

Mandates and reforms

There has been no dearth of proposals for reforming the Senate. As we would expect, some of them have been thoughtful and carefully argued; others have not. However, all these proposals have two things in common. First, all are predicated on assertions or assumptions about why the Senate exists and what role, if any, it should play in Australia's political system; and, second, all conclude that there is something that needs to be reformed—that there is some significant misfit between the reformers' assertions or assumptions and their assessments of the status quo.

When thinking about proposed changes affecting the Senate that politicians themselves have made, it is worth bearing in mind that their judgments about political institutions often are colored by the political situations in which they find themselves at the moment. If an institution serves their purposes, they may conclude that it deserves to be respected and protected. If it poses an obstacle to their ability to achieve their goals, they may discover that the institution is in need of 'reform'.

Conflicting statements by many political leaders, in Australia and elsewhere, could be adduced to illustrate this point, but we need look no further than Prime Minister Howard. In June 2003, the Prime Minister began floating proposals to make it easier for the government and the House of Representatives to override Senate objections to a government bill. The proposal would eliminate the need for a double dissolution, followed by an election for all members of both chambers, before a joint sitting could be convened to vote on a bill that the Senate had refused to pass in a form acceptable to the government. One proposal would permit a joint sitting after the dissolution and election of the House of Representatives, but not the entire Senate as well. An alternative would allow the government to convene a joint sitting without any intervening dissolution and election at all. Why? According to the Prime Minister, 'Tragically for Australia, the Australian Senate in

recent years, so far from being a states' house or a house of review has become a house of obstruction.¹⁹⁷

In commenting several months later on Prime Minister Howard's proposals, Senator John Faulkner, the ALP's Leader of the Opposition in the Senate, noted that Howard had spoken of the Senate in much more complimentary terms in 1987, before he became Prime Minister.¹⁹⁸ The Senate, he had argued, was:

one of the most democratically elected chambers in the world—a body which at present more faithfully represents the popular will of the total Australian people at the last election than does the House of Representatives. *Commonwealth Parliamentary Debates* (House of Representatives), 8 October 1987:1022

Faulkner also quoted Howard's 1997 opinion about the Senate's exercise of its legislative powers:

The Senate has a perfect right to determine the way in which it will process legislation ... If those opposite [the ALP] had behaved with a little more respect towards the rights of minorities in this parliament over the years, then perhaps they would not be facing the attitude that is now being taken by the Senate. If they had not insulted the Senate, if they had not sought to undermine the Senate, if they had not described the Senate as 'unrepresentative swill', if members of the Labor Party did not contain within its ranks people who still want to destroy the Senate, they would not be faced with this situation. *Commonwealth Parliamentary Debates* (House of Representatives), 19 August 1993: 330

With this reminder that 'reform' is in the eye of the beholder, we will review in this chapter several recent proposals to illustrate their variety, comment on their merits, and illuminate the theories of Australian government implicit in them. First, though, we will examine one of the most familiar and powerful collections of assertions and assumptions about how Australia's national policies are supposed to be made and how its parties in Parliament are supposed to behave. This theory of sorts, which many Australian politicians have seemed to endorse when it has been to their advantage to do so, goes to the heart of Australia's political order and implies a minimal and largely passive role for the Senate within that order.

197 John Howard. 'Closing Address to the Liberal Party National Convention—Adelaide SA', 8 June 2003. Available electronically at www.pm.gov.au/news/speeches/2003/speech2331.htm

198 John Faulkner. 'Reform of the Senate', 16 August 2003. ALP News Statement. Available electronically at www.alp.org.au//media/0803/20005358.html.

The matter of mandates

One way in which many politicians and some scholars have tried to clarify the respective roles and powers of the House of Representatives and the Senate is by resorting to claims of electoral mandates. So much sweat, if not blood and tears, already has been shed in arguments about the existence and meaning of mandates that I enter the fray only because of the implications of the theory of mandates for the centrality of the House and the marginality or illegitimacy of the Senate, especially when it actually exercises its constitutional powers.¹⁹⁹

The principles of responsible government, conventionally understood, imply that a majority in the Parliament, or the lower house of a bicameral parliament, will prefer the existing government to any available alternative. These principles do not necessarily require that the government can and should prevail in the Parliament on all occasions and on all matters. In the Commonwealth Parliament, the government always *can* prevail because its supporters command a majority in the House and they are united in a single disciplined party (or an almost equally disciplined coalition of parties). However, to conclude that the government always *should* prevail requires a further justification that emerges from the mandate theory of democratic governance.

Briefly put, the mandate theory asserts that the government has both the responsibility and the right to have the Parliament enact the legislative proposals that its party or parties had championed during the preceding election campaign. If the government fails to pursue enactment of those proposals, it fails in its obligation to the electorate and it breaks the links of democratic governance. Those links involve a clear and simple logic: a party seeks support from the voters for its program; the voters endorse that program by voting for the party and giving it enough seats to form the government; and the party then has the *responsibility* to enact its program into law. Furthermore, the verdict of the electorate gives the winning party, now in government, the *right* to enact its program. It would seem, therefore, that any constitutional arrangement, parliamentary procedure, or Opposition stratagem that might prevent the government from implementing its plans is, to that extent, illegitimate.

This is essentially the argument that Prime Minister Howard made after the 1998 election:

¹⁹⁹ The best discussion of this issue, certainly in the Australian context, is Goot (1999a).

I have a very simple view about the political process in this country. And that view is that elections are opportunities for opposing political forces to lay their plans in detail before the Australian people and when the Australian people have made a decision it is the obligation of the victor in that political contest to implement the plans laid before the Australian people. There is nothing complicated about it. (quoted in Nethercote 1999: 16)

Notice that there is no mention here of the fact that the Australian people had made a decision to leave the Senate under non-government control. Howard was speaking to a Liberal Party meeting, so he can be excused for attempting to rally the faithful. Nonetheless, he was unquestionably right in saying that he was expressing a very simple view about the Australian political process.²⁰⁰

The Prime Minister was not alone in claiming for his government a mandate to govern. That theme was a favourite among Australian editorial writers in the days following the 1998 election, as this sampling attests:

The Senate has no right to thwart a newly elected government's election program. In our Westminster system, the authority of government lies in the House of Representatives. (*Sunday Mail* (Adelaide), 4 October 1998, p. 16)

John Howard has won government and now has the right and duty to present to Parliament the program on which he was re-elected. Anyone who challenges that ... should go sit in a corner and not annoy the rest of the country. (*Daily Telegraph* (Sydney), 5 October 1998, p. 12)

No assertions from Labor ... can alter the fact that John Howard and the Coalition won the 1998 Federal election with an unquestioned mandate to govern. (*Sydney Morning Herald*, 5 October 1998, p. 12)

[O]ur Westminster convention decrees that the party with the majority of seats in the House of Representatives enjoys the right to govern. (*Herald Sun* (Melbourne), 5 October 1998, p. 18)

Australia made its choice with its eyes open and the Government should now be allowed to deliver. (*Australian Financial Review* (Sydney), 7 October 1998, p. 18)

[T]he second Howard Government, like its predecessors, is right to insist that it does have a mandate to implement its electoral program. (*Age* (Melbourne), 10 October 1998, p. B9)

200 There are more nuanced conceptions of mandates; see, for example, Emy (1996, 1997). Our interest, however, is with how the concept is used in political discourse, not in what political theorists think it should mean or how they think it should be used.

We will find this same theory reflected clearly in a current minister's critique of the Senate and the influence that minor parties can exercise in it. In a 1999 paper (Coonan 1999b) revised and republished in 2000,²⁰¹ Senator Helen Coonan, a Liberal Senator from New South Wales and Assistant Treasurer in the Coalition Government from November 2001, canvassed a variety of proposals to change the Senate, including abolishing the equal representation of the states in the Senate and authorizing a joint sitting of the two houses to resolve a legislative deadlock as soon as it occurs (not only after a double dissolution election and a third unsuccessful attempt to pass the bill). She did not directly endorse any such proposal because each would require a constitutional amendment, and Australia's track record of approving amendments by referenda made her very dubious about securing approval of any constitutional change, especially one that would be interpreted as reducing the political leverage of some of the states. Instead, she expressed most interest in a way of reducing the numbers of minor party Senators, or eliminating them altogether, by imposing a minimum percentage of first-preference votes that any party would have to win before it could receive transferred preferences and, therefore, hope to win seats in the Senate.²⁰²

Her underlying argument begins with the assertion that the Senate has become, or is in danger of becoming, 'an obstructionist competitor in the government of the country, frustrating or at least substantially delaying urgently required responses to national problems and regional and world crises,' and so 'is disabling Australia from realising and enjoying its full potential.' Instead of acting as 'a great institutional safeguard for all Australians', 'The Senate safeguard has in fact become a handbrake on progress.' This situation has arisen for reasons with which we have become familiar: the adoption of proportional representation in 1948 for Senate elections and increases in the size of the Senate, in 1948 and again in 1983, combined to facilitate the election of minor party Senators and to increase the likelihood that no government party would have 'the numbers' in the Senate.

The result has been that, when the government and the Opposition disagree, minor parties hold the balance of power in the Senate and can use their leverage to secure changes in government policies. The

201 This paper was presented as an address to the Sydney Institute on 3 February 1999. The quotes that follow are taken from the web version, available through [www.onlineopinion.com.au/May/hand.htm].

202 However, Coonan's own analysis showed that the imposition of even a relatively high five per cent threshold would not have prevented election of any of the 16 minor party or Independent Senators who were elected in 1993, 1996, or 1998.

current system for electing Senators ‘permits the election of minor parties on a fraction of the national vote who may then be in a position to exercise on behalf of their minority interests not just a voice, which indeed should be able to find expression in a healthy democracy, but in effect to have a casting vote on national legislation.’ Therefore, the election laws should be amended to make it more difficult for minor parties to win Senate seats. Coonan’s argument assumes that the government and the Opposition are routinely arrayed against each other which, as we have seen, is not at all the permanent condition in the Senate. But for the sake of argument, let us accept her assertions as to the leverage that minor parties have enjoyed and how they have used it. What is the problem that needs to be solved, other than the obvious inconvenience this situation poses for the government of which she is a member?

In using their votes to force changes in government legislation, she argues, the minor parties in the Senate are engaging in ‘political opportunism that reduces any sense of common purpose to the lowest common denominator,’ because they are interfering with implementation of the government’s electoral mandate. The government’s lack of a majority in the Senate requires the government to compromise which, she clearly implies, is a bad thing in parliamentary government:

[P]roportional representation has ensured that neither of the major parties will have a working majority in the Senate. At the very best that means that government will be by compromise. That, in turn, means at least delay, at worst inability on the part of Government to respond in what it considers to be effective and necessary ways to crises in the national and international spheres.

But is not compromise a virtue in democratic government? Evidently not in parliamentary government, because compromise intrudes on the government’s exercise of its mandate to govern:

[I]f responsible government is to function according to convention, in my view it requires the authority of the people ... to govern generally and in accordance with the specific promises and responsibilities spelt out in its policies. In our system, this authority is delivered to the party that wins a majority of seats in the House of Representatives and forms the Government.²⁰³

203 Not all Members and Senators agree, at least not all the time. Senator Amanda Vanstone, a fellow Liberal Party Senator and minister, offered a different view of what democratic politics, and the Senate, are all about: ‘In politics I don’t get what I desire most of the time, but you don’t want a system where people get everything they want. People who go into politics have a degree of megalomania. You’re there, Jack, you can do whatever you like. That’s why the Senate is there, that’s why the

Here is the mandate theory in full bloom. What need is there for any deliberative legislative process at all? The election determines a winner, so the winner—the government—has the right and responsibility, and should have the power, to do anything and everything that it said it would do. The government allows the Opposition to criticize its proposals, but the government would be violating its commitment to the public if it allowed itself to be swayed by the merits of the Opposition's arguments. In reply, as we shall find, the non-government parties may argue that they are the ones that really have the mandate because the government failed to receive the support of a majority of voters. This 'overall majority argument,' according to Senator Coonan, 'conveniently overlooks the fact that our present system awards government to the party that secures a majority of seats in the House of Representatives.' The obvious rejoinder, of course, is that her argument conveniently overlooks the fact that the same present system awards control of the Senate to the party or parties that secure a majority of seats in that house.

The second and more serious problem is that Senator Coonan only pays attention to the parts of her Constitution that she likes and not to those that are the ultimate source of difficulties for her government. We have heard her argue about what is needed 'if responsible government is to function according to convention,' and her argument might well be sound if she were a member of the House of Commons. But in Australia, the same Commonwealth Constitution that says not one word about responsible government, much less about the conventions surrounding it, is explicit in its grant of authority to the Senate to amend legislation. If Coonan is prepared to draw inferences about responsible government from what the Constitution does not say, advocates of Senate power are that much more justified in drawing the inferences that, if the Senate has the right to amend bills, it also has the right not to pass them until the House has responded to its amendments in a manner satisfactory to the Senate, or not to pass those bills at all.

