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The Selection of Judges for Commonwealth Courts*

The Hon Sir Gerard Brennan AC KBE

This is a subject of constitutional significance. I address it from that viewpoint. Nothing I say refers to any particular judge or group of judges.

The process for appointing judges is unstructured and the criteria for making appointments are not defined. To quote a discussion paper issued in 1993 by the Attorney-General's Department–

> Little is known publicly about the appointment process and no established internal rules for selecting judges have been developed. The appointment process has varied according to the personal preferences of individual Attorneys-General. [1]

If we are to review the process of selecting judges, we should understand why we appoint judges and the functions which they are appointed to perform. Then we can consider the qualities of the women and men who should fill the judicial offices of the Commonwealth and the best means of selecting them.

Donald Horne said that the first of the civic values which most Australians would share is maintenance of the rule of law. It protects peace, order and progress. It is the

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 10 August 2007.

1 *Judicial Appointments—Procedure and Criteria*, sometimes known as 'the Lavarch Paper', after the Attorney General of the time.

basic underpinning of a free society. It is a value which is never questioned and, in the political arena, it is sometimes invoked to justify particular measures. But what is meant by 'the rule of law'? It means that the state, by its institutions, gives effect to the legal rights and duties, powers and immunities which affect relationships between people and with government. Implementing the rule of law requires a definition of those rights and duties, powers and immunities and a coercive mechanism to give effect to the law in particular circumstances.

In a democratic society, it is the function of the judiciary, separated from the political branches of government, to define the legal rights and duties, powers and immunities to which effect is given. In the familiar words of Chief Justice Marshall in *Marbury v Madison,*[2] 'It is emphatically the province and duty of the judicial department to say what the law is.' In a democracy which respects the separation of powers, the courts are the responsible institution to enforce the law as defined in concrete situations. In totalitarian societies, on the other hand, the legislature might retain the power to interpret its laws; the repositories of state executive power are authorized to enforce the law as they see it without judicial supervision and the judiciary is directed to decide cases in accordance with state policy. Experience elsewhere and our own history have shown that that kind of self-regulation is incompatible with the rule of law. The rule of law means that the law as defined by independent and impartial courts is applied by the judiciary or under judicial supervision.

We should be clear about how judges implement the rule of law. The rule *of* law is not the same as rule *by* law. It may be that Nazi Germany was ruled by law, many of Hitler's heinous policies being implemented by courts which applied laws framed in accordance with the prevailing ideology. The rule of law, on the other hand, seeks to do justice according to law. The judge is not a juridical robot. He or she may have to make value judgments in which common sense and an appreciation of community standards play a part: was the defendant negligent? Was the conduct dishonest? What is in the best interests of a child? What is the appropriate sentence to impose? Sometimes, particularly in the higher courts, a judgment has to be made on more technical or complicated issues: do the facts attract one rule of law or another? What is the meaning of an ambiguous statute? Should an earlier precedent be distinguished in the present circumstances? How should I exercise my discretion? A judge's active participation in the process is an integral element in, an essential characteristic of, the rule of law. In a secure democracy, public confidence in the judiciary is critical to the rule of law. That is, confidence in the selection of the best judges available and confidence in their competent and impartial application of the law. Both the public and the existing judiciary have a vital interest in the process and the outcome of selecting judges.

What do judges do to maintain the rule of law and what are the qualities that are needed to do it? First, the duty of defining the law applicable to particular circumstances means that judges must be legally competent. The law is a complex discipline and the complexity of contemporary society is reflected in the complexity of the law, whether the law is found in statute, regulation or case law. To avoid the wastefulness, if not the scandal, of useless litigation, the judges need to be well versed in the law, especially the law to be applied in their particular court. And they need to

[2] (1803) 5 US (1 Cranch) 137, 177.

have the ability to apply the law to the proceedings as they unfold before them. They must have an ability to listen but also to control effectively the conduct of the litigation. Litigants and the public purse cannot afford the judge who does not have the knowledge or experience to distinguish between material that is relevant and helpful and material that is irrelevant and time wasting. Such a judge, lacking the ability that gives authority, is not only inefficient in the conduct of the litigation; the emerging judgment is likely to be woolly, confusing or just plain wrong. An analytical ability is required to determine the relevance of facts and to define with the necessary precision the applicable rule of law. Then, after hearing whatever the parties may have to say, the judge alone must reason to a conclusion and to articulate those reasons in judgment. These elements of judging must be performed carefully and that often takes time. So an inclination to industry is needed.

As judgments resolve contests and as the reasons for judgment are sometimes contested by those whose interests are apt to be affected, a judge must have and exhibit a resolute strength of mind. When Sir Frank Kitto gave advice to his colleagues, he wrote:

> Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all.[3]

The judges of different courts do not need the same set of legal skills possessed to the same degree. The different jurisdictions vested in the several courts call for different sets of skills and any process for the selection of judges must allow for the recognition of those differences. The nature of the workloads of courts also differ: some judges find that their docket is filled by cases of boring similarity; others find a more varied diet requiring continual attention to new issues. In some courts, the major questions for determination are questions of fact; in others, the major questions are questions of law. A practical and sophisticated understanding of what a candidate for judicial appointment to a particular court will be called upon to do is desirable in the appointing authority.

There are qualities of character and disposition to be desired in all judges. The supreme judicial virtue is impartiality[4]. Both partiality and the appearance of partiality are incompatible with the proper exercise of judicial authority. The one poisons the stream of justice at its source; the other dries it up. Lord Devlin commented that—

> The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.[5]

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3 *Why Write Judgments?* Delivered 1973, published in (1992) 66, *Australian Law Journal*, 787, 790.

4 'Judges and Lawmakers', (1976) 39 *Modern Law Review* 1 at 4.

5 Ibid.

To be, and to appear to be, entirely impartial in the resolution of a dispute, a judge must be independent of external influences. That has been recognised since the Act of Settlement three centuries ago which provided for security of judicial tenure and undiminished remuneration during a judge's tenure of office. An American Bar Association Commission's *Report on Separation of Powers and Judicial Independence* noted that 'Judicial independence is not an end in itself but is a means to promote impartial decision-making and to preserve the supreme law of the land.' Chief Justice Lamer of Canada acknowledges[6] that the fundamental purpose of judicial independence is the maintenance of the rule of law but, he observes—

> There is an unfortunate tendency on the part of some to characterise judicial independence as a principle that enures primarily if not exclusively to the benefit of the judiciary itself. While it would be disingenuous to deny that the judiciary benefits from security of tenure and financial security, it must be emphasised that the primary beneficiary of the principle of judicial independence is society as a whole.

The process for selecting judges should not impair the safeguards on judicial independence. An aspirant to judicial office and, even more, an aspirant to judicial promotion, should have no incentive to speak or act in any way that might advance the aspiration except by the resolutely professional discharge of his or her professional duties. In other words, the ideal process is one where the only relevant consideration is whether the candidate has, and has demonstrated, the professional ability and the independence and impartiality of mind that is required for the performance of the judicial duties in question.

A judge must be not only able, but willing—once the judicial gown is donned—to shed any predilections that might affect either the conduct of the litigation or the judgment to be delivered. And a judge must remember that judicial impartiality or the appearance of judicial impartiality can be affected by inappropriate conduct or associations even outside professional life. The very authority of the court depends upon the demonstrated impartiality of its judges as well as on their competence.

Criticisms of the present process

Now if men and women with these capacities are the judges whom we would wish to see appointed to our courts, how well suited is the present process of selection to discover and to appoint them? In this country we adopted without much reflection the process which, over the years, had been adopted in England for the appointment of judges. We entrusted judicial appointments to the uncontrolled and unreviewable discretion of the executive government. True it is that, in general, the power has been wisely exercised and Australia has been privileged to have judges who, with very few exceptions, have been competent judges possessed of the judicial virtues I have mentioned. The respectful aura with which the judiciary has been traditionally surrounded encouraged the public to expect and governments overall to satisfy the expectation, that judges would be appointed 'on merit'. But in reality, there have

[6] 'The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective' by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 4.

always been exceptions. And, recently, there has been an increase in the number of anecdotal reports of unmeritorious appointments.

The time has passed when it is possible to have any confidence in the system to discover and evaluate the abilities and the character of prospective appointees to Commonwealth courts. In earlier times, when the only Commonwealth courts were the High Court, the Bankruptcy Court and the Industrial Court, when the Attorney General of the day was an experienced and distinguished senior legal practitioner and when the judiciary was drawn from a Bar much smaller than it is today, it was possible for the Attorney perhaps to know personally and certainly to ascertain and to form adequately an appreciation of the relative merits of possible appointees. That is no longer the case. Certainly an Attorney, government minister or an Attorney General's department can take soundings from their friends and acquaintances as well as canvassing the views of serving judges, Bar Associations and Law Societies. However, a professionally inexperienced Attorney, or an Attorney's ministerial colleague or a government department is unlikely to have an appreciation of the actual functioning of the particular court or to be able to examine critically the respective merits of all possible appointees. The number of Commonwealth Judges has increased greatly in the last thirty years and candidates for judicial appointment can now be drawn from fields other than the practising Bar. The jurisdiction of the Commonwealth courts has expanded into new fields of law.

Commonwealth appointments are no longer restricted to the High Court or to what are known as the superior Commonwealth courts—the Federal Court[7] and the Family Court. In 1999, the Commonwealth Magistrates' Court was created[8] with a jurisdiction that is both extensive and important. Appointments to that Court are likely to attract less attention than appointments to the higher Commonwealth courts even though appointees will be exercising the judicial power of the Commonwealth in diverse areas including family law, bankruptcy, migration and industrial matters—issues which affect the vital interests of individuals.

It is impossible for the executive government to form a view of the comparative suitability of candidates for judicial appointment without extensive and relevant consultation and informed advice. That should be structured. The public interest is not served by appointments made upon advice, at least some of which may come from secret sources.

The need for a better method of selection

Thirty years ago, Sir Garfield Barwick, then Chief Justice of Australia, saw the problem clearly, even though there were fewer judges on only three courts to be selected from a smaller pool of possible appointees. In the first State of the Judicature Address he said:

> In my view, the time has arrived in the development of this community and of its institutions when the privilege of the Executive Government in this

[7] Also the Industrial Relations Court, the jurisdiction of which is now vested in the Federal Court: see *Workplace Relations and Other Legislation Amendment Act 1996*—Schedule 16.

[8] *Federal Magistrates Act 1999*.

> area should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may inhere in the appointment of a judge. Yet I think that long term considerations in the administration of justice call for some binding restraint of the exercise of this privilege. I make bold to suggest that, in all the systems of Australia where appointments to judicial office may be made by Executive Government, there should be what is known in some systems as a judicial commission—but the nomenclature is unimportant—a body saddled with the responsibility of advising the Executive Government of the names of persons who, by reason of their training, knowledge, experience, character and disposition, are suitable for appointment to a particular office under consideration. Such a body should have amongst its personnel judges, practising lawyers, academic lawyers and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees. Such a body is more likely to have an adequate knowledge of the qualities of possible appointees than any Minister of State is likely to have.[9]

I respectfully agree with Sir Garfield and the reasons he advances for the creation of a judicial commission to advise Government on the appointment of judges. Similarly, in the United Kingdom, the Lord Chancellor (Lord Falconer), in a paper issued by the Department for Constitutional Affairs, wrote:

> … in a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence. [10]

In 1995, in his book *A Radical Tory*, Sir Garfield Barwick pointed out the real risk of the present system in politicising judicial appointments:

> Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation, or at least an expected affinity in judgment to the philosophies of the party, form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it, even to the point of choosing the appointee merely to resolve a possible threat to the leadership.[11]

When experience of judicial work in a particular court is limited and there is an inability to form an adequate opinion about the comparative merits of particular candidates, there is a greater likelihood of favouring those with political or personal connections, irrespective of their experience or ability. In 1999, Justice Bruce McPherson, then chairman of the Judicial Conference of Australia, contended that—

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9 (1977) 51 *Australian Law Journal* at p. 494.

10 *Constitutional reform: a new way of appointing judges*, July 2003.

11 G. Barwick, *A Radical Tory*, Federation Press, Sydney, 1995, p. 230.

> There is growing evidence that the power of making judicial appointments is coming to be regarded by governments … as a form of patronage and a source of influence that can be used to serve their short-term political interests. [12]

The Hon. Geoffrey Davies, speaking with the experience of a State Solicitor General, leading advocate, and sometime Judge of the Queensland Court of Appeal, notes that the traditional practice of consultation about judicial appointments with a view to appointing the most suitable candidate has changed. 'This is what has changed', he said:

> Attorneys do not always consult with those professionally able to assess the professional qualities of candidates. When they do, they do not always disclose the names of possible appointees whom they have in mind. And they do not always accept the advice of professionals that a person they have in mind is not professionally qualified for the specific judicial position.[13]

He observes 'an increased politicisation of judicial appointments' because 'politicians appear to have come to believe that there are only two kinds of judges; those who are on their side and those who are on the other side.' If there be any doubt about the accuracy of this observation, the recent statement of the present Commonwealth Attorney must have dispelled it. The Hon Philip Ruddock, M.P., with insouciant disregard of recent history, is reported to have said that '[t]he most noticeable feature of the current approach for appointing judges is its accountability.'[14] He praises the existing practice in order to counter any proposal for a judicial commission—a proposal which, in the Attorney's eyes, 'is the [judicial] activists' last frontier: they see that the numbers of "conscious judicial innovators" is drying up, so want more of a say in picking future judges.'

Those comments may come as a surprise to the bipartisan members of the Senate Standing Committee on Legal and Constitutional Affairs in 1994 who, noting the 'element of mystery' attending judicial selection made these recommendations:

- that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment;

- that the Attorney-General for the Commonwealth should establish a committee which would advise him or her on prospective appointees to the Commonwealth judiciary. That committee should include

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[12] 'Judicial Appointments and Education: Response from the Judicial Council of Australia' (1999) 73(7) *Law Institute Journal* 23, 25 as cited by R. Davis and G. Williams in 'Appointments Process: Gender and the Bench of the High Court of Australia' (2003) *Melbourne University Law Review*, 32.

[13] The Hon. G.L. Davies 'Why we should have a judicial appointments commission'—a paper delivered to the Australian Bar Association Forum on Judicial Appointments, Sydney, 27 October 2006.

[14] 'System protects us from judicial rule', *Australian*, 17 July 2007, p. 14.

representatives of the judiciary, the legal profession and the non-legal community; and

- that the Attorney-General for the Commonwealth should urge the Attorney-Generals of the States and Territories to establish a similar advisory committee in their respective jurisdictions. [15]

As Geoffrey Davies observed, things have changed. We have heard that recently prospective judicial appointees have been interviewed by the Attorney General. We do not have access to any record of these interviews but are left to speculate on what may have transpired. Public questioning of a nominee, as in the United States, may be unacceptable but secret private questioning of potential appointees is a denial of transparency in the process, especially in light of Sir Garfield Barwick's warning about political criteria in the making of appointments. We saw the ambition to exercise raw political power when Mr Tim Fischer called for a 'Capital-C Conservative' to be appointed to the High Court. What a disservice was thus done to the High Court. Politics becomes the dominant consideration in judicial appointments when governments seek to wrest court judgments to their own purposes or when patronage is to be conferred on friends or the party faithful. It is high time that politics, which need not be taken out of consideration entirely, is subordinated to the requirements of merit, competently assessed. Unless that is achieved, the reputation and authority of appointees will be questioned and public confidence in the impartiality of the judiciary will be diminished.

There is a further justification for reviewing the present method of selecting judges for Commonwealth courts. Apart from the exercise of a court's jurisdiction, some judges are called on to exercise non-judicial functions, especially under modern legislation which often enlists judges as *personae designatae* to perform what are essentially executive functions. The most traditional of these functions is probably the issue of search warrants in aid of criminal prosecutions or warrants for the arrest of persons accused of arrestable offences. The exercise of these powers is governed by well-established law and is subject to judicial review. In more recent times, however, judicial *personae designatae* have been enlisted to exercise novel executive powers. We are now familiar with the Administrative Appeals Tribunal where the powers, albeit executive in nature, are exercised in a judicial manner and are subject on appeal to judicial control. The AAT case load relates, in the main, to an entitlement or disentitlement to a right or privilege available under a statute (licences and pensions, for example) or to the assessment of statutory imposts (customs duties and taxes, for example). These powers do not generally infringe or override the rights and immunities protected by the common law. With the passage of anti-terrorism legislation, however, the *persona designata* arrangements have been significantly extended.

Judicial officers, serving or retired, are now enlisted to issue warrants for detention and questioning, to make orders extending the periods of detention or questioning and to preside at and supervise the conduct of questioning sessions. Moreover, these powers are not now reposed in all members of a Court or Tribunal—they are

[15] Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, Canberra, May 1994, p. xvi.

conferred only on those judicial officers selected by the Attorney General or by regulation.[16] Judicial control of the exercise of these powers is difficult, if not impossible, to invoke even though the involvement of judicial officers is intended to give an assurance of balance in the circumstances of each case. This gives a new relevance to the question of the appointment of judges. The Attorney General is the minister charged with the administration of the anti-terrorism laws, having power to authorize applications for warrants to the judicial *personae designatae.* He has the authority to select the judges on whom 'anti-terrorism powers' are conferred. Does not this arrangement open the way to the appointment of at least some judges who might favour too readily the exercise of the anti-terrorism powers, at the expense of personal liberty? The arrangement appears to saddle an Attorney with at least a reasonable suspicion of conflict of interest. It tends against continuing to allow an Attorney General a non-transparent, non-accountable role in selecting judges.

Overseas practices

Australia is one of the few nations whose national government has repelled a proposal for more transparency in the process of selecting judges. The United Kingdom Parliament enacted the Constitutional Reform Act in 2005 which set up a Judicial Appointments Commission. The Act addresses the two aspects of judicial selection that affect transparency and objectivity: the constitution of the authority to make a selection and the criteria to be used in the process.

The Act provides a mechanism for selecting a candidate for appointment to judicial office. Selection Commissions are created to select a President, Deputy President or a member of the Supreme Court (the reconstituted Appeals Committee of the House of Lords). Their selection is advised to the Lord Chancellor who notifies the Prime Minister who must recommend the person selected to Her Majesty for appointment. Selection Committees are prescribed for each of the other senior judicial offices and the Judicial Appointments Commission is authorized to prescribe a selection procedure for puisne judges of the High Court and other prescribed office holders. Once the Commission has selected an appointee to a given office, the Lord Chancellor has only a limited power to reject or to require reconsideration of the selection. Ultimately the Lord Chancellor must accept a person who has been selected, but the selection may subsequently be disregarded if the person selected declines appointment or is unavailable or fails a health test.

The Act provides[17] that selection of judges is to be 'solely on merit' and the Commission must be satisfied that the appointee 'is of good character' but, subject to these requirements, the Commission 'must have regard to the need to encourage diversity' of candidates.[18] Of course, those are rather broad criteria. Much depends on

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16 *Australian Security Intelligence Organization Act 1979*, Division 3. I addressed this topic in an after dinner address to the University of New South Wales Symposium on Terror and the Law on 4 July 2007.

17 Section 63.

18 Section 64. In May 2006, the Lord Chancellor, the Lord Chief Justice and the Chair of the Judicial Appointments Commission published a 'Judicial Diversity Strategy' designed to fulfil the statutory directory.

what is included in the notion of 'merit'[19] and what blemishes are consistent with the retention of 'good character'.

The Commission has developed five 'core qualities and abilities' which are required for judicial office. They are:

- Intellectual capacity
- Personal qualities
- An ability to understand and to deal fairly
- Authority and communication skills
- Efficiency.

Each of these is a heading which embraces particular qualities. For example, 'intellectual capacity' includes:

- High level of expertise in a chosen area or profession
- Ability quickly to absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

In Canada, although the Government retains a discretion in the appointment of judges, an Advisory Committee on Judicial Appointments has been established in each province and territory.[20] The Committees assess candidates on the basis of three categories—'recommended', 'highly recommended' or 'unable to recommend' for appointment. One of the tasks of such an Advisory Committee is to give a measure of objectivity to the concept of merit and that has been done by prescribing criteria for appointment.[21] The Office of the Commissioner for Federal Judicial Affairs reports that:

> Independent judicial advisory committees constitute the heart of the appointments process. The committees are responsible for assessing the qualifications for appointment of the lawyers who apply. There is at least one committee in each province and territory; because of their larger population, Ontario has three regionally based committees and Quebec has two. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner. [22]

The South African Constitution provides that the President appoints the Chief Justice, Deputy Chief Justice, President and Vice President of the Supreme Court of Appeal

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[19] Justice Mary Gaudron is reported as saying that merit 'can have no legitimacy if patronage or "the Old Mates Act" applies': 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court' [2003] *Melbourne University Law Review*, 32 fn 88.

[20] The Canadian experience is reviewed by C.N. Kendall in 'Appointing Judges: Australian Judicial Reform Proposals in light of Recent North American Experience' (1997) 9 *Bond Law Review*, 175.

[21] See, for example, the Canadian Federal criteria at http://www.fja.gc.ca/fja-cmf/ja-am/assess-evaluation-eng.html and the criteria of the Ontario Judicial Appointments Advisory Committee http://www.ontariocourts.on.ca/judicial_appointments/policies.pdf

[22] http://www.fja.gc.ca/fja-cmf/ja-am/com/mem-eng.html

after consulting the Judicial Service Commission. In the case of the Chief Justice and Deputy Chief Justice he also consults the leaders of parties represented in the National Assembly. Other judges of the Constitutional Court are appointed after consulting the Chief Justice and leaders of parties represented in the National Assembly 'in accordance with the following procedure':

> a. The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
>
> b. The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
>
> c. The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

In New Zealand, the Attorney General retains the responsibility of advising on the appointment of judges. The Ministry of Justice website on judicial appointments, however, advises that:

> Although judicial appointments are made by the Executive, it is a strong constitutional convention in New Zealand that, in deciding who is to be appointed, the Attorney-General acts independently of party political considerations. Judges are appointed according to their qualifications, personal qualities, and relevant experience. [23]

I do not understand that that convention applies to the Executive of the Commonwealth. In 2004, the Ministry of Justice issued a discussion paper in which it reiterated the qualities which are looked for in making a judicial appointment. They are grouped under four headings:

- Legal Ability
- Qualities of character
- Personal technical skills
- Reflection of society

These headings are expanded into criteria for appointment. The criteria and the procedures followed in making an appointment are set out on a Ministry of Justice website[24] and were issued in booklet form in 2003.

In Israel Judges are appointed by the President on the nomination of a Judges' Nominations Committee, consisting of:

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[23] http://www.courtsofnz.govt.nz/about/judges/appointments.html

[24] Published on the Ministry website: http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html

- three judges (the President of the Supreme Court and two Supreme Court justices)
- two members of the Knesset (Israel's Parliament)
- two Ministers (one of them being the Minister of Justice, who chairs the Committee)
- two representatives of the Israel Bar Association.

Vacancies are advertised, candidates are interviewed by a sub-committee and a decision on appointment is taken by secret ballot.

The systems in vogue in the United States are well known but, as neither direct election (which is incompatible with s72 of the Constitution) nor public examination of a candidate by a Senate Judiciary Committee seems to be attractive to most Australians,[25] I do not comment on the arguments for or against them.

Possible models for Australia

The experience of other jurisdictions is informative. Most common law countries have been conscious of the need to make the appointment of judges more structured and objective in order to achieve three principal objectives: building and maintaining public confidence in the judiciary; removing political influences that might impair the selection of the most qualified candidates judged on merit; and, subject to the necessity of appointing candidates on merit, expanding the categories from which judges have hitherto been appointed. I should not have thought that an improvement in the process to achieve these objectives would be undesirable in Australia. The principal disadvantage in the eyes of some would be the elimination of political patronage, a price that none of the main political parties has thus far been willing to pay. But there is little integrity in paying lip service to the rule of law while we cloak in secrecy both the criteria and the procedure for appointing the judges to whom the task of enforcing the rule of law is entrusted.

Of course, any reform of the present practice must conform with s 72(i) of the Constitution. It provides that '[t]he Justices of the High Court and of the other courts created by the Parliament … [s]hall be appointed by the Governor-General in Council.' This provision precludes any system which would allow any authority other than the executive government the power to make a federal judicial appointment. However, academic opinion seems to favour the view that s 72(i) merely identifies the appointing authority and that a law prescribing a process of nomination by a Judicial Appointments Commission would be valid.[26] Certainly no constitutional doubt has

[25] The Lavarch Paper, op. cit., p. 21 comments that '[t]here has been little support for the federal Parliament to be involved with an inquiry into the merits of judicial appointment.'

[26] This was the view expressed by Professor Winterton in *Parliament, the Executive and the Governor General: a Constitutional Analysis.* Melbourne University Press, 1983, pp. 100–101; by Professor Zines' Opinion to the Australian Constitutional Convention Judicature Sub-Committee, *Proceedings of the Constitutional Convention.* Brisbane, 1985, vol. 2, p. 35. Dr James A. Thomson in *Australian Constitutional Perspectives* (ed. H.P. Lee and George Winterton, Law Book Company, Sydney, 1992, pp. 251, 268–269) canvasses the different views. If the source of power to make judicial appointments were s 61, as Mr Ruddock believes (fn 14), there would be less doubt about the validity of a law providing for the appointment of persons nominated by a Judicial Appointments Commission.

attended the enactment of sections 7[27] and 8[28] of the *High Court of Australia Act 1979* which govern the appointment of High Court Justices.

Assuming the validity of a law which would regulate the process of appointing federal Judges, the proposals of the Senate Committee earlier cited may be taken as a starting point.

First, 'that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment.' This has been done in the United Kingdom, Canada and New Zealand; it can be done here. Criteria have two advantages: they provide a public assurance of the quality of judicial appointments and they focus attention of referees and members of any selecting authority on qualities that are relevant to the selection they are to make. As in England, the development of the criteria should be the function of a Judicial Appointments Commission. The criteria relating to legal ability would reflect the jurisdiction of the respective courts. This is of particular significance in the selection of Justices of the High Court. Although popular comment and governmental interest might emphasise the legal ability of a candidate in public law, a large proportion of the High Court's work is in private law—not least in dealing with the burden of special leave applications. This part of the Court's work attracts little attention but Justices with broad experience are needed to assist in the massive and varied case load.

Next, the Senate Committee recommended 'that the Attorney-General for the Commonwealth should establish a committee which would advise him or her on prospective appointees to the Commonwealth judiciary' and '[t]hat committee should include representatives of the judiciary, the legal profession and the non-legal community.' A Judicial Appointments Commission would give structure to the process of selection and, with satisfactory drafting of the legislation, would restrain Executive Governments from the making of unmeritorious appointments for political or personal reasons. Differently constituted selection committees of the Commission would be needed for each of the Commonwealth Courts, reflecting their respective jurisdictions and administrations.

The third recommendation '[t]hat that the Attorney-General for the Commonwealth should urge the Attorney-Generals of the States and Territories to establish a similar advisory committee in their respective jurisdictions' lies outside the scope of this paper, though the considerations which warrant a Commonwealth commission would have much force in the States.

While preference for different models of a Judicial Appointments Commission will vary,[29] one model could be based on the general framework of the United Kingdom Act with the necessary adaptations and some variations. In 2006, two distinguished academic lawyers—Professors Simon Evans and John Williams—presented a well-

[27] Section 7 requires prior consultation with the Attorneys General of the states.

[28] Section 8 prescribes the professional status required of an appointee.

[29] See Rachel Davis and George Williams, 'Appointments Process: Gender and the Bench of the High Court of Australia' [2003] *Melbourne University Law Review*, 32.

researched paper to the Judicial Conference of Australia.[30] The authors proposed a Judicial Appointments Commission based on the English model but with some variations. I agree with the basis of their proposals, but I would prefer a model with different variations from the English template. I suggest —

1. While the United Kingdom Act provides that the Chief Justice of a court should preside on a selection committee for her or his Court, a Chief Justice of a Commonwealth Court might find the relationship with an incoming judge more difficult if the Chief has participated in the selection process—especially if it became known that the appointee was not the candidate favoured by the Chief Justice. I should prefer to allow the Chief Justice to appoint a nominee to the selection committee if she or he so chooses.

   A Selection Committee for the High Court might be composed of—

   (a) The Chief Justice or her/his nominee

   (b) The Attorney-General of the Commonwealth or her/his nominee

   (c) The President of the Australian Bar Association or her/his nominee

   (d) The President of the Law Council of Australia or her/his nominee

   (e) 2 non-legal members appointed by Government who are familiar with the work of the Court

   (f) A person of distinction chosen jointly by the Chief Justice and the Attorney-General.

   It should be mandatory for the Selection Committee to consult the Attorneys-General of the States and Territories, each of whom should be entitled to submit one or two names which the Selection Committee would be bound to consider in settling the list of nominees for submission to Government.

   A Selection Committee for a Court other than the High Court should be differently composed. As each of the Judges of those Courts is based in a State or Territory and discharges a majority of her/his duties in that State or Territory, it would be preferable to include the local rather than the National Presidents of the professional bodies in the Selection Committees.

2. The United Kingdom Act strips the Prime Minister and the Lord Chancellor of any ultimate power to decline to accept a selection. In Australian conditions, and with an eye to the provisions of s 72(i), it is preferable to leave the ultimate choice to the Executive Government but not without some restraint designed to ensure that merit is the prime consideration. The Selection Committee should submit a list of, say, three names from which the Government is invited to make the appointment. If the Government wishes to consider another person who is not listed, the Attorney-General should refer the name of that person to the

[30] *Appointing Australian Judges: A New Model*, JCA Colloquium, 7–9 October 2006. The authors' model was preceded by a review of the existing literature and an informative description of overseas models.

Committee with a request to reconsider the list. The Committee would then either include the name in a new list of three or inform the Attorney in writing why the listed names are preferred. If Government nevertheless proposes to appoint the person who is not listed, the Attorney-General should inform the Committee in writing of the Government's reasons for appointing outside the list. This is not a coercive sanction but it provides a sufficient incentive not to appoint an unlisted candidate for dubious reasons.

