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## **The Problem of Planned Cities: Canberra in Context\***

*Don Aitkin*

We are used to hearing that our national capital is special, and it is. But it is also only one of the more recent, and is the most sustained, of the attempts to build a ‘new town’. History is simply full of them. Some of the oldest towns of which we have records started like Canberra, in an empty or almost empty space, and with a plan.

Let me offer you Mohenjo-daro, in the Indus Plain, a site that has been claimed as the oldest planned city in the world. It is not at all the oldest ‘city’ or permanent settlement, which may be Jericho, which is 11 000 years old. It is worth remembering that human life in permanent settlements is not any older than Jericho, and what human beings have achieved since they first began to stay in one place, grow crops and herd animals, is simply astonishing. Mohenjo-daro was built about five thousand years ago, and was one of the cities of what is called today the ‘Indus civilisation’, about which we know very little. It was quite a sophisticated place, all things considered, with a drainage system, a rectangular grid layout, separate dwellings protected for privacy and against noise, public buildings and a central marketplace, a lot of infrastructure to ensure a good water supply from the Indus River, on whose banks it stood, and high levels of sanitation. It even had what is called ‘the great bath’, and though that might have been a municipal swimming pool, it was probably a place for religious observance. We can guess from all this that the city, which housed about 35 000 people, had what we would recognise as a system of government.

All that remains are its ruins, and most of them are still under the sand, because exposing the ruins leads quickly to erosion. What happened to the city? We don’t really know. It was rebuilt several times on the wreckage of the past, perhaps because of floods, and finally abandoned about a thousand years after it had been begun. The story of Mohenjo-daro is a familiar one. For reasons often lost to us, a society decides to build a new town or city. It starts with a plan, and the plan is likely to include defence, water, sanitation, easy communication within the walls, a marketplace and public granary, public buildings, temples and the rest. Something then happens, perhaps a flood or earthquake, or invasion, or a plague—but the outcome is that the city loses its purpose, and a lot, or all, of its people. Those remaining cannot maintain it, and its buildings and infrastructure fail and crumble. The Romans, for example,

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were splendid town planners, but their knowledge and skills did not survive the collapse of the Roman Empire.

Not all cities have begun like Mohenjo-daro. Some, at river crossings, like Oxford, or close to river junctions, like Babylon, or at obvious intersections in trading routes, like Istanbul, or at good ports, like New York, began as people simply took advantage of the site, and just grew. No doubt someone had a plan at some stage, and you can see bits of planning in all large cities, but such cities just grew in an ad hoc and relatively unplanned way. The lack of planning has very expensive consequences over time, for it requires retrofitting if the city grows. The building of Bangkok's freeways and rapid transit railway systems provides a good contemporary example: there the dominance of individually owned motor vehicles makes it almost impossible for the bus system to work, and puts the building of railways systems at a disadvantage because of the lack of land, so much of it already given to roads. Going underground in Bangkok is difficult because of the waterlogged soil on which the city is built.

Over the last ten thousand years there seem to have been two separate and conflicting building sentiments throughout the history of towns and cities. One is the desire to start again, for a variety of reasons: an earthquake or a tidal wave may have demolished the settlement, or fire destroyed it, or the new city marks a new political beginning. The other can be likened to the effect of a magnet: established settlements attract people, who tend to come whether or not there is any planning for their arrival. The clash between these two sentiments is evident in every established city unless its development has been almost completely accidental or is lost in history. Incidentally, many settlements have been planned from the beginning but, for a variety of reasons, no settlement followed the plan. A good example is Currowan, on the Clyde River in New South Wales, which was surveyed in the second half of the 19th century, in expectation that people would come to establish agriculture and a small port. But no one came. Most country towns in New South Wales started with an original survey, whose grid lines are still there today in the pattern of the original streets.