As I have said, underlying Senator Coonan's argument is an uncomplicated and linear concept of democracy: (1) the party presents a program to the people; (2) the people vote for the party; (3) this constitutes an endorsement of the program; so (4) the party enacts the program. This understanding of how a democracy should work calls to mind the aphorism usually attributed to H.L. Mencken, that 'there is always an easy solution to every human problem—neat, plausible, and

states are there. It's frustrating, but the citizen should be grateful for this.' (quoted in Terrill 2000: 287)

wrong',²⁰⁴ except that here we have a solution that is worse: it is neat and plausible—and dangerous.

For better or worse, the mandate theory in Australia is something else that was transported and transplanted from Great Britain. The most explicit endorsement of the theory is found in the 'Salisbury Convention', by which the House of Lords committed itself not to block legislation to implement commitments that the government, with its majority in the House of Commons, had made in its most recent election manifesto. The convention dates back to 1945 after Britain elected its first majority Labour Government, which confronted a weak but not powerless House of Lords that was composed overwhelmingly of Conservative Party supporters. It was the Conservative leader in the House of Lords, Lord Salisbury, who agreed to the convention. Had he not done so, and had the unelected hereditary peers delayed enactment of Labour's legislation (to the extent the Lords still could do so under the Parliament Acts of 1911 and 1949), a powerful movement might well have developed for legislation to reform or abolish the House of Lords.²⁰⁵

The Salisbury Convention was justified on two grounds. First, the House of Lords was not elected and so was not able to claim any democratic legitimacy. Second, the political composition of the Lords always favoured the Conservatives to an overwhelming degree. The consistent result was an imbalance in party composition compared with the Commons, and especially, of course, during periods of Labour government. Neither of these conditions holds true in Australia. The Commonwealth Senate always has been directly elected, and it can make its own claim to being as representative as the House of Representatives. The House claims that it is the representative body because seats in the House are allocated to, and within, the states on the basis of population. In the Senate, of course, each state enjoys equal representation regardless of its population; so, the House argues, it cannot claim to be a truly representative body. Defenders of the Senate reply, however, that the Senate actually is *more* representative than the House, in that electing Senators by proportional representation has produced a closer correspondence between seats and votes in the Senate than in the House. In other words, the distribution of seats among parties is closer in the Senate than in the House to the distribution of votes among the parties in the national electorate (Evans 1997b: 22–23). A party that receives 40 per cent of the vote, for example, is more

204 *The New York Evening Mail*, 15 November 1917.

205 As we recently have observed, such a 'constitutional' reform can be achieved in the UK by ordinary legislation.

likely to win more or less 40 per cent of the seats in the Senate than in the House.

Notwithstanding these differences between the situations in London and Canberra, Australian governments have adopted the mandate theory with great enthusiasm. In his review of the 1975 crisis, Gough Whitlam laid out a formulation of this misguided and pernicious theory that is so stark and strong as to merit quotation at some length:

[T]he mandate of 1972 was the most positive and precise ever sought and ever received by an elected government in Australian history. The program was the most comprehensive, its promulgation and popularisation the most intensive and extensive in our political history. Its central elements had been developed not in the three weeks of an election campaign ... but over a period of half a decade and more. Three successive conferences of the Labor Party, in 1967, 1969, and 1971, had rewritten two-thirds of the Party's platform. The program's crucial reforms in the three great areas of schools, hospitals and cities had been presented to the people not once but four times, at elections in 1967, 1969, 1970 and 1972, each time more precisely, each time more successfully, until their unequivocal endorsement on 2 December 1972. I deliberately ignore in this context our equally clear mandate on matters related to international affairs—the ending of the Australian commitment in Viet Nam, our recognition of the People's Republic as the sole government of China, the interment of the already moribund South East Asia Collective Defense Treaty Organisation (SEATO), the independence of Papua New Guinea and the ending of conscription for military service in Viet Nam or anywhere else. (Whitlam 1979: 5)

We believed that the precision of the program reinforced the strength of the mandate and that so strong a mandate would meet with no more than token resistance from a Senate which had no mandate at all. We were grievously wrong. The strongest resistance came on the very matters upon which we were most entitled to believe our mandate to be the most explicit. (Whitlam 1979: 5–6)

As leader of a reform government, I placed the strongest interpretation on the meaning of the mandate given at an election by the majority of the people. Conservatives naturally prefer its restricted interpretation—that an election win confers a mandate to govern but is not an instruction to implement an election manifesto to its last detail. The weaker interpretation is not, I believe, acceptable for a party and government of reform. Our minority position in the Senate confirmed my determination to interpret the mandate in the strongest sense. (Whitlam 1979: 7)

The ALP had campaigned on a clear and comprehensive policy program, and the voters had approved that program by voting for the

ALP, which gave the ALP a mandate—a right and a responsibility—to implement its program ‘to its last detail.’²⁰⁶

Whitlam is to be forgiven for the enthusiasm that he and his Labor colleagues brought to his Ministry after the ALP’s 23 years in the political wilderness, just as he is to be forgiven for the righteous indignation he continued to feel several years after his dismissal. Nonetheless, the factual assumptions of his argument are breathtaking.

To accept his argument requires us to accept, first, that the Australian electorate was fully aware of each and every one of the elements of the Labor Party program. This is an assertion for which Whitlam offers no evidence, of course—his book is political argument, not political science—nor can I offer any evidence to the contrary. However, what political scientists have learned about the public’s interest in and its attention to the positions of political parties leads me to believe this claim to be entirely implausible (McAllister 1998; Goot 1999a).²⁰⁷ Here, for instance, is Jaensch’s assessment of the situation in Australia as of 1986:

A summary of survey findings suggests that most Australians are not informed, not interested, and show a very low level of knowledge of personalities, institutions, issues or policies. Few voters even know the names of their local members, or the candidates they voted for at the last election. Many do not distinguish between state and national politics, and many of the voters have no idea of the policies of the party they supported, or of the issues at the election. (Jaensch 1986: 148)

Yet Whitlam—and, more important, contemporary advocates of electoral mandates, whether in Parliament House or universities—would have us accept that Australians voted for the ALP in 1972 *because* they supported the Labor program *in its entirety*, and in particular because the voters supported in 1972 key proposals that, by the same kind of logic, they must have rejected on three prior

206 This was not just a post hoc formulation. Nethercote (1999: 13) quotes a lecture that Whitlam gave in August 1975, several months before his dismissal, in which he asked rhetorically whether his government’s mandate in 1972 and again in 1974 had been ‘a grant of permission to preside or a command to perform’. Not surprisingly, he concluded that it was the latter.

207 After the Republican Party took control of the US House of Representatives in 1995 for the first time in 40 years, its leaders immediately claimed a powerful mandate to enact immediately a specific catalogue of bills, known as the ‘Contract with America,’ that many of its candidates had supported during the campaign. Survey research subsequently revealed that relatively few voters knew about this ‘Contract’ or paid much attention to it or could identify its elements. Could it fairly be said, then, that the Republicans really had a mandate to enact their treasured agenda after 40 years as the seemingly permanent minority party?

occasions. The voters had been presented with the party's 'crucial reforms in the three great areas of schools, hospitals and cities' in the elections for the Senate in 1967 and 1970, and in the intervening election for the House of Representatives in 1969. Labor did not emerge from any of these elections with a working majority in the chamber that was contested. But when Labor then won in 1972, it was supposedly because the voters now approved those same reform planks. In each of the four elections, the reforms were presented to the people 'more precisely' and 'more successfully,' so the 1972 election constituted an 'unequivocal endorsement' of them. Any reader who has no difficulty imagining average voters deciding to support Labor because they agreed with Whitlam that SEATO was moribund is welcome to accept the other assumptions his argument requires.

These assumptions are (or were) subject to empirical examination. Although it is too late to interview a random sample of Labor voters to learn why they voted for the ALP, what they knew of the party's program, and which elements of that program they supported and which they opposed, it would be possible to ask those same questions of Labor voters today and then extrapolate backwards, on the plausible assumption that the basis for voter choice is probably not that much different now than it was 30 years ago, and that the level of public knowledge about parties and politics was probably not much greater then (and quite possibly less then) than it is today. Lacking such evidence, I cannot prove that Whitlam's implicit theory is wrong. I would wager, however, that (1) public comprehension of Labor's program was far, far more shallow and less widespread than he would like to believe; (2) support for specific policy commitments was only one among many reasons—Whitlam's personality and style being prominent among them—that led Australians to vote for Labor in 1972; and (3) most Labor voters who supported some ALP policies also opposed others of the party's policies—or they would have opposed them if they had known about them.

There are two other reasons for questioning the empirical basis of the mandate theory. First, the theory assumes that voting is prospective, not retrospective—that voters make their decisions on the basis of what the competing parties promise to do in the future, not on the basis of voters' evaluations of what the parties have done in the past. In many instances, I suspect, Australians, like Americans, cast their votes in order to 'throw the bums out.' That kind of cliché about democratic politics implies that voting is retrospective. The same inference also has to be drawn from much of the rhetoric of the Opposition, whether that happens to be the ALP or the Coalition. The Opposition is constantly criticizing the government. In fact, we may say that the Opposition

spends most of its time for several years trying to convince Australians that the incumbent government deserves to be kicked out of office. Then it spends only a matter of weeks explaining what it will do if elected to replace the government. If voting is prospective and based on a comparison of the parties' policy promises for the future, why do all parties devote most of their time and energy to criticizing the evils and errors of what their competition did in the past or is doing now? There can be no such thing as an electoral mandate (and this is true by definition) unless elections are decided on the basis of parties' promises for the future, not their record of performance in the past. The parties' own strategies and rhetoric strongly imply that they do not believe this to be the basis for voters' choices—at least until the morning after a party wins the House and then discovers that it has won a powerful mandate after all!

A second, related reason is that the mandate theory assumes that voters are voting *for* a candidate or party and not *against* a candidate or party. Yet consider Solomon's (2001: 185) claim that 'The way people vote at election time is mainly influenced by their dislike of one side or the other, rather than their attraction to particular policies.' To the extent that voting is retrospective, it is a verdict on the performance of the party or coalition in government. If voters are satisfied with the government's performance, they are likely to vote to retain it in office. If not, they are likely to vote against it. In either case, the basis for voter choice is *the government's record* and what it portends for the future, not the policies espoused by the Opposition. Furthermore, this is a perfectly rational basis for choice. The government's record is there to be evaluated, and it is reasonable for voters, like investors, to extrapolate from past performance to future results. How are voters to evaluate the Opposition's promises, especially if it has been out of power for some years and its current leaders have no record of performance as government ministers? This is not to say that all voting is retrospective instead of prospective or that voters are less likely to vote for the party they support than to vote for an alternative to the party they oppose. However, both are reasonable ways for voters to make their decisions, and there is no room for either in the theory of electoral mandates.

In addition, there are at least two other, more normative, reasons for rejecting the mandate theory. First, as I have argued, the theory posits that the government has a responsibility as well as a right to enact its program. The government made promises to the people during the last campaign, and the electorate voted for the government on the basis of those promises. Now the government must fulfill its promises. How,

therefore, can a government justify failing to do its best to implement one or more of its campaign promises?

Paul Kelly recounts that, after the 1975 election, 'The most crucial early decision of the Fraser government was the reversal of its previously stated stand in favour of wage indexation':

In a day Fraser had repudiated one of the central campaign promises on which he went to the electorate. The key economic proposals he put to the people were the implementation of tax indexation backed by wage indexation. This was explained throughout the campaign in the clearest possible terms in speech after speech. ... Fraser was not terribly concerned about repudiating a key section of his policy platform if other factors came into play. He believed that the government was elected by the people in an act of trust to take the best decisions possible at any given time, rather than be tied to a specific set of promises. He claimed that dogmatism would inevitably lead to bad government. (Kelly 1976: 324–325)

Was he wrong? Surely under some circumstances, a government's failure to live up to one of its commitments can be condemned as misrepresentation and dishonesty. Under other circumstances, though, the same decision not to implement a campaign commitment must be recognized as an adjustment to changing circumstances or to the discovery that policy choices that looked simple when in Opposition are revealed to be more complicated when in government.

For our purposes, the point is simple. The more a government insists on its responsibility as well as its right to implement each and every one of its campaign promises, the more it must accept condemnation whenever it does not try its best to do so. A government may respond by seeking to distinguish between electoral commitments that were at the heart of its appeal to the voters and others that were of lesser significance, arguing that it is at liberty to ignore the latter.²⁰⁸ That argument has merit, however, only if voters know, before making their voting decisions, which of its promises each party is committed to honouring and which it is not. But, it will be argued, conditions change, so it would be unreasonable to demand that a government keep all its

²⁰⁸ Emy (1997: 74) has proposed that 'It would be desirable for the parties to agree to make a clearer distinction between core promises, on which each was seeking specific electoral endorsement, and non-core promises which would have the status rather of good intentions.' This strikes me as impractical. No party would want to lose the flexibility that an explicit distinction between core and non-core promises would compel it to forsake. And no group of Australians would be happy to learn that the promise a party has made to meet the group's needs or advance its interests was really just a non-core promise, a statement of good intentions. The pressure on parties to move almost all its promises into the 'core' would become intense and irresistible.

promises when some of them no longer suit the needs of the nation. That is exactly right; it would be destructive to demand consistency at all costs. But is it only the government that has the right to make such judgments? Surely the non-government parties have an equal right—and responsibility—to evaluate whether government promises continue to make as much sense as they did on election day.