3. As appointments to the High Court are usually made from the ranks of serving judges, it would be invidious to publish communications between the Selection Committee and the Attorney-General about the relative merits of candidates. The same view could be taken about appointments to other Courts but for less cogent reasons.

Conclusion

Governments no longer have the means of making an informed judgment about the comparative merits of possible judicial appointees. A more structured and informed process is needed—a process which allows for the views of an informed public to be taken into account and which yields appointments measurable against stated criteria. The efficiency of the courts is enhanced by the appointment of the most competent and impartial judges available to serve. Thus public confidence in the courts is maintained and the rule of law protected.

Question — Thank you very much for that address. I found it quite inspiring and very thought-provoking. It brought to mind the recent Thomas case and I wonder if you would comment on that where the findings of the various judges appeared to reflect more their attitude to the Terror Laws than any other aspect.

Gerard Brennan — The brief answer is no, but I should explain. It has been a great privilege for me to serve as a member of the High Court. I do not think that it is any function of a retired member of a court to comment on the work of her or his successors and for that reason, if for no other, I would not comment on the judgements in the Thomas case. There's another reason. Apart from the media reports, I haven't read them, and that will take a little time, perhaps when I'm finished re-reading *Gone with the Wind*. The case is obviously an important one. The only comment that I would make is not in relation to that case but with regard to the problem that we have with the Anti-terrorism Laws and that is the problem, not in that case, but in other cases, of the difficulty of ensuring judicial review of decisions, which are obviously of importance to the safety of the community but which are of no less importance to the liberty which we are trying to defend.

Question — You have mentioned the public confidence and public assurance almost 23 times so far—the importance of appointment in that context. My question is, given the changing world, particularly towards terrorism and the perception of security by the general public, how do you think the balance should be met in terms of executing

the law and maintaining the public confidence, because if any perception of not following the law in terms of detriment to the public is going to come back to the judiciary again if they get wrong. So how do you balance that?

Gerard Brennan — I've been very happy to come and speak today on the question of the process for selecting judges. I've pointed out one aspect of the developing law with regard to anti-terrorism in that context. The question of how to balance the security of a people against their civil liberties is I think a question of enormous importance. It's one which I must say that I would not here wish to enter upon and it's not because it's not important. It is of vital importance in my view, but it does need a particular enquiry into the specific provisions that have been enacted. The difficulties of their operation have a significance, both for the security of the country, the ability to provide any possible system of safeguard, and the availability of judicial review. In other words, I think the problem is a complex one and I wouldn't wish to give, as it were, a broad, sweeping, off the cuff, over the top, view about that.

Question — My first question is almost petty: what actually are those permissions for leave, which you mentioned? The second question is: you've spoken several times about the loss of confidence in the legal system. May I naively ask what that implies and what the effects of that are?

Gerard Brennan — The cases which come to the High Court of Australia are cases which these days, for the most part, reach there by a process known as special leave. This is a filtering process. It is intended to ensure that only those cases go on appeal to the High Court which raise matters of general importance, either to the community or the legal system. Now there are many applications for special leave for which the applicants always contend that those criteria are fulfilled. They are I think, running at something of the order (and I may be wrong about the figures), of about 600 a year at the moment. Now that's an exponential increase from the number that there were when I was a member of the court. The difficulty in dealing with special leave applications, many of them being made by persons who are not legally represented, is that, although there may be very thick papers, and much of it could be described as dross, every now and again you find a pearl somewhere in there and you can't be sure that there isn't a pearl somewhere in 600 by umpteen pages of material. These pages of material are dealt with in the first place by an analysis that is done by some of the Chief Justice's officers, but ultimately the pages are looked at by each of the judges. Now I don't mean each judge does 600. More likely it would be that they would be divided into groups of two or three, so that they are split up, but you don't get just one judge dealing with a case. You would get a number of judges looking at the papers, as it were a dossier.

Sometimes when the question is finely balanced as to whether they should be granted special leave, the matters are then listed for hearing before a full court in open session. Now the burden of dealing with this paperwork is just crippling and nobody sees it, apart from the registry staff and the associates I suppose. Some of them are here today, and no doubt they are all burdened by the fact that their judges are trying to deal with this mass of paper. To appoint a judge because he or she happens to have a high profile in relation to some matter of public importance, neglecting the question of whether they have a general experience which allows them to deal with this mass

of materials that comes through special leave would be a miscarriage. So that's what the leave situation is. I'm sorry, I'm getting Alzheimer's: what's the second question?

Question — The second one was that you referred several times to a loss of confidence in the courts. What does it mean?

Gerard Brennan — Lets take, if you can remember back this far, the Communist Party Dissolution case. I know that's been in the media lately, but I'm not using it for that purpose. Now that was a case in which political opinion was obviously very clearly divided, indeed there was a political campaign on the question of a passage of that legislation. Ultimately the High Court by a majority held that the legislation was *ultra vires,* against the Constitution; invalid. Certainly there was disappointment in some quarters about the decision of the High Court in that case. I don't think there was any doubt at all about the validity of the reasoning in that case. The Court's judgement was accepted. It was accepted generally as being a judgment which the court applying the rule of law was entitled to make and correctly made. Or if you like take the Bank Nationalisation case. Again a matter of political controversy, and once again both in the High Court and then (as the law then provided) in the Privy Council, again the decision of the courts was accepted as being the appropriate decision.

I'm not sure that cases of controversy today, for example the Thomas case, are as happily or as readily accepted as they once were. Somehow or other there seems to be a thought:'Oh well, maybe they're just doing some other sort of job, they're not really applying the law.' I can only say that after a lifetime of experience in the courts, I've got no doubt that the judges are applying the law. They are applying it by applying the judicial method of reasoning and that is what is so critical to the appointment of judges. You have to have people, who are experienced in the law, not only technicians who know the various statutes and cases and so forth, but who understand the principles that underlie the various rules.

Especially in the High Court that's essential, where you're dealing now with the highest court for Australia. It wasn't so until, what was it 1986, when the last ties were cut with the Privy Council, but now the High Court has that responsibility of ensuring that the law is applicable for Australia. When there is any lack of confidence in the quality of the judges who are going to be appointed, you then make the decisions of those judges much more open to controversy. It was Alexander Hamilton in 1788 writing in *The Federalist*, who pointed out that the judicial branch of government, is the least dangerous. It hasn't got the power of the sword. It hasn't got the power of the purse. It's got only the power of judgment. Unless the reasonings of the Court are accepted generally by the public, it doesn't have a powerbase. So you need to have judges who can express these values in a not only coherent, but convincing, way and if you have that then you have public confidence. Without it you are without any powerbase at all and that is dangerous for the rule of law.

Question — I'd like to ask a question about the rule of law. What happens if the government of the day brings in laws to abolish the rule of law and substitute the divine right of the kings in determining justice as it should be? I'm thinking particularly of laws that enable somebody on the government's behalf to kidnap a three or four year old girl and put her in an electrified cage and leave her there until her parents agree to sign over their rights to refugee status in Australia under refugee

conventions. The government leaves them there until they cave in under the stress of seeing their daughter become catatonic, and they have no redress legally, because the High Court has decided that that law is perfectly legal. That's one position. The other position is if you do take an activist position and intervene on behalf of justice, not on behalf of the law, in administering the law of the Commonwealth, that opens the door for the Fiji and Thai type situations, where the military decide that it knows better than the legislators. So do you have any opinion on resolving that dilemma, between being allowed to override idiotic legislators, and opening the door for other people to follow suit. Do you think that would be a dangerous precedent or a welcome precedent in regards to justice?

Gerard Brennan — I can only say I hope that poor little girl doesn't get dandruff. I think the question, if I might say so, is malposed and it is malposed for this reason. The question that will always be before the High Court is whether the particular piece of legislation is within the Commonwealth's legislative power or not. That's where it starts and that's where it finishes. It's all very well speaking about activism as though it gives the judges some discretion about all these things; that they are chargers on white horses who are going off into the wild blue yonder—that is not so. The whole nature of the judicial process is that while it is not always hide-bound to follow the exact words of an earlier precedent, for example, it is bound so far as statute is concerned and so far as the Constitution is concerned, to follow the language of the legislature. The question of whether a law is within the legislative power is resolved according to a legal method. That is, as they say, constrained by precedent, by the methodology of judicial reasoning, which is logical, and sometimes by analogy, if there's no direct proposition to govern it. You don't have these wild swings of discretion that are so often times said to be the judicial process. So that if the legislation is within power it's within power. If it's not within power it's invalid. The notion that somehow or other there are great big opportunities for judges to do justice otherwise in according to what the law is, is mistaken. The law has to provide some leeway for justice in particular areas where leeway is appropriate, but in terms of whether or not a piece of legislation is within the constitutional power, that's a matter which is governed strictly by the legal considerations. That may not, I suppose, be very convincing to somebody who hasn't done it, but I can only say that having been party to some judgments which were said to be activist; having taken part in those judgements by the reading of cases or the reading of statutes or the reading of the Constitution and thinking of the background at which those statutes or Constitution were enacted, and applying the logical method of reasoning, which is so much at the heart of judicial process, I just can't understand the notion of activism if it isn't the notion that somehow or other you look to see whether or not just results will follow. That doesn't mean that you can depart from the law—you can't.

I'm sorry if that's not convincing, but that's the best I can do.

Question — Before coming to the question I want to ask, can I just say in relation to the last two questions that I think one of the finest and the most scholarly judgements in recent times, is clearly the judgement of the Chief Justice in the Mabo decision and it is unfortunate that so many who don't like the outcome have responded by denigrating the Court, rather than by analysing the reasoning. My question goes to your comments about a more structured process, and in particular for the development of criteria. I think I understood you to say that the sort of committees involved in the

structured process would be responsible for the development of the criteria, and it is with that proposition that I have a reservation and my reservation is this. You will know that for some years I was involved in advising governments on appointments, and that was many years ago when there were very few women on the Court and judges used to say to me: 'Appointments should only be made on merit and not a gender basis.' Some years later when a number of women had been appointed, a number of those same judges came to me and said they were wrong. They said the appointment of women had changed the culture of the Court and by that I understood them to mean, amongst other things, that it enabled the Court better to apply the social values of the community. Now the appointment of women was done by decision of the executive, and I wonder whether a committee of the kind that I think you have recommended would be as attuned to those sorts of needs as an executive might be. For that reason I wonder whether there shouldn't be a larger role for the executive in relation to the criteria for appointment.

Gerard Brennan — Thank you for a number of your comments. This I think is the reason why under our provision of Section 72 (1) it is desirable to leave the ultimate selection to the executive government, because there is an area of discretion here, which need not be political, or not in any party political sense, but can be in a wider sense designed to achieve a desirable result in the constitution of the judicial body. But as to the suitability of a judicial commission to develop the criteria, I think the English experience is instructive. Recently the Lord Chancellor, the Lord Chief Justice, and the President of the Judicial Commission in England have produced a paper on diversity. It was their work which was designed to achieve greater diversity in the constitution of the British judiciary.

If you have a committee which contains not only lawyers but indeed perhaps a majority of lay people who are interested in the legal process and have some knowledge about it, I think you'd probably have the prospect of an input that will ensure that you aren't, as it were, going to produce judicial clones in the next generation. I can't think of a better method than having (a) those who are knowledgeable in relation to the work of the courts, and (b) those who have an interest in the work of the courts, as the people to create the criteria that are needed, and indeed, provided the statute directs a requirement of consideration of diversity, developing even the criteria for consideration of those elements.

The States, the Commonwealth and the Crown—the Battle for Sovereignty*

Anne Twomey†

Federation and State Sovereignty

Before the Australian states were even formed, the battle for sovereignty had already begun. Some of the framers wanted a system akin to the Canadian one, where the Governor-General would be the senior British representative in Australia and all communications from the states to the Crown would go through the Governor-General. Others sought to maintain the sovereignty of the states through their direct and independent relationship with the United Kingdom and the Crown. In the end, they prevailed.

Sir Samuel Griffith made it clear that the term 'governor' was used in the Constitution, rather than 'Lieutenant-governor', in order to show that the 'states are sovereign'[1] and maintained their independent links with the United Kingdom. Unlike the Canadian system, state governors were to be appointed directly by the Queen,

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† This speech is based on UK, Commonwealth and State Government records, which are discussed in greater detail in: A. Twomey, *The Chameleon Crown—the Queen and Her Australian Governors.* Federation Press, Sydney, 2006.

1 Samuel Griffith, *Official Record of Debates of the Australasian Federal Convention, 8 April 1891*, Sydney, 1891, p. 866. The Debates are online at http://www.aph.gov.au/Senate/pubs/records.htm

rather than by the Governor-General. The proposal that communications between state governors and the monarch be passed through the Governor-General was defeated.[2]

The result was that in the federation established by the Commonwealth of Australia, sovereignty was shared.[3] Both the Commonwealth and the States were sovereign within their own spheres. Each had an independent relationship with the Crown through the British Secretary of State for the Colonies. The Commonwealth had no say or involvement in matters such as the appointment or removal of State governors, the reservation of State Bills or the disallowance of state laws. These were all dealt with by the monarch on the advice of British ministers. The states preferred this outcome, because they regarded the British as being less politically interested in their affairs than the Commonwealth Government, and therefore more likely to be fair and reasonable in their dealings.

The Commonwealth, however, from the very beginning kept trying to claw back state sovereignty and assert its dominance over the states. If it could not control all state communications to the Crown, it at least wanted copies of them. The British Government agreed that state governors should, at their discretion, copy their communications to the Governor-General if they concerned federal matters.[4] This led to constant complaints by Governors-General that they were not receiving copied correspondence. In 1912, A B Keith explained to his masters in the Colonial Office that the 'truth of course is that the Governor General has comparatively little work to do and therefore is naturally anxious to see as much correspondence as he can otherwise he has little of interest to read.'[5]

The *Statute of Westminster*

The relationship between the Crown and its dominions changed dramatically in the 1920s. The Governor-General ceased to be a representative of the British Government, and dominion ministers were permitted to advise the monarch directly on dominion matters, including the appointment of the Governor-General, the reservation of bills and the disallowance of laws.[6] These changes culminated in the enactment of the *Statute of Westminster 1931*, which freed dominion legislatures from the application of the *Colonial Laws Validity Act 1865*, so they were no longer bound

2 Ibid, 22 April, 1897, Adelaide, 1897, pp. 1180–1.

3 UK, 'Report by the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia', HC 88, *British Parliamentary Papers*, 1934–5, vol. 6, p. 613, at para 8; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, per Evatt J at 378; and *New South Wales v Commonwealth* (1931) 46 CLR 155, per Evatt J at 220-1; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, per McHugh J at 451; *Austin v Commonwealth* (2003) 215 CLR 185, per McHugh J at [207]; and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [65].

4 Despatch by the Colonial Secretary, Mr Chamberlain, to the Governor of South Australia, 11 March 1901.

5 Minute by A.B. Keith, Colonial Office, to Mr Davis, January 1912.

6 See the Imperial Conferences of 1926 and 1930.

by Imperial laws of paramount force, except for those of constitutional status. These changes, however, did not apply to the Australian states.[7]

The states are often unfairly criticised for not lobbying to be given the legislative freedom granted by the *Statute of Westminster*. However, they had good reasons for not doing so.

- First, Western Australia, South Australia and Tasmania wanted British legislative protection from Commonwealth abuse of power and to be able to seek British legislation to allow them to secede from the Commonwealth.[8]
- Secondly, without the application of the *Colonial Laws Validity Act*, the states would not be able to entrench provisions of their own constitutions, such as those entrenching the existence or the abolition of an upper House.
- Thirdly, the British Parliament would only relinquish its legislative power over state matters if it no longer had executive responsibility for state matters. As neither the King, nor the British Government, was prepared to let state ministers advise the King directly about state matters, the only substitute for British ministers would be Commonwealth ministers, or the delegation of the King's powers to the Governor-General, as in Canada. Neither result was acceptable to the states, as it would subordinate them to the Commonwealth and they would lose their sovereign status.

So the states remained under the British Crown, leaving all these arguments to arise again in the negotiation of the *Australia Acts* half a century later.

The states continued to take comfort in the belief that the British Government, being so far away and disinterested in their affairs, would act as a trustee, to protect their interests but not to interfere in them. As Australia gained its independence, this belief became treated as convention. Australian history books, politics books and constitutional law books all stated that the British Government merely acted as a 'channel of communication' in putting state advice to the monarch about state matters, and that it would be a breach of 'convention' for it to act independently or in its own interests in doing so.[9]

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7 The position was different in Canada, as it was the Canadian Governor-General who dealt with matters such as the appointment and removal of provincial Lieutenant-Governors and the reservation of provincial bills or the disallowance of provincial laws. As the British Government and the monarch had no involvement in these matters, there was no issue of change. There was also no problem with giving provincial legislatures the same legislative freedom under the *Statute of Westminster*, as there was no need for British legislative power to support any executive responsibility with respect to the provinces.

8 See, for example: Memorandum by WA Attorney-General to WA Premier, 1 October 1931; Letters by SA Agent-General, Sir H. Barwell, to the SA Treasurer, 16 April 1931 and 14 May 1931; and Letter by Tasmanian Premier to Mr Lyons, Commonwealth Opposition Leader, 7 August 1931.

9 See, for example: T.P. Fry, *The Crown, Cabinets and Parliaments in Australia.* University of Qld, Brisbane, 1946, p. 266; A.C. Castles, 'Limitations on the Autonomy of the Australian States' [1962] *Public Law* 175, at 176; G. Sawer, *The Australian Constitution.* AGPS, Canberra, 1975, p. 71; R.D. Lumb, *The Constitutions of the Australian States.* University of Queensland Press, St Lucia, Qld, 4th ed, 1977, p. 72, n. 48; L. Zines (ed.) *Commentaries on the Australian Constitution.* Butterworths, Sydney, 1977, p. 38; and H.E. Renfree, *The Executive Power of the Commonwealth of Australia.* Legal Books, Sydney, 1984, p. 439. See also the same assertion made in standard historical and political texts: H.R. Anderson, 'The Constitutional Framework' and R.L. Reid, 'The

In the United Kingdom a completely different view was taken. British ministers considered that if they advised the monarch on a matter, including an Australian state matter, they were responsible to the Westminster Parliament for that advice and were therefore under an obligation to give their own independent advice and to take into account the interests of the British Government. As long as state matters remained uncontroversial, this difference of view was not apparent. In the 1970s, however, with the election of the Whitlam Government, matters became very controversial indeed and the cracks in convention became chasms.

The Whitlam Government

The Whitlam Government, upon its election, faced an interesting dilemma. On the one hand, it wanted to sweep away all colonial relics. On the other hand, it wanted to subordinate the states. This led to a piecemeal approach, with the Whitlam Government first seeking the termination of Privy Council appeals and references from the states.

The Colonial Laws Validity Act

The British Government did not appreciate this fragmented approach. It wanted all matters dealt with together. The Lord Chancellor put this directly to Gough Whitlam when they met in London on 24 April 1973. Lord Hailsham asked him why he would not 'do a job of it' and 'cut the painter'.[10] The formal UK record of the meeting states:

> Mr Whitlam said that in some respects his government did not mind the Australian states having a residual colonial status since this helped to make clear that they were not fully sovereign. For this reason he did not at present want to press for the abolition of the application to the states of the *Colonial Laws Validity Act* since to do so might seem to increase the claim of the states to sovereignty.[11]

The British Prime Minister, Edward Heath, noted in his personal record of a meeting with Whitlam on the same day:

> I then asked him about Section 2 of the Colonial Laws Validity Act, to which he replied that he did not wish to have this repealed, certainly not before they had been able to consider legislation in Canberra to take its place. If the United Kingdom Parliament were to repeal Section 2 of the Colonial Laws Validity Act, it would only increase the actual powers of the

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Government of South Australia', both in S.R. Davis (ed.), *The Government of the Australian States.* Longmans, London, 1960, pp. 5–6 and p. 374; R.S. Parker, *The Government of New South Wales.* University of Queensland Press, St Lucia, Qld, 1978, p. 259, n. 3; S. Encel, *Cabinet Government in Australia.* Melbourne University Press, 1962, p. 69; and W.G. McMinn, *A Constitutional History of Australia.* Oxford University Press, Melbourne, 1979, p. 91.

10 UK note of meeting on 24 April 1973, between Mr Whitlam, Sir A Douglas-Home, Lord Hailsham, Sir Peter Rawlinson QC, and various officers.

11 Ibid.

> states and this he strongly opposed. It was only when his Government had been able to take the powers away from the states that he would wish Section 2 of the Colonial Laws Validity Act to be repealed in respect of the states. I refrained from commenting on this desire to retain legislation which was not only colonial in aspect but colonial in title.[12]

The Channel of Communication

The Whitlam Government also pressed for all vice-regal communications between the states and the United Kingdom to be made through the Governor-General.[13] The next British Prime Minister, Harold Wilson, gave this proposal short shrift, replying that as long as the British Government remained responsible for advising the Queen on state matters, state communications on these matters had to go through it, rather than the Governor-General. The British Government was not prepared to change its constitutional relationship with the states without their agreement.[14] The Whitlam Government had not realised that British ministers played a substantive role in state affairs, and had mistakenly regarded their role as a mere formality.

At a meeting between Prime Ministers Whitlam and Wilson on 20 December 1974, Whitlam suggested that the Governor-General could be a 'post-box' for state recommendations to the Queen. The British Foreign Secretary, James Callaghan, pointed out that only ministers could advise the Queen, so the consequence of this proposal would be that state ministers would be advising the Queen, increasing their power and sovereignty.[15] This thought disconcerted Whitlam, who then suggested that the Governor-General take on all the powers of the British Government with respect to the states, making him a Viceroy. He said that he was happy to vest such an important power in his trusted Governor-General, Sir John Kerr, whose appointment, he noted, had been roundly 'applauded'.[16]

The Seabed Petitions

The British were not prepared to change the status of the states without their agreement. That status was of a colonial dependency of the British Crown. This was confirmed during the seabed controversy. In 1973 Queensland and Tasmania petitioned the Queen to refer to the Privy Council, for an advisory opinion, the question of who owned the seabed adjacent to the states. The states claimed that they were petitioning the Queen as Queen of Tasmania and Queen of Queensland. The Whitlam Government claimed that it was an Australian matter, so the 'Queen of Australia' should decide it and she could only be advised by Commonwealth ministers.

The Queen referred the petition to her British ministers for advice. The British Cabinet concluded that Her Majesty was not Queen of each state, as state ministers could not directly advise her. It also concluded that the Australian states remained

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12 Memorandum by Mr Heath on his meeting with Mr Whitlam, 24 April 1973.

13 Letter by Mr Whitlam to Mr Wilson, 6 June 1974.

14 Letter by Mr Wilson to Mr Whitlam, 1 August 1974.

15 UK record of meeting between Mr Wilson and Mr Whitlam, 20 December 1974.

16 Australian note of meeting between Mr Whitlam and Mr Wilson, 20 December 1974.

dependencies of the British Crown and that it was the Queen of the United Kingdom who performed functions with respect to the states, on the advice of British ministers. The 'Queen of Australia' only had powers with respect to Commonwealth matters, not state matters. Finally, it concluded that Commonwealth ministers also had a right to advise her in her capacity as Queen of Australia, because the Commonwealth also claimed ownership of the seabed and therefore had an interest in the matter.[17]

In making its decision on how to advise the Queen, the British Cabinet also accepted that the British Government's own political and strategic interests should be taken into account. These included not upsetting political relations with the Commonwealth, and avoiding the application to itself of any Privy Council opinion on the law concerning the ownership of the seabed.[18] It did not regard itself as a mere 'channel of communication' for state issues. Nor did it consider that it was under an obligation to act in the best interests of the states without regard to its own interests.

The British Foreign Secretary advised the Queen not to refer the petition to the Privy Council, as did Commonwealth ministers. The Queen accepted the advice of both sets of ministers, effectively rejecting the argument of Commonwealth ministers that they alone had the right to advise her on the matter.[19]

Nonetheless the Commonwealth tried hard to 'spin' the impression that the Queen had accepted the argument that only Commonwealth ministers could advise her on Australian matters, including state matters. It even tried to get the Queen to do so by inserting a reference to her acceptance of Australian advice in her speech on the opening of the Commonwealth Parliament. It was changed by the Queen's Private Secretary 'for the sake of truth'.[20]

Other Controversies

There were other incidents that showed the states that the British Government gave independent advice to the Queen on state matters. The British Government rejected Joh Bjelke-Petersen's advice to extend the term of the Queensland Governor, Sir Colin Hannah, in 1976,[21] and seriously considered sacking Sir Colin for involving himself in local politics by criticising the Whitlam Government. It was only the dismissal of the Whitlam Government that saved him, because British officials considered that it would be hard to sack Hannah when Sir John Kerr had involved himself far more spectacularly in local politics. [22] Bjelke-Petersen later confessed to a Premiers' Conference that until that point he had always believed that he was the one

17 Record of meeting of the UK Defence and Overseas Policy Cabinet Committee, 30 July 1973.

18 Opinion of the UK Attorney-General, Sir P. Rawlinson, 27 July 1973; and Cabinet Minute, DOP(73) 77, 17 December 1973.

19 For a more detailed discussion of the ensuing controversy, see: A. Twomey, *The Chameleon Crown*, op. cit., Ch 10; and A. Twomey, 'Constitutional Convention and Constitutional Reality' (2004) 78 *Australian Law Journal* 798.

20 Letter by Sir M. Charteris, Buckingham Palace, to Mr Wright, No 10 Downing St, 27 December 1974.

21 Letter by the UK Foreign Secretary, Mr Callaghan, to Sir C. Hannah, 16 January 1976.

22 Letter by Mr Fergusson, Foreign and Commonwealth Office ('FCO'), to Sir M. Charteris, Buckingham Palace, 6 January 1976. For a more detailed discussion of these events see A. Twomey, *The Chameleon Crown*, op. cit., pp. 62–8.

advising the Queen about such matters, and it was a surprise to learn that the British Government gave its own independent advice to the Queen.[23]

In 1979, the British Foreign Secretary also threatened to advise the Queen to refuse royal assent to two New South Wales bills if they were reserved.[24] One concerned the termination of appeals to the Privy Council from state courts. The other proposed bill required that the Queen act on the advice of state ministers in appointing the state governor. British officials were concerned that if the states could advise the Queen directly, she would become Queen of each state and each state would become a realm of the Crown on an equal footing with the Commonwealth.[25] It was argued that this would unbalance the federal structure and that such action could not be taken without Commonwealth agreement.[26]

Unfortunately, the Governor, Sir Roden Cutler, received this despatch from the British Foreign Secretary on the same day that the Privy Council Appeals Abolition Bill, which had already passed both Houses, was sent to him for assent. The Wran Government balked at the idea of its bill being refused assent, so it did not provide the necessary certificate needed for the assent process to proceed. The bill was left in legislative limbo in the Governor's desk drawer. Nervous British officials waited for the bill to arrive, checking to see if there were any postal strikes, but it never came.[27] British diplomats in Australia later boasted that they were pursuing a 'policy of masterly inactivity' on the matter.[28]

After many more diplomatic skirmishes and a bit of provocation on the part of the NSW Government, its proposal to require the Queen to act on the advice of state ministers was eventually dropped. One British official concluded that:

> New South Wales authorities, who had clearly been trying to pull a fast one, and were not really very surprised to be caught, simply gave in.[29]

In the many discussions between New South Wales and British officials on the issue, it was made abundantly clear that the British Government would give independent advice to the Queen on reserved state bills, and that if it regarded them as 'unconstitutional', it would not advise her to assent.[30]

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23 Transcript of the Premiers' Conference, 24 June 1982, p. 44. See also his previous assertion that the Queen appointed State Governors on the Premier's advice: *Queensland Parliamentary Debates*, Legislative Assembly, 28 October 1975, p. 1520.

24 Letter by Lord Carrington to Sir R. Cutler, 19 November 1979.

25 Memorandum by Mr Whomersley, Legal Adviser, FCO, to Mr Britten, FCO, 20 September 1978. See also: NSW, 'Minute of Meeting with UK Officers re Abolition of Privy Council Appeals and Appointment of Governor', 27 September 1979, p. 5; and Memorandum by Mr Upton, FCO, to Dr Hay, Research Dept, FCO, 12 March 1980.

26 Telegram by Sir D. Murray, FCO, to Sir D. Tebbit, UK High Commissioner, Canberra, 16 November 1979.

27 It was eventually annulled by the *Constitutional Legislation (Repeal) Act 1985* (NSW). See the more detailed account in A. Twomey, *The Chameleon Crown*, op. cit., Ch 14.

28 Memorandum by Mr Spire, UK Consulate, Sydney, to Mr Baylis, FCO, 6 March 1980.

29 Minute by Mr Upton, FCO, 7 February 1983.

30 FCO, Paper, 10 September 1980; and NSW, 'Residual Constitutional Links—Further Discussions with British Authorities', March 1981.

The *Australia Acts 1986* and sovereignty—a battle won

These events spurred the states to reach agreement on the *Australia Acts* to terminate the United Kingdom's role with regard to the states. However, this raised the same dilemma that arose during the enactment of the *Statute of Westminster*. If British ministers were no longer to advise the Queen upon state issues, who would replace them? The Fraser Government argued that Commonwealth ministers should replace them. This was not acceptable to the states.

Later, the Hawke Government suggested that the Prime Minister act as a 'post-box' in passing on state recommendations to the Queen. This proposal was subsequently scotched by the Department of the Prime Minister and Cabinet, on the ground that the Prime Minister would remain politically responsible for unpalatable state advice. Hawke was told that if the Queensland Government wanted Sir John Kerr to be appointed as its next governor, Hawke would have to make the formal recommendation and defend it in the Parliament. This was a bridge too far for Hawke and the end of the post-box solution.