But cities are different. Their growth can proceed so quickly that the original plan becomes inadequate, and the planners are unable to cope. Sydney grew in a rather random way until the arrival of Governor Macquarie, who reorganised the streets of the port and renamed them. By the 1830s the City of Sydney as we know it today had been defined, and so had the tip of Pyrmont—the developers were moving in! It was not until 1948 that there was any sort of plan to cover the whole city, and that plan ordained a green belt around the city, rather like Colonel Light's parklands in Adelaide, though much larger. But the rapid growth of the city after the war meant that the green belt had gone within little more than a decade. Nothing much has changed: continued rapid growth and the topographical difficulty of the area make

Sydney a continuing planning nightmare, and that leads to a diminished quality of life for many of its residents.

Another example, perhaps more optimistic, is that of Adelaide. Colonel Light provided the new city with an admirable plan and, in part because the city initially grew slowly, its shape and surrounding parklands became accepted (although the early settlers cut down all the trees, so Adelaide's parklands did not always look as they are today). But in the 20th century there seemed no thought of continuing to build the city according to some adaptation of Colonel Light's plan, and it simply grew outwards along the main arterial roads. Suburbs developed, railways were introduced, and infrastructure like a water supply was provided. But urban planning as such seems hardly to have been thought of outside a suburban context. The Elizabeth area, developed after the Second World War, is distinctively different, because of its neighbourhoods, built around small shopping centres, and of the general absence of the grid. Of course, there is now a plan for the whole of the city of Adelaide, but in that concept the planned city of 1839 has become the 'CBD'. Greater Adelaide now has a large footprint, stretching 20 kilometres east to west and nearly 100 kilometres from north to south.

The story of Adelaide provides powerful lessons about planning cities. The three great ingredients for a successful venture are 'Vision', 'Plan' and 'Will'. The vision comes first, and it has to come first, because a great deal of energy and money will be expended in developing the new city project. The vision has to capture the imagination, and provide attractive possibilities for those who are to live in the result. The plan sets out the basic geometry of the city, its public places, how people are to get from one place to another, where they will buy food, and—at least in times past—its defences. 'Will' is the underlying support base of both the vision and the plan, and it has to be there from the beginning, because from the very start of every plan there are objectors, who will include those who didn't get the job of drawing up the plan, those who see some other use for the land, those who don't want to go there anyway, and others who just like objecting. I've mentioned Colonel Light's Adelaide: you need to know that he had in mind one thousand blocks of one acre each in the main town. That's not what happened. And even if he had been longer lived—and more powerful—time, other pressures and growth would have disturbed his plan, as they were quickly to do. But his basic shape for the city survived, and has given the centre of Adelaide a quality and attractiveness matched by no other state capital city.

Vision and Plan can only be guessed for the older cities—London, Paris, and Madrid, for example. Paris is very old—there has been a settlement there for at least 6000 years and its shape has been determined in part by the River Seine, and in part by the edicts of France's rulers. But the great boulevards we admire today are relatively new,



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and were constructed to prevent any more barricades being created by the rebellious population; that work was carried out in the middle 19th century. The earlier Paris had been in part a maze of narrow streets and alleyways. But you can imagine that the work was not only highly expensive, but caused great distress among the half a million or so residents whose houses were simply razed, and whose neighbourhoods disappeared. What is done cannot usually be undone, especially when buildings are torn down.

But things that are half done can be left half done, and this is what happened in St Petersburg. Peter the Great envisioned a new capital city for Russia, and he wanted it near the sea. He first built a fortress at the site, in 1703, then a church. Nine years later, when random development was in full swing, he moved the capital from Moscow to St Petersburg, and four years later still developed a plan, with an Italian designer, whereby the city centre was to be on an island, with a series of canals defining the city. While that plan was never finished, enough of it was done to shape the modern city. Peter the Great died in 1725, not long after he had founded the Academy of Science, the university and the Academic Gymnasium, a high school for proficient students. The pace of change and of building, not to mention the speed of his other reforms, caused such opposition that, once his great will was gone, the capital was moved back to Moscow for a few years. It did return, work on St Petersburg resumed, and the city then remained the capital of Russia until the Bolshevik Revolution. It moved then back to Moscow partly for reasons of defence—St Petersburg was too close to German forces in Estonia.