Finally, consider once again Whitlam's claim to have had a right and responsibility to implement all of Labor's electoral program. The ALP emerged from the 1972 election with a majority of only nine seats in the House of Representatives. Although it had won its first House election after 23 years in opposition, its victory was something less than overwhelming. Yet Whitlam's mandate theory had nothing to offer all those who voted for non-Labor candidates. They had lost; there was nothing more to say. They would have to wait three years and then try again, just as Labor had waited and tried again, and then waited some more and tried once more, again and again throughout the seemingly endless era that Menzies had defined. Whitlam offers a winner-take-all approach to politics that evidently places no value on the concepts of compromise and accommodation, and finds nothing to be gained by giving a little in order to at least recognize the legitimacy of one's opponents' interests and preferences. In fact, Whitlam's concept of an electoral mandate, like that of his political soulmate, Senator Coonan, de-legitimizes compromise and accommodation. After all, the voters had endorsed the Labor program, not some diluted version of it. So those voters had a right to have that program enacted as it had been offered during the campaign. For Labor to have done anything else—to have agreed to compromises in the interests of finding common ground with the Opposition—would have constituted a breach of its trust with the electorate.

Why does the government insist on strict party discipline in the House? Not only because it can, but also because it should. Party discipline is needed to win, and the government must win because it has a mandate that gives it the responsibility as well as the right to win. And why does the government become so upset when the Senate delays, amends, or even defeats one of its bills? Not only because it frustrates the government's policy preferences, but because it also interferes with the implementation of the government's electoral mandate. A government is put in an untenable position when it has the right and responsibility to win, but not, because of the Senate, the ability to win—or at least to win as it should, without having to compromise. So, it is not difficult to argue, the Senate should not exercise its constitutional powers or the Constitution should be amended to strip it of those powers when they challenge the

government's ability to enjoy the fruits and meet the obligations of its mandate.

It is very easy to understand why any party that has won an election would want to claim that it has a clear and unequivocal mandate to implement its program. Perhaps the best response to a government's claim to have such an electoral mandate is to fight House fire with Senate fire. If the government lacks a majority in the Senate, does that not mean that the non-government parties and Senators enjoy a mandate of their own: a mandate derived from two elections over a six-year period; a mandate for them to oppose the government, especially because the parties' shares of votes at elections are more accurately reflected in the distribution of Senate seats than House seats?²⁰⁹

When the balance of power in the upper house is held by a few members none of whom belong to the largest two parties, we have the most complicated situation of all—everyone can claim to have a mandate for something. The government claims it has a mandate because it has won a majority of seats in the lower house. The opposition claims that it has a mandate to oppose the government's legislation because that is what oppositions are for, and because more voters voted against the government than voted for it. And the minor parties and independents in the Senate can claim that they were elected precisely because their supporters wanted to modify the government's legislative program. (Sharman 1998: 154)

That was the kind of argument made in 1995 by Senator Cheryl Kernot, then Leader of the Democrats in the Senate:

[W]hile [the Democrats] do not have a mandate to govern the country or to over-ride the Government's political or economic agenda, we do have a mandate ... to ensure the Government is made accountable and that its legislation is properly scrutinised and debated ... (quoted in Lipton 1997: 200)

And then again, after the 1996 election:

Voters opted to take out an insurance policy by giving balance of power to the Democrats ... [M]ore than half the people who deserted Labor gave their primary votes to candidates other than the Coalition Clearly, there are two mandates resulting from this election: one for government to be changed, and one for a balance of power check on that Government in the Senate. (quoted in Sugita 1997: 171)

209 'In declaring their opposition to the privatisation of Telstra as a major part of their election policy, the Democrats claimed that they had secured a mandate to oppose the sale of Telstra in the Senate. The incoming coalition government, on the other hand, argued that only governments could have mandates and that the Senate should respect its mandate to sell.' (Mulgan 1996: 197)

In the 1996 election, five of the Democrats' seven Senators were elected, one in each of five states. In light of the claim that Senator Kernot made after that election (just quoted), it is fair to observe that, of those five Senators, none received as much as 15 per cent of the first-preference votes cast, and five of the six were the last in their state to achieve the quota of votes required to win a seat, thanks to the distribution of preferences. The Democrats won their seats according to the rules of the game, to be sure; whether the magnitude and manner of their victories justified any claim to having received a mandate is a different matter entirely.

If we accept Senator Kernot's arguments, then I think it is fair to say that the concept of electoral mandates contributes nothing useful to prescribing what constitutes appropriate, even legitimate, uses of constitutional powers by either the government or its parliamentary opponents. If everyone has a mandate, then no-one does. Let Sharman continue:

The issue may be simply the extent to which governments must compromise when they make new laws—from this perspective no-one has a mandate to do anything except enter into negotiations. The present situation in the Commonwealth Parliament requires governments to compromise so that a larger group than the governing party, perhaps even a body of parliamentarians representing a real majority of voters, supports a proposed measure. This means that, quite apart from any amendments that may be required, legislation is closely scrutinised, and the government of the day and its supporting bureaucracy must publicly justify every proposed law to a legislative body whose support cannot be taken for granted. (Sharman 1998: 154)

All claims of electoral mandates should be viewed with profound suspicion unless it can be verified that they accurately reflect the knowledge, preferences, and intentions of the voters. Most often we can expect to find that mandates are mirages, the wishful thinking of those claiming to have received them—a commonplace rhetorical device that most or all parties can use in attempts to convince themselves and others that they are acting in the name and in the interests of the voting public. Claims of mandates become dangerous, however, when they are invoked to support a claim that the government has a right to govern without hindrance and, therefore, that any hindrance by the Senate is undemocratic and illegitimate. For all the constitutional, electoral, and political reasons that we have explored, no one party is likely to enjoy such a mandate in Australia, nor should we want it to. Sharman is correct in concluding that 'no-one has a mandate to do anything except enter into negotiations,' and that is something to be welcomed, not deplored.

Complicating this discussion is a distinction sometimes drawn between a general mandate and a specific mandate.²¹⁰ The general mandate is a license that the voters are supposed to have given the government at the last election to do as it thinks best, as circumstances require but within the parameters of the party's known philosophy. The voters then will review the government's performance at the next election and decide whether or not to extend its mandate. The specific mandate, on the other hand, is a directive that the voters are supposed to have given the government at the last election to enact and implement certain specific proposals that it enunciated during the election campaign. At the next election, the voters will evaluate the new sets of proposals presented by all the parties and decide which of them will receive the electorate's directive to proceed with its program. In either case, the relationship posited between voters and governors requires that the government be able to do what it thinks best (in the case of a general mandate) or what it has promised to do (in the case of a specific mandate). And in either case, the relationship is understood to be between the electorate and the party or parties that control the House and, therefore, comprise the government.

There is no place here for the Senate. By implication, therefore, the Senate should not do anything that impedes, delays, or prevents the government from fulfilling its mandate with the people—except to act as the House of Review, whatever that may mean—no matter what powers the Constitution gives the Senate.

Governments are likely to claim that the mandate covers a general right to govern which gives them a right to determine policy as they see fit, subject only to the eventual verdict of the voters. They also claim a specific mandate which confers a right, *and a duty*, to enact policies contained in their election program. In 1993, these two aspects of the mandate came into conflict over the budget. The government held that its (general) mandate entitled it to enact the budget as it stood (with consequent damage to financial confidence if this mandate was interfered with). The coalition, on the other hand, argued that the budget was in breach of the government's (specific) mandate in so far as it increased taxes. (Mulgan 1996: 196; emphasis added)

With both mandates in hand, the government cannot lose. It can insist on enactment of the policies it advocated during the campaign because of its specific mandate, but it also can claim the right to enact policies inconsistent with its campaign pledges, or which were not

210 This is a distinction for which Goot (1999a) has considerably less sympathy than Mulgan (1996).

discussed during the campaign, because the voters also have bestowed on it a general mandate—‘a general right to govern.’

In fact, any government needs to insist that it has both mandates. Take the case of Australia’s present Coalition Government. Its 1998 re-election campaign emphasized its support for enactment of a Goods and Services Tax (GST). So after its victory, it naturally claimed what was in effect a specific mandate to enact that policy into law. Then, in 2003, the same government decided to involve Australia’s defence forces in the war against the government of Iraq, a position that could not possibly have been in the minds of voters at the last election as well as a position that, if opinion polls are to be believed, did not enjoy the support of most Australians when the decision was made.

Some mandate theorists would argue that, when such a critically important issue arises in this way, the government should call an election to have its policy endorsed before committing itself to a course of action. Although that actually could have been done in the case of the war in Iraq, the Howard Government did not do so. In fact, the government made it clear that it would decide on its policy without recourse to the electorate and that it would make its decision *before* it scheduled a full-dress debate on the issue in Parliament. The government must have been relying, even if implicitly, on its conviction that it held a general mandate. Furthermore, that is precisely what Australian governments often must be doing. It simply is not practical to hold new House elections every time a major new issue requires a governmental response before the end of the current government’s three-year term. Yet even in these circumstances, governments still insist on having their own way, claiming that this is their right because they have a mandate to govern, so non-government Senate majorities should not try to make them compromise on policies that never have been presented to the electorate.

But even though governments need to claim both mandates, the two are incompatible with each other. The concept of a general mandate posits that voters put their faith in a party, trusting it to do what is wise and right, whatever the government decides, after the election, that may be. On the other hand, the concept of a specific mandate is predicated on voters choosing a party because it has produced a manifesto of specific policies that it has pledged itself to implement. The voters select that party because they agree with its menu of policy choices, not because of some generalized trust they have in the common sense, good judgment, and rectitude of the party’s leaders.

Presumably recognizing the problem, Mulgan proceeds to try to define it away:

Neither aspect of the mandate depends, as is sometimes thought ... on any conscious intention on the part of voters. ... the general mandate follows from the support for a government of a majority in the lower house; the specific mandate follows from the inclusion of a policy in the government's election program, *regardless of whether any voters knew of it, let alone whether their votes were determined by it*. Inclusion in the manifesto has been recognized as both necessary and sufficient for the recognition of such a mandate. (Mulgan 1996: 196, emphasis added)

In the process, the logical and empirical underpinnings of the specific mandate disappear entirely because voters now are able to prefer one party over another on the basis of policies of which they are unaware. There no longer is any necessary connection between specific voter preferences and specific government policies.²¹¹ And the general mandate seems to mean little more than 'we won, which gives us the power to govern, which gives us the right to govern.' Mandate is reduced to mantra.²¹²

Certainly representative government assumes and requires that those whom the people elect to represent them in government make a good faith effort to do what they have promised to do, in so far as they are able to do it and unless their policy commitments made during the election campaign are overtaken by events. There can be no argument with the second condition: we would not want our representatives to continue pursuing the policies they had announced without regard to how circumstances may have changed since election day. The real question concerns the first condition. Does the fact of a democratic election then require that those elected should be able to implement their campaign promises whenever and however they choose, or that they should pursue implementation of those promises within the rules of the game as already established by the Constitution?

From the way in which I have formulated the question, it will be obvious that I support the latter interpretation. Imagine, for example, that, in its manifesto or policy speech, a party promises to 'take whatever steps are necessary to protect the nation against terrorism', a

211 However, Mulgan later argued, with cause, that what is important is not the empirical or logical underpinning of mandate claims, but what claims politicians make and with what effect. From this perspective, 'The mandate is understood as a convention which allows a government after winning an election to proceed with a policy it has clearly announced during the preceding election campaign.' (Mulgan 2000: 319)

212 Uhr (1997: 74) speaks of mandates as magic. 'Mandate is a magic word in the sense that it is used just as magicians use special words to conjure up extraordinary effects to reinforce their spellbinding authority.' Both the concept and the consonance are the same.

not unlikely promise in today's world. If that party wins, surely it does not now have *carte blanche* to take *whatever* steps it decides are necessary; its policies and actions still must conform with basic principles of human rights, civil liberties, and democratic freedoms. By endorsing the party's commitment to fight terrorism, the electorate certainly has not somehow nullified the constitutional authority and responsibility of the High Court to invalidate the government's new laws as unconstitutional if that need should arise. No, the only mandate that the electorate can give to any government is one to proceed within the limits of the established constitutional order, and, in Australia, that established constitutional order includes the Senate with its virtually co-equal legislative authority, just as it includes the High Court and its authority. Whether these constitutional arrangements are good or bad is another question. For our thinking about mandates, what matters is that these arrangements exist, and no election result can set them aside or should be used as an excuse for trying to do so.