The states insisted that they should advise the Queen directly on state matters. This was not acceptable to Buckingham Palace, which was concerned about the Queen receiving conflicting advice from Commonwealth and state ministers. The Palace also argued that it would be 'unconstitutional' for the Queen to receive advice from persons who were not ministers of an independent country.[31]

The British crown law officers responded that 'independence' was not relevant, as the dominions had first started advising the monarch directly before they became completely independent. Moreover, the crown law officers pointed out that in a federation, sovereignty is shared, and that the state of Victoria had been treated by the British courts as an independent state for the purposes of a claim of Crown immunity.[32]

Sir Antony Acland, the permanent head of the Foreign Office, wrote to the Queen's private secretary explaining that in a true federation, state ministers can just as much be ministers of the country as federal ministers. The states were not inferior in status to the Commonwealth and state ministers were not necessarily disqualified from advising the Crown on matters within their exclusive competence. He concluded:

> As we see it, the relationship of Her Majesty with the Government (or Governments) of a country of which she is Queen is a matter of that country's domestic affairs. Australia as a whole is independent. When the United Kingdom bows out, the Government of that independent country will comprise all Australia's Governments (Commonwealth and state)—in other

[31] Letter by Sir P. Moore, Buckingham Palace, to Sir A. Acland, Permanent Under-Secretary, FCO, 2 March 1984.

[32] Brief to the UK Attorney-General, 22 March 1984. See also the Memorandum by Mr Chick, FCO, to Mr Boyd, FCO, 14 September 1984, where he observed that the sovereignty argument would 'strike an Australian as showing an inability to understand a federation where sovereignty is divided between the States and the Commonwealth.'

> words 'independence' and 'sovereignty' will not be the prerogative solely of Commonwealth Ministers.[33]

After years of argument and negotiation, this view was reached in Australia as well. The Commonwealth Government agreed that the states should advise the Queen directly about state matters. Senator Evans, in trying to convince the Palace that this was an acceptable proposal, explained that:

> The states are jealous of their sovereignty, and the Commonwealth has no wish to impinge upon it. The states are not prepared to solve one offence by committing themselves to another—that is by handing to the Australian Prime Minister the right to recommend or block appointments of state Governors who, in the states, exercise significant constitutional authority. Any such solution would run counter to the nature and history of federation in Australia as shown by the express provisions of the Commonwealth Constitution continuing the constitutions and residual sovereign powers of each state.[34]

The formal advice to the Queen from Prime Minister Hawke also stressed the nature of the federal system and recognised the importance of maintaining the 'sovereign identities and powers' of the states within their constitutional limits. He concluded that it was therefore necessary for the states to advise the Queen directly.[35]

Section 7 of the *Australia Acts* now gives the states the power to advise the Queen directly on state matters—the same power that was regarded by Whitlam as dangerously increasing the status of the states and was regarded by the British Government as establishing independent Realms and Crowns.

The states not only had a victory in maintaining their own sovereign status and independent relationship with the Crown. More important was s 15 of the *Australia Acts 1986*, which secured their place in Australian sovereignty. The original source of the Commonwealth Constitution was the sovereignty of the Westminster Parliament. The Commonwealth Constitution was legally binding because it was a British law of paramount force. British legislative supremacy over Australia was diminished by the *Statute of Westminster*, but was terminated by the *Australia Acts.*

The power to amend or repeal those fundamental statutes that form our Constitution, the *Commonwealth of Australia Constitution Act 1900*, the *Statute of Westminster 1931*, and the *Australia Acts 1986* was transferred by s 15 of the *Australia Act 1986* (UK) not to the Commonwealth but collectively to the Commonwealth and all the state parliaments. If all the state parliaments request the Commonwealth Parliament to do so, it can now amend or repeal these foundational constitutional provisions. This is the ultimate recognition that no matter how much our federal system is trammelled

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33 Letter by Sir A. Acland, Permanent Under-Secretary, FCO, to Sir P. Moore, Buckingham Palace, 14 February 1984.

34 Commonwealth Government, 'Aide-Memoire' provided by Senator Evans to Sir P. Moore, February 1985.

35 Letter by Mr Hawke, to Her Majesty, 31 July 1985.

and distorted by Commonwealth laws or High Court decisions, sovereignty in Australia remains vested collectively in the Commonwealth and the states.

Question — That last point which our speaker made about what the British version of the *Australia Acts* said, what did the Australian version of the *Australia Acts* say on that particular point?

Anne Twomey — That's a very good question. They are in fact identical in substance and the reason why I said the British version did that rather than the Australian version, is that although the words in them are the same, the power to do that was effectively exercised by the British version. Now one of the notable things about the *Australia Acts* is that there was quite a significant disagreement within Australia as to whether it should be done independently in Australia without the involvement of the United Kingdom. That was the view of the Commonwealth and that was also the view of New South Wales after just having had its fingers burnt over the whole business with the British Foreign Secretary. So New South Wales and the Commonwealth were very strongly of the view that this should only be done in Australia, by Australians, with no British involvement. Other states, such as Queensland and Western Australia in particular, thought that the British should also be involved because if you're trying to transform sovereignty, if you're trying to limit the powers in the United Kingdom, you need the involvement of the United Kingdom in abdicating its power and passing it on. So to make sure that everything was done neatly and constitutionally correctly, so that it couldn't be challenged and result in lots of nasty litigation, the deal was that they would do identical Acts. Those who believe that only the Australian version should count could believe that and ignore the British version. Those who believed that the British version was necessary could say: 'Well that works even if the Commonwealth version doesn't.'

Now there are some disputes between constitutional scholars on this subject. People have different views as to what is necessary and what is done but to the extent that there is a provision that vests control in Australia over documents that were previously exclusively in control of the United Kingdom, then it is a United Kingdom power that is needed to support it. So once that happened, once Section 15 of the *Australia Acts* and the British version of the *Australia Acts* passed that over, at that point the United Kingdom stopped being involved in our system. Now the United Kingdom could repeal the UK version of the *Australia Acts* but it wouldn't make one iota of difference because what has happened now is that all power has passed here, and even if the British legally under their constitution, under their powers, could say that they reclaimed power, that would be irrelevant for us because all power is now vested here. Our courts would always recognise that all power is now vested here. The United Kingdom power is now completely irrelevant to us, but it was necessary to have that act of transferring it across.

Question — You focussed very much on the historical past. I wonder whether you would comment on some of the implications for the future, for example if Australia

became a republic by a referendum at the federal level, how would you see your argument playing out in relation to the states. Would it be open to each of the states individually to decide whether it remained a monarchy or do you see the situation differently?

Anne Twomey — That's a terrific question actually, and it's a very difficult one. It's one I try to address in the book *The Chameleon Crown*. The question here, and this is one that the British addressed but the Australians didn't, is what did the *Australia Acts* do? Does the fact that the states now advise the Queen directly, did that create a separate Crown in relation to each state? Are there now separate realms? Do we have seven Crowns in Australia: one Queen of Australia for the Commonwealth level and a Queen separately for every state? Or did it somehow transform that crown of Australia so that the Queen of Australia is now changed and instead of just being Queen in relation to the Commonwealth level, she's now become Queen in relation to the whole of Australia, but is now just advised separately by different ministers accordingly to Australia's internal system?

That's something that the British were prepared to face head on. They raised it in their own discussions, and one of their officers went to Australia and discussed this with Commonwealth and state ministers and asked: 'Well, what is it you're trying to do?' He came back and said: 'There are obvious differences of opinions out there and no-one is prepared to address the question.' Basically it was swept under the carpet because nobody wanted to face that fight. They had enough difficulty getting agreement as to the terms of the *Australia Acts*. They didn't want to get into this idea as to whether there was one Crown or seven Crowns because they didn't want to have the fight and therefore destroy the agreement that they already had. So at the Australian level it was just ignored. If you look at the *Australia Acts* there's no reference to the Queen of Australia or anywhere else, it's just the Queen, and you interpret it as you wish. Interestingly, if you try to apply normal rules of statutory interpretation you end up with a very bizarre position because the Commonwealth *Acts Interpretation Act* would apply to the Commonwealth version and the United Kingdom's *Interpretation Act* would apply to the UK version, and of course they refer to different queens, so that in itself is just a complete mess. One has to assume that there was some overall intention.

What the British said in the end was, on the basis of history; one would normally assume that separate Crowns were created because state ministers were advising the Queen directly. But the British are very pragmatic in their constitution-making and they said: 'You could devise for Australia a separate system. You could say you now have transformed the Queen of Australia so you have one Queen of Australia and you have her advised by different ministers because it's a federation.' So basically, you can make what you want of it would be their view, and that's how it was left. Ultimately it's up to Australians to decide. It's a matter of trying to achieve some sort of consensus as to what it is that was created. Now that leads to all sorts of difficulties when you come to a republic, because if you're not absolutely sure what you've got, you don't know quite how to change it. If you only have one queen and you get rid of her, then automatically there is no queen in relation to each state, unless you actually had a republic referendum that had the effect of abolishing one queen and creating six, which would just seem a little bit silly. So that's one possibility. The other possibility is to say that the states retain their connections to the Queen: that there were separate

Crowns and that each state was left to deal with it. Now in the 1999 referendum, that was the view that was taken that each state would be able to retain its own Crown and break up relationships later but I think that's something that needs a lot more thought and a bit of consensus-building.

I tried to address this in a PhD thesis I had. I think if one wants to take analogies from it, one should be able to say that if sovereignty were vested collectively in the Commonwealth and the states, and that's what Section 15 of the *Australia Acts* did, then by analogy you would say that the Crown then is a collective Crown of the Commonwealth and the states. It is therefore one Crown; and I think you can make a good argument for that. Ultimately, I think this is not for me to decide, but something for everyone to decide, and I don't have a final view on it.

Question — Before I ask my question, I might crosscheck my understanding of the issue. My understanding is that when the Prime Minister goes in to the Governor-General to get the writs issued for a general election, that then passes on to the state governors who then also have to agree to a general election being called. So there is a check and balance, in a way, a sovereignty there—that was an issue around the Whitlam dismissal. With the enactment of the *Australia Acts*, has that power changed, and what would that mean in relation to the previous gentleman's question about a republic? Would states if we moved to being a republic give up that check and balance in power?

Anne Twomey — There are some complicating factors in all of this. When the Prime Minister seeks to call a general election, if he's just seeking to call a general election in relation to the House of Representatives, then that's a matter between the Prime Minister and the Governor-General. If a half Senate election is also to be called at the same time, which is what normally happens, then it's the state governors who issue the writs in relation to that. Normally there is a communication to the states and state governors are asked to issue a writ. There can be complicating factors if state laws about Senate elections in issuing the writs aren't consistent with Commonwealth laws, and then there may be some timing problems that come up.

In the 1975 period there was an issue as to whether if Mr Whitlam, in the dying days of his government in November 1975, had called a half Senate election, there was some question that some state premiers might have advised their governors not to issue the writs for the election. In my research I've written a bit about this because the British government was quite aware that this was a problem. Interestingly, at the time, there was a rumour going around that what would happen is that Mr Whitlam would advise the Queen as Queen of Australia to instruct the state governors to issue the writs. Now again, that was a misunderstanding of the different status of the Queen in relation to the Commonwealth and the states because it was not the Queen of Australia who could instruct the state governors, it was the Queen of the United Kingdom who could instruct the state governors. So really, Mr Whitlam would be advising the Queen of Australia to advise the Queen of the United Kingdom to advise the governors to issue the writs. The British government was quite aware of this problem and was very concerned about it, and so in the lead-up to the dismissal that was the thing that was spooking the British government. Sir Roden Cutler had actually advised the British High Commissioner that if he was instructed by the Queen to issue the writs against the advice of his state premier, he would resign. So that was

going to be a big constitutional crisis if it happened—instead we got a different constitutional crisis.

How does that differ now if we just have one Queen of Australia? If the same situation arose again, with a state premier advising the governor not to issue the writs to an election, could the Commonwealth Prime Minister advise the Queen as Queen of Australia to instruct the state governors to do so? That would in part depend upon whether we have one hybrid crown or whether we have separate Crowns, to which we don't know the answer. Ultimately it's probably irrelevant, because Section 7 of the *Australia Acts* doesn't give the Queen that power any more. The Queen only has power in relation to the appointment and removal of the governor. So unless the Queen were to say to the governor: 'I will remove you unless you issue the writs', it wouldn't be within her power. The Queen could only be advised on appointing and removing the Governor by the state premier. So it's not going to happen. There is no jurisdictional power for a Commonwealth Prime Minister to advise the Queen of Australia to instruct state governors to issue writs.

Not that I think any of this is actually going to happen, but theoretically that's the answer.

Question — So the state government could still stop a half Senate election?

Anne Twomey — Technically a state premier could advise the governor not to issue writs for that particular state for a half Senate election, yes, but the Constitution would require that that half Senate election occur by the time that the Senate's term is finished. It could delay a half Senate election technically. Realistically it's not going to happen.

Question — The flyer that came around for the lecture, did it say 'Crown, States and Territories', did I remember rightly?

Anne Twomey — 'States, the Commonwealth, and the Crown—the Battle for Sovereignty'.

Question — Well, OK, I still want to bring up the territories—we are in one. The fact is that we people in the territories don't appear to have the same rights as the states. Is it to do with the amount of people, or why can't we get the same rights? We do need them—there have been several variations where the states have overturned things, as you know, particularly euthanasia, which people want the choice of. So why is it that the states are the poor relation?

Anne Twomey — In terms of the *Australia Acts*, just as a matter of interest, there is a definition in there that makes the *Australia Acts* extend to states and to new states. Now that was put in at the request of the Northern Territory because the Northern Territory was anticipating becoming a state and therefore wanting the *Australia Acts* to apply to it. There are all sorts of fascinatingly technical constitutional issues that arise in relation to that, which I won't go into, but if anyone's interested, in the latest edition of *Public Law Review* I've written an article about the Northern Territory, the *Australia Acts* and how all this could connect in relation to statehood.

The ACT is in a different position. The ACT is different because it contains the capital. There are provisions in the Constitution expressly for the formation of a territory which is to be the place of government in which the capital is to be placed. There are special powers in the Constitution that deal with this 'seat of government'. No-one's ever been exactly sure what the seat is and where it is but I'm pretty sure we're in it now. How far the seat extends, we're not absolutely sure. So that leaves the ACT in an awkward position. Could the ACT itself ever become a state? The answer is probably no unless you carved off everything but the 'seat of government' and turned that into a state, but that would be pretty awkward. In most federal countries that the idea is that the capital should be in a territory of its own outside the system of states and federations. So there are broader political reasons for that.

The Northern Territory is a different category. Yes, it technically could become a state. The conditions on which it would become a state would be a matter for some debate. It doesn't have to come in on the same conditions as every other state, so you wouldn't have to give it the same number of senators and the like. The difficulty with becoming a state is that all sorts of responsibilities are then incurred and it's very difficult if you have a small population and not enough critical mass to be able to manage a government to do those sorts of things. The Northern Territory is certainly trying to head towards statehood and deal with those issues. The ACT is in a bit more of an awkward position, but it is privileged also to have the capital and to have much greater access to members of parliament than many other people do.

Question — First of all, congratulations on bringing to life what could be a very flattish subject for some of us. Has the appointment of Australian-born and Australian citizens as governors and as governors-general changed the situation and the relationships between the United Kingdom and Australia?

Anne Twomey — I think it has to some extent. There was a fair battle over it, although from the time Sir Isaac Isaacs was appointed in 1930-odd, Australians were able to be Governor-General of Australia. At the state level that wasn't accepted until after World War II. So we didn't get an Australian as a state governor until 1946 and even then that was a fairly mighty battle. The reason for that was that the King took the view that he wanted to personally know his representatives. On the appointment of Sir Isaac Isaacs, one of the objections of the King at the time was that he was not personally known to him, and he wanted to have as his representative somebody that he knew.

So how does that change and shape Australia? I think it does make a big difference and there was a long campaign for that. You might be aware that in Western Australia there was a long period in which they didn't have a state governor, they just relied on their lieutenant governor, partly because of that issue of Britishness, but actually more because of the Depression, and you had to pay a lieutenant governor half what you had to pay a governor, and that was the main reason for that. I think that in terms of the role of the governor, if the role of the governor or the Governor-General is to represent ourselves that is something that would be a real challenge for a British person to do. I think it's something more successfully achieved by Australian appointments.

What Did the 'Yes' Vote Achieve? Forty Years after the 1967 Referendum*

Larissa Behrendt

I'd like to begin by paying my respects to this country and acknowledging that we're meeting today on the land of the Ngunnawal people.

I'm going to talk about the 1967 referendum, and I'm going to move on to some more topical issues towards the end of the lecture, because in some ways the 1967 referendum is a part of why we see indigenous policy in the situation that it is in today. Obviously 40 years on is a good chance to reflect on all that's been achieved and hasn't been achieved since that time. When we look at the fact that indigenous Australians today still have 17 years less life expectancy than their non-indigenous counterparts, and we see the statistics about the disparity between opportunities in relation to education, employment, health and housing, it does give us cause to ask what these enormous moments like the 1967 referendum do that either helps or hinders us in terms of moving towards achieving social justice for Aboriginal people.

To understand the 1967 referendum we actually have to go back to when the Constitution was drafted and understand what it was that the 1967 referendum was trying to fix. It is well known that at the time the Constitution was drafted, the drafters were working with a few very key but widely held assumptions about Aboriginal people. One of these was that we were a dying race; another was the underlying assumption about the superiority of the white races at the time. And we see evidence

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 29 June 2007.

of that not just in relation to the attitudes held about Aboriginal people at the time but also by the fact that the first piece of legislation that was passed by the Australian Parliament was the legislation that entrenched the White Australia Policy into law. If we look at the discussions around the framing of the Constitution and the deliberations about what kind of legal framework we were going to have to govern our country, and what decisions were made, we can come to understand quite a few key assumptions about what sort of society we were going to be creating.

One of the very interesting proposals that was put up for discussion by the framers of the Constitution, which came through from the Tasmanian Parliament as part of the process, was to consider a clause within the Constitution that would entrench certain rights that included rights like due process before the law, equality before the law and some rights around the dealing with property. I think it's very instructive that those ideas about having a rights clause were rejected by the framers of the Constitution because it reveals what they were trying to do in relation to the Constitution. First of all they rejected those clauses because they did want the capacity very strongly to be able to make laws that were racially discriminatory in relation to indigenous people and in relation to other groups within the community, particularly the Chinese. So there was a deliberate intention to ensure that this was a legal framework that would allow discriminatory legislation. Another decision that wasn't quite so racially based but does explain a lot about our system of governance, was that in rejecting putting entrenched rights into the Constitution, rather than having a Constitution like the American Constitution where rights are entrenched and the decision about how you protect those rights and what they mean is undertaken by judges, the decision was made to leave the Constitution silent about most rights and to leave the decision making about what rights we protect and how we protect them and how we value them against other rights to the parliament. That's the place where we as a country put our trust in how those rights are decided. That's been a fundamental hallmark of our Constitution.

That takes us to looking at what the 1967 referendum tried to achieve. From the 1930s we saw the emergence of Aboriginal leaders like Fred Maynard and William Cooper, whose advocacy around indigenous issues really focussed on the idea of citizenship rights. The language of equal rights for Aboriginal people had been a very strong part of the campaign for social justice for Aboriginal people. People like Cooper and Maynard were men who had grown up in circumstances where they had worked on pastoral properties but weren't able to own pastoral land, who had been self-educated, heavily involved in the trade union movement, so involved in politics as well, with quite astute political sensibilities and inherent belief in the idea that if indigenous people were able to take control of their own lives, were able to run their own pastoral properties, could have control of land etc, and make decisions about their own lives, that would be a key part of the agenda for achieving social justice for Aboriginal people. And at the time a lot of that campaign did focus on the idea of citizenship rights.

For that reason, it's not surprising that the culmination of a lot of that activism would end up in campaigns that talked about equality for Aboriginal people. At the time of the referendum, the posters and the information put out by the proponents of the 'yes' vote was very focussed on using the language about equal opportunity for all Australians and equal opportunity for Aboriginal people. The language of citizenship

rights and equal rights and the idea that this was about equality was very strong in that campaign and so it's not surprising that there is a lot of mythology about what the 1967 referendum actually did. Two of the biggest assumptions about it that are wrong are that it gave indigenous people the right to vote or that it was the moment at which indigenous people became citizens. In fact it didn't do either of those things: in fact what it did do was include indigenous people in the census, and give the federal government the power to make laws in relation to indigenous people.

It's very clear that the proponents of the 'yes' vote thought that those two changes would go much further than they actually did. In particular, the idea of including indigenous people in the census wasn't looked at as simply a body-counting exercise. It was believed that if indigenous people were included in the population in this way, it would start to break down this barrier that had occurred where indigenous people were treated differently to other members of the community. So there was a belief that inclusion in this way would be a kind of nation-building exercise where we would be incorporating, in an imagined community kind of way, indigenous people into the fabric of Australian society. In hindsight, when we look at how debates around something like native title can be so divisive, and the wedges created by painting indigenous people as threatening to the interests of land holders, and even un-Australian in relation to their attempts to exercise their own property interests, we see lots of instances where I think there's still a psychological terra nullius if you like, that excludes indigenous people from being seen as an equal part of the Australian community. But it's important to remember that that was the aspiration of the people who were advocating for the 'yes' vote in relation to including indigenous people in the census, and the assumptions made around giving power to the federal government were just as aspirational but also have been just as usurped as the first change was.

It's very clear that the proponents of the 'yes' vote had assumed that by giving the power to the federal government and taking it away from the states who had for so long abused that power in a way that people thought had breached the rights of indigenous people and hadn't actually been beneficial to them at all, that the federal government would actually move to act in a benevolent way towards indigenous people. It was the key assumption that they would use that power for the betterment of Aboriginal people. In hindsight we've seen lots of instances where that just hasn't been the case, and although we've seen the passing of native title legislation, it's just as easy for that to be repealed or for legislation that protects rights like the Racial Discrimination Act to be overridden or prevented from operating in relation to specific issues.

There have been a lot of instances we can point to where the federal parliament in using that legislative power in relation to Aboriginal people hasn't used it benevolently. The extent to which it's required to think of the interests of indigenous people was tested in the Hindmarsh Island Bridge case. You may remember that the circumstances of that case were that the heritage protection legislation that operates nationally was prevented through additional legislation from applying to the people of the Hindmarsh Island area, so that they couldn't oppose the building of the bridge. As part of the argument when this case was heard by the High Court, it was put to the Court that they should remember that it was the original intention when that change was made, that this was a power that should be used benevolently. Only Justice Kirby said that you could look at that intention to interpret how the Federal Government can

use that power today. Justice Gaudron said: 'Although that's a nice idea, in theory it just can't hold water in relation to the law as we understand it.' Other judges were much clearer about the fact that that intention couldn't be used in the interpretation of how that power is used today and simply said that if the federal parliament has the power to make that legislation to provide that benefit, they also equally have the power to take it away and to deprive people of that benefit today. So you can see then how the promise of the 1967 referendum and this idea that the 'yes' vote was going to provide a new era of non-discrimation, failed to meet the expectations of the people who were the basic proponents of the 'yes' vote, for those reasons that it didn't actually go to underpin some of the very key assumptions that were made about the sort of legal framework our Constitution should provide when it was first drafted.

There is a case that I refer to a lot in my work. For Australians, whether they are Aboriginal or not, it's the case that remains the litmus test of the kind of legal system we have when it comes to how Australia protects basic human rights. It's the case of *Kruger and the Commonwealth*, which is the stolen generations case—the first one that went to the High Court. In that case, unlike *Gunner and Cubillo*, which was a case that was argued around tort law and duty of care, the plaintiffs in the Kruger case, who were children who'd been removed in the Northern Territory under the child removal ordinance there, and a parent who had lost her child under that policy, made out their case on the basis that that policy had breached certain inherent rights that they had, including the right to due process before the law, equality before the law. You will remember that they were some of the rights that were proposed through the Tasmanian Parliament, freedom of movement and freedom of religion, which is actually protected in the Constitution under section 116. Their basic claim was a claim of the breach of basic human rights, and interestingly, in the way that they brought the claim together, they didn't rely on any of the rights that we might think were specifically indigenous rights, but rights that we would think of as applying to all Australians. They were unsuccessful on every claim that they put forward, including interestingly the section 116 freedom of religion clause, which the Court interpreted so narrowly that it didn't apply to their circumstances.

I think that result gives us a snap-shot of the fact that there are so many rights that many Australians might assume are protected somewhere in our legal system, but actually have no protection at all. We are still reliant on the government to make laws about protecting our rights. It's a good snap-shot of where we stand in that way, but it also highlights the fact that where we do see in our legal system this failure to protect rights, it's always going to fall the heaviest on the people who are the most vulnerable—the people who are culturally distinct and the people who have been historically marginalised. As the experience of the stolen generation shows, that is most likely to be Aboriginal people. So those silences have left a big legacy for Aboriginal people and they've left a legacy for all Australians and what we can see, analysing the 1967 referendum forty years later, is that it didn't actually go to cure some of those fundamental problems that our legal system has in relation to how it protects rights. Whatever the intentions were, that hasn't been the outcome.

There is another aspect of the 1967 referendum that has profoundly shaped the way in which we deal with indigenous issues today, and it was I think an unintended consequence. That was the fact that when that power was transferred to the federal government as part of the changes to the racist power, it effectively left the

responsibility for some of the key aspects of the indigenous portfolio shared between state and territory governments. In relation to issues like health, education, and housing, there has been a split in the responsibility between those two levels of government. And rather than that relationship since 1967 between those two levels of government being one of collaboration and co-operation, it had been one that has been much more characterised by what we understand as cost shifting, where one will try and push the responsibility onto the other level of government, which effectively leaves Aboriginal people under-funded on all of those keys areas.

We saw a classic example of this last year in relation to the Northern Territory when the issue of violence against indigenous children was raised through the comments of the Public Prosecutor, Nanette Rogers. At that time the Federal Minister for Aboriginal Affairs, Mal Brough, came out and said what a terrible situation this was—that it was an absolute disgrace, and he pointed the finger firmly at Clare Martin and her government, saying that 'This is what happens when you don't have enough police and resources put into communities to control these law and order issues.' By painting it as a law and order issue, he was putting that responsibility clearly into the territory and state pocket, but the response of Clare Martin was to come out and say 'Well, this is a terrible situation, it's absolutely horrible that this is happening and it's the fault of the federal government who has consistently under-funded these communities in relation to housing, education, employment and health.' She was absolutely right as well; in fact they were both right; both levels of government had been negligent in relation to those areas.

It has been a particularly marked feature of the indigenous affairs portfolio in the post-ATSIC era. When ATSIC was operating it was the body that both levels of government would blame when things went wrong, even though it never had responsibility for education and only briefly had responsibility for health, and those two key areas remained federal and state responsibilities through the whole lifetime of ATSIC. You'd be very aware of those simple phrases: 'ATSIC failed; it's ATSIC's fault; ATSIC hasn't done anything.' And it became the scapegoat that masked a lot of government neglect, and in the post-ATSIC era it became more pronounced that the two levels of government now argue against each other in relation to these issues. You still occasionally hear people saying its ATSIC's fault, but I think people need to really start taking responsibility for some of those things. So I think that what we've seen as a result of 1967 referendum, as one of its sad unintended legacies, is this issue of cost-shifting that means that governments have found a way to avoid their responsibility to Aboriginal children.

There is another aspect if we look at those debates around the issue of violence in the Northern Territory when they rose up in the media last year as a political football. It was evident that there is another key barrier to achieving social justice for Aboriginal people. Apart from saying that this was the fault of the Chief Minister that these issues were occurring at such a terrible rate in Aboriginal communities, the other response of the federal government was to very quickly say: 'We are not going to throw anymore money at this issue. There are things that need to be done, but one thing we're not going to do is waste any more money on indigenous affairs.'

The fact that that response, that political sound bite, was so quickly accepted by the general community and the media as being an appropriate first step, that the issue

wasn't more money and we don't need to think about the funding issue, I think shows how an underlying racism within the Australian community still becomes a really big barrier to achieving social justice for indigenous people. The social research continues to show us that Australians are increasingly resistant to the characterisation of being racist, especially in attitudes towards groups like indigenous people or Muslins. At the same time, the research that we do at UTS at the centre I work in often engages in the sort of research where we're asking indigenous people to clarify their views about the world. For example, we might do research that asks them about what they mean when they want a treaty, or what they mean when they say self-determination, and it never ceases to amaze me that almost always the first thing that people in that sort of research will state in terms of their priorities, is something about racism or access to services and not feeling racism in relation to that. I think that's an interesting observation when you compare that to the fact that many Australians think that racism isn't a problem, but it's still actually one of the things that indigenous people, whether they are in the cities, in the rural areas or in remote areas, feel quite defines their experiences within the Australian community and how their issues are dealt with.

The challenge in that environment of unravelling and unmasking assumptions such as that there is too much money thrown at indigenous people, or we don't need to spend more money on these issues, is that it becomes a big barrier because people don't ask the questions about those assumptions that they should. There is complacency about this issue which comes from the fact that that view of indigenous people getting too much money fits in with the stereotype that is still very prevalent about the extent of welfare dependency in indigenous communities and the idea that there is a lot of indolence and dole-bludging that goes on. If that wasn't masking people's perceptions, they could ask very clear, hard questions about how much money is being put into Aboriginal affairs.

The Howard government always says that it is the government that puts more money into indigenous affairs than any government previously, and they are absolutely right, but when they calculate those figures, they include a whole range of issues that don't actually only include the money that goes specifically to indigenous communities. They include things like all of the money spent operating the National Native Title Tribunal, and all of the money that goes into the processes whereby people are able, if they are not indigenous, to make claims to protect their own interests in native title claims, which is funded by the Federal Government. It has included in the past money spent on litigation like defending the Gunner and Cubillo cases, which runs into millions of dollars. You don't see the fact that in relation to what we are told is indigenous-specific spending, a lot of that money actually isn't about spending to develop capacity and improving indigenous services, it's about processes that relate to indigenous people, but often work against those very two things.