A democratic constitution establishes a set of procedures and institutions that, collectively, lay out the rules of the game in which advocates of different public policies compete to have their preferred policies enacted as law. No election victory, no matter how sweeping, can sweep away the rules of the governance game. In Australia, those rules include the constitutional powers of the Senate and the statutory procedures for electing Senators.²¹³

The electorate bestows two things on the winner of a free and fair democratic election for parliament (or for president and congress). First, it bestows the advantage of numbers. If the winning party gains a majority of seats in parliament, it gains an obvious advantage in its efforts to see its policies enacted. Under most parliamentary standing orders, it also gains effective control of the legislative agenda, so that it

²¹³ What that election victory may do, however, is enable one team of players to change the rules of the game, if it is willing and able to do so. A theme to which we shall return in the next chapter is that the continuing non-government control of the Senate, which has been critical to the contemporary revitalization of the Senate, depends on continuing to elect Senators in much the same way they are elected now. This makes the Senate vulnerable to an agreement between the government and the Opposition to change the rules of the game. There are several ways in which this might be done without appearing to change the electoral system in a fundamental way. As Senator Coonan suggested, for example, there could be a threshold imposed of some percentage of first preference votes that a minor party would have to win before it would be eligible to have any of its candidates elected to the Senate with the benefit of voters' second and later preferences. Or states could be divided into a number of districts in each of which only one or two Senators would be chosen at each half-Senate election, which would make it far harder for any minor party or Independent candidate to secure election.

decides what proposals will be considered seriously, as well as when they will be considered and for how long. Second, the electorate bestows a sense of legitimacy on the party's policies. The party can, and certainly will, claim that the election demonstrates the public's support for its program. Even if there is no evidence that most voters know very much about that program and that they voted for the party because of that program—in other words, there is no basis for a specific electoral mandate—at least the winning party can argue that the voters prefer its program to any of the other party programs that were on offer at the election.

Notice that neither of these advantages is dichotomous; the winning party enjoys them to greater or lesser degrees. A close election may give the winning party only a slight numerical advantage in the parliament. (In fact, one of the major complaints about some election systems is the degree to which they produce a disparity between seats and votes, with the winning party receiving a percentage of seats that is considerably larger than its percentage of votes.) That advantage may not be enough to produce winning majorities on all parliamentary votes. It may suffice, for example, to pass legislation by majority votes, but not to take any actions that require a higher majority such as a two-thirds vote. Or, if more than two parties have won seats, the 'winning' party may win only a plurality of the seats, so it still will need to find parliamentary allies in order to create winning majority voting coalitions.

By the same token, the persuasiveness of the winning party's claim to have the public's support for its programs also depends on the magnitude of its election victory. A party that wins a 51 to 49 per cent victory hardly can make a convincing claim that 'the people' have endorsed its program wholeheartedly when almost every second voter opposed it. 'John Howard claimed victory on the night of the [1996] election, publicly noting his 'very powerful mandate' arising from his remarkably large forty seat majority. The Coalition's share of the final two-party preferred vote for the house was very large by historical standards: just under 54 per cent.' (Uhr 1997: 74) In that election, the government won 46.9 per cent of the first preference vote (Goot 1999a: 327). Are we simply to ignore the facts that a majority of Australians gave their first preference votes to other parties or candidates, in effect voting against the government, as did the voters who gave the Coalition only half of the Senate seats that were contested in that election? Instead of claiming a mandate from the people, would it not have been more accurate for the Prime Minister to have claimed a mandate from half the people?

It is tempting to dismiss all talk of mandates as nothing more than self-serving wishful thinking, and to invoke an old axiom of American politics—that where you stand depends on where you sit. It was Prime Minister John Howard who did not hesitate to claim a mandate after the 1996 election, so perhaps it was some other John Howard who, as a member of the Opposition in 1987, had asked during a House debate why the Labor Government of the day did not agree to a public referendum on its Australia Card legislation:

[W]hy do they not put that belief [that the public supported the bill] to a test at a referendum and not hide behind the argument that there is some kind of mandate out of the last election? That suggestion is invalid not only in terms of the number of votes cast but also on the simple proposition that when people vote at an election they do not vote on only one issue. *The mandate theory of politics from the point of view of proper analysis has always been absolutely phoney.* (*Commonwealth Parliamentary Debates* (House of Representatives), 15 September 1987: 57, emphasis added)

Governments inevitably will continue to claim electoral mandates (no leader of a winning party could possibly resist the temptation) and, on that basis, argue that the Senate, if it has a non-government majority, should respect the government's mandate by not delaying or rejecting government bills and by not insisting on Senate amendments that are unacceptable to the government and the House. Not so, we learn from the same John Howard, this time speaking in the House in 1993:

The Senate has a perfect right to determine the way in which it will process legislation. If under the constitution the Senate has coextensive powers with the House of Representatives, except in relation to certain designated matters, does that not mean that the Senate has a perfect right to say in which circumstances, in what time, through what process and through what procedure it will deal with legislation that comes to it from the House of Representatives? (*Commonwealth Parliamentary Debates* (House of Representatives), 19 August 1993: 332)

I doubt that many readers will be shocked to encounter such inconsistencies, and I would be surprised if we could not discover that an ALP leader had made similarly inconsistent statements about mandates. Yet it would be a mistake to become *too* cynical about mandate claims because, after all, there is supposed to be a discernible linkage between electoral choice and parliamentary decisions. It would be wrong, in several senses of the word, for the non-government majority in the Senate to refuse to pass any of the major legislation proposed by a government that has just won a landslide victory in the House. But it would be equally wrong for the Senate to passively endorse every bill sent to it by a government that had barely been able

to scrape together a House majority after an election almost three years earlier.

More judgment is required, of course—more political nous—when the political situation falls somewhere between these two extremes, as it usually will. Still, it is worth bearing in mind a conventional principle of statutory construction: that there is presumed to be a reason why a law gives someone the authority to do something and, therefore, that there is presumed to be some circumstance under which it is proper for that authority to be exercised. So too for interpreting a constitution: if it grants, even by necessary implication, a government institution—the Senate, for example—a power to do something, it must have been with the expectation that, under some circumstances, it would be proper for the institution to do what the constitution empowers it to do. If the Senate acts to block or dilute government legislation that most Australians actively support, the government has an obvious recourse: to go to the people during the next election campaign and ask the voters to punish those Senators who were responsible for thwarting the will of the nation. Parties and politicians have a wonderful facility for anticipating such attacks and protecting themselves against them by accommodating themselves to what they are convinced their voters want.

If *Odgers' Australian Senate Practice* (2001: 13) is any indication, the Senate itself is well aware that deciding how much deference to give to government bills requires the exercise of judgment; it is more complicated than a simple 'yes or no' proposition. In developing the theme that the Senate should use its constitutional powers 'circumspectly and wisely,' its author, Harry Evans, identifies a number of factors for Senators to consider, including:

A recognition of the fact that the House of Representatives represents in its entirety, however imperfectly, the most recent choice of the people whereas, because of the system of rotation of senators and except in the case of simultaneous dissolution of the two Houses, one-half of the Senate reflects an earlier poll.

The principle that in a bicameral parliament one house shall be a check upon the power of the other.

Whether the matter in dispute is a question of principle for which the government may claim electoral approval; if so, the Senate may yield. The Senate is unlikely to resist legislation in respect of which a government can truly claim explicit electoral endorsement, but the test is always likely to be the public interest.

The third of these factors recognizes, in all but name, that sometimes a government can claim a mandate for specific legislation and that, in those cases, the Senate generally should defer to the

government. However, there also is a loophole: the Senate may act otherwise if it decides that doing so is likely to be in the 'public interest.' This last phrase, obviously enough, is so broad and imprecise as to open a loophole through which the Senate could drive a roadtrain when it decides to be governed by its own judgment instead of the government's legislative program.

As John Uhr reminds us, by referring back to the Salisbury Convention (discussed above), the mandate theory was born and raised during the course of a constitutional and political debate over the respective powers of the elected House of Commons and the hereditary House of Lords:

The misleading model of 'mandate' is drawn from the British parliament at Westminster, where the mandate theory developed in the pre-First World War struggle between the House of Commons and the unelected House of Lords. The irony is that it was the Lords which foolishly taunted the Commons with the charge that a range of contentious government bills on social policy lacked a mandate. The Commons successfully curtailed the power of the unelected Lords to obstruct government bills, and adopted the strategy of claiming a mandate for every contentious bill. ... Mandate theories derive from the inter-cameral disputes of Westminster, and seem an inappropriate response to the realities of parliamentary power in Australia ... (Uhr 1997: 75–76)

In Great Britain, no credible claim then could be made that the House of Lords enjoyed democratic legitimacy; in Australia, no credible claim now can be made that the Senate does not. This difference is no mere detail. Any Australian government that would claim that its electoral mandate gives it a right and responsibility to enact its program without hindrance or delay must concoct a satisfactory explanation why Australian national policy should be determined solely by the outcome of free and fair elections affecting one side of Parliament House but not influenced at all by the outcome of equally free and fair elections affecting the other side of the same building.

In earlier chapters, experts on the Commonwealth's election laws have been heard to argue that it is virtually impossible for either the ALP or the Coalition to win control of the Senate. To be more specific, for either protagonist to win the Senate outright, it would have to win electoral landslides that would be unprecedented in modern Australian history. Whether a government majority in the Senate is impossible or merely unlikely, the fact remains that, as each election campaign begins, both sides know that the winner is almost certain to confront a Senate that it does not control. This leaves each of the major party protagonists with two choices.

One choice is for the ALP and the Coalition each to proclaim all the fine and wonderful things it will do if it receives the people's mandate to govern. Then, if it wins a majority in the House of Representatives, it must attempt to convince non-government Senators that, in exercising their constitutional authority, they should defer to the government instead of exercising their own best judgment even though they too were elected to legislate. If the government does not succeed, it may berate the Senate, bemoan its fate, seek a double dissolution, or do all three. The other choice is for both major parties to accept and acknowledge that, whichever of them wins the election for the House, its victory will be incomplete, and, therefore, that it needs to moderate its campaign promises accordingly. Perhaps if Australia's political leaders spent less time in campaigns making promises that they know they may not be able to keep, there would be less talk after elections of expectations unfulfilled, promises broken, and commitments unkept. Perhaps there also might develop a better public understanding of the practical realities of the Commonwealth political system.²¹⁴

I wonder what the citizens of the state of Victoria make of a recent amendment to their Constitution. Section 12 of the *Constitution (Parliamentary Reform) Act 2003*, assented to on 8 April 2003, amended the *Constitution Act 1975* by adding a new Section 16A for the purpose of 'improving the relationship between the Houses':

16A. *The principle of Government mandate*

- (1) It is the intention of the Parliament that regard should be given to the following principle—

The Council [i.e., the Legislative Council, which is Victoria's equivalent of the Commonwealth Senate] as a House of Review will exercise its powers in recognition of the right and obligation of the current Government to implement—

 - (a) the Government's specific mandate—the policies, promises and initiatives which were publicly released by or on behalf of the Government during the last election campaign; and
 - (b) the Government's general mandate—to govern for and on behalf of the people of Victoria.
- (2) The principle in sub-section (1) is not to be construed as limiting the powers of the Council, the Assembly or the Parliament.

²¹⁴ The same argument can just as well be made about American presidential campaigns. The danger, of course, is that the voters of either nation may punish a candidate (or party) who resists telling them what they want to hear.

I admit to having no idea what this section is intended to mean and what effect, if any, it is intended to have. In one brief section, the Constitution now gives constitutional standing and sanction to a collection of concepts that we already have reviewed critically: the upper house as a House of Review, the government's obligation as well as its right to implement its program, and both its specific and its general mandate to do so. By itself, sub-section (1) seems to be sending a message to the Legislative Council to be more circumspect. Sub-section (2), however, seems to be saying that sub-section (1) is not intended to effect any changes in the powers of either house or in their exercise of those powers. In that case, I can only think that if this new section has any effect at all, it will be to increase confusion, not clarity, about the respective roles of the Legislative Assembly and the Legislative Council. Worse yet, it will embolden Victorian governments to claim that they now have an affirmative constitutional obligation always to win in their Parliament.

Politics is a complicated and subtle business (though rarely depicted as such by Australia's politicians), and those who offer simple answers are likely to be wrong. That is true with regard to the Senate and the exercise of its legislative powers. In deciding when and how and how much to exercise those powers, it must respect the judgment of the voters and what the results of the last election imply about their policy preferences. This involves making thoughtful and informed judgments about which issues and proposals seemed to capture voters' attention and their fancy, and which were less important to them. What an election says about public support for a specific policy proposal depends on how much emphasis the party gave to that proposal during the campaign, how clearly the party articulated its proposal, and how much that one proposal dominated the party's approach to the campaign.²¹⁵ The Senate also must respect the principles of responsible government as they apply to the creation and survival of the government and its relationship with the House of Representatives. But the Senate also must respect itself and the Constitution that gave birth to it. Balancing all these things is not easy; there is no formula for calculating the right balance. But then anyone who thinks that making a political system work is easy has never spent much time in Canberra—or Washington or Paris or Tokyo or Brasilia or ...

215 'If a general election is fought on a single issue, in such a way as the whole election seems to turn on the question of whether or not a particular policy ought to be adopted, the victorious party can meaningfully claim to have a mandate to follow its known policy in that particular matter.' (P.A. Bromhead, quoted in Goot 1999a: 330)

Proposals for reform

Having disposed of the matter of mandates, let us turn now to a review of the merits and broader implications of several proposals affecting the Senate that would require either statutory or constitutional change.

Blocking the Senate from blocking supply

Senator John Faulkner, Leader of the Opposition in the Senate for the ALP, wrote (1999: 126) that ‘Labor is committed to constitutional reform to prevent the Senate rejecting, deferring or blocking appropriation bills,’ and that he thought there might well be a multi-party consensus in favour of doing so. In an obvious response to the events of 1975, Faulkner argued that:

The real problem [concerning the Senate] arises with regard to the Senate’s power to deny financial sustenance to a government, particularly when such power is exercised not because of any objection to the content of the legislation appropriating the funds, but to bring down the government. This flies in the face of one of the basic principles of our system of government, that a government is responsible to the House of Representatives and continues in office only so long as it has the confidence of that House. (Faulkner 1999: 125)

Faulkner, of course, is not the first to make such an argument, and certainly not the first ALP leader to do so in the aftermath of ‘the troubles’ of 1975. Whitlam proposed at the 1976 Australian Constitutional Convention in Hobart, for example, that ‘this convention recommends that the Constitution be amended so as to remove the power of the Senate to reject, defer, or in any other manner block the passage of laws appropriating revenue or moneys or imposing taxation.’ And in 1979, the ALP proposed at its federal conference that the Senate should not be able to delay any money bill and that it should not be able to reject any bill or delay any other bill for more than six months (Hutchison 1983: 147–148). This proposal clearly was reminiscent of the Parliament Act of 1911 in the UK. More recently, in 1988, a commission on constitutional reform recommended:

that the Constitution be altered by the inclusion of sections to limit the power of the Senate to reject, or refuse to pass, Bills it cannot amend. In particular we recommend that the Constitution be altered to provide that:

If at any time during the first three years of a parliament the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Bill shall be presented for the Royal assent. (quoted in Jaensch 1997: 61)

I argued in Chapter 4 that the Coalition majority in the Senate should not have used the Senate's constitutional power to block supply because its essential reason for doing so was to serve its short-term political advantage, so I sympathize with Faulkner's objective (but not with Labor's far more draconian 1979 plan). The question, though, is whether the necessary solution to the problem is a constitutional amendment that reduces or nullifies the Senate's power under sec. 53 of the Constitution.

Such an amendment would deny the Senate its most powerful constitutional weapon on the grounds that, like nuclear weapons, the power to deny appropriations to the government is a power so drastic and damaging that its use never can be justified. Even if that is true, however, that does not necessarily leave us with a choice only between a Senate that has been constitutionally castrated and a Senate that can force a government to resign. There are more benign alternatives.

One could amend the Constitution to give Representatives, like Senators, a fixed term of office of, say, three or four years unless the requirements for a double dissolution are met. If the Constitution were amended in this way, it would transform the consequences of blocking supply. A non-government majority no longer could take this step with the hope or expectation of forcing the government to call an early election because there could be no early election for the House alone. Senators would have to convince the government to seek a double dissolution which, of course, would put every Senator at electoral risk as well. However, such a constitutional amendment would affect the dynamics of politics and governance in other and less predictable ways. It may or may not be desirable to prevent governments from calling elections at times that are expected to work to their electoral advantage. Any constitutional amendment that would have this effect needs to be evaluated and approved on its own merits, not as a means to achieve some other purpose that can be achieved more directly.²¹⁶

Another related proposal that also is more benign than reducing the Senate's legislative powers would amend the Constitution to provide that, if the Senate fails to pass budget legislation, a double dissolution must ensue. (Recall that in 1975, the Governor-General was able to grant a double dissolution only because other bills, unrelated to the

216 In 1981, a Labor-supported bill in the Senate would have established a fixed term of four years for both houses, prevented the Senate from blocking supply in the future, and barred the Governor-General from again dismissing a government—all obviously in reaction to the events of 1975 (Souter 1988: 580–581). Faced with opposition from the Fraser Government, only the first of the three provisions survived the Senate's deliberations. But even this truncated bill died in the House.

crisis over supply, already had met the requirements of sec. 57.) In this way, Senators would exercise their greatest and most extreme constitutional power, and thereby force an election on an unwilling government and House, only if they were prepared to put all of their own seats at risk. On its face, this proposal has the virtue of promoting fairness. Appealing though it may be, however, I question the practicality of this proposal.

First, the poor track record of past proposals for constitutional amendments, as well as the virtue of constitutional continuity and stability, argue that a 'solution' that involves amending the Constitution should be the last resort chosen. Second, it is doubtful that a constitutional amendment could be drafted in a way that would eliminate all doubts as to if and when the Senate actually has refused to pass legislation that would trigger a double dissolution. Recall the questions that have arisen in the past about what constitutes 'failure to pass.'²¹⁷ Third, if the amendment applies only to bills funding the ordinary annual services of government, the Senate would be free to block every other spending and revenue bill. Alternatively, there is a danger that the coverage of the amendment would be so broad, covering any bill with any significant spending or revenue provision, that the cure would prove more injurious than the illness. Fourth, there is no guarantee that the double dissolution would produce a new Parliament that would not be inclined to continue the same party battle, but now with fresh troops in the ranks of each.

Fifth, a period of some weeks, at a minimum, would necessarily intervene between the Senate's action and, after the double dissolution and the election that follows, the convening of the newly-elected Parliament. So if the 'crisis' is not to continue during that time, the double dissolution may have to occur early enough so that the electoral process can be completed before the money runs out. But that would require a determination, presumably by the government, that a constitutionally sufficient blockage has occurred when more than ample time remains for further negotiations and for a political solution to the impasse to be reached. Any observer of democratic politics appreciates the importance of timing in political negotiations and the tactical value of resorting occasionally to brinkmanship. Political solutions often are found for what seem to be even the most intractable disagreements, but only when an unavoidable deadline looms. The political process in a

217 An approach to this difficulty might be to amend the Senate's standing orders to require it to vote on approving covered legislation within a specified period of time. But this requirement would be effective only if it could not be suspended, amended, or repealed by majority vote.

democracy often is messy and replete with uncertainties, and I doubt that this proposed amendment could make it otherwise.

There are other, less drastic, alternatives to be considered, one of which derives from recent American experiences.

As I mentioned in the context of the 1975 crisis, it has become almost commonplace for the departments and agencies of the American federal government to run out of money to continue their normal operations, or teeter on the brink of doing so, because the President and the Congress are unable to reach agreement on the necessary appropriations bills for the new fiscal year. Almost invariably, the response is for the President and the Congress to agree to a temporary funding bill—a new law that temporarily continues the availability of funding for what usually is a matter of days or a few weeks in the hope that a long-term agreement can be reached before the end of that time. If that hope proves a forlorn one, another continuing resolution, as these stopgap appropriations laws are known, is enacted.

Typically, a continuing resolution allows one or more departments and agencies to continue spending but only at the same rate they could spend during the fiscal year just ended (perhaps with an adjustment for inflation) and only for the purposes for which they could spend during the prior year. This is the most obvious and ‘prominent solution’ (to use Thomas Schelling’s famous phrase) to determining a generally acceptable temporary funding level. Sometimes, though, more complicated formulas are used, or certain exceptions are allowed for implementing new program initiatives on which both the President and the Congress, and both political parties, agree. One or more such continuing resolutions have been enacted in most recent years. Yet the Congress has been unwilling to approve any bill that would create what is in effect a permanent continuing resolution by stating that whenever a funding deadlock occurs, the affected departments and agencies may continue to spend, for existing purposes only and at last fiscal year’s level, until the deadlock is resolved without the necessity for Congress to enact a targeted continuing resolution on each occasion.

The reason lies in the fact that any funding level that is established in advance introduces a bias into the political contest in that it gives one side or the other in the dispute an incentive not to resolve it because that contestant finds the status quo under the permanent continuing resolution to be preferable to any alternative solution it is likely to negotiate with the other side. If, for example, there is a deadlock over the bill appropriating funds for defence, with the President seeking to increase defence spending significantly and the Congress wanting to cut it marginally, the Congress might well prefer no agreement to any agreement that the President is likely to accept. In short, no automatic

funding mechanism can be devised that is policy neutral and, therefore, politically neutral. It would work to the advantage of either the President or the Congress, though who benefits, of course, would vary from issue to issue and from year to year.

What is a problem in Washington, however, might not be considered a problem in Canberra. Appropriating funds permanently, not annually, is a practice already well-known to the Parliament.²¹⁸ The government might be reasonably content with a mechanism that allowed it to continue spending at the same rate at which it had been able to spend under its own budget for the previous year.²¹⁹ In fact, if the automatic spending mechanism was triggered on more than rare occasions, a government might even begin building into its budget for each year a cushion to ensure that it would have adequate funding levels if it had to continue operating under that budget during part of the following year. In any event, a law providing automatic spending authority would avoid the danger that a deadlock between the government and the Opposition, manifested in a deadlock between the House and the Senate, would bring the Commonwealth to a halt. It also would allow the Senate to retain its existing constitutional power to refuse to pass an appropriation bill, but only to dramatize its policy disagreements with the government. The Opposition could not use a deadlock over appropriations for short-term partisan advantage, as Fraser and associates did in 1975, because it could no longer be argued, as it was in 1975, that a government that cannot ensure supply has no choice but to resign.

I am not the first to suggest such a mechanism for Australia. On 23 September 1987, Senator Michael Macklin, Australian Democrat from Queensland, presented his Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) Bill 1987, which proposed to add the following new paragraph to sec. 53 of the Constitution:

If the House of Representatives passes a proposed law appropriating revenue or moneys for the ordinary annual services of the Government in respect of a year, and at the expiration of sixty days after the day on which the proposed law is transmitted to the Senate the Senate has not passed the

218 As of the mid-1980s, according to Reid and Forrest (1989: 350–352), roughly two-thirds of annual expenditures from the Consolidated Revenue Fund and Loan Fund were authorized by permanent appropriations, leading them to conclude that ‘Nowadays the greater bulk of public expenditure escapes annual approval by Parliament.’ According to *Odgers’ Australian Senate Practice* (2001: 310) the proportion had increased to 78 per cent in 2001.

219 Some accommodation might be necessary during the first year of a government’s life, when the budget for the prior year was not its own.

proposed law, there shall be deemed to be in force, until the Parliament makes a law appropriating revenue or moneys for those services in respect of that year, a law appropriating for those services in respect of that year an amount of money equal to the amount appropriated for those services in respect of the year immediately preceding that year.

In short, his constitutional amendment would have allowed the government to spend during a financial year at the same rate as during the prior financial year if the Senate failed to pass the appropriation bills for the ordinary annual services of the government within 60 days after receiving those bills from the House.

My suggestion is for a law, much like the one that Senator Macklin proposed, that would be triggered on the first day of a new financial year if the basic annual appropriations bill for that year had not already been enacted. Senator Macklin's proposal, by contrast, would have given the Senate 60 days to act on that appropriations bill, once passed by the House. If the bill were not enacted by the end of the 60-day period, funding at last year's level would become available for the coming financial year, even if time remained for additional negotiations and legislative action before the new financial year actually began. More important, Senator Macklin proposed a constitutional amendment, whereas I doubt that is necessary.²²⁰

Ministers in the Senate

David Hamer, former Representative and Senator, has offered an array of reform proposals for the Senate (Hamer 1996). Assessing some of them, such as giving Senators four-year fixed terms and resorting to referenda to resolve House-Senate deadlocks instead of the current procedures involving double dissolutions and joint sittings, require far more analysis than he was able to offer in his brief essay. Other proposals that he made, though, are misguided on their face, at least if the American experience has anything to offer. Particularly noteworthy is his insistence (1996: 72) that 'The Senate should ... pass the Budget as a package. The Budget is such an interwoven mix of economic, political and social measures that to have a Parliament tinkering with its details is a recipe for disaster.' This, of course, is the present practice in both houses, and one that deprives them of their most effective possible

220 If this proposal would require a constitutional amendment, it probably would be doomed unless it had strong bipartisan support. It is too easy to imagine the amendment being criticized on the grounds that it would allow the government to continue spending the people's money, year after year after year, without anyone taking responsibility by voting for appropriation bills.

way to hold government accountable and make it more responsive to the Parliament. Nothing concentrates the mind of a US department or agency head more effectively than the knowledge that if the Congress is unhappy with his policies or performance, it has both the opportunity and the will to react by cutting his budget. Surely an Australian minister would be sensitive to the same prospect if he knew that parliamentary review of the budget amounted to more than an extended debate followed by a single vote on the entire package, without change.