You don't have to scratch the surface very hard to see the evidence of the underspending on the key areas. The Australian Medical Association did a fantastic report in the lead-up to the last election that showed that basic indigenous health needs were under-funded by 460 million dollars, and work that's being done in the Northern Territory, particularly by the researchers at the Centre for Aboriginal Policy Research (CAPR), has highlighted enormous under-spending in the Northern Territory in relation to education and housing. Some studies have shown that in relation to education, in some areas in the Northern Territory there is only 40 cents

spent on the education of an indigenous child for every dollar spent on a non-indigenous child. In the same community where that research was done, when a shared responsibility agreement was signed with the community, who were told to send their children to school, the children turned up to find there weren't enough teachers and classrooms, highlighting the massive under-spending on basic infrastructure that we see in some of these communities. Those sorts of clear statistics that we have that show under-spending on the key areas of indigenous health, education and housing, get masked when we blanketly accept statements like 'there's too much money being spent on these issues.' We don't see that from the failed policy of shared responsibility agreements that is now being back-pedalled from by the federal government. The 100 million dollars first earmarked for it only saw 25 million dollars end up in indigenous communities, with 75 million dollars being spent on administration. I think many indigenous people were asking what sort of questions would have been asked if that had been the way that ATSIC had operated when it was doing a program.

So there is a whole range of issues that I think come out of the fact that the failure to scrutinise indigenous funding means that many Australians are left asking 'why is it that we are spending so much money on indigenous issues, but still we see no profound change in relation to these key socio-economic areas, where we consistently see in report after report the fact that communities are actually dysfunctional rather than getting better?' That's a really genuine and honest question that Australians ask and should be asking, but the answers that are so clearly there are never put forward because we're given lots of other reasons as to why these things occur.

We've seen some really good examples of that recently in the Northern Territory, again after decades and decades of reports where indigenous people have led the discussions about the need to tackle violence in indigenous communities. Where indigenous women in particular, but indigenous men as well, have consistently highlighted this as a pressing issue and pointed to a raft of reasons that give rise to these issues, not the least being the importance of dealing with those underlying issues of disadvantage like health, housing and education, we have never seen any interventions by government that address the blueprints that are clearly set out in report after report.

That's been the basic frustration of many Aboriginal people over the heavy-handed interventions that we've seen in the last few weeks. Not only is it a fact that these blueprints have been there and this national emergency has been there for decades, not just in the Northern Territory, but in other places around the country, with New South Wales having a report that shows similar levels of violence in some indigenous communities, there have been, in the light of all of that government failure that I've mentioned before in terms of allocating resources, indigenous people on the ground who despite that neglect have gone on and developed programs in their communities with no resources and no government funding. That's where the original initiative for having safe houses for women came from; it's where the initiative of having many of those communities become dry communities came from; it was from the communities themselves who have worked in this way.

All of that work, the capacity for indigenous people to try and deal with these issues from inside, gets overridden when we see a paternalistic approach, which basically

tries to place the blame for these sorts of issues on the indigenous community. The Anderson and Wild Report, like other reports on indigenous violence, highlighted the fact that many of the perpetrators of sexual abuse against indigenous people are non-indigenous people, because like many paedophiles they are attracted to places where there is dysfunction because they know where there is dysfunction in the community, there are vulnerable children and that's where paedophiles find their prey. So it's little wonder that they find themselves in communities where there is dysfunction, and whether it is in the Northern Territory or in rural New South Wales, we see that phenomena. There has been nothing in the raft of suggestions that have been put on the table by the Federal Government that deals with the fact that this is a problem that actually is as prevalent from non-indigenous perpetrators as indigenous perpetrators. Instead we are left with the impression that this is an indigenous community problem that the indigenous community has done nothing about, and often it is implied or explicitly said that it is a result of indigenous cultural values that this sort of behaviour takes place.

It has been my experience and observation that where we see dysfunctional communities, its not because indigenous cultural values are strong and not being moved away from, in fact it's the exact opposite. It's where indigenous cultural values, the strong values of reciprocity, kinship, respect for elders etc have actually been weathered away and replaced by dysfunction. I think there is some evidence to support that. If you look in New South Wales at the areas and the communities where there are low crime rates in indigenous communities (and there are lots of them) you'll find it is where there is the strongest sense of community, and often where the position of women that they have held traditionally in our communities is still strong and respected.

This misinformation about what the underlying issues are and where the cause of the problems are, doesn't assist us in dealing with the problem in a long term way. You'll notice that none of the solutions put forward by the federal government last week had anything to do with fixing health services, fixing levels of housing or fixing issues around education—they were all about intervention. And it is true that when there's a crisis we need forms of intervention, but what the research consistently tells us is that if you want programs to work, just as if you want policies to work, the key aspect is to include indigenous people in the processes of developing that policy and implementing those programs in their own communities. That is what the evidence here in Australia tells us works in relation to those programs and it is consistent in relation to research done on indigenous issues in North America, particularly in Canada, around issues of health. It is the stark deficiency of the approach of the federal government last week that it was without any consultation with the indigenous communities affected. These were punitive programs that were set down for them with the only consultation being with an indigenous leader in Cape York who was not connected with those communities. It is really easy to see why those communities in the Northern Territory felt frightened by the changes and felt as though this was something that had been imposed on them and they were being punished.

A further concern about the approach is that the interventions proposed are fairly punitive in what they do and a lot of them are being done without the resources behind them to make them effective; or they are clearly policy directions that don't

work. For example, we know for a fact that if you prescribe prohibition in a community it won't work and that's true whether it's a black community or a white community. It has only been effective where it's been trialled with the consent of the community agreeing to have those sorts of situations in place. We see one of the other interventionist measures that is being proposed is the tying of welfare payments to school attendance, when we've already had the experience in Wadeye that there aren't enough teachers and classrooms to accommodate children.

Further concerns are about mandatory testing. The original proposal was that children be tested on the first day to see if they had been abused. There was concern about issues of privacy and consent, but additionally there were concerns raised by the Australian Indigenous Doctors Association that there weren't enough doctors or resources to perform those sorts of tests. And questions were seriously being asked about why the government can have this sort of interventionist measure, when for decades we've been saying there is an enormous underspending on basic indigenous health needs, and have been highlighting the need to continue to put resources into indigenous community health services. The next day we were told that these were only health tests, which still didn't give any indication of how these things were going to be resourced, or explain how if you did find health issues or issues of abuse, what resources were being put in, in terms of counselling or further health treatment for that. The day after that, people were being told that these tests wouldn't be mandatory. I think that really highlights that this was policy on the run. It made it incredibly difficult for indigenous communities to respond to and obviously made them very angry and very confused.

I think the bottom line is that it is one of the key problems with this federal government's approach to indigenous issues (and they're not unlike other governments in relation to this), that their key strategies have never been led by what the research or reports say. There are numerous reports—we all know that—that say similar things and give similar blueprints about what people working on the ground in these issues say need to be done. They are consistently overlooked and even at a time when the government says that it is acting because it feels there is an emergency, all of those recommendations are overlooked. Instead of looking at the research and looking at what we know works and looking at programs that have been developed in communities that do work, that actually often end up being defunded or not funded, we see approaches that are led by ideologies and they are the ideologies of assimilation, they are the ideologies of mainstreaming, they are the ideologies of mutual obligation, and that's what the drivers in indigenous policy have been.

People are so concerned about it because the last time these were the drivers in indigenous policy we ended up with bad policies and bad results. There is nothing in the application of this new kind of paternalism that shows any reflection about why this was a policy initiative that failed the last time, or to give us any indication of why it might be different this time. There's no indication or any evidence that these approaches are going to work, and most frustratingly, the evidence shows what actually does work. This top-down push to assimilation, push to mainstreaming, works against that very important research that says to make a difference in the lives of indigenous people, we need to be working with indigenous people to build solutions from the ground up that are going to be effective. We need to be taking leadership on indigenous issues that means that we are actually bringing people along

with us, not dictating to them, which is why I think we see so much evidence of the continual failure of indigenous policy and so much scepticism from the indigenous community about why all of these supposedly new approaches are going to work.

All of that is fairly grim and I don't pretend it's not. In fact, I've been particularly disheartened by the fact that I think Labor is as unable to critically analyse what is inherently and obviously wrong with these approaches as many people on the ground could have told them. I think they have made it clear that it is much more important to be seen to be taking an approach that's about appeasing the concerns of the same sector of the electorate that John Howard is so concerned to impress, rather than using this as an opportunity of building trust and faith in a new vision within the indigenous community. I'm incredibly saddened by that and it doesn't give me much hope that if we simply have a change of government that things will be better. I would need to see a lot more evidence of some real thought about different approaches before I would be confident of that.

But to take us back to the 1967 referendum, I think that's where we do get a sense of hope. There is no doubt that a lot of these policy directions that have been so detrimental to Aboriginal communities have occurred as a result of an increasing conservatism within the Australian community that comes from a whole raft of pressures, whether it's the economic insecurity that now sees people value interest rates as an election issue over human rights or whether it's the fear about the war on terror and our fear of outsiders and our fear of people who are different to us. In that climate of extreme conservatism, it's easy to forget what the real magic of the 1967 referendum was, and that was that 90.77 per cent of Australians voted 'yes'. They voted 'yes' because they thought that by voting 'yes', they were going to give Aboriginal Australians a better chance at a life within Australia, that they were going to be given the capacity to be able to live in Australia at a standard that wouldn't make us ashamed. I think that that is a really important moment to hold on to because it's not often in our history that non-indigenous Australia has actually understood that its fate is tied to the fate of the indigenous community.

Gough Whitlam once said that how we treat indigenous people is the standard by which everyone else will judge us, and I think that is really true. I don't think it's just a matter of how other people would judge us; I think it's really a matter of how we judge ourselves as a society. If we think that laws are working and policies are working because middle class white Australia is doing alright, then that surely can't be the test. We need to be actually evaluating what kind of society we are by how well we do by the people who are less fortunate, who are historically marginalised, who are culturally distinct, and who are severely socio-economically disadvantaged. How they fare under out laws, our policies and our Constitution, is how we are going to be judged as a society. At the end of the day I think its how John Howard and Mal Brough will be judged too.

Question — Much of what I think I heard you say was about media responsibility for holding governments accountable. When I listened to you it reminded me that since self government in the Northern Territory, the Commonwealth has retained responsibility in relation to outstations; communities of less than 100 people, of which there are more than 500 in the Northern Territory. It seems to me that the mainstream media hasn't picked up this issue at all. The Federal Government, in a very centralist way, is now going into 62 communities in the Northern Territory with a population of more than 200, which are Northern Territory government responsibility. Besides Amanda Vanstone's reference to outstations as 'cultural museums' at the end of 2005, the whole issue of outstations, (which Amanda Vanstone was also presenting as the remote outposts of paedophilia, which is why she was suggesting these cultural museums should be closed down) we haven't heard anything from the media about outstations. So I was going to invite you to comment on that. Why aren't we hearing from the mainstream media about those places that have been a Commonwealth responsibility since 1978, under the Memorandum of Understanding between the Commonwealth and the Northern Territory Government, and is this just again an example of media slackness in relation to indigenous people?

Larissa Behrendt — I can't begin to second guess the media because I'd hurt my head, but I think you raise a really interesting issue. Obviously, as you've said, Australians get their information from the media, and the media is lazy. It would be interesting to see how many actually know of the issues of outstations and those nuances around where responsibility lies. We can see when we look at budget figures and blanket statements, that they're not unpacked; let alone how people start to think about the more sophisticated issues. Often the indigenous affairs section in newspapers is the section given to the newer journalists, and I know that many people who work in the area like me often get journalists who are new, starting in the area, who want to know what the stories might be that they can cover. So there certainly is a sense that people are finding their feet in this portfolio.

Having said that, there are other newspapers that clearly run strong campaigns with a very firm editorial view about indigenous issues, and that's always going to cloud their perspective, and sometimes the general community isn't able to discern sophisticatedly what's an editorial line and what's fact because they don't have the facts in front of them themselves. The education system is probably as complicit in that as the media, because it makes the general community unable to ask the right questions, and it is what produces the journalists.

You reminded me of a very interesting thing when you were talking about the outstations, because they've had their own attack as you've said, the 'cultural museums' thing, and that's one of the ironies of the way that the government has run its campaign against indigenous communities. Not so long ago there was a campaign through the federal government and through right-wing think-tanks to close down those remote areas, basically saying that if people chose to live there they couldn't expect the same level of services that other Australians could, and that they were economically unviable. I was reminded of that when Clive Hamilton made comments about drought assistance being bad policy, saying it is bad public policy to be continually giving money to people who might actually be engaging in bad farming practices. The response from Canberra was to basically say: 'How dare somebody attack our farmers; this is part of the Australian ethos that we need to protect', and

Clive Hamilton had to confess that there's something more about farmers than just economic rationalist arguments; they are an important part of the Australian community. But when those debates about the outstations were going on we didn't hear any politicians in Canberra saying: 'Hang on a minute, it's a really important part of the Australian culture and history to have had this aspect of Aboriginal culture; it's important to protect and there are more than just economic arguments here.' In fact, rather than putting forward that sort of view, we were, as you pointed out, being told that these are dysfunctional communities where paedophilia is rife. Nobody made any public statements as to why they should be protected, whether it was on economic terms or otherwise.

I think you're right to highlight the fact that this latest assault is just one of many of assaults. It is similar to what I think is the other large assault on indigenous issues that has been in a way a clouded by this. At the same time that the government is putting this pressure on the Northern Territory on these specific communities, they are pulling out a large amount of resources from the south east. They have been removing resources from the south-eastern parts and the southern parts of Australia in key areas like housing and the work for the dole programs, which in some areas are the only form of employment where there is no workforce. That's being done rather silently and with stealth, and with complicity by the state governments. The largest indigenous community in Australia is in Mount Druitt, and it's in danger of losing all of its social housing money. I think the pity is that we're going to be looking at the social and economic outcomes of these bad policy decisions in 10 and 20 years from now.

Question — My question involves Noel Pearson. When I saw Howard on Lateline, I felt that his presentation and the announcement of his intervention smacked of Pearson, and I wonder whether you can talk about the paternalism of the Howard intervention, and what appears to me to be a strong paternalism in the Pearson approach, and what that means for Aboriginal leadership in Australia. I think many white people look at Pearson, and he's pretty impressive, but my preference is for Mick Dodson and Pat Dodson. How does that get communicated to the Australian people?

Larissa Behrendt — Well that's a pretty loaded question, isn't it? There's a very strong protocol within the indigenous community that we still respect, and I think Noel's been the beneficiary of this for a long time, that we don't think its appropriate for us to attack each other publicly. That creates a wedge, and allows our opponents to make us weak if we are seen to be fighting amongst each other. Often the press are very keen to get sound bites from one indigenous leader attacking another; they seem to think that makes good sport.

There were 500 different indigenous languages in 1788, and I think especially in the post-ATSIC era, indigenous politics and leadership is very regionalised, and what works in the Murdi Paaki region in New South Wales is different to what will work in Alice Springs, and what will work in Cape York, and the leadership is also different. I don't think that that's a view that many Australians see, because they don't see that side of how indigenous communities work and operate.

Noel has had a very strong view about what direction we should be taking in indigenous affairs and he has put that very strongly. It is true that he has enjoyed unprecedented contact with the federal government, and the Opposition as well, in having opportunities to express his views about what should happen. They have engaged in a way that has frustrated many other Aboriginal people, who are just as experienced at working in their own communities about these issues and what works, but don't have the privilege of being able to have that access to influence, and I think that frustration on their part is understandable.

It's a protocol within the indigenous community that you should not tell other Aboriginal groups what they should be doing. You would have seen press releases from people within the Northern Territory expressing their concern that Noel is now quite vocally saying that his approach should be used there, and being very unapologetic about breaching that protocol. I think another source of criticism from within the indigenous community is that he has never gone to visit them. Another source of frustration from the people that I've spoken to in the Territory in the last week and a half is that it's well known and on the public record that Mal Brough phoned Noel Pearson before implementing these changes. I spoke to women in Alice Springs two hours after the government made the announcement and they didn't know anything about it, and that sort of process goes against all of our cultural protocols and people get very angry about it, especially when they feel that what is being imposed upon them against their will and without their consent, and is not what they think will actually work. There is a growing concern about that, but it's a concern that I think has been in the indigenous community and has been brewing amongst people working on indigenous areas for some time. I can't tell you how many people say to me: 'Gee, I like Noel Pearson; he's so impressive, and he's so articulate.' When I ask them what it is about what he says that they like so much, they are often really hard pressed to tell me, and I wonder how much racism there is when people think: 'An articulate Aborigine, what a role model!'

Question — I was wondering what you might see as a justification, for the sake of argument, for the remote Aboriginal places or settlements and some of the less remote ones. I can think for instance that they could be very valuable if travellers get lost and they might come across Aboriginal settlements, which would redirect them to safety. I wondered if you could summarise a conceptualisation that would in the eyes of non-Aboriginal Australians help to present a convincing argument for the maintenance of remote settlements.

Larissa Behrendt — I think that there is a whole raft of them. There's actually some research that shows that where people do have access to their own land in that way, they enjoy improved health and other well-being aspects, so less suicides and so on. There is a strong correlation between people having the capacity to live on traditional land and their health outcomes. If you are looking for cold hard research and economics there's a whole lot of stuff in that. But we have a really large country and people live in all parts of it, black and white, and in the past we've been really inventive about how non-indigenous people have lived in remote parts of this country—we had flying doctors, we had radio schools. When people talk about these remote outstations, they seem to somehow lose all of that creativity in terms of how you can actually in innovative ways support people's choices about where they want to live, without depriving of them of their basic human rights; without saying: if you

want to live in these areas, we don't have to provide you with education and health services. We see lots of examples where non-indigenous people in Australia choose to live in very remote places and we don't abandon them in the way that we do Aboriginal people. I think that sometimes comparing those situations can start to make us realise that there's something more in how we make that value judgement than simply somebody's choice. It has a lot to do with their cultural background and the colour of their skin.

Mandates, Consensus, Compromise, and the Senate*

Stanley Bach

The paper that I am discussing with you today grows out of interests that were reflected in my 2003 book on the Australian Senate, *Platypus and Parliament.*[1] More immediately, the themes I will develop here have been stimulated by the paper that I prepared in anticipation of my current visit to the ANU's Parliamentary Studies Centre.[2]

That paper, which I shall revise with the benefit of comments I hope to receive from some of you here today, examines the fate of Senate amendments to government bills during the past eleven years. Using data gleaned from the Senate's annual publication on the business of the Senate,[3] I have attempted to trace the path that each Senate amendment took until its ultimate disposition. My purpose has been two-fold: first, to develop some empirical evidence about how often the Senate, when it had a non-government majority, evidently compelled the government to accept amendments to its legislation that it would not accept voluntarily; and second, to investigate how this record of Senate legislative influence has or has not changed since 1 July 2005, when the government assumed numerical control of the Senate for the first time since 1981.

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 19 October 2007.

1 Department of the Senate, 2003.

2 'Senate Majorities and Legislative Outcomes: the Fate of Senate Amendments, 1996–2006,' October 2007.

3 *Business of the Senate* is published annually by the Department of the Senate. Statistics contained in it are available online at http://www.aph.gov.au/Senate/work/statistics/index.htm

I will not review my findings in detail now because the full text of the paper will be available for any of you interested in reading it. With regard to my first purpose in looking at the documentary record, I will summarize a more complicated set of findings by saying only that I did indeed find evidence of the Senate's influence on legislation, manifested in amendments that the House of Representatives initially rejected but that ultimately either were adopted or that led to other changes in government bills that both houses accepted. With regard to the second purpose, I will observe simply that, through the end of 2006 at least, the change in partisan control of the Senate has been reflected in the virtual disappearance of Senate amendments that the government opposed but that nonetheless led to changes in government legislation. Although I have not yet had the opportunity to incorporate data for this year, it already is clear that the 2004 Senate elections did make a difference in the government's ability to work its will in this building.[4]

I doubt that these summary conclusions will come as a surprise to anyone here today. But social scientists like to think that there is some value served by documenting the obvious, because every once in a while, what we think to be obvious proves not to be. There remain, however, two related questions that the documentary record cannot answer. During the years of non-government control between 1996 and mid–2005, was the Senate's impact on legislation a little or a lot, and was that impact good or bad? Answers to these questions depend not so much on our interpretation of any data, but on what we think the Senate should do—how it should exercise its powers and responsibilities as a participant in the national legislative process. This judgment, in turn, depends on how we believe national policy decisions should be made under Australia's constitution or under any other reasonably democratic constitution. There are few questions more fundamental to the governments under which we live, whether in Australia or the United States.

Before going any further, let me acknowledge the bias that I bring with me today. In 2000, in connection with the Commonwealth's centennial commemorations, Professor

[4] The potential effects of those elections are not limited, of course, to the Senate's influence on legislative decisions. However important the Senate's legislative responsibilities are, it is equally important for the Senate to hold the government accountable for how it has, or has not, implemented existing laws. In this respect Harry Evans has reviewed the first year of government control of the Senate and found that '[t]he government majority in the Senate has greatly increased the ability of the government to do what it likes and not to explain itself except to the extent it chooses.' Ch. 10, 'The Senate' in C. Hamilton and S. Madison (eds), *Silencing Dissent.* Allen and Unwin, Crow's Nest, NSW, 2007, pp. 220–221. Specifically, he notes such developments as reduced time for Senate committee review of government bills, regular defeat of motions ordering the government to produce documents, and, perhaps most depressing of all, fewer sitting days for a body that already was not exhausting itself with the number of days on which it worked. Since then, the Senate also effectively abolished the references committees that had been chaired by non-government senators.

It should be noted that, in recent years at least, the government was not always responsive to Senate attempts to obtain information about its decisions and activities, even when non-government senators were in the majority. To this outside observer, in fact, the government's attitudes toward these efforts sometimes seemed to be dismissive or even contemptuous. But to the extent that these attitudes did prevail then, and may prevail now, it must be in part because the Senate has been reluctant to assert vigorously its full range of constitutional powers and to insist on due respect for its constitutional responsibilities and prerogatives. If the government has 'dissed' the Senate, as young people in America now are prone to say, the Senate itself must accept some of the responsibility by allowing it to happen.

Elaine Thompson, who introduced us to the concept of Australia's 'Washminster mutation' of the British and American models of government, wrote a paper for the Parliamentary Library on the first century of Australian parliamentary democracy. In her paper, she commented on how the how the role of the Senate has changed in recent decades. She concluded by writing that:

> [t]here is still no convention concerning the limits of the Senate's powers with respect to the Executive. Indeed it is reasonable to suggest that there is a political convention developing which expects the Senate to play a restrained, but nonetheless active role as a second chamber reviewing and, on occasion, rejecting government.[5]

This 'restrained, but nonetheless active role' is what I had in mind when I entitled the lecture I gave here in early 2003 'The Delicate Balance' in the Australian political system. I think it fair to say that there is no dearth of people in this building—especially those who walk on blue carpet, many who walk on green carpet, and even some who walk on red carpet—who will willingly and enthusiastically make the case for restraint. It should come as no surprise, on the other hand, when I say that, as an American who spent most of his professional life working for the U.S. Congress, I prefer to make the case for activism.

Let me summarize the argument I am about to make by saying that there are at least three basic models of the decision-making process that can characterise the way in which democratic—or shall we say republican?—regimes work. One of those models is, to my mind, flawed on both empirical and normative grounds, especially when applied in the sweeping way that its proponents often advocate. Another of the three models is a chimera whose advocates are in need of a radical platitudectomy. As you already will have guessed, it is the third model that I intend to advocate as being best suited to preserving and improving the long-term health of my society and perhaps yours as well; but it also is a model that is under threat in my country and seemingly discredited in yours.

I will proceed by discussing each of these models in turn, asking whether any one of them is more likely than the others to characterise how democratic governments can and should work. In the process, I also will make some comments about the implications of my argument for the United States, and I even may venture some thoughts about what it might mean for Australia.

Mandate Majoritarianism

The first model that I want to discuss briefly posits that, by the very definition of what constitutes a representative democracy, government policies are to be decided by the majority of representatives who, in turn, speak for and act on behalf of a majority of the electorate. To the extent that constitutions prescribe decision-making by majority vote, this may seem to be little more than a truism. Yet majority control of policy inevitably is constrained—by constitutions, as they may be interpreted by courts; sometimes by requirements for super-majorities for some purposes, such as to

[5] Elaine Thompson, 'Australian Parliamentary Democracy After a Century: What Gains, What Losses?' Parliamentary Library at www.aph.gov.au/library/pubs/rp/1999-2000/2000rp23.htm.

override an executive veto of legislation, as in Washington; and always by the inescapable need for unelected officials to make policy themselves in the process of filling in the interstices of enacted law.

Furthermore, the kind of majoritarianism I have in mind goes beyond the recognition that democratic constitutions typically give a majority of MPs the power to work their will. The more ambitious form of majoritarianism, what I will call mandate majoritarianism, begins with recognising the power of the parliamentary majority, but then moves on to contending that the majority has the right and the obligation, as well as the power, to control parliamentary decisions because that is what the voters expect and demand. At the moment, my argument is that mandate majoritarianism rests on a collection of assumptions about the behaviour and motives of the electorate for which there is little empirical support. Later I will take the argument further by suggesting that this model of decision-making would be undesirable even if there were an adequate empirical basis for it.

I critiqued the notion of electoral mandates at some length in *Platypus and Parliament*, so I will content myself today with summarizing that critique and the empirical reasons for doubting the existence of any such mandates.

In summary, the argument for mandate majoritarianism is this: as each parliamentary election approaches, each of the parties contesting it puts forth a catalogue of specific and detailed programs that it will enact and implement if entrusted with the power of government. Each voter then studies and evaluates all of these catalogues (otherwise, platforms or manifestos), selects one because he or she endorses all its elements, and then votes for that party. One of the parties receives a majority of votes that translates into a majority of seats in the parliament, or in the house that monopolises power if it is a bicameral parliament. That party then enacts into law, and without substantive change, the programs enumerated in its electoral catalogue of promises, and once those programs are enacted, the governing party proceeds to implement them in the manner it deems most consistent with the commitments it had made to the electorate.

Where this argument goes beyond recognising the parliamentary majority's power to control parliamentary decisions, if that majority is sufficiently unified and determined, is in contending that the majority has both a right and a responsibility—it has a mandate—to do so. In entrusting a party with a majority of seats in parliament, the electorate thereby gives that party not only the power but also the right to enact and implement its program because the election results constitute a blanket endorsement of that program. Moreover, this is more than a grant of discretionary authority to act. The governing party is obligated to enact and implement its program, again without substantive change, because a failure to do so would constitute a breach of trust with the electorate. The party must do what the people have elected it to do. It not only has been given a mandate to govern, it has been mandated to govern.

Two elements of this argument may seem unreasonable: first, that the party must enact and implement each and every one of the policies and programs it advocated during the election campaign; and second, that it must enact and implement them without substantive change. You may think that these are unnecessarily restrictive requirements. Upon closer examination, though, it should be clear that removing these elements from the argument would leave the majority party, once in power, with so

much discretion that the individual voters could have no real confidence that they really knew what package of policies and programs they would be 'buying' if their party were victorious. If that party, once elected, could pick and choose from among the promises it made during the campaign, or if it reserved to itself the right to embody a general campaign promise—to 'control the growth of government', for instance—in any one of a myriad of legislative forms, the linkage between election and governance would be too weak and unpredictable to be very meaningful.

It should be noted that the potential applicability of mandate majoritarianism is limited. All else aside, it makes sense as a model only when the nation's electoral system is very likely to produce single-party majorities in government or, as in the case of Australia, the possibility of a majority composed of a stable and durable coalition. This is most likely though not inevitable when MPs are elected from single-member constituencies. Such systems tend to encourage two-party competition—and, therefore, a clear electoral victor—because the election in each constituency is a winner-take-all contest in which parties that are unlikely to win have trouble convincing voters to support them. (Preferential voting weakens the strength of this argument, of course.) Those systems also tend to give the party winning the most votes more than its proportionate share of parliamentary seats, thereby increasing the likelihood that there will be a single-party government.

In presidential-congressional systems, there is the possibility of divided partisan control, with one party controlling the executive and another controlling one or both houses of the legislature. In fact, this has been a common condition in the United States during the past half-century. Under these circumstances, no party can make a convincing claim for a mandate to govern, although American presidents routinely do so when confronted by a Congress in which the other party has a majority in the Senate or the House of Representatives. So too in parliamentary systems in which a single party, constituting the government, does not hold a majority of seats in parliament (or in the house of parliament that matters). If there is a minority government, and non-government parties and independents comprise a majority in parliament, the governing party has no reasonable claim to an electoral mandate. By the same token, if there is a majority coalition government, the only case in which there can be a plausible argument for a mandate is if the coalition is formed before the election and the participating parties agree to campaign on a shared and well-publicized platform. Otherwise, voters cannot know with confidence exactly what catalogue of policy commitments they are endorsing with their votes.

My core argument, however, is that even when mandate majoritarianism is possible, there is little empirical evidence to support the existence of electoral mandates. Let me simply point to the assumptions about parties and voters that are implicit in this model and encourage each of you to ask yourselves whether they truly are characteristic of the parties and voters you know.

First, claims of election mandates require that the parties seeking such a mandate must explain to the voters during the campaign just what they would do if entrusted with control of the government. I reviewed the documents prepared by the Liberal and Labor parties in anticipation of the 2004 election, and I was genuinely impressed by the depth and breadth of information that both parties offered the voters, certainly in comparison with the U.S. party platforms that are adopted when we nominate our

presidential candidates and then are immediately forgotten. If the Liberal Party documents that I examined were typical of all the others, voters in 2004 were presented with roughly 1500 pages of policy explication that presented the party's intentions for the three-year period now ending. And since voters are required to choose among two or more parties, we need to add, at a minimum, the several hundred pages that comprised the 2004 ALP platform.