Furthermore, the 'details' to which Hamer refers are the amounts that the party in power intends to spend to carry out the activities of the Commonwealth government (or some of them; many are funded indefinitely or permanently, as we have seen). A national budget may be presented as a mass of numbers and details, but in fact it is the single most important documented statement of the government's priorities for each year. It cuts through all the rhetorical commitments that governments make and the assurances of sympathy and support that they offer, and answers one of the most basic questions of politics: who gets what. In the same volume in which Hamer's essay appears, for example, John Langmore, a former Labor MP and minister, discusses several policy commitments that recent Labor governments made but then failed to fund adequately or at the levels they had promised. If a legislative body is denied the opportunity to tinker with those details of the budget, as is usually the case in parliamentary regimes, it is powerless to propose even marginal adjustments in the government's priorities. There is no more dramatic or consequential manifestation of the legislative weakness of parliaments.

The change that Hamer described as the key step that he would take is to remove all ministers from the Senate. Let Hamer make his own argument:

The Senate will not become a really effective legislature until ministers are removed from it. If this might be thought a remarkable act of self-abnegation by senators, the compensation should be that the chairs of major Senate committees are given the status and privileges of ministers, for they are, or should be, at least as important. It would not be difficult to gain these benefits for the chairs of major Senate committees because the Senate has to approve any increase in the number of ministers. This would give it considerable leverage in due course, if not immediately.

If the chairs of Senate committees were fairly divided between the various parties—and the Senate has recently made a start in that direction—there would be a situation where the major Senate figures owed their positions not to which party was in government but to their own standing in the Senate. The Senate would start to develop as an important legislature. But while ministers remain in the Senate, the Senate will continue to spend too much of its time duplicating the electioneering role of the House of

Representatives and, in the process, handing far too much legislative power to the minor parties and independents who hold the balance of power. (Hamer 1996: 74)

Other observers have come to the same conclusion. Four years later, for instance, Solomon (2000: 11) noted the argument that selecting some Senators as ministers actually weakens the Senate:

The idea is that the Senate is corrupted by containing members of the government of the day. Senators, it has been argued, would be better able to perform the legislative tasks if they were able to debate proposed laws in the absence of ministers. If people who were elected to the Senate were prevented from winning ministerial rank, the Senate would then be filled with people who wanted to be legislators, not members of the executive government. The proposal [to bar Senators from appointment as Ministers] has won the approval of many supporters of the Senate, but not of most senators. They still aspire to be ministers. And governments do not want to surrender the power they have over the members of the government party in the Senate, even if they do not control the whole of the Senate.

Hamer acknowledges that requiring all ministers to come from the House of Representatives would narrow what already is a modest talent pool from which prime ministers must assemble their governments. If the House is closely divided, the majority may have fewer than 80 members. If there are as many as 30 ministers, then three of every eight eligible members would have to be ministers if all ministers came from the House. Add to that the need to find ministers who are experienced, who know something about the portfolio they receive, and who represent the various states in reasonable proportions, and it becomes clear why it may be necessary for governments to find ministers among Senators, whether they might want to or not.²²¹ In turn, the presence of ministers on the government bench in the Senate, as well as shadow or former ministers on the Opposition bench, lends weight and credibility to Senate proceedings that they otherwise might not enjoy (Uhr 2002: 9–10).

Still, Hamer (1996: 74) argued, so long as Senators can hope to become ministers, ‘The whole political aspiration pyramid is skewed in the wrong direction.’ Nor is he alone in making this argument. Blewett (1993: 12) too contends that:

perfecting the Senate as a House of legislative review and as the body for effective scrutiny of the Executive ... would require the elimination of all

²²¹ However, that concern did not dissuade the House Standing Committee on Procedure from expressing the opinion in 1986 that all ministers should be Members of and responsible to the House of Representatives. (*House of Representatives Practice* 2001: 58–59)

ministers from the Senate. For while the ambition of most of the leading and abler players in the Senate is to retain or secure ministerial office, as it is today, then the capacities of the Senate will be distorted to service those ends.

To those who think that increasing the capacity of Senate committees would be a very good thing, it is an appealing prospect to change the incentive structure in the Senate so that the personal ambitions of Senators would be tied to the health and influence of the committees on which they serve and especially the committees they are selected to chair. At least ambitious Senators would have a choice between career paths—to take the chance of running for the House and securing appointment as minister if their party is in government, or to remain in the Senate and build their influence through service on committees. It is unclear, however, exactly how and why any governing party would permit any ‘reforms’ that would strengthen the Senate committee system, and thereby undermine the strength of parties and party discipline in the Senate. Most Senators will use their committee positions most of the time to promote the policies of their parties so long as they know that their continued service in the Senate depends on how highly their party organization places them on their party’s list for the next Senate election. Under the current electoral system, just about all it takes to put a Senator’s career in jeopardy is for his party to move him or her down from second or third to fourth place on the party list.

If there no longer are ministers in the Senate, the government and the Senate would have to compensate in some way. Just as Senate ministers now speak, at Question Time for example, for House ministers who cannot be present to speak for themselves, government Senators somehow would have to be designated to represent every minister. Otherwise, there would be no-one for the Opposition to interrogate. Whatever accountability now takes place through debate and questions in the Senate chamber would dissolve if only the Leader of Government Business in the Senate and the Government Whip could claim to speak for the government.

Hamer’s proposal also points to a related issue that he does not discuss but that also merits review: who speaks for the government before Senate committees? There recently has been a debate about whether Senate committees can and should require the appearance of ministerial advisors who are political appointees and advisors, not career public servants. There also is ongoing discussion about what kinds of questions it is proper to put to senior public servants when they testify before committees and what questions public servants should decline to answer and instead refer to their ministers. But what has received less attention is the wisdom and even the practicality of

continuing to observe the convention that Senate committees may not insist on receiving testimony from ministers who are members of the House of Representatives, as most ministers are.

The argument underlying this convention is that whatever bicameral harmony there is in Parliament House would be seriously damaged if one house decided that it had the right to interrogate members of the other house. The principle is sound and one that is respected in the US Congress as well. The problem, however, is that allowing this convention to continue to operate in Canberra seriously impedes any efforts Senate committees may make to evaluate government legislation or review government performance. Today a Senate committee can hear from a minister if that minister happens to be a Senator or if the minister chooses to accept the committee's invitation to testify. Otherwise, the committee must content itself with hearing from whichever government Senator is designated to speak for a minister from the House, or with hearing from public servants who are not supposed to be asked to defend government policy because that is the domain of the minister—who, of course, cannot be obligated to attend and offer that very defence.

Not all governments that are responsible to a parliament or its lower house draw their ministers from among the ranks of MPs. But in all those that do, ministers by definition wear two hats. With the merging of the legislature and the executive, ministers are at one and the same time members of the Parliament and members of the government. As MPs, they should be protected from demands from the other house for their appearance and testimony. However, this immunity that they enjoy in their capacity as MPs should not also immunize them from being held accountable in their capacity as ministers. It certainly would be inappropriate for a Senate committee to question members of the House about any of their actions or positions taken as the representatives of their electorates. But it should be appropriate for the Senate to insist that they answer questions about the actions and positions they have taken as government ministers. Surely there will be instances in which committees and ministers will disagree as to whether a particular line of inquiry crosses this border. In those cases, let the committee and the minister make their cases and let the public (and the media) decide whether the Senate is intruding into matters that are none of its business or whether the minister is stonewalling.

As long as the convention remains unchanged, Senate committees simply cannot provide the kind of scrutiny that accountable government requires. And, by the way, removing all ministers from the Senate would move all ministers beyond the reach of Senate committees

which, of course, would only hamper the committees' accountability efforts.

Installing presidential-congressional government

In his *Coming of Age: Charter for a New Australia* (1998), David Solomon, the author of two informative books on the Parliament cited elsewhere in this study, rejects precisely the kind of reform that we encountered Senator Coonan advocating during our discussion of electoral mandates. Specifically, he objects to a proposal floated but not yet pushed by leaders of Coonan's Liberal-National Government that would transform the Senate into a two-party house. Under this proposal, each state would be divided into six electoral regions, with two Senators to be elected from each, one at each half-Senate election that takes place every three years. At any one half-Senate election, only one Senate seat would be contested so inevitably it would be won by one of the major parties. Even in the case of a double dissolution, when two seats would be contested in each electoral region, the major parties almost certainly would win both seats and, what is more, they almost certainly would split them, with the ALP winning one and the Coalition winning the other. As a result, Solomon argues, minor parties soon would shrivel and die. Just as third parties never have thrived in the United States because they have no chance to win the ultimate electoral prize, the presidency, minor parties in Australia would lose their attraction to voters if they could not make a plausible argument that they had a chance to win representation in the Senate.²²²

In explanation of the proposal, Solomon quotes the Liberal Party official who had developed it as saying that its purpose was to enable the government to govern 'and not have interminable debate and compromises and committees and inquiries.' (quoted in Solomon 1998: 90) There we have it again: compromises as things to be avoided, but now linked with other undesirables which just happen to be staples of effective democratic legislatures: debate, committees, and inquiries. Perhaps the moral is to ignore proposals for political 'reforms' when they are made by people whose professional interest is only in winning power, not in the purposes to which that power is put.

One possibility is that implementing this proposal would produce a Senate that is evenly divided between the ALP and the Coalition.

²²² Another version would divide each state into three regions. During each normal half-Senate election, each region would select two Senators—almost inevitably one from Labor and one from the Coalition. The consequences for minor parties and Independents would be the same.

Another possibility is that the result would be a House majority of one party and a Senate majority of the other, a possibility that cannot be dismissed in light of the fact that half the Senators would have been elected at the preceding election, three years earlier. The frequency of divided government in the United States, with a president of one party occupying the White House and a Congress with majorities from the other party, or even a Congress with one party controlling the House of Representatives and the other party controlling the Senate, should make clever Australian political operatives contemplate that the same thing could happen in their country. This proposal, and variations on the same theme, would remove from the Senate the minor parties and Independents and the leverage they now often have, but at a considerable risk to any government's ability to function, and at the cost of substituting direct confrontation in the Senate between government and Opposition for the greater flexibility that the presence of other non-government Senators now provides.

Solomon's rejection of the Liberal Party plan would seem to cast him as a conservative who finds acceptable the current process for electing Senators and the distribution of Senate seats that it produces. Far from it, though. In fact, Solomon is the revolutionary in that his proposal for reforming the Senate is to abolish it in the process of scrapping everything that goes by the names of parliamentary or responsible government or the Westminster model in favour of an American-style presidential-congressional system.

His diagnosis and prescription are easily summarized: 'the real problem is that the executive government has come to completely dominate the lower house of parliament. That problem cannot be overcome unless the executive is moved out of the parliament altogether.' (Solomon 1998: 60) The discussion that follows is replete with disparaging observations about the House and what happens in it, typified by his claim that 'The only purpose of the house is to do the government's bidding.' (Solomon 1998: 72) In their current incarnations, the House and even the Senate are beyond salvaging as either legislative or oversight bodies because no government will permit them to work effectively:

[A]ll Australian governments reject and resist any suggestion that they should not be able to put into law any proposal which they have determined upon. In effect, they do not accept the notion that the parliament (or some part of it) has a role independent of government to consider independently and fashion the laws, to question and demand answers about the way in which the government is conducting the affairs of government, and to provide a form of public accountability. They will not acknowledge the extent to which they are supposed to be accountable to the parliament, let

alone surrender to the parliament the power to fulfil its theoretical responsibilities. Governments have preferred to forget that the people elect members of parliament to represent them. (Solomon 1998: 77)

Solomon (1998: 85) contrasts this diagnosis with a rather idealized vision of the American Congress and presidential-congressional relations and, not surprisingly, concludes that the Australian political system requires radical reform:

Governments, having taken control of parliament in the twentieth century, are not willingly going to surrender their powers and increase the ability of oppositions to upset their legislative programs or question their actions. Governments are not going to allow proposals for parliamentary reform to reduce the power of governments over parliament or make governments more responsible to parliaments.

The only way in which genuine reform will be achieved is through the adoption of something like the American system of separation of powers.

At this point, his vision for what this new political system would look like becomes rather fuzzy. But even if he had spelled it out in detail, we would not assess it here because long books have been written, and are needed, to fully compare, contrast, and evaluate parliamentary versus presidential-congressional regimes. No, what is more problematic is that Solomon fails to lay out any plan for getting from here to there. Given the government's control of the House through strict party discipline, why should we expect any government in Canberra to support such a radical change that is designed to confront it with an assembly that it is much less likely to control? Today the government does not control the Senate; tomorrow, if Solomon has his way, it would not control the parliament (or perhaps now best called the legislature) at all. Indeed, Solomon's critique has the ring of a *cri de coeur*: a diagnosis that he cannot avoid of a debilitating illness for which he has no practical remedy.

Is the situation as dire as Solomon believes? In theory, no. In theory, so long as non-government parties (and Independents) control the Senate, they have the leverage they would need to transform the Senate into an independent legislative body that holds the government to strict account for its actions, that reviews its legislation with a critical eye, and that even feels free to initiate its own bills—but only if they are truly, truly determined to make all this happen. The non-government majority has the ability to force any reform proposals it chooses onto the Senate's agenda and have them adopted over the government's opposition. Doing so would constitute a peaceful coup d'état of sorts, but it could be done. The government might respond, through its control of the budget, by trying to starve the Senate of resources to

actually implement its new ambitious plans, and as we know, the Senate cannot directly amend the budget. However, the Senate has the clear constitutional power to hold any and all government legislation hostage until it agrees to accommodate the Senate's demands (or secures a double dissolution).

All this could happen, but it is very unlikely, for at least two reasons. First, I suspect that most of Australia's Senators have been inculcated with the idea that parliamentary government is not only the best form of government, it is the natural and naturally right form of government for Australia. Most of them probably would be terminally uncomfortable with both the kinds of revolutionary changes in the Senate that are possible and also with the methods that would be required to bring them about. Second, any transformation of the Senate that would strengthen it vis-a-vis the government must, by necessity, be led by the Opposition. And I expect that any Opposition would be at best ambivalent about such a program because it sees itself as the Government-in-Waiting. As John Uhr (2002a: 15) has argued from a slightly different perspective, 'The major parties share a particular interest in ensuring that Senate power does not generate permanent gridlock adversely affecting their next turn in executive office. ... Given this very regular alternation in office, the major parties' own political ambition is an important constraint on Senate power.'

The role of the Opposition in Canberra, as in any parliamentary system, must be extraordinarily frustrating. Naturally, therefore, the Opposition must view its exile to the wrong side of the chamber as temporary, as aberrational, as an unnatural state of affairs that the next election is certain to cure. And equally naturally, therefore, that Opposition will be skeptical of any institutional reform that would work to its advantage today but would then cripple it during all those many coming years that it hopes and expects to be in government. It is all too likely, then, that any programs for major institutional change in the Senate—changes that would speak to Solomon's critique and obviate the need for the even more radical change he proposes—would fail because they would fail to find a champion in the Senate, certainly not on the government side and probably not on the Opposition side either. I will return to this calculus toward the end of the next chapter.

A head of state for a republic?

First, though, I will conclude this chapter by considering a proposal that has received far more attention than any of those discussed earlier: whether Australia should become a republic and, if so, what form that republic should take. I venture some personal observations on the

subject because I anticipate that, sooner or later, it will again occupy parliamentary and public attention as it did in the late 1990s.

On 6 November 1999, Australia rejected by referendum a set of constitutional amendments that would have replaced the office of the Governor-General with a President, elected by a two-thirds majority of the members of the Parliament, who would have exercised essentially the same powers that the Governor-General has enjoyed, and subject to essentially the same constraints. Since Federation, 44 constitutional amendments have been put to national referenda and only eight have succeeded. So it was not particularly surprising that this amendment also was rejected (as was another to add a preamble to the Constitution). Irving and McAllister (2001) are among those to point out, however, that, as Irving (2000: 111) puts it, ‘The result was ... even worse than most had predicted. Majorities in every State rejected both questions The national count of just over 45% in favour put the republic question in among the lowest third of all referendum results.’

Although the explanation of this result is not our concern here, surely some Australians preferred the status quo while others preferred to have a President directly elected by the people instead of one chosen by the Parliament.²²³ Still others would have been justified in voting ‘no’ because of the specific new constitutional language that was proposed (though I certainly do not suppose that many did so). Although that text now is primarily of historic interest, one provision of the proposed new sec. 59 deserves mention in light of our discussion in Chapter 4 of the 1975 crisis and in anticipation of matters that we will take up in the next chapter. The final paragraph of sec. 59, as proposed, stated that:

The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions that related to the exercise of that power by the Governor-General.

This new section would have established both reserve powers and conventions in the Constitution itself, but without defining either of them. Had this section been part of the Constitution in 1975, it would not have offered Governor-General Kerr any clear guidance as to

223 McAllister (2001: 256) reports survey results showing that ‘combining those who wanted a directly elected President with those favouring appointment by the Parliament—a large majority of the electorate were actually in favour of the introduction of a new system of government. Indeed, according to the survey, just 24% of those interviewed favoured the retention of the current system.’

whether his reserve powers extended to dismissing a government that still enjoyed majority support in the House of Representatives and, if they did, whether the governing constitutional conventions justified his dismissal of the Labor Government under the conditions prevailing on 11 November of that year. Almost exactly 24 years later, the Australian people were asked to create a presidency without knowing exactly what powers they were investing in that office.

As we shall see in Chapter 10, the approach taken by the drafters of the proposed sec. 59 has been justified on the grounds that both reserve powers and conventions cannot be defined and delimited precisely enough to reduce them to writing. If so, this inability to specify the powers of an office can be taken as reason enough not to establish it. On the other hand, it can be argued, and with force, that contention over the events of 1975 should not detract from the fact that Australia has lived quite comfortably for a century with understandings (or a lack of understandings) of both reserve powers and conventions that have remained unwritten. Later in this chapter, I will put forward a proposal that defines this problem out of existence. For the moment, though, let us simply set it aside and proceed on the assumption that it poses no insurmountable obstacle to having a president as Australia's head of state.

The first question, of course, is whether or not replacing the Governor-General with a President would be a good thing to do. This is a value-laden question that is not particularly susceptible to social scientific analysis. Is it desirable for Australia to have a continuing connection with the Queen and her successors? If the question were whether or not Australians should prefer a monarchy to a democracy, then political theorists and empirical political scientists would have something to contribute. Because the connection now is essentially symbolic, I have little to offer as a political scientist. Still, I will offer my own opinion that I tend to agree with those who believe that Australia derives no particular benefit from retaining that vestigial umbilical cord that the monarchy provides. One of my first vivid memories is watching the Queen's coronation on television. I have a certain admiration and affection for her. But if I were an Australian, I would be a republican.

This conclusion raises more questions than it answers. The 1999 referendum proposed a minimal agenda for change, essentially replacing the Governor-General with a President while transferring the powers of the former to the latter without substantive change. As we have just seen, this intention extended to an explicit attempt to transfer applicable reserve powers and constitutional conventions as well. For what undoubtedly was a mixture of reasons, the opportunity for a more

encompassing re-examination of the Commonwealth's structure of government was foregone. Some advocates of a republic, for example, would have liked to preclude any future President from exercising the kind of reserve power on which Governor-General Kerr relied in 1975. Others would have preferred to expand the powers of the President well beyond those of the Governor-General, with the goal either of having the executive power shared between the President and the prime minister and Cabinet, or of moving part or all of the way to an American-style presidential-congressional system.

Any such major re-design of the constitutional system is not something to be undertaken lightly. First, and inescapably, it involves value judgments—for instance, how important is governmental efficiency in making decisions when weighed against the breadth of support for the decisions made? Second, it requires a clear statement of exactly what is wrong and precisely how and why any proposed constitutional reform is going to fix it, and a convincing explanation why the problem cannot be solved without resorting to constitutional amendment. And third, it involves predictions about how certain institutional arrangements, whatever their theoretical virtues, will work in a particular set of circumstances. Ultimately it is pointless to argue the relative merits of parliamentary and presidential systems in the abstract because there are so many other factors that influence how they work in practice. Lijphart (1999a), for instance, argues that what he calls consensus democracy has advantages over the alternative, majoritarian democracy. However, either a parliamentary or a presidential system can lean toward either form of democracy, depending, for instance, on the electoral law in effect, the number, size, and unity of political parties, and whether the legislative and executive power is concentrated in the hands of one party or whether it is divided among parties in a way that necessitates compromises among them.

The discussion that follows takes as its starting point the kind of minimal agenda for change that was presented in the 1999 referendum without also assuming that this is what most Australians do want or should want. A decision about how a President should be elected cannot be made without taking into account what powers the President would be entitled to exercise—both the powers explicitly assigned to the office and whatever reserve powers may accompany them. So in asking whether a President should be directly elected, my answer depends on the assumption that the powers of that office would be no greater than those of the Governor-General. A different assumption probably would produce a different answer.

A directly elected president?

If there is to be a President who assumes the existing powers of the Governor-General, how should he or she be chosen? I instinctively prefer allowing the people to choose those who represent them. In this case, however, and notwithstanding drafting problems with the 1999 proposals, I would prefer to have the President of Australia, if there is to be one, elected by the Parliament. My primary concern is that a popularly-elected president some day might emerge as a competing centre of democratic legitimacy. I have seen no evidence that there is much sentiment in Australia for trading in the current political system for one that more closely resembles the French mixed system or any similar systems in which there is both a president and a prime minister, both directly elected and both of whom can legitimately claim to be the freely-elected choice of the people. Yet that is precisely the possibility that would remain if the President of Australia retained even some of the powers that the Constitution now vests in the Governor-General, to say nothing of whatever additional reserve powers may be found in the bottom drawer of the president's desk (and that the 1999 referendum sought to recognize without defining them).

As I write this, Australians are debating whether or not Australian military forces should participate in an anticipated war against Iraq. Let us imagine a similar situation arising sometime in the future, when a popularly-elected president resides at Government House in Canberra. Suppose that there is an armed uprising in the Indonesian province of West Papua, which shares the island of New Guinea with the former Australian territory of Papua New Guinea. The indigenous Melanesian population of West Papua rebels, seeking independence from the rest of non-Melanesian Indonesia. Memories of East Timor are revived, and there is real concern that Papua New Guinea may be drawn into the conflict, transforming a domestic insurrection into a war on Australia's doorstep. Indonesia's overwhelming advantages in manpower and weaponry create the prospect of devastation across both halves of the island, and Australians speak of an impending genocide if Australia does not intervene. Opponents of intervention, however, emphasize the delicacy of Australian-Indonesian relations and raise fears that any intervention in the New Guinea conflict almost certainly will lead to a wider war.

The Australian Government decides that Australia must intervene militarily and, however reluctantly, most Australians seem to concur. But now also imagine that Australia's elected President is a beloved poet of international renown whose poetry has connected with Australians better than anyone since Henry Lawson and Banjo

Patterson. For several years, he has been an ideal representative for the nation, appearing at events at home and abroad to express with eloquence how Australians see themselves and what makes Australia unique. Both the government and the Opposition have had good reason to be pleased with the President whom Australians had elected two years earlier. At that time, however, it was not known that the President opposed any commitment of Australia's military for any purpose other than the immediate self-defence of the island-continent. The concern of Australians was Australia, he believed; it was a conviction that had pervaded his thinking and his poetry for decades. This conflict, however tragic, is an internal matter for Indonesians, including the West Papuans, to resolve for themselves. Australia has no business intervening in the internal affairs of any other nation, he argues, and especially not a neighbouring sovereign state and certainly not one with such an enormous and largely Muslim population distributed over hundreds of islands.

The President consults his copy of the Commonwealth Constitution and discovers that he can prevent what he is absolutely convinced would be a national calamity. There it is, in the clear, unambiguous language of sec. 56:

A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General [now the President] to the House in which the proposal originated.

So he informs the Prime Minister, in a statement that he immediately makes public, that he will make no such recommendation for the appropriation of any 'revenue or moneys' to fund any military operations outside Australia's national borders. Furthermore, if the government uses funds that it already has available to pay the costs of military intervention in Indonesia or Papua New Guinea, he will exercise his constitutional discretion by refusing to recommend appropriations for selected other purposes, and even withhold his assent from other laws, until the government commits itself explicitly to withdraw from conflict or not to become involved in it in the first place.

The government is furious, of course, and the Prime Minister immediately consults his legal advisors who assure him that the President is acting within his constitutional powers. While it is true that he was never expected to exercise this power in this way, the High Court is very unlikely to compel him to recommend an appropriation because the government wants it, nor is it likely to sanction any attempt by the government to circumvent sec. 56. So the Prime Minister poses another set of questions to his legal advisors: Can he sack the

President? Can he do it because the President has exercised one of his constitutional powers in this way and under these circumstances? Assuming the government can dismiss the President immediately, how is he to be replaced? How quickly can a replacement be installed? Who, if anyone, can exercise the powers of the office while it is vacant? Which of these questions might give rise to litigation that could tie the government's hands until the High Court rules on them?²²⁴

Meanwhile, the popular and charismatic President is travelling across Australia, from Hobart to Broome and Cairns to Kalgoorlie, reciting his poems, making his case, and closing his speeches by declaiming:

I speak for Australia! My friends, that is what you chose me to do. You elected me because you know that I share your values, the values that unite all true Australians. Today I am here to speak for those values that make Australia such a special place. I ask you now to raise your voices and speak with me. If we all speak with one voice, we will be heard, even by the bureaucrats and politicians in Canberra, and we will prevail.