So we might say that Australia's parties meet the first requirement for election mandates, or at least that they come closer to meeting it than political parties typically do. However, that in itself poses a dilemma. If the party's manifesto is cast in more general terms, there can be all kinds of ways to write bills that arguably would implement the various items in it. So the voters might know in general terms what legislation to expect, but not the specifics. And, as we all know, in legislation as in so many other things, 'the devil is in the details' (a phrase which, incidentally, has been attributed to such luminaries as Michelangelo, Flaubert, and Mies van der Rohe, or perhaps it was Le Corbusier). But if, on the other hand, the party platform truly is so specific and detailed that it can be translated into legislative language without difficulty or ambiguity, then the governing party's commitment to fulfilling its mandate leaves it little or no room to adapt to changing circumstances. No theory of electoral mandates can pass the proverbial 'giggle test' if it asserts that a party has the right and responsibility to implement its program of policy promises, but if it also contends at the same time that, of course, the party has to be able to make whatever changes in that program it considers necessary.

Second, mandate claims also must assume that the voters actually understand and evaluate the various parties' plans and promises. The sheer size of the Australian party manifestos, with their supporting white papers and other documents, gives me absolutely unshakeable confidence that if comparable documents actually were presented by U.S. parties, very few of America's voters would have more than the vaguest idea what is in them. Yet when the victorious party subsequently insists that one of its bills must be enacted and should not be changed, it can point to a paragraph or bulleted point in these documents as proof positive that a majority of voters must want the bill enacted because the party advocated it during the election campaign and the party won the election, from which it is supposed to follow that the electorate thereby endorsed that particular campaign promise. And if any government makes the same argument with respect to each of its campaign promises (although it would be impossible to enact all of them into law before the next election), it must assume that the electorate understood and supported each and every one of them. This assumption, too, is so implausible on its face that simply stating it suffices to refute it.

Third, the mandate theory assumes that voters base their election day decisions on their evaluations of the parties' respective programs. In the United States, we know that this is not even remotely the case. Voters may prefer one party's general approach to domestic and foreign policy to the other's, but they also are influenced, and often more so, by such factors as their parents' voting history, their own long-standing party loyalties, and, increasingly in the era of television, how much they like and trust individual candidates. We used to joke about 'yeller dog Democrats'—voters who'd vote for a yellow dog so long as it was the Democratic party's candidate. And American voters who claim that they don't routinely vote for one party or the other proudly claim instead that they vote 'for the man, not the party'—and, therefore, not

the party platform. Voters whose choices do reflect their strongly-held policy views often are concerned intensely with one issue, whether it be abortion or gay marriage or gun control or immigration or the war in Iraq, and they pay much less attention, and give much less weight, to the others. Furthermore, voting in America often (perhaps typically) is retrospective; voters' decisions are based on evaluations of how the party in power has performed since it took office, not on what it promises to do in the future. If most voters are not content with how the government has been performing, they are unlikely to be persuaded by its promises for the future. On the other hand, if most voters are satisfied with recent government performance, they are unlikely to throw the governing party out of office in favour of another party that can offer only assurances of its good intentions.

In short, the voting behaviour of Americans is entirely inconsistent with the assumptions and requirements of mandate theory. I venture to think that much the same may be true of the Australian electorate.

It seems to me, then, that on empirical grounds alone, mandate majoritarianism is a deeply flawed model of decision-making, even when the majority of the electorate has voted for the majority in parliament. It is much more difficult to defend the model when the parliamentary majority does not receive a majority of the popular votes—when the majority of votes go instead to the opposition and to other parties (and independent candidates) that are not in government. In Australia, for instance, neither Labor nor the Coalition often wins a majority of the votes cast in elections for the House of Representatives. In fact, in the 24 elections since 1949, only three times has the party winning control of the House and, therefore, the government, won a majority of the vote, and on two of those occasions it won by margins of 50.1 and 50.2 percent. What becomes of the argument that the government has both the right and the responsibility to have its legislative program enacted as it sees fit when the majority of the electorate, by that same theory, had rejected that program at the most recent election?

Consensualism and its alternative

I believe the second model I wish to discuss, decision-making by consensus, is equally flawed, and for the same fundamental reason: it makes assumptions and imposes demands that, most of the time, simply are unrealistic.

In the United States, we frequently hear our elected officials say that we need to reach a consensus on how to address the pressing issue of the moment, whatever it may be. The goal should not be to enact the policy prescriptions of one party or political tendency—usually progressives versus conservatives—rather than those of the other (or others). Instead, the goal should be to bring together both or all parties in the legislature, and to bring together the legislature and the executive, in support of a policy decision that all recognise to be the right thing to do.

Let me share with you a few examples that I gleaned from the *Congressional Record*, Washington's equivalent to *Hansard*, for January and February of this year, during the first days that the Democrats once again had majority control of both houses of Congress.

The Democrats in the House of Representatives flexed their new-found political muscle by passing a collection of bills during the first one hundred hours of session, the implication being that they were improving on the record of the House Republicans when they had taken power in 1995 and passed their collection of favoured bills during the first one hundred days. Both the content of the bills that the House passed in early January and the procedures by which they were considered were frequently contested, and bitterly so, by the House Republicans, who once again were learning the pain and frustration of being in the minority.

One such bill concerned the highly contentious issue of embryonic stem cell research which, for many, raises the spectre of abortion. During the debate, the new Republican leader in the House criticised the Democratic bill and the speed with which it was being propelled through the House by praising what he described as an alternative that 'offers the potential for a new consensus approach' to the issue. About a week later, at the conclusion of those first one hundred hours, one Democratic Representative was impelled to announce that '[w]e have set a tone for the 110th Congress that is one of cooperation, consensus, and compromise that extends beyond party lines.' I recall no such announcements from the Republican side of the House chamber.

Soon thereafter, the new Democratic floor leader in the House of Representatives spoke in a debate about re-adopting a procedural rule that the Republicans had repealed. The rule had allowed, and now again allows, the delegates in the House who represent the District of Columbia and America's other territorial possessions to cast some meaningless votes on the House floor. Referring to two of the most expensive U.S. government programs, Medicare, which provides health insurance for seniors, and Social Security, which provides income support primarily for seniors, the Majority Leader proclaimed that the 'residents of the five territories should have a voice in shaping a bipartisan consensus that shores up the financial health of these vital programs.' He said this, notwithstanding the fact that Social Security regularly is described as 'the electrically-charges third rail of American politics'—to touch it is to risk almost certain political death—as well as the universal recognition that Democrats look for every possible opportunity to accuse Republicans of wanting to cut, gut, privatize, or otherwise attack the Social Security program.

Such paeans to consensus were not limited to the House of Representatives by any means. In February, the senior Republican Senator on the Finance Committee, with responsibility for reviewing and recommending bills affecting taxes, was discussing a provision of the income tax code known as the 'alternative minimum tax.' The distinguished Senator wanted to 'remind people,' he said, 'that in 1999 we passed a repeal of the alternative minimum tax, but President Clinton vetoed it and we haven't been able to repeal it since … .' Moments later, though, he went on to assert that '[t]here is a bipartisan consensus that only complete repeal is an adequate solution to this problem' of the alternative minimum tax.

Finally, what was the most contentious issue in American politics in early 2007, and now for that matter? The war in Iraq, of course. You may recall that the House of Representatives adopted a resolution expressing the opinion, without attempting to embody that opinion in law, that the President's troop 'surge' was not a good idea. The Democrats in the Senate, with the support of a handful of Republican colleagues,

attempted to bring a similar resolution to a vote, but they were stymied by a filibuster supported by most Republicans. One of the leaders of this debate was the former Republican chairman of the Senate's Committee on Armed Services, who had broken with the President on this issue and who had been instrumental in drafting a resolution that the Democrats ultimately supported in opposition to sending more troops to Iraq.

During the debate, this Senator emphasised that he and his allies had no intention of promoting legislation that could in any way jeopardise the safety and well-being of American military personnel already in Iraq. He insisted that '[w]e solidly support that concept of no cut off of funds.' 'What do we do short of that?' he continued. 'Well, we have a debate. Somehow you have to have some focal point, something written down, some document in writing as to the ability of this institution, the Senate, to reach a consensus, and a bipartisan consensus, on how best we go forward with a new strategy in Iraq.'

There is one thing that all these references to consensus have in common. They all are nonsense.

I always have understood 'consensus' to refer to a meeting of the minds—a group of people all coming to a common understanding about something.[6] That agreement may be the result of a collective process of deliberation. Or it may be that each member of the group deliberates independently and then they come together to discover that they have reached the same conclusion. Whatever the process, there is implicit in the notion of consensus, to my mind at least, the idea that all members of the group, or at least the overwhelming majority of them, share the same understanding as to what is good, or what is right, or what is the best thing to do. Central to any consensus is, first, that it is supported by all, or almost all, of those involved, and, second, that they support it by choice, not because they are in any sense constrained or compelled to do so.

Conceiving of consensus in this way immediately reveals just how unlikely it is for us to expect to find a consensus on almost any issue of national significance that engages the attention of the Congress in Washington or the Parliament in Canberra. Political decision-making rarely is a process of politicians reasoning together until they all agree that there is a right answer to the question before them. In support of this contention, I need only refer to the thought of a distinguished but unrecognized American philosopher, my father, who used to say that when two people always agree, it's certain that one of them isn't thinking.

I will return to this theme shortly. In a practical sense, though, the line of argument I've pursued on this subject is irrelevant. Did that Republican Representative really believe that there was a consensus about stem cell research that was waiting to be revealed and embraced? Did that Democratic Representative really expect that his chamber would discover a consensus about how to address the exploding costs of Medicare and Social Security? Did that Republican Senator really believe that there was a consensus in favour of repealing the alternative minimum tax when recent and repeated attempts to repeal it had failed? And did his Republican colleague really

[6] In fact, the dictionary on which I've happily relied for more than four decades offers 'unanimity' as its chosen synonym for 'consensus.'

expect that out of the Senate debate about Iraq would emerge a common understanding among Senators about what to do there? Did they really believe that consensus was likely, or even possible, in light of the different values that their colleagues hold most dear and the different interests, preferences, and needs of the people they represent? Of course not.

Instead, or so it seems to me, these references to consensus imply almost the opposite: that the problems under debate were so difficult, so divisive, and so intractable that, instead of confronting and addressing them as best they could, it was far easier for these legislators to talk about how wonderful it would be somehow to find solutions that everyone would prefer to the alternatives.

Let me take a momentary detour that, whether you believe it or not, will get me where I want to go. One effect and, to my mind, a benefit of electing MPs from individual constituencies is that each is linked to a particular geographical area and the people who live there. Consequently, it is possible to address MPs in debate not by name but by reference to the constituency—district or state—that each represents: not as 'Mr. Jones,' for example, but as 'the Member for Buncombe' (which, incidentally, is in North Carolina, and is the original source for 'bunk'). This is the practice in the British House of Commons as well as the Australian House of Representatives, and, though sometimes honoured in the breach, the U.S. House of Representatives as well.[7]

Although this form of address sometimes sounds stilted and artificial to visitors, as do many of the formalities of parliamentary practice, it is explained and justified on the grounds that it de-personalises debate and reduces the level of animosity that otherwise might develop in the chamber. While that may be true, I think it also serves another related but distinguishable purpose.

It has been said that members of a durable parliamentary assembly need to believe and remember that the members of other parties may be opponents but they are not enemies. At the extreme, representative government is all too likely to collapse if members of parties or parliamentary groups believe that their personal well-being and security, and those of their supporters, are in jeopardy because they are in the minority. (Those who are convinced they are bringing democracy to Iraq might bear this in mind.) The concept of 'enemy' evokes images of war with victors and vanquished; the concept of 'opponent' evokes images of a game with winners and losers, but a game that will be played again and again so that today's loser can hope to become tomorrow's winner.

One reason parliamentarians find themselves opponents is because they have fundamentally different philosophies of government (or ideologies, if you prefer). What is the appropriate role of government in the society and economy, for example, and to what extent and for what purposes should the government intervene in the

[7] One reason the practice is not always followed in the last of these is that referring to the 'Gentleman from California,' for instance, is not very helpful when there are quite a few men representing California districts. I suppose that is why Australian Senators are identified by name; with 12 Senators from each state, referring to the 'Senator from Tasmania' would not be very discriminating.

choices and behaviour of individuals as well as collective entities such as corporations? Another reason is that parliamentarians may have different understandings of how the world works. They may differ, for example, over whether international disagreements are amenable to negotiated resolutions or whether international actors respond only to the threat or application of force. Similarly, they may differ over whether helping the disadvantaged in society is best done by targeted government programs that, by definition, do not benefit everyone equally if at all, or whether economic growth and a favourable business climate is the surest way to promote prosperity in which all will share. On their most dispassionate days, it even may be possible for MPs to agree that they seek the same ends even if they have fundamental disagreements about the best means to achieve them.

There is a third reason why MPs disagree which is related to the other two but which is reflected in the impersonal and indirect way in which they often are expected to address each other. Under most party and electoral systems, including the form of proportional representation used in Senate elections, MPs represent geographic constituencies and those constituencies may have different needs and interests. MPs usually are expected to represent those needs and interests in the sense of speaking and advocating for them: 'I rise to speak for Buncombe,' as that Congressman is supposed to have said in 1820. Even in systems that elect all MPs from single national party lists, the parties may assign MPs of their party to develop strong ties with a particular community or region, perhaps the one in which each MP resides or was born. Generally speaking, we can expect this linkage between MP and a constituency to be minimal when national party organizations control the selection and re-selection of parliamentary candidates to the virtual exclusion of local influence, and when citizens base their voting decisions on national issues, without regard to how the various parties' programs would affect their local areas, professions, or individual welfare.

If we accept a constituency linkage to be a typical characteristic of parliamentary life and work, we also must accept that MPs' constituencies differ and that, very often, the differences among them are not differences of ideology or worldview; they are measurable differences. Some constituencies are richer than others; some have an atypical racial or ethnic composition; some depend more on industry and others more on agriculture; some rely more than others on exports for jobs and local prosperity. These possible differences could be multiplied. But the point is that, because of such differences, many proposed laws will benefit some constituencies more than others, and sometimes they even will benefit some constituencies at the expense of others. When one MP refers to a colleague who disagrees with him by referring to that colleague's constituency, it is a way of reminding the MP that his colleague may be taking a contrary position in order to reflect and promote the real interests of his constituents.[8]

[8] The larger the constituency, the more diverse it is likely to be; and the more diverse constituencies are, the more they will tend to be like each other in their needs and interests. Sometimes what is most important, however, is not the nature of the constituency as a whole, but the nature of the winning MP's electoral constituency—the majority that has elected him or her to office. In the U.S. House of Representatives, it is not unknown for a very progressive member to be succeeded by a very conservative one, or vice versa, because the district is fairly evenly divided politically and election outcomes are decided by the swing voters in the middle who are most likely to vote differently from one election to the next. The conservative MP will perceive the needs and interests

Examples abound. Free trade can benefit consumers by increasing the availability of lower-cost imports—clothing made in China or Bangladesh, for instance—but that competition can cost workers their jobs if the textile plants where they work cannot compete successfully. Farm price supports can help keep family farmers in business, but only at the cost of higher food prices and higher taxes. Increasing corporate taxes can reduce the need to increase individual income tax rates, but only at the cost of reduced corporate profits and, it is argued, reduced capital investment and shareholder value. Drilling for oil in the Alaskan wilderness may eventually help control how much it costs me to heat my home and fuel my automobile. And so on.

It does not follow from examples such as these that politics is always a zero-sum game—that for every winner there is a loser. It does follow, though, that government policies and actions often have differential effects on different groups and regions and, therefore, on different constituencies. The challenge of law-making rarely lies in deciding who's right and who's wrong. Instead, the challenge usually takes the form of having to strike the most appropriate balance among competing needs and interests, even perhaps in debates over abortion: preserving the life of the mother versus protecting the life of the child. That is why a true consensus on important policy choices rarely is possible, because consensus implies a virtually unanimous agreement as to what is right, not what is the best we can do under the prevailing circumstances. And, returning to my earlier subject, that is also why I believe that mandate majoritarianism is undesirable on normative grounds, in addition to being unrealistic on empirical grounds.

Compromise as a virtue

When I was a boy, my schoolmates and I had to memorise the Preamble to the U.S. Constitution, which is so brief I'll take a moment to read it to you:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

These words had become so familiar to me that it was only years later that I stopped to think about what they mean, and about the act of faith that my constitution represents: that the particular set of political institutions it created somehow would lead to the achievement of all those goals laid out in the Preamble, such as establishing justice and providing for the common defence. The authors of Australia's constitution saw no need for such a statement of goals, but I'm confident that the same assumption can be attributed to them: that the structure they were creating was more likely to promote the same future for Australia than any other on which they might have been able to agree.

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of the constituency quite differently from his or her progressive predecessor because each has a different mental picture of it in mind, no matter how an outside observer might view it.

It is on two of these goals that I want to concentrate for a moment, and those are the goals of promoting the general welfare and insuring domestic tranquillity, or social harmony as we might call it today. In brief, my argument to you is that majoritarianism based on claims of electoral mandates is not the most promising basis for promoting the *general* welfare or for insuring domestic tranquillity in the long run.

If by majoritarianism we mean only that law-making decisions are to be made by majority vote, then as I said earlier, we are almost defining a core element of what we mean by democratic governance.[9] Mandate majoritarianism is another matter altogether, because it transforms the power of the governing party (or coalition) to work its will in the parliament into both a right and a responsibility to do so. If that party is entrusted by the voters with the power of government, it is only so that it can implement the legislative program that the majority of the voters endorsed when they cast their ballots. Any concessions to the party or parties that are not in government would come at the expense of the government's ability to fulfil the mandate it sought and received.

What then of the needs and interests of those constituencies whose representatives are not members of the governing party? Defenders of electoral mandates would argue, I suppose, that the victorious party already had taken those needs and interests into account in the process of formulating the program it presented to the voters. This is true to some extent, I'm sure. I would not want to imply that any responsible political party would deliberately ignore the needs and interests of any numerically significant segment of the population. However, I do question the notion that the leaders or members of any party are the ones best able to decide what should be done for or to those groups—whether regional, economic, social, or whatever—that largely opposed their party in the past and are likely to oppose it in the future.

It is an underlying tenet of democratic government that the people themselves are the ones best able to determine their needs and interests and what government actions will best serve them—what will promote *their* welfare as part of the *general* welfare. When it is impractical for us as citizens to speak for ourselves as our laws are being made, we rely on the people whom we have elected to speak for us. If all those who voted for non-government parties and independents believe that, once the election is over, they have no effective voice in government decisions until the next election rolls around, this situation cannot, in my judgment, effectively insure domestic tranquillity. On the contrary, long-term social harmony benefits from a generally-shared belief that the needs and interests of all segments of the population are being expressed forcefully in parliament and that their representatives are able to have a modicum of influence over the decisions made there.[10]

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[9] Although the size of the required majority can be an issue. As I observed earlier, constitutions and parliamentary standing orders may require absolute or larger majorities, such as two-thirds votes, for certain purposes, and it can be said today that the U.S. Senate effectively requires a three-fifths vote to bring any contentious proposition to a vote.

[10] Even if the government party could and did take all needs and interests into account as it formulated its election manifesto, that would not suffice, because it is important for all segments of the population to see themselves as having some effect on government policy-making.

This finally brings me to the third of the three models of democratic decision-making to which I referred at the outset. If mandates are a myth, and a dangerous one at that, and if consensus is a chimera, then compromise is a virtue. The alternative to mandate majoritarianism is not 'consensualism,' it is a recognition that compromise is a good thing.

Here I am juxtaposing compromise against consensus. If the search for consensus is the search for what is right, the search for compromise is the search for what is best or most generally acceptable (which may or may not be the same thing) under the prevailing circumstances. Compromise requires the governing party to accept some limits on doing what it would like to do, and what it has the numbers and the formal constitutional authority to do, in order to take into account—legislatively, not just rhetorically—the needs and interests of those who voted against it. As my authority on this point, I will quote John Stuart Mill, who wrote that:

> [o]ne of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views.[11]

I don't mean for a moment to suggest that the minority, or the Opposition, should have as much influence over legislative decision-making as the majority, or the government. What I do mean to suggest is that the long-term interests of a nation are best served when the governing party has to ask itself what changes in its legislation it can accept that will ameliorate the detrimental effects that bill may have on certain constituencies, whether defined geographically or otherwise, without sacrificing the principles it has committed itself to promoting. And if the governing party is not inclined to view such compromises as desirable, which is what I would anticipate in the real world of politics, then it is good if the nation's political institutions give some person or entity the power to make the government accept them as necessary.

Let me illustrate my contention with one concrete example. In the United States, there has been a recurring debate over whether Congress should increase the statutory minimum wage, the hourly wage that federal law requires employers to pay most of their employees. Most congressional Democrats have argued that the minimum wage has been too low for many families to support themselves adequately. Most congressional Republicans have argued that increasing the minimum wage would put too much pressure on many small businesses (which, they argue, are the engine that really drives job creation in the U.S.), forcing them to lay off employees or even close their doors. I'm not competent to say how many people would benefit from the wage increase or how many jobs or small businesses would be lost. But it does seem reasonable to me to believe that there is some truth on both sides of the argument. The pity is that it has been so difficult to agree on a compromise that hardly rises to the level of rocket science: coupling a minimum wage increase with tax breaks for small businesses; in effect, making the taxpayers pay for part of the cost of the minimum wage increase. Such a compromise—socializing part of the costs of a new or

[11] Quoted by David Hamer in his *Can Responsible Government Survive in Australia?* 2nd Edition. Department of the Senate, Canberra, 2004, p. 347.

increased government benefit program, and thereby offsetting a focused benefit with a cost that is so widely distributed that it cannot really be felt by those paying for it—is an approach that often is available to government policy-makers.

Compromise by choice or necessity?

The last issue I want to address today is how such compromises are to be achieved.

In this context, let me first note that compromise seems to be taking on more of a pejorative connotation in Washington these days, sometimes being equated with the abandonment of principle. This reflects, I believe, the increased polarisation that has come to characterise American politics in recent years, as each of the two parties has become more homogeneous internally and as the policy disagreements between the two parties are thought to have widened. Party unity in congressional voting has increased as has the level of vituperation in political discourse. Compromise has become more difficult as the members of each party either have come to believe their own rhetoric about the other or they have become so trapped by their rhetoric that they are unable to justify compromises they otherwise might be willing to make. Furthermore, it is so much easier and perhaps even more satisfying for Representatives and Senators to use legislative debates as a way of appealing to their supporters in anticipation of the next election than it is to negotiate compromises with their political opponents from whom they have become increasingly estranged.

Although I have been away from Australia for four years now, it also seems to me that Australian politicians, at least those in government, often are reluctant to speak publicly about legislative compromise. The tenor of question time and the tone of each major party's public comments about the other would be hard to reconcile with a visible approach to legislating that revealed the government to be taking the Opposition's concerns seriously and accepting amendments that took them into account, while not satisfying them fully. As I documented in 2003, the voting record in the Senate does not reveal a government and Opposition always opposing each other; it is striking, in fact, how often the government and Opposition voted together on divisions during 1996–2001. That, however, is a hidden story of Australian politics. The kind of compromise approach to law-making that I am advocating involves a public recognition that compromise is taking place and that those compromises benefit the nation.

It is often said in my country, and I would not be surprised if it were equally true in Australia, that the time horizon of politicians is limited to the date of the next election. What may contribute to the long-term health of the polity (the general welfare) and its domestic tranquillity is going to be less important in practice to most elected officials than what will contribute to their shorter-term electoral success and their ability to promote their values and the interests they represent while they enjoy the power to do so. I acknowledge, therefore, that the winners of parliamentary elections are unlikely to concede voluntarily any of the fruits of their victories to the losers: the minority in the U.S., the Opposition in Australia. If so, the question then becomes whether there are conditions under which policy compromise is likely to be necessitated by the structure of political systems or the dynamics of electoral competition.

In a presidential system such as mine, the constitutional divide between the executive and the legislature can promote a competition for influence and an unwillingness of the Congress to accept presidential legislative proposals without change.[12] That is so even when the same party controls both branches of government. It is even more likely to be the case when the constitutional divide is exacerbated by divided party control, which has been more the norm than the exception in the U.S. during the last half-century.[13] When these factors are supplemented by relatively weak party discipline and an electoral system that encourages legislators to think first about how their electoral constituency, not their party leaders, want them to vote, policy compromises become almost inescapable, even when compromise is lamented as a necessary evil, not as a positive good.

The problem we have been having is the reluctance of the president to accept the inevitable need for compromise, and the temptation for members of the other party in Congress to insist on too much. As a result, we have had much too much talk of consensus and much too little willingness to engage in the search for practical compromise.

On the other hand, when both branches of government are controlled by the same, highly disciplined party whose unquestioned leader is the president who controls the political future of his party's legislators, it would be surprising for him to sanction any voluntary concessions to other parties and the constituencies and interests that they represent. This has been the problem encountered in some quasi-, pseudo-, or proto-democracies, especially in Africa, where the dominant party has been largely the personal vehicle of its dominant leader, the president, and the legislature has thought of itself as a parliament, not a congress.

In a parliamentary system characterised by two dominant parties, there is little reason to expect a compromise approach to legislating, especially if each party is quite homogeneous and the two parties are quite polarised. One case in point has been Bangladesh, where there is raw hostility between the two parties, even though the policy differences between them are more difficult to pinpoint. When the leader of each party has accused the other of being complicit in murder, we should not expect them to relish the prospect of compromise decision-making.

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[12] During times of crisis, the U.S. Congress sometimes has set aside its capacity for independent judgment, but not for too long. Examples are the Great Depression of the 1930s, when Congress rubber-stamped the first legislative initiatives of the Roosevelt Administration, but then had second thoughts about the risk of excessive government intervention into the economy; and the national security crisis following September 11th, when Congress approved executive powers that, upon reconsideration several years later, have raised serious questions about excessive government intrusions into personal privacy and civil liberties.

[13] When Senate Republicans were in the majority in Washington before the 2006 election, they became frustrated by Democratic filibusters that prevented votes to confirm some of President Bush's judicial nominees. Republicans discussed exercising what came to be called the 'nuclear option' that would effectively have changed Senate rules to undermine or prevent at least some filibusters. In response, some Senate Democrats spoke of the right to filibuster on the Senate floor as if it were an integral part of the constitutional scheme of checks and balances. It was implied that Congress can check and balance presidential power only when the party opposing the president has the ability to block the president's legislative initiatives (and nominations) in at least one house of Congress. Such an argument has no basis in constitutional theory or constitutional law, but I admit that it did, and does, have some practical political resonance.

In a multi-party system, which often is the product of proportional representation, we need to look at how and when governing coalitions are formed. Such a coalition can be the product of pre- or post-election negotiations among disciplined parties, negotiations that culminate in a specific and detailed political 'treaty' that binds the participating parties to a legislative agenda from which the dominant coalition partner must hesitate to diverge for fear of losing its parliamentary majority. If political parties are much weaker, on the other hand, and if coalition negotiations focus more on the allocation of portfolios and patronage, the dominant partner has more room for manoeuvre and more opportunity to make policy compromises if it chooses to do so.

It probably is fair to say that a compromise approach to legislating is most likely when parties are weakest and legislative majorities have to be assembled one vote at a time. I understand that, in the Kingdom of Jordan, for example, there are no parliamentary parties worthy of the name. MPs are elected as independents and do not then coalesce into unified and stable parties. This situation might seem to give the advantage to the government (putting aside the fact that the King really is the de facto policy-maker) because it is unlikely to face any organised opposition. However, I have heard it argued that the actual result is just the opposite, because the government does not have a parliamentary majority on which it can rely or that it can hope to mobilise. Instead, it must find the votes it needs where it can, and this situation allows each MP to bargain for whatever concessions he is able to extract.

The title of my paper speaks of mandates, consensus, compromise, and the Senate. What does this discussion of the first three mean for the fourth? I think the answer will be obvious to those of you who have followed my argument thus far.

In 2003, I argued that the Senate constituted the forum in which the Australian government can best be held accountable for its actions and decisions. The House of Representatives, controlled as it is by a highly disciplined government majority party whose members' political futures depend largely on public support for their party's government, have little practical incentive to question, probe, challenge, oversee, or investigate it in the public forums of Parliament. However much government party members might deny this, it is hard to deny the political logic that challenging their own party's government in public can only damage the party and their own political prospects.

The Senate, on the other hand, has been in quite a different situation precisely because it has had a non-government majority for most of the last half-century. The combination of close party competition and the form of proportional representation that has been used in Senate elections since 1949 has put the government, whether Coalition or Labor, at a disadvantage in Senate elections, to the extent that the results of the 2004 Senate elections came as a surprise to many (including, I suspect, members of the Coalition government itself). Between 1996 and mid–2005, the non-government Senate majority had the institutional control, the constitutional power, and the political incentive to hold the government to account in a way that could not reasonably be expected of the House of Representatives. Although, in my judgment, the Senate did not live up to its full potential in this regard, it did contribute to the health of the regime by complementing the formality of government responsibility to the House with a more meaningful degree of accountability to the Senate.

Today I wish to argue that, for the same reasons, the Senate with a non-government majority has the same institutional control, constitutional power, and political incentive to compel the government to accept legislative compromises that it would be unlikely to make of its own volition. If the compromise approach I have described is preferable to the alternatives, and if the House of Representatives are very unlikely to be, and be seen to be, the forum for conciliation of which Mill spoke, then it is again to the Senate that we must turn. That is largely why I chose to look at the disposition of the Senate's legislative amendments since John Howard became Prime Minister.

It would be unfair for me to speak at length here about findings that you do not have before you. So I will say only three things.

First, there is clear evidence of what we might call 'compelled compromise.' The government obviously has had to find additional votes in the Senate to pass its legislation, and certainly this has forced it to make some unwelcome compromises. However, I have not yet discerned a practical way to distinguish amendments made for this purpose from amendments that the government has proposed or accepted willingly in order to address weaknesses it had come to recognise in its own bills. Still, more often than not, government bills have survived Senate legislative consideration unscathed; and also more often than not, the Senate has not insisted on its amendments when the House has disagreed to them. My tentative conclusion is that this is a story of a glass that is half-empty, not half-full.

Second, I did not find much procedural evidence of legislative compromise after government bills have left the Senate and been returned to the House for further action. When the House has disagreed to a Senate amendment, the upshot usually has been either that the Senate has chosen not to insist on its amendment or the House eventually has chosen to accept it. There have been relatively few instances of the third possibility—the two houses agreeing on a presumed compromise in the form of an alternative to the Senate amendment to which both the Senate and the House of Representatives then agreed. It is unwise to ask a small body of data to support too heavy a load of inference. Even so, what I have found does suggest that what often is called the process of reconciling legislative differences between the two bodies has been less a process of reconciliation (that is, compromise) and more a process of allocating victories and losses between the Senate and the government acting through the House.

And third, July 1, 2005, did mark a turning point. After the government took control of the Senate, almost no non-government amendments were approved by the Senate, so there was no need for the government, acting through its House majority, to accept policy compromises. Virtually the only legislative amendments that Parliament has made since that date have been amendments proposed by the government itself. So has the change in party control in the Senate made a difference? I think so. Has that change contributed to the long-term health of the political system? I fear not.

Question — There's a certain amount of literature which says that having total control is not only bad for the country but bad for the ruling party and the government. What's your view on that?

Stanley Bach — The House of Representatives in Washington was controlled by the Democratic Party without interruption from 1955 through to the beginning of 1995 and I guess my answer is that Lord Atkin was on to something. It was clear that the Democrats in our House of Representatives came to take their power for granted and I think most observers would agree that in some respects they came to abuse it, in the sense of how they undermined minority participation and minority rights through various organisational and procedural changes they made. So I think some alternation in power will help to prevent that. We've had more regular alternations in power in the Senate and we have seen for this reason, among others, somewhat more restraint in a new majority trying to flex its muscles. I do have to say though, that when the House Republicans did become the majority in early 1995, at first they said: 'We are not going to do to the Democrats in the House what they have been doing to us for the last 40 years'; and about two months later they started to say: 'But all we're doing to you Democrats is just what you did to us for the past 40 years.' Now the Democrats are back in power, and I fear we're seeing a process that social scientists call path-dependent. Once you start down some paths it's very hard to turn back and go in the other direction because there are tactical advantages to some of these innovations. It's a destructive spiral.

Question — But what about being able to enact your program by having total control in both houses plus the executive government? You're then tempted to enact some of the more bizarre features of your program and this gets you into trouble.

Stanley Bach — This is a question that's a little bit more difficult for an American to respond to, because you're presuming our parties have programs. Our parties are considerably more polarised now than they were before the disappearance of the conservative Democratic south and the disappearance of the moderate, not to say liberal, Republican north-east. When you have both Houses of Congress controlled by the same party, about the only real power that the minority party has is its ability to filibuster in the Senate. You see, in the Senate you can't vote to pass a bill if there are senators who still want to talk about it, no matter how long the debate goes on, unless you can assemble a three-fifths vote to stop the debate, and the majority party in the Senate rarely if ever controls three-fifths of the seats. So a determined minority in the Senate can generally bring the institution to a standstill. Before this most recent election, the Congress was completely under Republican control. The Democrats in the Senate started to elevate the filibuster into a matter of high constitutional principle, that it is part of the system of checks and balances, because it was the only effective power lever that the national Democratic Party had. This is what I sometimes call a constitutionalism of convenience, just as it will be interesting to see what the ALP and the Liberals have to say about the Senate if the situation next July should be reversed.

Question — I'm sympathetic to the general call you have for compromise, but I wish to call your attention to the fact that one of the reasons why we had a majority Liberal Senate in 2004 was because of the demise of the Australian Democrats, who were

exactly the kind of compromising party that you call attention to. Unfortunately, they compromised once too much by being willing to pass the GST, the sales tax that almost got the Howard Government beaten in 1998. It seems as though a compromise is getting it sort of in the neck, and I would like you to comment on that.

Stanley Bach — I'll make two comments. First, politics is a messy business. Second, I'd be a little bit careful about generalising from a sample size of one. Also, I do take your point about the demise of the Democrats.

Question — I refer to your candid comments in the beginning that a journalist and a presenter on the radio did not read the policies in the last election. If a journalist doesn't do that, what chance does a member of society have? Also, can you think of a way that you can make things easier on the general public in terms of information, and do you think the internet has a part to play in this?

Stanley Bach — Well the internet certainly has a part to play in making information available. That's the resource to which I turned when I wanted to confirm my supposition that for the 2004 election Labor and Liberals had put out massive policy documents. So you can make the material available, you can make it readily accessible, but people have to choose to find it and they have to choose to read it. But you have a dilemma: the longer the documents are, the fewer the number of people who are going to read them; but the shorter and more general those documents are, the less value they have for predicting what parties in government will do, and the greater the gap between some general statement like restraining government spending or cutting taxes, and a specific bill that's to be introduced in parliament, where we're told: 'This is a bill to implement that promise.'. So no, I don't have a good solution.

Question — I have a question that's also related to the Democrats. The Democrats tried to carve out a position where they said they were there to keep the bastards honest. But they then seemed to adopt a policy of keeping the bastards dishonest. What would happen is that the government of the day would sit down and produce a policy document, take it to the electorate, and then we'd have an election around it. We had a big election around GST, and then they won the election and then they wanted to implement their policy that had been fully costed in great detail. The Democrats turned around and said: 'We're there to keep you honest. But we're not going to let you introduce your reform.' This has happened again and again. For example, the superannuation surcharge. The government turned around and said: 'If elected we will wind back a tax.' The Democrats turned around and said: 'Well, we'll keep you honest. You've won the election, but we won't let you do what you promised to do.'

Another model might be to sit down and espouse a balance of power party that says: 'We will require a government to enact the legislation, we're not going to impede it, but we're also going to sit down and say we'll agree to allow you to enact your proposed reforms, but we'll tie it into making sure you enact all your promises and not just cherry-pick the ones that suit you'. So there is another model that you could come up with where governments which have a mandate are actually given the opportunity to enact it, but also requires that they enact all their mandates and not just cherry-pick the ones that suit them. I think that's why the Democrats fell down, not

because they compromised *per se*, but because they had this duplicity in their position.

Stanley Bach — The GST was a matter of some controversy wasn't it? That occurred before my first visit here, so I don't claim to know very much about it, but as you may assume from what I said earlier, I don't have a great deal of sympathy with your argument because I don't think that government can make an empirically valid claim that it does have a mandate to enact everything in its program. Before I could accept that kind of approach, I'd want to see some opinion data, for example, that gives us some notion of what the Australian electorate actually did know when they cast their votes and to what extent they cast their votes on the basis of that information. Earlier this week, I went to a seminar at the ANU where Professor Ian McAlister presented some results on Australian public opinion derived from election surveys from 1987 to 2004. I suggest you get a copy of this from the ANU, or take me on faith when I say that among all of these survey results there is very little that would give any support to folks who would claim there really is an election mandate out there.

Question — You referred to a tendency towards an increased presidential style of government in Australia, and certainly that same comment has been made in respect to the United States. I refer particularly to the work of Chalmers Johnson, where he asserts that what we have in the United States is increasingly an imperial presidency, which implies a breakdown in the whole range of checks and balances that are supposed to characterise a republican form of government as supposedly set out by the founding fathers. An important element of this argument though, is that he also talks about a military industrial complex, or rather a military industrial Congressional complex, in which, on the basis of looking after their constituents as you put it, together with the fact that the military industrial complex has plants and therefore employment in every state, the Congress is really unable to put pressure on the executive on the matter of foreign policy. Most of what you've said has been in terms of very good comments about procedures, but what this argument is saying in respect to the United States, and possibly also Australia in a much smaller way, is that the breakdown of the system of checks and balances and the rise of an imperial presidency has a serious effect on policy content, particularly in relation to foreign affairs or international politics. This is a very difficult issue, a very complex issue but I was wondering if you have a comment on that.

Stanley Bach — You have opened not one can of worms but quite a few. I'm aware of Johnson's work. I haven't read this book, but I know of it. Several perhaps disjointed responses: first your reference to the imperial presidency. Arthur Schlesinger wrote a book entitled *The Imperial Presidency* in 1973. We've been there before. Your reference to the military industrial complex, as I'm sure you know, evokes memories of President Eisenhower in the late 50s. So the kinds of concerns that you've expressed either as your own or reflecting Johnson's work are in most part not new; concerns about an imperial presidency are very much tied to the prominence of foreign policy in the debates of the moment. Nixon's imperial presidency was all in the context of winding down the Vietnam War, and I think with respect to Bush in the context largely of the Iraq War.

It is true that there historically has been a considerable reticence on the part of members of my Congress to challenge presidents on questions of foreign policy, both

because lives are at stake and because these are issues frankly that most of our representatives and senators don't feel nearly as competent to address as questions of domestic policy. So yes, there does tend to be much greater deference to presidents because it's much easier for members of Congress to stand back and if things go sour to say: 'Well, you won't find my fingerprints on it.' We did have resolutions with regard to sending troops into Iraq, and those of you who follow American politics may know how some Democratic senators and presidential candidates have had to tiptoe and tap dance around explaining why they voted the way they did.

Johnson's argument, as he summarises, teeters on the edge of conspiracy theory; that there is this military industrial complex that really is controlling decision-making. I think that's much too much of a simplification. It's true that much spending on defence turns into spending that occurs within the United States on military procurement, and that is a wonderful boon for the states and districts where the military plants are located, but what the argument doesn't take into account is instances in which what you have in Congress is competition for those contracts. I remember one case, I forget how many years ago it was, when Congress was about to provide money for some aircraft I think it was, and there was a heated debate between the senior senator from Washington and the senior senator from Georgia about the merits of two different models for this plane, and it wasn't a coincidence that Boeing is located in Washington and Martin Marietta is located in Georgia. So it's not any kind of monolith controlling government decisions.

Question — My question relates to the difference between consensus and compromise because I think you've put far too high a bar on consensus. The idea that people will always be in harmony is of course nonsense, but it seems to me the difference is that the American system assumes that you start with your position; you have an interest group, their position is fixed, and then it gets traded off in a complex series of manoeuvres through Congress and so on. Consensus it seems to me is best typified by systems of proportional representation in lower houses, and assumes that while people come from different places, there is movement in the process of debate, and they end up with a position that they could at least all live with, if not wholeheartedly support. So it seems to me that there is a conceptual difference there between compromise and consensus that you didn't allow for.

Stanley Bach — Where you have proportional representation you don't have powerful interest groups, is that right?

Question — You do but it plays out differently and they perhaps end up by being a little more muted than can happen in America for example.

Stanley Bach — I think there's some truth to what you say but I think to an extent it's a caricature about how political decisions are in fact made in the United States. Yes, interest groups are influential, but they are not the ones who really make the decisions. After all, bear in mind, what interest groups have to offer are two things: information and money. Now the information is valuable, but if members of Congress receive information from lobbyists and they discover the information is false, they are not going to listen to those lobbyists again. So lobbyists have a real incentive to tell the truth. They just don't tell all the truth. They tell the part of the truth that supports their position. Well, that's why you need a non-partisan and professional research

staff, to always say: 'On the other hand'. The other thing that interest groups have to offer is money. Money is used for campaigns. What's the purpose of campaigns? It's not to raise money, it's to attract votes. So an interest group is only going to have an effect of one of our representatives or senators to the extent that the funds they provide can be used to attract votes, and the senator is not going to say to the interest group: 'You give me a campaign contribution and I'll vote your way' if he know that's going to alienate a significant share of his constituents, because it's just not worth the price. What he is ultimately most interested in is not the money, it's the votes. So that's one general kind of reaction.

With regard to proportional representation, the argument you're making is one that's been made elsewhere. I don't pretend to be an expert on PR; I've never lived under a PR system, but for those of you who are interested I commend to you the work of Aaron Lijphart from the University of California San Diego, who has written books on patterns of democracy in which he makes just this kind of argument. It's complicated because it depends not just on whether you have PR but what kind of proportional representation and what kind of party system. This is why I said at one point that if you've got PR with many parties and none of them approach a majority, you could either have a treaty signed between parties before the election, maybe a bit like the Liberals and the Nationals, or a voter votes for a party without any real idea of whether that party is going to end up in government and if so, who its allies would be. A classic case was for some years in Germany where you had the CDU and the SPD representing generally the centre right and the centre left, and in the middle you had the Free Democrats, who really did usually hold the balance of power. But if you were voting for the Free Democrats very often you didn't know whether you were voting for a coalition with the SPD or the CDU. So I sympathise with the arguments for PR, but first I want to know what kind of PR and I want to know something more about the political and electoral system in which it's going to be imbedded. It's very difficult to predict exactly how it will work.

The Senate, Accountability and Government Control*

Harry Evans

The purpose of this paper is to examine the measures by which the Australian Senate seeks to ensure the accountability of the executive government to Parliament and the effect on those measures of the government party majority which took effect on 1 July 2005, and to draw some implications on the nature and limitations of the accountability of the executive under the Australian system of government.

Accountability

One of the principal functions of a legislative assembly is to ensure that the holders of the executive power are accountable, that is, that they are required to explain to the legislature and the public what they are doing with the power entrusted to them. This requirement is an essential safeguard against mistake and malfeasance in government. The executive branch of government is a complex machine consisting of many parts and many office holders. Mistakes are not only possible but likely, and not all of those office holders, sometimes not even the whole of the government, will resist the temptation to use the power of the state for improper purposes. So the holders of the executive power must be subjected to scrutiny and exposure to ensure that the power is properly employed.

This legislative function is the subject of some famous formulations. 'We are called the Grand Inquest of the Nation,' observed William Pitt the Elder in 1741, 'and as such it is

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our Duty to inquire into every Step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss … ', and no participant in the parliamentary debate in which he spoke disagreed with that proposition.[1] Said Professor, later President, Wilson: 'Unless [the legislature] have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless [the legislature] both scrutinise these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.' [2]

While it is usually seen as an adjunct to democracy, that is, the right of the whole population to judge its government, the accountability of the executive predates democracy and is an essential element of a far older phenomenon, constitutional government: government subject to limitations and safeguards. Pre-democratic constitutional states vigorously practised executive accountability. Office holders were subjected to 'confirmation hearings' and end-of-term accountability examinations in ancient Athens.[3] In the Roman Republic there was an insistence that the greatest statesmen and military heroes, even the conqueror of Carthage, should be held accountable.[4] The Grand Council of the Republic of Venice had a sort of question time for examining officials.[5] Constitutional government, government with safeguards, entails such institutional measures.

The accountability function of the legislature clearly depends on obtaining information. Much of that information is in the hands of the executive government. In the temptation to conceal its mistakes and misdeeds, the executive government may refuse to give up the information. Thus many of the contests between legislatures and executives are, or become, battles over the disclosure of information. Thus also the 'Watergate principle', that the cover-up often subsumes the original offence.

Legislative methods

Legislatures have two traditional measures for ensuring accountability: requiring the production of documents which record executive activities and the dealings of government with others, and questioning witnesses, not only ministers and public officials but also others, about government activities.

Legislatures traditionally have processes to compel the production of documents and the testimony of witnesses. Those processes ultimately depend on the ability to pursue unreasonable refusals as contempts of a house. The powers to deal with contempts are characteristic of Anglo-American houses, and have come down to each House of the Australian Parliament. With their control of the law-making power and the appropriation

1 An account of this debate is in Raoul Berger, *Executive Privilege: a Constitutional Myth*, Harvard University Press, Cambridge, Mass., 1974, pp. 29–31.

2 Woodrow Wilson, *Congressional Government*, 1885, Meridian, New York, 1956, p. 193.

3 Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*, Harvard University Press, Cambridge, Mass., 1999, pp. 74–5.

4 Livy, XXXVIII, 50, trns. Henry Bettenson as Rome and the Mediterranean, Penguin, 1976, p. 385.

5 Gordon, op. cit., p. 139.

of public funds, legislatures also have the political means of coercing executives, including a range of political remedies short of legislating or denying funds.

Accountability measures may be applied either in the whole house of a legislature, or, more commonly in recent times, through committees, which are best able to examine witnesses, sift evidence and advise their houses.

The questioning of ministers in the chamber through the relatively modern procedure of question time is notoriously an occasion of political theatre virtually useless for obtaining information or making ministers explain themselves. It will not be considered here. Other procedures in the whole House, such as the committee of the whole stage on bills in the Senate, are more useful accountability tools.

The Senate's measures

The Australian Senate has always used both of the traditional methods of legislative inquiry. The Senate itself has ordered the production of documents, and occasionally examined witnesses. The power to require the production of documents and summon witnesses has routinely been delegated to Senate committees, which have been empowered to hold hearings and report their findings.

While still making inquiries ad hoc when particular circumstances arise, the Senate has built up over many years a range of standing accountability measures, including permanent orders for the production of information, and committees to scrutinise legislation and government regulations, to examine public expenditure and to oversee government operations.

The basic aim of all of these measures is to disclose information about the activities of the executive government to enable a judgment to be made about its performance. The Senate, like other legislatures, has frequently encountered executive refusals to produce information. Like the strongest of those legislatures, it has used a range of remedies to coerce recalcitrant executives, although it has not resorted to its ultimate power, the power to impose penalties for contempts, in the course of disputes with the executive government.

Public interest immunity

The assertion of the value of the accountability of the executive to the legislature does not involve any claim that all information should always be disclosed. Legislatures have recognised that there are legitimate grounds on which the executive may not disclose some information to the legislature and to the public. In past times executives asserted 'Crown privilege', the alleged ability of the advisers of the Crown to withhold information to protect the operations of the executive. The claim was renamed 'executive privilege' to adjust to republican systems. More recently, following the terminology used by the courts of law in determining whether information should be admitted in legal proceedings, the subject has been renamed again as 'public interest immunity'. This terminology has the benefit of establishing the proper basis of every claim for non-disclosure: that the disclosure would be harmful to the public interest in some specific way. Several grounds for claims of public interest immunity have come to be recognised, such as prejudice to national security, prejudice to the rights of parties to

due process of law in legal proceedings, invasion of the privacy of individuals, damage to the commercial interests of traders in the marketplace, and so on. The Senate and comparable legislatures have accepted claims on some of these grounds in the past, depending on particular cases.[6]

The position of the Senate and every comparable legislature, however, has always been that it is for the legislature to determine whether a claim of public interest immunity is sustained. The Senate asserted this right in a resolution in 1975, which employed the language of claims of privilege, but which declared that 'the Senate shall consider and determine each such claim.'[7] More recently, in relation to claims of commercial confidentiality, a resolution of the Senate made it clear that such claims must be made by a minister and be based upon a statement of the apprehended harm to commercial interests, so that the Senate may be assured that the claim is not lightly raised and may give appropriate consideration to the reasons.[8]

Executive governments, on the contrary, have claimed a right to determine whether the public interest requires non-disclosure of information. It is obvious why no legislature worthy of the name could accept such a claim. It makes executive office holders judges in their own cause, and hands back to them the power to determine whether their own mistakes and misdeeds will be discovered. It allows them to determine the conditions on which their activities will be scrutinised. Clearly submission to such a claim would seriously erode the safeguard of constitutional government.

The fact that the Parliament by legislation has given ministers power to determine conclusively whether some information should be disclosed, under the Freedom of Information Act, does not affect the right of the Senate to determine whether to accept stated grounds for non-disclosure. An order by a House and an application under that statute are very different processes. This was made clear by the Senate and its Procedure Committee in 1992.[9]

The legislature may be persuaded that information should not be disclosed without actually seeing the information in question, but such persuasion requires the disclosure of some other information to support apprehended harm to the public interest, and is far removed from a simple assertion of executive secrecy.

In 1994 the then government, in evidence by the Leader of the Government in the Senate to the Senate Privileges Committee, stated that the government would not seek to refuse information to the Senate except on the basis of carefully considered public interest grounds.[10]

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6 A paper entitled 'Grounds for Public Interest Immunity Claims', listing potentially unacceptable and acceptable grounds for public interest immunity claims, based on cases in the Senate, was prepared for senators and published by the Senate Employment, Workplace Relations and Education Legislation Committee in May 2005.

7 *Journals of the Senate*, 16 July 1975, p. 831.

8 Ibid., 30 October 2003, p. 2654.

9 Senate Procedure Committee, Third Report of 1992, Parlt. Paper 510/1992; *Journals of the Senate*, 3 June 1992, pp. 2404–5.

10 Senate Privileges Committee, 49th Report, Parlt. Paper 171/1994; government submission, hearing, 18 August 1994, transcript, pp. 14, 16.

The Howard government did not adopt that approach; an attempt by a senator, by way of a letter and then a question on notice, to get it to do so, was not responded to for three years, and then met with a non-committal response.[11] Instead, the government declined to produce information, often without raising any recognisable public interest immunity grounds, or without giving any reasons at all.

Government party majority

In Australia there is a strong perception that accountability is something that oppositions and non-government parties, particularly when those parties have a majority in a house of the legislature, seek to impose upon executive governments, that governments will always seek to avoid that imposition, and that they will be successful in doing so where they have a majority of their own party in a house. This is not in accordance with the theory of parliamentary government, nor its practice until relatively recent times. That theory is still based upon an assumption that government party backbenchers will question executive office holders of their own party in the public forums of the legislature and seek to uncover any errors. Party discipline is now so tight in Australia, however, that government backbenchers invariably support executives of their own party in declining to disclose information to the legislature. They conceive their public role to be not that of scrutineers of government but supporters, in all things, of their government. This has virtually crippled the ability of lower houses, where governments by definition have a party majority, and left accountability measures to be pursued by non-government majorities in upper houses.[12]

Because of this, governments feel that they are able to dismiss and reject accountability measures simply as manifestations of party politics, attempts by the losers of the last election to dictate to the winners. This attitude has also spread into the public perception of the political process, making it more difficult for non-government parties to enlist public support in their attempts to expose the activities of government. Such a mindset is often combined with the 'mandate theory', that a government which possesses the endorsement of the people as expressed in the last election should not be hindered in carrying out its intentions. If that theory were consistently followed, there would be no way of the public making an informed judgment at the next election of the government's

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[11] Senator Allison, Australian Democrats, Victoria, wrote to the Leader of the Government in the Senate in April 2003. Having received no reply in 2004 she put a question on notice asking when a reply would be forthcoming. The letter and the question remained unanswered at the general election of 2004, so in the next Parliament she placed the question on notice again. On two occasions she raised the matter in the chamber but did not receive any substantive response. *Journals of the Senate*, 14 May 2003, p. 1803; 22 June 2005, p. 787. The new Leader of the Government finally responded in May 2006 to the effect that 'requests' for information would be considered on their merits.

[12] Although party discipline is much less tight in the United Kingdom, the same complaint is made there about the House of Commons; eg., Diana Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice*. Clarendon Press, Oxford, 1994, p. 298: 'The corruption of ministerial accountability to Parliament, mainly through the operation of party solidarity, challenges Parliament to continue to play its constitutional role in accountable government, or to accept a diminished constitutional position and concede the accountability function to others. Its failure to recognize that accountability needs to be addressed as a major constitutional issue in which it should lead the debate acts to emasculate the central doctrine of the British Constitution, confirming that individual ministerial responsibility frequently provides a façade behind which the government can hide, safe in the knowledge that Parliament lacks the constitutional integrity to offer a sustained and effective challenge.'

performance.[13] The whole point of constitutional rule is that governments must be called to account between elections. If government backbenchers are to abandon their public accountability role, and the partisan political interests of the non-government parties are to be the only source of accountability measures, it is better to have that kind of accountability than none at all.

As will be seen, the Senate has provided a demonstration of this situation, first because of the long periods in which it has not been under the control of a government party majority, and second in the period after 1 July 2005 when the Howard government achieved a majority of one in the chamber. Unsurprisingly, the data confirms the thesis that accountability is greatly weakened in a house with a government majority, but an analysis of the extent to which this occurred in the Senate and the way in which it occurred provides a useful basis for assessing the state of accountability in Australia and measures to enhance it.

Orders for production of documents

The Senate historically has made extensive use of orders for production of documents, resolutions requiring ministers and government agencies to present documents to the Senate, as a means of exposing government activities. Such orders may be standing, requiring regular presentations of information on particular subjects, or may require once-only presentations of specified information.

In the last Parliament before the Howard government took office, that of 1993–96, 53 orders for documents were made and all but four were complied with.[14] In accordance with the undertaking given in 1994, when the then government sought to avoid compliance with an order for documents a ministerial statement was made indicating the reasons for the documents not being produced. Sometimes the reasons were accepted, if only tacitly, by the majority of the Senate, and sometimes non-acceptance was signified by various means. This pattern continued into the early terms of the Howard government, but that government exhibited an increasing resistance to orders for documents. In the Parliament of 1996–98, 48 orders were made and five were not complied with. In the Parliament of 1998–2001, there were 56 orders and 15 were not complied with. In the Parliament of 2001–04, there were 89 orders and more than half of them, 46, were not complied with. The reasons given by the government for not producing documents came to be increasingly remote from any recognisable claim of public interest immunity, and often consisted of simple assertions that documents were confidential and off-hand dismissals of the non-government parties' interests in the information.

The Senate struggled to take effective remedies against the increasing number of government refusals to respond to orders for documents. The non-government parties had to choose the issues on which they were willing to fight. In some cases effective remedies were adopted.

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13 A comprehensive refutation of the mandate theory is in Stanley Bach, *Platypus and Parliament: the Australian Senate in Theory and Practice*. Department of the Senate, Canberra, 2003, pp. 276–299.

14 All statistics in this paper have been compiled by the Senate Table Office from the *Journals of the Senate*.

In 1999 the Minister for Family and Community Services, Senator Newman, refused to produce in response to a Senate order a draft document on changes to the welfare system which she had earlier said she would release at a Press Club address. Instead she produced substitute documents, including, eventually, the stated final version of the required document. Among the grounds for refusal to produce the required document were that its disclosure would 'confuse the public debate' and 'prejudice policy consideration'. Advice from the Clerk of the Senate suggested that these were novel grounds of unclear meaning. The minister was censured by the Senate. The Senate also adopted measures to penalise the government and to gain access to the content of the required document. Question time was extended, the Community Affairs References Committee was ordered to hold a hearing on the matter, and officers of the relevant department were ordered to give evidence before the committee. Officers duly appeared and gave evidence, although under an instruction from the minister not to answer some kinds of questions. When the committee reported the Senate carried a resolution rejecting the minister's claim of public interest immunity and the grounds on which it was based.[15]

The government refused in 1999 to produce documents relating to purchases of magnetic resonance imaging machines. The principal grounds were risk of prejudice to administrative inquiries and the confidentiality of the government's relationship with the medical profession. Advices from the Clerk of the Senate suggested that these grounds were novel and lacking in cogency. The matter was extensively explored at an estimates hearing, and the advices were released. Subsequently, a report by the Health Insurance Commission was produced, with an indication that cases had been referred to the Director of Public Prosecutions. The Senate directed a further committee hearing on the matter, at which officers were closely questioned. An Auditor-General's report was obtained. Both the Senate committee and the Auditor-General found evidence of serious administrative deficiencies. Finally, a large volume of documents was tabled.[16]

The collapse of the airline company Ansett Australia led to two orders for documents in September 2001 relating to the government's approval of the takeover of Ansett by Air New Zealand. The government refused to produce the documents on various grounds, including confidentiality of advice and a claim that producing the documents would distract departmental officers from the task of attempting to save Ansett, but it was indicated that the orders would be attended to later. The Rural and Regional Affairs and Transport References Committee were given a reference on the Ansett collapse. The committee held hearings accordingly. Departmental officers were then questioned, without the government attempting to prevent the hearing.[17]

One of the most drastic remedies the Senate could adopt would be refusal to pass government legislation until related information is produced. On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an

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15 *Journals of the Senate*, 13 October 1999, pp. 1845–6; 19 October 1999, pp. 193–2; 21 October 1999, pp. 1966; 22 November 1999, p. 2007; 25 November 1999, p. 2077; report of the Community Affairs References Committee, Parlt. Paper 364/1999.

16 *Journals of the Senate*, 21 October 1999, p. 1967; 29 November 1999, p. 2123; 15 February 2000, p. 2280; 10 April 2000, pp. 2582–3, 2585; 10 May 2000, pp. 2682, 2689; Community Affairs Legislation Committee, estimates hearing, 1 December 1999, transcript, pp. 51–3.

17 *Journals of the Senate*, 19 September 2001, pp. 4875, 4879; 20 September 2001, p. 4896; 24 September 2001, p. 4922; 25 September 2001, p. 4943; 27 September 2001, p. 4996.

ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were not produced and the bills were not passed. The bills were subsequently brought on and passed as a result of an agreement between the government and some senators as to amendments of other legislation and the tabling of some documents.[18] This and other cases indicated a willingness to compromise on the part of senators who were pursuing the required information.

The most significant permanent order of the Senate requiring the production of information is that first passed in 2001 for the publication on the Internet of details of all government contracts costing more than $100 000. This was an attempt to introduce transparency and accountability into government contracting, which had been a notoriously murky area and the subject of frequent claims of confidentiality. At first the government resisted the order on a claim that it was beyond the power of the Senate, but this stance was tacitly abandoned and the order has subsequently met with substantial compliance.[19] It had become well established by the time the government gained its majority in the chamber. The government refused to comply, however, with a similar order in 2003 requiring the listing of government advertising campaigns, a highly politically-charged subject, on the ground that the information could be obtained by other means, particularly through estimates hearings. There was no attempt in the Senate to enforce the order, and senators appeared to be willing to pursue the information through the estimates hearings.[20] As will be seen, once the government obtained its majority there was a partial closure of that avenue.

After gaining its majority in the Senate on 1 July 2005, the government had the easier option of simply using that majority to reject motions for the production of documents. In the Parliament of 2004–07, after the government majority took effect, only one motion for production of documents was agreed to, and this related to documents in the possession of an independent statutory body, which presumably was willing to disclose the documents, rather than the government itself. All other motions for documents were rejected. Predictably, there was a fall-off in the number of such motions moved. Senators simply stopped moving them, knowing they would be ineffective. Only 25 motions for documents were moved during that period.

At first some reasons were given for not agreeing to these motions, mainly reasons which did not constitute recognised public interest immunity grounds. One of the reasons repeatedly given, for example, was that the information had not been published; obviously motions for documents are by definition directed to unpublished material.[21] Subsequently, most motions for the production of documents were rejected without any reasons given.