They do not want to listen. Our Prime Minister tells us that there will be a debate in Parliament, but only when it is too late to make a difference—only after he has decided what the policy of Australia will be. That is not democracy, my friends, when one little man from one corner of our country can meet in secret with his cronies and send the future of Australia to its death.

224 As I read the Constitution Alteration (Establishment of Republic) 1999 Bill, as passed by both houses (but then rejected by the voters), the prime minister could remove a President at any time and for any reason (proposed sec. 62). However, that bill provided for Parliament to select the President. If the President were directly elected instead, the Constitution surely would not permit any President to be removed from office without cause and without a formal proceeding that leads to a vote in Parliament. But assume for the moment that the proposed sec. 62 was in force. Then once the prime minister removed our hypothetical President, the longest-serving state governor, regardless of party, would act as President until the Parliament approved his successor or unless the Parliament had made some different arrangement to fill presidential vacancies (proposed sec. 63). It is quite possible, therefore, that invoking these provisions would not solve our prime minister's legal problems, and certainly not his political ones. He could find himself faced with an acting President who also opposes his government's policies. He also would have to go through the procedures of the proposed sec. 60 before a new President could take office. These procedures involve receiving the report of a nominating committee and then convening a joint sitting of both houses of the Parliament, all of which could become time-consuming. Moreover, the choice of any President would require the concurrence of the Leader of the Opposition in the House, who could withhold his approval, arguing that the voters need to resolve the policy conflict by electing a new government and that the new prime minister should be the one to nominate the new President (subject, of course, to the approval of the new Leader of the Opposition, who might well be the former prime minister).

Did you elect the Prime Minister to speak for you? No, of course not. He is the choice of other politicians. I am your choice to be your voice.

My friends, the Prime Minister may be able to ignore the voices of our so-called representatives, but he cannot ignore the voice of the people. Join with me, Australians, so the government finally will hear us. I speak for Australia! We speak for Australia!

After watching the government's public support plummet by the day, the embattled Prime Minister counter-attacks, arguing that this is a decision that the Australian people elected the government to make. The President responds that he has a mandate from the people who put their trust in him as a person, not in some party label. Meanwhile, the Opposition, quiescent until now, points to the public opinion polls that overwhelmingly support the President, and pronounce that the government has lost the confidence of the Australian people and that the government must resign so the voters can decide this question that literally involves the life or death of who knows how many young Australian men and women. If the government refuses to resign, the Opposition announces, perhaps the time has come for the non-government majority in the Senate to invoke the Senate's power of legislative veto over any and all legislation relating to the powers of the government in international affairs.

Such a series of developments are unlikely, of course, but they certainly are possible, and to me, they make a compelling case for preferring a President elected by the Parliament to one elected directly by the people. It is true that an indirectly elected President could do much the same things—and I will return to the implications of this argument—but at least he would not be able to invoke a popular mandate for his actions.

A transition to the presidency?

The results of the 1999 referendum suggested that many Australians were uneasy with cutting the last ties to the monarchy and were unsure how happy they would be with a President, however chosen, as their head of state.

With this uncertainty in mind, I offer the possibility of an incremental transition that would allow Australians to become comfortable with the new arrangement and assuage the unhappiness of those who oppose it, as well as allowing the transition to take place even before a constitutional referendum is scheduled to ratify it and embed it in the Constitution. Let the Parliament enact a law, tomorrow or whenever, that establishes the office of the President, and let that law assign to the President ceremonial and representational responsibilities

only. So long as the statutory powers of the President do not conflict with the constitutional authority of the Governor-General, I see no constitutional impediment to such a law.²²⁵

I would then expect that the President who is selected under the terms of this law would become increasingly visible in the public eye, playing whatever public role the Governor-General now plays, and probably a more active one than that. In consequence, the Governor-General almost certainly would become far less visible to the public and soon would fade into obscurity as his public role disappears and he is reduced to attending the meetings and signing the papers that are necessary to satisfy the constitutional formalities. Assuming that a wise government makes a popular selection for Australia's first President (or that the electorate makes an equally popular choice), I suggest that the government arrange for the President also to be named the Governor-General when the latter office next needs to be filled. The same person will wear two hats, at least temporarily, but the British bowler will largely disappear from view, and the primary reminder of the formal constitutional connection between Australia and the monarchy will be the coins in Australians' pockets.

If this transition is complete before the Queen leaves the throne, that would be an appropriate time to make the formal constitutional change which, I suspect, at that point would occur without trauma. Meanwhile, this transitional period should allow Australia's best minds to concentrate on resolving all the related issues such as the meaning and future of reserve powers and whether the Constitution should continue to assign powers in ways so very much at odds with how the Australian political system actually works and what the Australian people surely would accept. The goal of this constitutional re-examination should be to ensure that the head of state acts only in a symbolic and representational capacity and exercises no governmental powers.

A head of state at all?

Campbell Sharman (2001: 173–175) has argued that, where the head of government is not also the head of state, the likelihood of tension between the two offices depends on the legitimacy of the head of state and the powers vested in that office. From this perspective, the Australian Constitution creates a mis-match by providing for 'a head of

²²⁵ Irving (2000: 114) has made a similar suggestion with regard to the office of Governor-General. 'It would be quite possible constitutionally to have a parliamentary choice, even a direct popular election, for the Governor-General, leaving the Constitution itself undisturbed, with the name of the chosen candidate going forth as the Prime Minister's nominee to the Queen ...'

state, the governor-general, with relatively low legitimacy and very extensive constitutionally specified powers.’ So, he concludes (2001: 179), if Australia’s Prime Minister is to remain the head of government, then ‘Whatever one’s preference for a republican head of state—appointed, indirectly chosen through parliament, or directly elected, a prerequisite is the formal reduction of the powers of the head of state.’²²⁶ My only quarrel with this contention is that I would not reduce only the formal powers of the head of state; Sharman’s argument applies with at least equal force to reserve powers.

However, let me carry the argument one step, though a major step, further by suggesting that we really have been considering two separate questions: first, whether Australia should be a republic; and second, how should its head of state be selected. Let me now pose a third question: whether it is either desirable or necessary for Australia to have a head of state who is not also the head of government. Perhaps it is not surprising that Gough Whitlam (1979: 184) wrote in his memoir of 1975 that ‘Experience has shown that a Head of State who is anything more than an ornament is a menace.’ Although Whitlam obviously was not the most detached commentator on this matter, his contention still merits consideration.

There are three primary arguments for having a separate head of state. First, the head of state performs various time-consuming ceremonial functions and so allows the head of government to concentrate on the job of governing. If there were no Governor-General, or if there were to be no President, it would be the prime minister or other government ministers who would be under pressure to attend all the various civic functions and international events (such as funerals of foreign leaders) that require recognition in the form of the presence of a senior representative of the nation. Yet when there was a memorial service for those who died in the 2002 Bali bombing, it was thought right that the prime minister himself should attend. And when there is political credit to be gained by attending an event such as one, for example, to demonstrate support for Australia’s embattled farmers or those who fought the bushfires that savaged Canberra in early 2003,

226 There is an alternative, he acknowledges, but not an appealing one. ‘[T]he combination of low legitimacy and high powers has the bad effect of making tension between the head of state and the head of government a matter which has the potential to raise serious constitutional disputes. The question of a remedy to this situation can be approached by either increasing the legitimacy of the office or reducing its powers. ... Increasing the legitimacy by having the head of state directly elected, while leaving the powers of the governor-general/president as they are, would create the monster of a United States presidency coupled with a parliamentary executive ...’ (Sharman 2001: 176–177)

the PM does not send the head of state in his place or in place of another senior minister. So we could expect that the presence of a head of state would continue to make life only somewhat easier for the prime minister and his Cabinet than it otherwise may be. That may be a good reason for having a head of state, but it hardly is a sufficient one.

Second, the head of state can stand as a symbol of the nation, a figure of special legitimacy who transcends the cut and thrust of the political arena. The best example, of course, is the Queen. But an Australian President would not necessarily enjoy the same respect and deference. Imagine if the President were to be elected by the Parliament with no direct public participation in the choice. Would the person selected automatically rise in the public's estimation to become someone accepted as the spokesperson for the nation, much less an embodiment of all that is best about the Australian people? That would depend very much on the personal characteristics of the person chosen; his or her elevation to the status of national symbol certainly would not be an inevitable consequence of having been chosen by one of Australia's least respected classes, its politicians. On the other hand, imagine that the President is elected. If it is to be a meaningful election, there must be a choice. And if it is a meaningful choice, we can expect that at least 40 per cent or more of Australians will have voted for someone else. Do we expect those Australians to accept the President as speaking for and representing them, as symbolizing their nation, even though they voted against him or her?

The best way to maximize the likelihood that a President will gain wide acceptance as national spokesperson is to select someone who does not come from the world of politics. A poet, perhaps, as I assumed in my hypothetical scenario, or a scientist, community leader, or sports figure. But that brings us to the third, and perhaps the most important, supposed benefit of having a head of state—having someone to act as defender of the Constitution in exceptional cases of emergency by exercising the reserve powers, on the scope or very existence of which Australia's best and brightest so far have been unable to agree, and by exercising them within the constraints of accepted constitutional conventions, on the definition of which there has been no universal accord.

Here is the dilemma. Although most Australians, and most Americans for that matter, might not believe it, governance is not for amateurs. The effective exercise of political power requires a knowledge of public affairs, an instinct for understanding people and their motives and intentions, an understanding of law and history, an appreciation of the importance and nuances of public rhetoric, and, among other aptitudes, the wisdom to know when to do nothing. And

so, shocking as it may seem, the people best equipped to exercise those mystical reserve powers and understand those uncertain conventions are people who have been in the political arena. It would be rash to assume that the qualities and experiences that have made someone a great poet, scientist, or athlete will have prepared that person to exercise great power at times of national crisis. Quite the opposite, in fact. He or she is likely to make a mess of it, despite the best of intentions.

Ah, but we say, our President will have his or her advisors to offer the benefit of their knowledge, their experience, their understanding of the complex world of governance. But who are these advisors to be? Public servants or parliamentarians, or alumni of either corps, or perhaps scholars who themselves lack any direct experience of their own? What other alternatives are there? If the President is chosen from outside the world of public affairs in order to find someone widely acceptable to the nation, is it not very likely that decisions of great national moment will be made by someone who is sadly bereft of political nous, or that they will be made, in fact but not in name, by people at his or her side whom no one elected to stand there?

Taking all this into account, I suggest that Australians think some more about the concept of responsibility—not only the responsibility of the government to the Parliament, but the responsibility of government ministers, and especially the prime minister, to the nation. The ceremonial and symbolic roles of the head of state can be performed perfectly well by the head of government. In this era of televised politics, any prime minister who cannot speak as effectively to the nation as he can speak to his parliamentary colleagues across the dispatch boxes is unlikely to succeed at the job.

Sharman (2001: 178) has argued that if a President does not have all the explicit powers that the Constitution now assigns to the Governor-General, the result could be to ‘create a vastly more powerful prime minister, whose office would be subject to almost no institutional checks.’ His argument would have that much more force, of course, if there were no President or Governor-General at all. The prime minister presumably would become the commander-in-chief of Australia’s armed forces, for example, and he (or the Cabinet) would be able to convene sessions of Parliament, schedule half-Senate elections, and effect double dissolutions. If the authority to dissolve the House before the end of its three-year term is not given to the prime minister or the Cabinet, it could be decided by vote of the House itself, just as the House could approve the choice of a new prime minister, minister, or Cabinet through a vote of investiture. I see no serious practical problems in re-assigning the powers that the Governor-General now exercises only at the request of the government of the day. In fact, I see

it as a positive gain because it would make assignment of the formal authority of government that much more commensurate with the actual responsibility for how that authority already is exercised. The government now effectively controls the exercise of the Governor-General's authority; let it take formal responsibility for those decisions as well.

That leaves us with the issue of reserve powers—in other words, whether Australia requires a *deus ex machina* to descend from above the political stage and intervene in cases of direst emergency to resolve crises that mere mortals have created for themselves and the nation. I am inclined to answer in the negative. Perhaps I have more confidence in the good sense of politicians than most have, or maybe I have more confidence in the ability of politicians to understand what is ultimately in their own best interests. I believe that if elected politicians create a mess for themselves, as they did in 1975, they are perfectly capable of finding their way out of it, and they will do so as they continuously reassess and recalculate how they can emerge from that mess in a way that leaves them with the fewest possible stains and that maximizes their public support. Finally, as for the need for a President or Governor-General to intervene when the government is alleged to have acted illegally or unconstitutionally, let the matter be resolved instead by the jurists on the High Court, who are almost certain to have the benefit of better training and more experience for the task. I would rather leave the interpretation and enforcement of the law, including the Constitution, to those trained for the task than put it in the hands of a President appointed or elected for entirely different reasons.