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18 Ibid., 12 August 2003, pp. 2089–90; 1 April 2004, p. 3324.

19 Ibid., 20 June 2001, pp. 4358–9; 26 September 2001, p. 4976; 27 September 2001, pp. 4994–5; Senate Finance and Public Administration References Committee, reports on accountability to the Senate in relation to government contracts, Parlt. Papers 212/2001, 610/2002.

20 *Journals of the Senate*, 29 October 2003, p. 2641; *Senate Debates*, 12 February 2004, pp. 20168–9; Senate Finance and Public Administration Legislation Committee, estimates hearing, transcript, 16 February 2004, pp. 154 ff.

21 *Senate Debates*, 17 August 2005, pp. 88–92. This debate made it clear that all motions for documents would be rejected. No reasons were given for most subsequent motions.

Attachment 1 shows the documents which were refused to the Senate during that Parliament by the rejection of motions for the documents.

Probably only really significant cases of concealment were the subject of these motions, but it is not possible to confirm this. Probably also many of the documents concerned had already been refused to committees, but again this cannot be determined because committees do not necessarily report on cases where they have asked for documents and have been refused.

It is possible that there were sustainable grounds for claims of public interest immunity in relation to some of the documents, but this cannot be known in the absence of any such reasoned claims made by the government. It is difficult to believe that there were sustainable public interest grounds in relation to all of the documents. The titles and subject matters of many of them leave the reader puzzled as to possible grounds, other than political embarrassment, for their non-disclosure.

The failure of the government to give reasons for not producing such documents in itself constitutes a breakdown of accountability. If executives are able to refuse information without giving any reasons, accountability is effectively halted.

Committee inquiries

The principal means whereby the Senate obtains information bearing on the accountability of the executive are committee inquiries. With the exceptions which are considered below, Senate committees may inquire only into matters referred to them by the Senate. The majority in the chamber therefore determines the subjects and scope of committee inquiries. After gaining its party majority on 1 July 2005, the Howard government was able to control inquiries by Senate committees. In addition, in 2006 the government changed the structure of the Senate committee system to give itself the majority and the chairs of all of the legislative and general purpose standing committees, which are the main inquiry vehicles for the chamber. Until that time, those committees consisted of references committees, with non-government party majorities and chairs, which inquired into matters of public interest referred to them by the Senate, and legislation committees, which inquired into legislation referred to them and conducted estimates hearings.[22] By effectively removing the references committees, the government gained total control over the committee system through its party numbers.

References to committees

Before 1 July 2005, the Senate had two options for inquiring into matters of public interest: referring such matters to one of the references committees, or establishing select committees for the particular purpose of conducting the specified inquiries. In recent years, particularly since the establishment of the references committees in 1994, the Senate has preferred the method of making references to the references committees, but has continued to use select committees for special inquiries.

[22] Senate Procedure Committee, First Report of 2006, Parlt. Paper 149/2006; *Journals of the Senate*, 14 August 2006, pp. 2474–82.

During the Parliament of 2001–04, seven select committees were employed. After the government gained its majority, no select committees were appointed. In effect, the government did not permit any special inquiries by the Senate into matters of public interest. It is difficult to believe that there were no matters worthy of such inquiries.

In relation to references to references committees, attachments 2 and 3 show the motions for references which were moved in the Senate in the Parliament of 2001–04 and in the Parliament of 2004–07 after the government gained its majority, respectively. The tables show the sources of the motions by party and whether they were agreed to.

Several significant conclusions emerge from these tables. Motions for references moved by the non-government parties were the major source of committee inquiries before the government gained its majority, but after that time non-government motions were mostly rejected. The low success rate of such motions is actually less than it appears, because in most instances non-government senators moving for references were compelled to alter their terms of reference in order to gain acceptance by the government. Looking at the subject matters of the references and the actual terms of references, it may be concluded that the references that were passed were overwhelmingly government-friendly references, or at least politically neutral. No references were accepted which might cause political difficulty or embarrassment for the government. Sometimes seemingly innocuous references led to not entirely government-friendly results; for example, the reference to the Finance and Public Administration Committee relating to transparency and accountability of public funding and expenditure revealed the serious decline in parliamentary control of the public finance system in the past decade.[23] Other references allowed evidence critical of government policies and activities to be heard, and provided a vehicle for non-government senators to make their own reports, but the scope of inquiries was severely limited compared with previous parliaments.

By having a party majority on all of the committees, the government was also able to determine the course of each committee's inquiry, including the deadline for reporting, which is normally set in the chamber, the witnesses who were heard, the information which was requested from government and other sources, and the compilation of the majority report.

In this situation, there is a danger of a parliamentary committee system becoming a mere stage set, with committees inquiring only into matters determined by the government on terms of reference approved by ministers, the conduct of inquiries determined in accordance with the government's wishes, evidence selected according to the government's view of the subject and reports written to reflect that view. In short, a committee system can become a mere echo chamber in which the government simply listens to its own voice. This situation was not reached during the 2004–07 Parliament; on the contrary, committees were still able to conduct useful inquiries into difficult subjects, gather informative evidence, and make valuable observations in reports. The culture of a genuine committee system survived to a certain extent. The long continuance of a government majority, however, could lead to a completely tame committee system.

[23] Senate Finance and Public Administration Committee, report on transparency and accountability of Commonwealth public funding and expenditure, Parlt. Paper 47/2007.

Certainly accountability suffered, to the extent that the Senate was not able to conduct inquiries through the medium of references to committees into any matters not approved by the government. As a former Deputy President of the Senate, of the Liberal Party, suggested, the inquiries most worth conducting may well be the very ones that a government does not want.[24]

A striking demonstration of this principle is provided by the matter of the Regional Partnerships program, one of several schemes under which ministers handed out parcels of money, amounting to millions of dollars, for 'development' projects. In December 2004, after questioning in estimates hearings and before the government majority took effect, the Senate resolved on an inquiry by the Finance and Public Administration References Committee into concerns about this program. The government voted against the committee reference. The non-government majority of the committee reported that its inquiry had been obstructed by the government refusing to provide information. Their report found a lack of accountability in the program, the dispensing of money without regard to the governing criteria, political bias across electorates and massive use of the fund just before elections. The government members of the committee defended the program. The committee recommended an inquiry by the Audit Office, which initiated a performance audit. The audit report, released on the eve of the next general election to the great discomfiture of the government, more than vindicated the committee's findings. If the committee inquiry had been proposed after the government majority took effect, it would undoubtedly have been rejected. Perhaps then the misuse of the program would not have been exposed, or perhaps the exposure might have been delayed. Neither result would have been to the benefit of the taxpayer, whose interests would have been best served by the Senate inquiry being fully effective in the first place.[25]

Standing references

Under the Senate standing orders applying to the legislative and general purpose standing committees, those committees are able to initiate their own inquiries in two areas: they are able to review the annual reports of government departments and agencies, and to examine the performance of those departments and agencies. These standing references are potentially very powerful accountability tools, as they allow committees, on their own motion, to call departments and agencies to account for their administration of particular programs and projects.

The standing references, however, have been little used, even before the government gained its majority in the chamber. The major reason for this is that the references were given to the legislation committees, which had government party majorities and government chairs, and, with a few exceptions, those majorities and chairs were unwilling to initiate robust accountability scrutiny. In some cases the Senate referred matters to the legislation committees which were then obliged to conduct inquiries into those matters. This avenue was closed off by the government majority after 1 July 2005. In the Parliament immediately before the government majority, committees conducted nine inquiries under these standing references. In the Parliament of 2004–07, after the

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[24] David Hamer, *Can Responsible Government Survive in Australia?*, revised ed., Department of the Senate, Canberra, 2004, p. 288.

[25] *Journals of the Senate*, 2 December 2004, pp. 186–7; Senate Finance and Public Administration References Committee, *Regional Partnerships and Sustainable Regions programs.* Parlt. Paper 226/2005; Australian National Audit Office, Report No. 14, 2007–08.

government gained its majority, there were only four such inquiries, two of which related to an agency whose activities caused particular concern to some government senators, and two of which were ad hoc hearings about particular programs which did not lead to any report.

Inquiries into bills

Inquiries into bills are not usually regarded as part of the accountability activities of a legislature, but rather as a facet of its legislative work in shaping the laws which are passed. The scrutiny of bills, however, is accountability related, in that it potentially involves requiring government to explain and justify its legislative proposals.

The Senate has always used references of bills to committees as an adjunct to its legislative work. Since 1988 it has operated a system for the regular referral of bills to committees through another committee, the Selection of Bills Committee, which reports to the chamber on the bills which should be referred for committee inquiries.

The government retained this system after it gained its chamber majority, and frequently boasted of doing so. In fact, more bills were referred to committees than when the government lacked a majority, and more bills were referred on the initiative of the government, sometimes before the bills were introduced. The government used its numbers, however, to restrict the time allowed for committees to report on bills and to withhold some bills from committees. In the Parliament of 2001–04, the average time for the committees to report on bills referred to them varied from 31 days in 2002 to 45 days in the first half of 2003. After the government gained its majority, the average declined from 30 days in financial year 2006–07 to 15 days in the latter part of 2007. There were many disputes in the chamber, usually on motions to adopt reports of the Selection of Bills Committee, about the government restricting the time allowed for committees to report on some bills and not allowing the referral of others. Persons and organisations making submissions to committees on bills also frequently complained about the lack of adequate time to provide their evidence. The government was accused of deliberately overloading and seeking to destroy the system for the scrutiny of bills by imposing these restrictions.[26] The fact that these complaints were made by non-government senators does not negate their validity.

What the statistics do not reveal, and what the complaints were mainly about, was the very short times allowed for examination of major bills. The WorkChoices legislation of 2005 represented the largest and most contentious changes to the workplace relations laws initiated by the Howard government. A committee was given less than three weeks to examine it, and lists of the most significant provisions were excluded from the terms of reference.[27] By contrast, the government's second largest and most important package of changes to workplace relations, in 2002, when there was not a government majority, was referred to a committee with eight weeks for the inquiry. As will be seen, the restriction of the scrutiny of the 2005 legislation was to rebound on the government.

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[26] *Senate Debates*, 12 October 2005, pp. 112–29; 19 October 2006, pp. 3–11; 8 November 2006, pp. 82–5; 8 February 2007, pp. 3–13; 10 May 2007, pp. 1–8.

[27] Ibid., 12 October 2005, pp. 112–29.

A committee was given only one day to examine the package of legislation for the government's takeover of indigenous affairs in the Northern Territory.[28] Although some administrative measures recommended by the committee were accepted, all proposed amendments were summarily rejected.

This was the normal pattern when bills were considered in the chamber: the government was able to reject all amendments of which it did not approve. Thus, in the Parliament of 2001–04 well over half of the 892 amendments moved by the Opposition and more than one quarter of the 965 amendments moved by the Australian Democrats were agreed to. In the Parliament of 2004–07 after the government obtained its majority only six out of over 600 Opposition amendments were agreed to and only two out of over 700 amendments moved by the Australian Democrats were accepted. Successful amendments moved by other parties declined from 168 to 14. The figures for the Australian Democrat amendments are particularly significant, in that, when it lacked a majority, the government was particularly prone to compromise with the Australian Democrats and to accept their amendments, notably on workplace relations legislation.

One effect of the ability of the government to push bills through committees and the chamber was to frustrate the work of the Scrutiny of Bills Committee. Since its establishment in 1981 this committee has drawn the Senate's attention to provisions in bills affecting civil liberties or the powers of the Parliament. Under the government majority, in some cases bills were passed before the committee was able to comment on them, and in other instances bills were too far advanced to allow the committee's concerns to be adequately considered.[29]

The ability of the government to pass its legislation with only the amendments it accepted meant that there was little or no pressure to persuade the majority of the chamber by properly explaining provisions in legislation and why particular amendments would not be acceptable. This in itself amounted to a lessening of accountability.

There were several instances of the government moving amendments, not only in the Senate but in the House of Representatives before bills were received in the Senate, to take account of matters raised in Senate committee hearings on bills and included in the committee reports. In one instance the government accepted an amendment suggested by Opposition senators in a minority report.[30] In 2007 the government put aside its proposed access card legislation after a committee recommended that it not proceed until promised provisions relating to safeguards were drafted.[31] These events indicate that committee inquiries into bills were not rendered entirely useless by the government majority, and that committees could still make a contribution to the legislative process.

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28 Ibid., 8 August 2007, pp. 144–50.

29 Ibid., 19 September 2007, p. 101. This was the case with the committee's reports on the Australian Crime Commission Amendment Bill 2007, the Northern Territory indigenous affairs package in August 2007, and the government's water plan package in the same month. Among the committee's comments on the Northern Territory package were references to 'Henry VIII clauses', that is, provisions allowing the amendment of the legislation by executive act.

30 *Senate Debates*, 28 March 2007, pp. 52–3.

31 Senate Finance and Public Administration Committee, report *Human Services (Enhanced Service Delivery) Bill 2007 [provisions]*, Parlt. Paper 106/2007.

The severe restrictions on the time allowed for the committees to scrutinise bills, however, represented a significant decline in accountability. More extensive examination of the bills may well have revealed further changes which should have been made, even if the government was not compelled to compromise with other parties on their legislative preferences.

The starkest demonstration of this was provided by the WorkChoices legislation. Having insisted on minimal committee examination, and pushed the bill through the Senate, the government had to return to it in 2007 with amendments designed to overcome serious public hostility to some of its effects. Had a longer committee inquiry been allowed, the evidence may have made the government realise that it should make further amendments before it was forced to do so. If the government had not had a Senate majority it certainly would have been obliged to accept further amendments to secure passage of the legislation, and then probably would not have had the subsequent difficulties.

Estimates hearings

According to a former Manager of Government Business in the Senate and Leader of the Opposition in the Senate of the Labor Party, estimates hearings are 'the most effective mechanism for parliamentary accountability that we have in our system of government',[32] and according to a Leader of the Government in the Senate in the Howard government, estimates hearings are 'in some ways … the most effective level of financial accountability that exists within our system'.[33]

The thrice-yearly round of estimates hearings provide senators with the opportunity to question ministers in the Senate and officers of departments and agencies about any of their activities and operations.

After the government gained its Senate majority, these were the only inquiries not under complete government control.

Even before that time, the government had exhibited a desire to restrict the scope of the hearings. In 1999 there appeared to be a concerted effort by ministers to restrict the hearings to their claimed original purpose by declining to answer questions which were not about how much money was to be spent on particular functions. This led to a dispute which found its way into the Senate, to the Procedure Committee and back to the Senate again. The Senate adopted the report of the Procedure Committee, to the effect that all questions going to the operations and financial positions of government departments and agencies are relevant questions for estimates hearings. As the Procedure Committee made clear, this only reasserted what had always been the practice.[34]

The government allowed the estimates hearings to continue, but placed restrictions on them which reduced their effectiveness.

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32 Ian Henderson, 'The Quiet Executioner [Senator John Faulkner]', *Australian*, 3 June 2000, p. 30.

33 *Senate Debates*, 19 August 2002, p. 3055.

34 Senate Procedure Committee, Second Report of 1999, Parlt. Paper 360/1999, p. 3; *Journals of the Senate*, 22 November 1999, pp. 2008–9.

A change was made to the timetable of the hearings, which had the effect of reducing by two the total number of days available for them.[35] Theoretically, the committees themselves can decide to extend their hearings beyond the days specified by the Senate, and this has occurred in a few cases in the past, but with the government majorities on the committees this is highly unlikely.

A more severe restriction on the effectiveness of the hearings was the large increase in refusals of ministers and officers to answer questions, often without raising anything resembling a public interest immunity claim, and in some instances without giving any reasons at all. Even if committees agree to press questions when answers are refused, which was an unlikely occurrence with the government majorities on the committees, when met with repeated refusals the committees can only report the matter to the Senate. Both ministers and officers were clearly well aware that the possibility of the Senate taking any remedial action was removed by the government majority in the chamber.

It is not possible to compile statistics on refusals to answer questions, particularly as refusals take many forms, such as taking questions on notice and then either not answering them or indicating that an answer will not be provided. It is therefore not possible to compare numbers of refusals before the government majority with the numbers afterwards. There is no doubt, however, that refusals to answer questions, with or without reasons, greatly increased after 1 July 2005. Some notable examples give a picture of the recurring pattern.

Governments have always expressed reluctance to disclose anything in the nature of advice to government, although advice is frequently disclosed where it supports the government's political purposes. Claims that information constituted advice and therefore would not be disclosed greatly increased. The most extreme example of a refusal related not to an estimates hearing but to an inquiry under a pre-1 July 2005 reference to a committee relating to works on the Gallipoli Peninsula. The Department of Foreign Affairs asserted that advice to government is never disclosed but in the most exceptional circumstances.[36] This claim was undermined by the voluntary disclosure by the government of advice relating to the sale of Medibank Private, which was apparently prompted by the attention given to a Parliamentary Library paper questioning the legality of the proposed sale.[37] Subsequently, answers to questions on notice simply stated that advice was not disclosed unless the government chose to do so.[38]

The government issued an instruction to all officers that they should not answer any questions about the AWB Iraq wheat bribery affair, on the ground that a government commission of inquiry into the matter had been appointed.[39] This was the first occasion on which a government imposed an unlimited ban on answering questions on the basis that a government-appointed commission of inquiry was looking into the matter.

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35 Senate Finance and Public Administration Legislation Committee, estimates hearing, 22 May 2006, transcript, pp. 12–13.

36 Senate Finance and Public Administration References Committee, report *Matters relating to the Gallipoli Peninsula*, Parlt. Paper 228/2005, pp xxii–xxiv.

37 *Journals of the Senate*, 4 September 2006, p. 2553.

38 Senate Foreign Affairs, Defence and Trade Committee, estimates hearings, November 2006, answers to questions on notice nos. 21, 22, 25 by the Department of Foreign Affairs and Trade.

39 Senate Finance and Public Administration Legislation Committee, estimates hearing, 13 February 2006, transcript, pp. 35, 139.

Previously governments had only expressed some reluctance about answering questions on such matters, or had invoked additional grounds. It was explicitly stated by the government that this was not a claim of public interest immunity, simply a refusal to answer, and it was not disputed that there is no procedural or legal barrier to the Senate inquiring into a matter which is also before a government-appointed inquiry. The refusal to answer some questions was repeated even after the commission of inquiry had reported.

There was a refusal to produce legal advice provided to the government on the legality of the United States Military Commissions, although the government had endorsed the processes to be followed by the commissions.[40] Similarly, there was a refusal to disclose the agreement between Australia and the United States for the transfer of prisoners from Guantanamo Bay simply on the basis that the agreement was confidential.[41]

Having made much of the innovation whereby government legislation would be accompanied by family impact statements, the government declined to produce these statements on the basis that they are prepared only for Cabinet.[42]

The government declined to disclose the amounts of money paid to JobNetwork providers, in spite of the concerns about the financial probity of some aspects of the JobNetwork scheme.[43] Similarly, there was a refusal to disclose how much of the $2.8 billion of subsidies to the motor industry was going to individual companies.[44] The principle that expenditure of public funds is a public concern did not seem to weigh heavily on the Prime Minister, who took two years to respond to questions about the cost of functions at Kirribilli House and the Lodge, and then refused to answer in relation to costs of particular functions.[45]

The issue of financial probity and accountability was most hotly raised in relation to the government's multi-million dollar advertising campaigns, which were widely perceived as a transfer of public funds to the government party's re-election coffers. The government refused, however, to answer any questions about planned or pending advertising campaigns.[46] It was not explained why the legislature should not know of expenditure on advertising simply because the campaigns had not yet begun.

As has been noted in relation to Senate orders for documents, there were persistent refusals to provide information on the ground that the information was not published by

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40 *Journals of the Senate*, 7 February 2007, p. 3385. Senate Legal and Constitutional Affairs Committee, estimates hearing, 13 February 2007, transcript, pp. 101–4.

41 Senate Legal and Constitutional Affairs Committee, estimates hearing, 21 May 2007, transcript, p. 101.

42 Senate Community Affairs Legislation Committee, estimates hearing, 15 February 2006, transcript, p. 133.

43 Senate Employment, Workplace Relations and Education Legislation Committee, estimates hearing, 16 February 2006, transcript, pp 50–1.

44 Senate Economics Committee, estimates hearing, 1 November 2006, transcript, pp. 27–9. It is notable that the chair of the committee baulked at this refusal.

45 Senate Finance and Public Administration Legislation Committee, estimates hearings, October 2005, answers to questions on notice nos. PM75, PM41, by the Department of Prime Minister and Cabinet.

46 Senate Finance and Public Administration Committee, estimates hearing, 22 May 2007, transcript, pp. 93, 96.

the government. The economics departments constantly employed this pretext.[47] A similar method of refusing to provide information was simply to say that data was not collected.[48] (Historically, parliamentary demands for information often required government departments to prepare statistics and to compile other information; only rarely have the Senate and its committees attempted to obtain this kind of information.[49])

There were constant complaints about departments not answering on time questions taken on notice, and providing answers just before committees began their next round of estimates hearings, so that committee members would not have adequate time to consider the answers, or the refusals to answer the questions.[50] In some cases departments refused to answer questions on the basis that they were similar to questions taken on notice which had not been answered. Answers were delayed in ministers' offices, where they had to be 'cleared' before they could be provided.[51] The fact that a 'draft' answer had been lodged with a minister was regarded by departments as ending their responsibility. On at least two occasions it was revealed, apparently by accident, that ministers' offices alter the answers provided by departments to make the answers less informative and to withhold some information.[52]

Several departments began to attach estimates of the cost of answering questions to all their answers, and then there were refusals to answer questions on the basis that preparing answers would be too costly. A senator asked the Department of Employment and Workplace Relations how many persons were receiving a particular entitlement, a piece of information which might be thought to be readily available to the department. The answer was eventually provided, with a statement that it took some hundreds of dollars to prepare.[53] It appears that, because accountability involves a cost, it must be rationed.

It may be that in some of these cases the government would have resisted answering questions even if it still lacked a majority in the Senate and was therefore exposed to the kinds of remedial action taken by the Senate in the past. Without its majority, however, the government would have had to tread more warily, and would have risked greater difficulties in consequence of refusals to answer. It was fairly clear that departmental officers had received a strong message that they could readily decline to answer

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47 Senate Economics Committee, estimates hearings, transcripts, 3 November 2005, p. 34; 30 May 2006, pp. 33–4, 44, 52–3, 80; 14 February 2007, pp. 98, 126, 133-4; 31 May 2007, pp 48–50.

48 Senate Employment, Workplace Relations and Education Committee, estimates hearing, 2 November 2006, transcript, pp. 6–7.

49 *Senate Debates*, 27 September 1993, pp. 1165-6; *Journals of the Senate*, 9 May 1996, p. 139; 5 March 1997, pp. 1560–1.

50 Eg., Senate Employment, Workplace Relations and Education Committee, estimates hearing, 28 November 2007, pp. 85–7.

51 Senate Employment, Workplace Relations and Education Committee, estimates hearings, transcripts, 2 November 2006, p. 96; 15 February 2007, pp. 88, 93–5.

52 Senate Finance and Public Administration Committee, estimates hearing, 12 February 2007, transcript, pp. 126–7. In September 2006 two versions of the answer to Senate question on notice no. 1715, the departmental version and the minister's version, were accidentally sent to a senator, allowing comparison of the helpfulness of the answers.

53 Senate Finance and Public Administration Legislation Committee, estimates hearing, 25 May 2006, transcript, pp. 58–63; Senate Employment, Workplace Relations and Education Committee, estimates hearings, February 2007, answer to question on notice no. W1119–07 by the Department of Employment and Workplace Relations.

questions without even bothering to refer the alleged difficulty in answering them to a minister, which is the process contemplated by the Senate's procedures.

A feat of imagination would be required to devise persuasive grounds for a sustainable claim of public interest immunity in these and many similar cases.

Of course, many questions *were* answered and much information not otherwise available was disclosed during the estimates hearings. The government, however, possessed an unlimited discretion to withhold any information on any or no grounds, and appeared to delegate this power to officers. In that situation, with the government disclosing only the information it chooses, accountability is at least on sufferance if not terminated.

In only two known cases did the government chairs of the committees or the government majorities question the refusal of ministers or officers to answer, or give a considered view of the grounds for the refusal, or press the questions.[54] On the contrary, the government chairs had to be disabused of the notion that they could rule questions out of order simply on the basis that a minister or an officer did not want to answer them.[55] The past determinations of the Senate about claims of public interest immunity being properly raised by ministers and determined by the Senate were entirely forgotten. There seemed also to be no appreciation of the principle that refusing information to a House of the Parliament is an extremely serious step not to be undertaken lightly.

There was one potentially significant addition to the Senate's armoury of accountability measures soon after the government gained its majority. In November 2005, on the recommendation of the Procedure Committee, the standing orders were amended to allow a senator to raise in the chamber a failure by the government to respond to an order for documents or to answer estimates questions on notice on time. This right was already available for ordinary questions on notice. The new procedure will become useful only when there is a majority in the chamber willing to agree to motions for documents and to apply some remedy to unreasonable refusals to answer questions.

Accountability and government control

There would seem to be no rational basis for denying the principle contained in past Senate resolutions: that information about the activities and operations of the executive government should not be withheld from the elected legislature unless that disclosure of the information would be harmful to the public interest on one of the recognised grounds, and that the validity of a claim of public interest immunity should not be determined by the government itself, which should not be the judge in its own cause. Enough history has passed to establish that mistakes and misdeeds multiply when they can be covered up, and that the ability of the public to determine how it is being served will be crippled in the absence of an inquisitive legislature.

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[54] The first known exception is referred to in note 44. Another partial but honourable exception is recorded in the report of the Senate Employment, Workplace Relations and Education Committee on additional estimates 2006–7, March 2007, Parlt. Paper 64/2007, pp. 14–15. The committee could not swallow a claim by an officer that the general provision in the Public Service Act requiring officers to maintain appropriate confidentiality allowed him to decline to answer any questions.

[55] Senate Finance and Public Administration Legislation Committee, estimates hearing, 22 May 2006, transcript, p. 9.

Proceedings in the Senate and its committees in the Parliament of 2004–07 sufficiently established that the accountability of the executive government is likely to go into a steep decline when a government possesses a party majority in the upper house. The recipe for sustaining accountability therefore appears clear: avoid such government majorities. This underlines the significance of the system of proportional representation for Senate elections, which has been the mainstay of lack of government control of the Senate in recent decades. With or without government majorities, ways must be found of separating accountability from party discipline. That is a difficult task, given the control which executives exercise over the selection of candidates and over their elected members.

Perhaps the best argument for accountability is that its absence is ultimately bad for governments as well as the country. The example of the WorkChoices legislation indicates that the possession by governments of absolute power to work their will may eventually undermine them. The AWB Iraq wheat bribery affair demonstrates that the longer misdeeds go uncorrected the greater the damage in the end. The lesson of the Regional Partnerships program is that unaccountable dealing with money leads to maladministration, political manipulation and, if exposed, electoral damage. If governments had regard to their own long term best interests, they would embrace parliamentary accountability with enthusiasm.

ATTACHMENT 1

DOCUMENTS REFUSED TO THE SENATE

1 JULY 2005 TO 20 SEPTEMBER 2007

COMMUNICATIONS—TELSTRA—Documents held by Telstra Corporation relating to shareholder attitude surveys conducted by Crosby/Textor.

DEFENCE—IRAQ—DEPLETED URANIUM—Report of the Australian Defence Force on the presence of depleted uranium in the Australian area of operations in Al Muthanna province in southern Iraq.

EDUCATION—VOLUNTARY STUDENT UNIONISM—Documents relating to options for voluntary student unionism.

EMPLOYMENT—COMMUNITY PARTNERS PROGRAM—The review of the Community Partners program, as commissioned by the Office of the Employment Advocate and conducted by Deloitte Touche Tomatsu.

ENVIRONMENT—HOPE DOWNS IRON ORE PROJECT—Briefing packages produced by the former Department of the Environment and Heritage for the Minister's consideration of the Hope Downs Iron Ore Project proposed by Hope Downs Management Services Pty Ltd.

ENVIRONMENT—NORTHERN TERRITORY—URANIUM MINES—Documents relating to the Commonwealth Government's authority to unilaterally approve uranium mines in the Northern Territory.

ENVIRONMENT—REVIEW OF MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE—Report on the review of matters national environmental significance made under section 28A of the *Environment Protection and Biodiversity Conservation Act 1999*.

ENVIRONMENT—TASMANIA—STYX AND FLORENTINE VALLEYS—Documents relating to the implementation of the 2004 election commitment to protect 18 700 hectares of old-growth forest in the Styx and Florentine valleys.

FAMILY AND COMMUNITY SERVICES—NATIONAL DISABILITIES ADVOCACY PROGRAM REVIEW—The National Disabilities Advocacy Program Review 2006, carried out by Social Options Australia.

FAMILY AND COMMUNITY SERVICES—SMARTCARD PROPOSAL—Documents relating to the smartcard proposal.

FINANCE—BOARD OF THE RESERVE BANK OF AUSTRALIA—APPOINTMENT—Documents relating to the nomination and appointment of Mr Robert Gerard to the Board of the Reserve Bank of Australia.

FOREIGN AFFAIRS—UNITED STATES OF AMERICA—MILITARY COMMISSIONS ACT—Legal advice received by the Government relating to the legality of the United States of America's Military Commissions Act (2006).

HEALTH—BETTER OUTCOMES IN MENTAL HEALTH INITIATIVE—Report from the review of the Better Outcomes in Mental Health Initiative.

HEALTH—REGULATION OF NON-PRESCRIPTION MEDICINAL PRODUCTS—Report provided by Deloitte Touche Tohmatsu relating to the regulation of non-prescription medicinal products.

IMMIGRATION—457 VISA PROGRAM—Report prepared by the Department of Immigration and Multicultural Affairs relating to T&R Pastoral and its employment of workers on subclass 457 visas.

IMMIGRATION—SIEV X—Documents detailing passengers purported to have boarded the vessel known as SIEV X.

LAW AND JUSTICE—AUSTRALIAN WHEAT BOARD—The Organisation for Economic Co-operation and Development foreign bribery survey response by AWB Limited.

LAW AND JUSTICE—BORDER RATIONALISATION TASKFORCE—Report of the Border Rationalisation Taskforce prepared in 1998.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—Documents relating to the research and development work to be undertaken by the CSIRO.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—SHEEP STUDY—Documents relating to a sheep study conducted by the CSIRO on the effect of transgenic peas on the immune response of sheep.

TAXATION—INFRASTRUCTURE BORROWINGS TAX OFFSET SCHEME—Documents held by the Department of Transport and Regional Services relating to taxation deductions under the Infrastructure Borrowings Tax Offset Scheme.

TRANSPORT—CIVIL AVIATION SAFETY AUTHORITY—TRANSAIR—Documents relating to Lessbrook Pty Ltd trading as Transair.

DEFENCE—NAVAL SHIPS—SAFETY—Documents including briefs to ministers concerning complaints and allegations relating to substandard maintenance on Navy ships, particularly with respect to HMAS Westralia.

ENVIRONMENT—PROPOSED ANVIL HILL COAL MINE—Documents relating to the Anvil Hill coal mine.

ATTACHMENT 2

PROPOSED REFERENCES TO SENATE COMMITTEES

2001—2004

Date	Committee	Subject	Agreed to	Negatived	Source
13 March 2002	Employment, Workplace Relations and Education	Education of students with disabilities	1		Opp
20 March 2002	Employment, Workplace Relations and Education	Small business employment	1		Opp
20 March 2002	Economics	Public liability and professional indemnity insurance	1		Opp
21 March 2002	Finance and Public Administration	Recruitment and training in the Australian public service	1		Opp
16 May 2002	Rural and Regional Affairs and Transport **Legislation** Committee	Quota management controls on Australian beef exports to the United States	1		Opp
19 June 2002	Community Affairs	Proposed legislative participation requirements for parents and mature-age unemployed Australians	1		Opp/AD
20 June 2002	Environment, Communications, Information Technology and the Arts	Regulatory, monitoring and reporting regimes that government environmental performance at the Ranger and Jabiluka uranium operations and the Beverley and Honeymoon *in situ* leach operations	1		Opp

Date	Committee	Subject	Agreed to	Negatived	Source
25 June 2002	Environment, Communications, Information Technology and the Arts	Capacity of the Australian telecommunications network to deliver adequate services	1		Opp/AD
25 June 2002	Environment, Communications, Information Technology and the Arts	Role of libraries as providers of public information in the online environment	1		AD
25 June 2002	Legal and Constitutional	Implications of excision for border security	1		Opp
27 June 2002	Rural and Regional Affairs and Transport **Legislation** Committee	Australian meat industry	1		Govt
27 June 2002	Rural and Regional Affairs and Transport	'Plantations for Australia: The 2020 Vision' strategy	1		Govt
27 August 2002	Legal and Constitutional	Progress towards national reconciliation	1		AD
29 August 2002	Rural and Regional Affairs and Transport **Legislation** Committee	Great Barrier Reef Marine Park Amendment Regulations		1	ON
18 September 2002	Employment, Workplace Relations and Education	Government's refusal to respond to an order of the Senate for documents relating to financial information concerning higher education	1		Opp
19 September 2002	Foreign Affairs, Defence and Trade	Possible military attack against Iraq by the United States of America		1	AD
21 October 2002	Community Affairs	Poverty and inequality in Australia	1		Opp
21 October 2002	Rural and Regional Affairs and Transport	Rural industry-based water resource usage	1		AD
23 October 2002	Employment, Workplace Relations and Education	Skills shortage and labour demand	1		Opp

Date	Committee	Subject	Agreed to	Negatived	Source
2 December 2002	Treaties Joint Standing Committee	Proposed agreement with the United States of America pursuant to which Australia would agree not to surrender US nationals to the International Criminal Court without the consent of the US	1		AD
10 December 2002	Foreign Affairs, Defence and Trade	Adequacy and effectiveness of the Government's foreign and trade policy strategy	1		Opp
12 December 2002	Foreign Affairs, Defence and Trade	General Agreement on Trade in Services	1		Opp
12 December 2002	Superannuation Select Committee	Planning for retirement	1		Govt
12 December 2002	Economics	Structure and distributive effects of the Australian taxation system	1		Opp
4 March 2003	Community Affairs	Government or non-government institutions and fostering practices established to provide care and/or education for children	1		AD
6 March 2003	Community Affairs	Pharmaceutical Benefits Scheme		1	AG
19 March 2003	Finance and Public Administration	Framework for employment and management of staff under the *Members of Parliament (Staff) Act 1984*	1		Opp
24 March 2003	Foreign Affairs, Defence and Trade	Assessment and dissemination of threats to the security of Australians in South East Asia	1		AG (as amended by Opp)
27 March 2003	Legal and Constitutional	Deployment of troops to Iraq		1	AG
27 March 2003	Finance and Public Administration	Funding for new building and machinery at the Moruya Steel Profiling Plant in New South Wales	1		Opp

Date	Committee	Subject	Agreed to	Negatived	Source
14 May 2003	Foreign Affairs, Defence and Trade	Report by the Director of Trials of the Review of Test and Evaluation in Defence	1		Opp
17 June 2003	Superannuation Select Committee	Superannuation Industry (Supervision) Amendment Regulations 2003	1		Opp
17 June 2003	Legal and Constitutional	Capacity of legal aid and access to justice arrangements to meet community need	1		Opp/AD
18 June 2003	Environment, Communications, Information Technology and the Arts	Burning of Australia's biggest tree, in Tasmania	1		AG (as amended by Opp)
18 June 2003	ASIO, ASIS and DSD Joint Statutory Committee	Nature and accuracy of intelligence information received by Australia's intelligence services	1		Opp
18 June 2003	Foreign Affairs, Defence and Trade	Role, operation and effectiveness of Australia's security and intelligence agencies in the lead-up to the Iraq war		1	AG
19 June 2003	Finance and Public Administration	Revised system of administrative review within the area of veteran and military compensation and income support	1		Opp
19 June 2003	Foreign Affairs, Defence and Trade	Adequacy of arrangements within the Department of Defence for the health preparation for the deployment of the Australian Defence Forces overseas	1		Opp
24 June 2003	Environment, Communications, Information Technology and the Arts	Broadband services		1	AD

Date	Committee	Subject	Agreed to	Negatived	Source
25 June 2003	Economics	Whether the *Trade Practices Act 1974* adequately protects small business from anti-competitive or unfair conduct	1		Opp
26 June 2003	Environment, Communications, Information Technology and the Arts	Regulation, control and management of invasive species	1		AD
26 June 2003	Legal and Constitutional	Process for moving towards the establishment of an Australian republic	1		AD/Opp
26 June 2003	Environment, Communications, Information Technology and the Arts	Levels of competition in broadband services	1		Opp
26 June 2003	Employment, Workplace Relations and Education	Government's proposed budget changes to higher education	1		Opp/AD
19 August 2003	Community Affairs	History of post-transfusion Hepatitis in Australia	1		Opp
13 October 2003	Rural and Regional Affairs and Transport	Draft Aviation Transport Security Regulations 2003	1		Opp
16 October 2003	Employment, Workplace Relations and Education	Building and construction industry	1		AD
16 October 2003	Rural and Regional Affairs and Transport	Quarantine risks associated with return of sheep stranded aboard the MV *Cormo Express*	1		Opp
16 October 2003	Legal and Constitutional Affairs	Australian expatriates	1		Opp
30 October 2003	Foreign Affairs, Defence and Trade	Australia's military justice system	1		Opp
26 November 2003	Treaties Joint Committee	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1		Opp

Date	Committee	Subject	Agreed to	Negatived	Source
10 February 2004	Foreign Affairs, Defence and Trade	Australia's involvement in preparations for the deployment of the United States of America's proposed missile defence program		1	AG
4 March 2004	Finance and Public Administration	Funding and disclosure of political parties, candidates and elections		1	AG
4 March 2004	Electoral Matters Joint Committee	Electoral funding and disclosure	1		AD
23 March 2004	Legal and Constitutional Affairs	Australian Federal Police Commissioner's views on the connection between Australia's involvement in the war on Iraq and the threat to Australia's security		1	AG
11 May 2004	Employment, Workplace Relations and Education	Functioning of the Office of the Chief Scientist	1		AG (as amended by AD)
13 May 2004	Employment, Workplace Relations and Education	Government's schools funding package	1		AD (as amended by AG)
16 June 2004	Economics **Legislation** Committee	Superannuation Industry (Supervision) Amendment Regulations 2004	1		Opp
23 June 2004	Finance and Public Administration	Level of expenditure on, nature and extent of, government advertising since 1996	1		Opp
23 June 2004	Community Affairs	Aged care workforce	1		Opp
24 June 2004	Environment, Communications, Information Technology and the Arts	Budgetary and environmental impacts of the Government's Energy White Paper	1		AD
24 June 2004	Community Affairs **Legislation** Committee	Pharmaceutical Benefits Scheme		1	AG

Date	Committee	Subject	Agreed to	Negatived	Source
9 August 2004	Rural and Regional Affairs and Transport **Legislation** Committee	Animal welfare	1		AD
Total			**53**	**10**	

ATTACHMENT 3

PROPOSED REFERENCES TO SENATE COMMITTEES

1 JULY 2005—20 SEPTEMBER 2007

Date	References Committee	Subject	Agreed to	Negatived	Source
14 September 2005	Rural and Regional Affairs and Transport	Rural water usage	1		AD
15 September 2005	Community Affairs	Roll out of Opal fuel throughout the central desert region of Australia		1	AG
5 October 2005	Community Affairs	Petrol sniffing in Aboriginal communities	1		Govt
6 October 2005	Legal and Constitutional	Arrest and deportation of Mr Scott Parkin		1	AG
6 October 2005	Employment, Workplace Relations and Education	Overtime and shift allowances		1	FF
10 October 2005	Employment, Workplace Relations and Education	Government's proposed changes to welfare		1	Opp
11 October 2005	Rural and Regional Affairs and Transport	Prime Minister's 2004 pre-election announcement on logging of old-growth forests in Tasmania		1	AG
12 October 2005	Employment, Workplace Relations and Education	Impact of proposed industrial relations changes		1	Opp/AD
13 October 2005	Employment, Workplace Relations and Education	Industrial agreement-making		1	Opp

Date	References Committee	Subject	Agreed to	Negatived	Source
7 November 2005	Foreign Affairs, Defence and Trade	Australia's response to the earthquake catastrophe		1	AG
10 November 2005	Foreign Affairs, Defence and Trade	Naval shipbuilding	1		Opp
29 November 2005	Rural and Regional Affairs and Transport	Australia's future oil supply	1		AG
7 December 2005	Foreign Affairs, Defence and Trade	Involvement of the Australian Wheat Board in the Oil-for-Food Programme		1	AG
7 December 2005	Community Affairs	Petitions tabled in the Senate relating to gynaecological cancers and sexually transmitted infections	1		AD/Opp/ Govt
7 December 2005	Environment, Communications, Information Technology and the Arts	Funding and resources available to national parks, other conservation reserves and marine protected areas	1		AD
7 December 2005	Employment, Workplace Relations and Education	Viability of a contract labour scheme between Australia and countries in the Pacific region	1		Opp
8 December 2005	Community Affairs	Funding and operation of the Commonwealth-State/Territory Disability Agreement		1	Opp
7 February 2006 (moved on 7 December 2005)	Employment, Workplace Relations and Education	Role and performance of the CSIRO		1	Opp
2 March 2006	Community Affairs	Funding and operation of the Commonwealth-State/Territory Disability Agreement		1	Opp
2 March 2006	Legal and Constitutional	Processes for assisting refugees and humanitarian entrants		1	Opp

Date	References Committee	Subject	Agreed to	Negatived	Source
2 March 2006	Rural and Regional Affairs and Transport	Adequacy of Australia's aviation safety regime		1	Opp
29 March 2006	Environment, Communications, Information Technology and the Arts	Women in sport and recreation in Australia	1		Opp
29 March 2006	Environment, Communications, Information Technology and the Arts	Proposed changes to cross media laws		1	Opp
29 March 2006	Rural and Regional Affairs and Transport	Shareholding in Snowy Hydro Ltd		1	AG
11 May 2006	Community Affairs	Gynaecological cancer in Australia	1		Opp/AD/ Govt
11 May 2006	Community Affairs	Funding and operation of the Commonwealth-State/Territory Disability Agreement	1		Opp
13 June 2006	Legal and Constitutional	Indigenous workers	1		AD
20 June 2006	Finance and Public Administration	Transparency and accountability to Parliament of Commonwealth public funding and expenditure	1		Opp
20 June 2006	Environment, Communications, Information Technology and the Arts	Australia's future sustainable and secure energy supply		1	AG
22 June 2006	Community Affairs **Legislation** Committee	Extent and effectiveness of certain regulations made under the *Social Security Act 1991*		1	AG
22 June 2006	Economics **Legislation** Committee	Price of petrol in Australia	1		Opp

Date	References Committee	Subject	Agreed to	Negatived	Source
15 August 2006	Environment, Communications, Information Technology and the Arts **Legislation** Committee	Australia's Indigenous visual arts and craft sector	1		Govt
15 August 2006	Community Affairs	Exclusive Brethren		1	AG
4 September 2006	Rural and Regional Affairs and Transport **Legislation**	Administration of quarantine		1	Opp
4 September 2006	Legal and Constitutional	Temporary Business Long Stay visas		1	Opp
6 September 2006	Employment, Workplace Relations and Education	Workforce challenges in the Australian transport sector	1		Opp
New committee structure came into effect on 11 September 2006					

Date	Committee	Subject	Agreed to	Negatived	Source
12 September 2006	Legal and Constitutional Affairs	National and international policing requirements		1	Opp
14 September 2006	Community Affairs	Legislation Review Committee on the *Prohibition of Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002*	1		Govt
7 November 2006	Foreign Affairs, Defence and Trade	Nature and conduct of Australia's public diplomacy	1		Govt
8 November 2006	Rural and Regional Affairs and Transport	Australia's aviation safety regime		1	Opp
8 November 2006	Foreign Affairs, Defence and Trade	Changing nature of Australia's involvement in peacekeeping operations	1		Govt
9 November 2006	Rural and Regional Affairs and Transport	Long-term impacts on Australian primary producers or variable rainfall etc as a result of climate change		1	AG
27 November 2006	Treaties Joint Standing Committee	New security treaty with Indonesia		1	AG
7 February 2007	Economics	Proposed takeover of Qantas		1	AG
8 February 2007	Employment, Workplace Relations and Education	Current level of academic standards of school education	1		Govt
8 February 2007	Rural and Regional Affairs and Transport	Impacts of the proposed dam on the Mary River at Traveston Crossing in Queensland		1	AG
26 February 2007	Rural and Regional Affairs and Transport	Additional water supplies for South East Queensland	1		Govt

Date	Committee	Subject	Agreed to	Negatived	Source
27 February 2007	Rural and Regional Affairs and Transport	Effect of the Government's decision to phase out Non-Forestry Managed Investment Schemes		1	Opp
1 March 2007	Rural and Regional Affairs and Transport	Need for a national strategy to help Australian agricultural industries adapt to climate change		1	AG
1 March 2007	Legal and Constitutional Affairs	Commonwealth exemptions provided to religious or other organisations		1	AD
21 March 2007	Community Affairs	Exclusive Brethren		1	AG
26 March 2007	Rural and Regional Affairs and Transport	National plan for water security		1	AD
28 March 2007	Community Affairs	Patient Assisted Travel Schemes	1		Govt
28 March 2007	Community Affairs	Mental health services	1		AD
29 March 2007	Economics	Private equity market activity	1		AD
29 March 2007	Environment, Communications, Information Technology and the Arts	Risks associated with projected rises in sea levels around Australia		1	AG
14 June 2007	Community Affairs	Cost of living pressures on older Australians	1		Opp
21 June 2007	Economics	An assessment of the benefits and costs of introducing renewable energy feed-in-tariffs in Australia		1	AG
9 August 2007	Legal and Constitutional Affairs	The detention and release of Dr Mohamed Haneef		1	AG
11 September 2007	Treaties Joint Standing Committees	Australia-Russia Nuclear Cooperation Agreement		1	AG

Date	Committee	Subject	Agreed to	Negatived	Source
13 September 2007	Environment, Communications, Information Technology and the Arts	Risks associated with the rise in sea level in Australia		1	AG
17 September 2007	Foreign Affairs, Defence and Trade	Australia-Russia Nuclear Cooperation Agreement		1	AG
19 September 2007	Rural and Regional Affairs and Transport	Effect of climate change on Australia's agricultural industries	1		AG
Total			**25**	**38**	

Abbreviations

AD Australian Democrats
AG Australian Greens
FF Family First
Govt Liberal/National Parties
ON One Nation
Opp Labor Party

Parliamentary Privilege and Search Warrants: Will the US Supreme Court Legislate for Australia?

Harry Evans

It is not often that a matter before the United States Supreme Court has the potential to reach into Australia and influence a basic constitutional law of this country. Such is the situation with an issue now potentially before the Court, involving the question of whether members of the legislature have any immunity against the seizure of their legislative documents by executive agencies through the execution of search warrants.

Significant developments in the law on this subject occurred in Australia, based partly on US precedents, before the distinct question arose in Washington. There is the possibility of the Supreme Court's first pronouncement on the issue feeding back into Australian law and changing the rights of members of the Parliament here.

The law

The law involved relates to the immunity of parliamentary proceedings from impeachment and question in the courts.

There are two aspects of this immunity. One is the immunity from civil or criminal action and examination in legal proceedings of members of the Houses and of witnesses and others taking part in proceedings in Parliament. This immunity is usually known as the right of freedom of speech in Parliament. Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts.

The immunity is in essence a safeguard of the separation of powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.[1]

Members of the Houses and other participants in proceedings in Parliament, such as witnesses giving evidence before committees, are immune from all impeachment or question in the courts for their contributions to proceedings in Parliament. As those contributions consist mainly of speaking in debate in the Houses and speaking in committee proceedings, this immunity has the significant effect that members and witnesses cannot be prosecuted or sued for anything they say in those forums. Thus the common designation of the immunity as freedom of speech. It has long been regarded as absolutely essential if the Houses of the Parliament are to be able to debate and to inquire utterly fearlessly for the public good.

The other important effect of the immunity is that the courts may not inquire into or question proceedings in Parliament as such. Subject to explicit constitutional provision, the courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the application of those procedures. The two Houses are thus free to regulate their internal proceedings as they think fit. The immunity of parliamentary proceedings from question in the courts is regarded as necessary for the two Houses to carry out their functions without the fear of their proceedings being delayed, restricted or regulated by actions in the courts.

In Britain the immunity was given a statutory form in Article 9 of the Bill of Rights of 1689, which was interpreted and applied by the courts in a number of cases. The famous article declares:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (I Will. & Mar., Sess. 2, c.2, spelling and capitalisation modernised. The commas which appear in some versions are not in the original text.)

That body of law became part of the law in Australia by virtue of section 49 of the Constitution, which provides:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In section 16 of the *Parliamentary Privileges Act 1987*, the Parliament used its legislative power to define 'proceedings in Parliament' for the purposes of the application of the article 9 law as including 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee', and to define impeaching or questioning to include any

[1] cf *US v Johnson* 1966 383 US 169; *Hamilton v Al Fayed* 1999 3 All ER 317.

'questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings'. These definitions reflected the case law on the subject in Britain and Australia developed since 1689.[2]

The British law was also inherited in a form in America. The Constitution of the United States provides that 'Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place' (Article I, s. 6). The immunity thus applies there to members, not to proceedings, and only to speech or debate, and therefore appears at first sight to be narrower than its British equivalent. The provision has been interpreted, however, as conferring a wide immunity on members in respect of their participation in legislative activities.3 The immunity, because it is expressed to apply to members, does not protect congressional witnesses in respect of their evidence, which is a difference from the Australian and British law. Congressional witnesses are granted certain immunities under legislation, but they may be prosecuted in the courts for perjury.

The Australian cases

In 1999 a senator's office was raided by Australian Federal Police investigating alleged misuse of entitlements, and documents, printed and electronic, in the office were seized. The senator challenged the legality of the seizure of the material, and the Senate supported his challenge in part, on the basis of parliamentary privilege.

The Senate's submission was to the effect that the immunity of proceedings in Parliament from impeachment or question in the courts, as explicated in section 16 of the *Parliamentary Privileges Act 1987*, means that a senator should not be compelled by legal process to produce documents closely connected with the senator's participation in parliamentary proceedings. The rationale of this interpretation is that senators would be impeded in their free participation in parliamentary proceedings if the documents connected with those proceedings could be compulsorily disclosed or seized by law enforcement agencies, even where the documents could not be subsequently used in legal proceedings.

In presenting this submission, the Senate had only one legal precedent to appeal to. This consisted of a judgment of the US Court of Appeals in 1995 which held that a member of Congress could not be compelled by the discovery of documents process to reveal documents associated with the member's legislative activities. The court held that compelling members to produce such documents would have a chilling effect on their information gathering and their legislative functions, and that the discovery process could not be used for a wide-ranging search of members' documents.[4]

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2 The statute has been accepted by courts in both countries as an accurate statement of the earlier law and the content of article 9: *Amann Aviation v Commonwealth* 1988 19 FCR 223; *Rann v Olsen* 2000 172 ALR 395; *Hamsher v Swift* 1992 33 FCR 545; *Prebble v Television NZ Limited* 1994 3 NZLR 1.

3 For example, *US v Johnson* 1966 383 US 169; *US v Brewster* 1972 408 US 501; *Gravel v US* 1972 408 US 606.

4 *Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408.

This judgment had already been referred to in Australia. It was persuasive in influencing two justices of the Queensland Court of Appeal in 1997 to hold that a senator could not be compelled by discovery to produce documents prepared for the purpose of parliamentary proceedings.[5]

The difficulty was that these judgments dealt with the discovery process, not with seizures under search warrant, and there was no certainty that the courts would apply the same principle in the case of such seizures. On the contrary, it was quite possible that the courts would draw a distinction between legal processes such as discovery and the execution of search warrants, which allows the executive government to seize materials to gain evidence for a prosecution but does not determine whether the evidence can subsequently be admitted before a court. Also, the cases dealt with discovery in civil proceedings. An argument could be mounted that different considerations apply to criminal proceedings and the investigations leading to them.

On the interpretation put by the Senate, such distinctions would be erroneous and founded on an incomplete understanding of the immunity. It protects members and legislative proceedings against criminal actions as well as civil, and therefore the production or seizure and scrutiny of members' legislative documents should not be used to undermine the bar on criminal proceedings any more than civil actions. Parliamentary proceedings and members' contributions thereto could effectively be impeached and questioned by requiring the production of the documents which lie behind these proceedings, particularly sources of information used by members, which could then be attacked through other investigations and legal proceedings. This evil would result regardless of how documents were compelled. Indeed, search warrants are more deadly in that respect than discovery and subpoena; an application for discovery and a subpoena can be challenged in the court through whose authority they occur, but the unimpeded execution of a search warrant means that documents immediately fall into the hands of executive agencies. The potential for intimidation of legislative activities is obvious.

The apprehended evil is clearly seen when it is remembered that members of the legislature, in their capacity as tribunes of the people, both rely upon and protect the public they serve. They receive complaints from constituents about government departments and agencies, complaints which are often made on the basis that parliamentarians will investigate them without disclosing their sources. In the past some such complaints have been the means of exposing serious official wrongdoing. Both the members and their constituent informants would be constrained by the thought that executive agencies, whether indirectly through law enforcement bodies or directly through their own search and seizure powers which many of them possess, would be able to identify citizens who are complaining about them by reading members' documents under cover of a search warrant. This would certainly chill parliamentary activities.

In the challenge brought by the senator, a justice of the Federal Court held that the question was one for the Senate and the executive and not for the court, as search warrants are an executive process. This judgment has been much criticised as contrary to the many cases in which courts have reviewed the form and application of search

[5] *O'Chee v Rowley* 1997 150 ALR 199.

warrants, and is not likely to be followed in the future. The judgment produced the desired result, however, because the court ordered that the seized documents be delivered to the Senate.[6] The Senate was then able to arrange for a neutral third party to examine the documents and to return those protected from seizure, according to the view taken by the Senate, to the senator.[7] Some unprotected documents were passed to the police, but the senator was not prosecuted.

A similar procedure was used in 2002 following the seizure under warrant of documents from the office of another senator. In that case, the state police accepted that some documents are immune from seizure by virtue of parliamentary privilege, and agreed to the process for the neutral 'filtering' of the documents. All of the documents were returned to the senator, as none were found to be covered by the search warrant. Again the senator was not prosecuted.

The federal government also accepted the parliamentary privilege argument of the Senate, and adopted a procedure whereby, in all cases of future searches under warrant of the premises of senators and members, there would be a neutral 'filtering' of the seized documents.

To formalise that procedure, a memorandum of understanding and Australian Federal Police Guidelines agreed to by the President of the Senate, the Speaker of the House of Representatives, the Attorney-General and the Minister for Justice and Customs, governing the execution of search warrants in the premises of senators and members, were tabled in the Senate in March 2005. The documents provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. The agreement underlying these documents was the result of several years of negotiations by the Senate, successive Presidents and the Privileges Committee, arising from the committee's consideration of the cases referred to above.

The US case

In 2006 the congressional office of a member of the US House of Representatives was searched and documents seized under warrant by federal law enforcement agencies investigating alleged corruption. This is believed to be the first occasion of a search of a congressional office, and the congressman's challenge to the search provided the first occasion for the courts to consider whether the legislative immunity protected legislative documents from such seizure. The principal agency behind the search, the Department of Justice, appeared to accept that some legislative materials should be immune from seizure, and had put in place its own 'filtering' process to ensure that legislative material was not seized. The congressman challenged the search on the basis that any seizure in a member's office is unconstitutional on separation of powers grounds. The House of Representatives did not support that wide claim, but maintained that the congressman should have been allowed to 'filter' immune material before non-immune material was seized.

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6 *Crane v Gething* 2000 169 ALR 727.

7 Senate Committee of Privileges, 114th Report, August 2003, Parliamentary Paper No. 175/2003.

In making this submission, the House of Representatives drew upon the earlier cases about discovery, and also referred to the Australian Senate's precedents, and particularly the agreements entered into by the Senate and the police in relation to the conduct of searches. The precedents of the New South Wales Legislative Council, which has successfully asserted the immunity, were also referred to. Submissions were also made to the court by former members of Congress, one of whom specifically recommended the Australian procedures.

The court initially ordered that a 'filtering' process be carried out. Then, in a judgment delivered in August 2007, the court held that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, and that that claim should have been determined by the court so that immune documents would not fall into the hands of the law enforcement agencies. The court thereby came to a position identical to that argued by the Australian Senate in its submissions to the Australian Federal Court in 2000.[8]

This judgment, if allowed to stand, will be persuasive if the question again comes before the Australian courts. With that proviso, that is not likely to happen, because of the agreement of our law enforcement agencies to the 'filtering' process whereby documents claimed to be immune are withheld from seizure pending the determination of a claim. The only gap in the Australian law is that, due to the Federal Court's judgment, it is not finally decided whether the courts should be making that determination or whether the Senate itself should do so, as in the past cases. It appears that, for the time being, the government is content to have the Senate making that determination through a neutral third party in future cases.

The US Department of Justice, however, has now petitioned the Supreme Court for a review of the judgment of the Court of Appeals, claiming that the judgment will seriously hamper the investigation of corruption offences on the part of legislators. The government position as expressed in the petition now seems to be that the parliamentary immunity confers no privilege against the seizure of documents under search warrant, and any 'filtering' process is an act of voluntary restraint on the part of the executive. One basis of the petition is that the law is uncertain because of other judgments suggesting that the legislative privilege is only a use immunity, that is, it limits the use to which legislative documents may be put in legal proceedings, but does not prevent their disclosure through legal processes and search warrants. This interpretation ignores the requirement for members to protect their sources of information, and the debilitating effect on their legislative activities if they were not able to do so.

The US government submission, if accepted, would completely subvert the proper application of the parliamentary immunity to the execution of search warrants, which should prevent material coming into the possession of the executive government by means of a warrant before claims of privilege are independently determined.

The submission that the law reflected in the Court of Appeals judgment impedes or delays criminal investigations and prosecutions does not stand up to scrutiny. It is

[8] *US v Rayburn House Office Building*, Room 2113, 2007, not yet reported.

significant that this complaint has not been raised at any stage by Australian law enforcement agencies, state or federal. The appropriate process under this law is that documents potentially within the scope of a search warrant are sealed and the affected member given a reasonable but limited time to claim privilege in respect of any of the documents. A court-ordered and supervised filtering process is then put in place to determine the claims in relation to particular documents. Documents in respect of which the claim is not upheld are ordered to be delivered to the law enforcement agency. This procedure should not result in any unreasonable extension of the already lengthy time which can be spent on criminal investigations and prosecutions before they come to a conclusion. Given the time taken by investigations, and all the other possibilities for questions of law to be raised, determined and appealed in the course of such prosecutions, legislative privilege claims should not be a major concern.

It is not clear when, if ever, the Supreme Court will hear the case. It may decline to do so and allow the judgment of the Court of Appeals to stand.

The implication for Australia

If the Supreme Court were to support the government's case, such a judgment could be found persuasive by Australian courts if the question were ever to arise again here, and there could thereby be a feedback effect on the Australian law. Executive agencies, urged on by law enforcement organisations, which are always seeking to expand their investigative powers, would have an incentive to attempt to overthrow the current agreed arrangements. Those arrangements rest ultimately on one Federal Court judgment which in turn rests on the American law as it then appeared. If the US law, declared by the Supreme Court, were to release search warrants from the scope of the legislative immunity, the Australian courts could well be persuaded to follow. This would diminish the protection which Australian legislators currently have and open up a loophole for executive interference with parliamentary activities.

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