Will and Plan are important in another way. While the plan almost immediately attracts opposition, it also is a magnet for people who see opportunities for them in the new environment. As Peter the Great discovered, people were in the new city before he really wanted them. The same thing happened when Brasilia was built. That city has an almost gigantic shape, and its basic infrastructure, with its vast vistas, was built in less than four years. But people came much faster than had been planned, and both Brasilia and its satellite cities grew for a decade or two in a helter-skelter fashion.

We are firmly in the domain of national capitals now, and I would like to make a couple of comments about Ottawa and Washington before I move finally to Canberra. All three, plus Brasilia, are federal capitals, and in each case they represent the nation. Each is an example of the conjunction of Vision, Plan and Will. Each has had its difficulties, and the name of each has become shorthand, often in a pejorative fashion, for the federal government of the nation. Each was placed where it is for a reason. Washington and Ottawa were placed close to the main divisions of their countries: between the French speakers and the English speakers, in the case of Canada, and between the North and the South, in the case of the USA. Brasilia was placed inland

so that it could be near to the geographic centre of the country, and the Australian Constitution ordained that the national capital territory of Australia had to be more than 100 miles from Sydney but somewhere in the state of New South Wales.

Ottawa's site was not only on the border of French and English Canada, but it was distant from the USA (with which Canada had been at war in the early 19th century) and accessible by water and by rail to both Toronto and Quebec. It was already a logging town, and essentially what occurred was the transfer of the parliament and the government to an industrial town. Whereas Washington started with a plan, Ottawa did not, and until the end of the 19th century it just grew. It was not until the middle of the 20th century that the Canadian Government decided that something had to be done to make the whole city, not just the parliament buildings, exemplify the national capital. But it is hard to retrofit cities, especially national capitals, and progress there is slow. It happens that the site, and the civic character of those who have lived in Ottawa, has saved it from the slums that disfigure Washington—a plan isn't everything. And contemporary Ottawa is a fine city, though away from the parliament buildings there is much less immediate sense of its being the national capital than is the case in either Washington or Canberra.

And so to our own national capital, which is in many respects the greatest triumph of the conjunction of Vision, Plan and Will, and it is, to repeat, the longest surviving planned city of the modern era that has kept its plan and its character, though nearly a hundred years old. The history of the design and building of Canberra is well known, and today I will focus on only a few aspects of it. One is the sculptural quality of the city in its setting: Walter Burley Griffin recognised the power of the setting, and argued that the built form must not try to surpass it, but rather to blend in with it. Successive generations have accepted that initial perspective, which explains why today's Canberra, though very much larger than Griffin's original conception, still keeps the spirit of its designer's creation. The city has what architect and historian James Birrell has called 'a soft, gentle touch', and that is something that visitors notice and wonder at. It doesn't look like what they think of as a city. But once they live here for eighteen months or so, they adopt its special character with great enthusiasm.

A second is the continuation of the original ownership of the national capital. As we have seen, most new towns start with a plan and an authority that insists that the plan be followed. But it is often not long before the plan, or the authority, or both, lose their force. Other things get in the way. For example, rapid growth can quickly exceed the bounds of any plan, and result in ad hoc adaptations that can destroy it, as happened in Sydney in the 1950s. Factors that greatly affected all development in Australia included a sequence of economic depressions and world wars, all between

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1890 and 1945. Very little of a positive, confident and developmental kind occurred in that time. Visions, plans and will were put aside. In Canberra development stopped in 1914, resumed in the early 1920s, stopped again in 1930, and resumed during the Second World War when the plan was pushed aside to allow the construction of scores of temporary buildings. It resumed properly in the mid-1950s, with a new plan that was based very much on Griffin's in 1911, modified by new understandings of how people lived, worked and moved. Paradoxically, the slow development of the national capital in its first fifty years at least saved it from the curse of rapid development, and allowed the plan to bed down.

The Commonwealth has been the main influence on the development of the national capital for two reasons. The first is that the Constitution made the Commonwealth Government its creator and developer. Even when the initial vision was gone, and Griffin was long since dead, the plan and its successors were still present, as was the will to protect the plan. The second is that the Commonwealth owns all the land within the ACT, so that all development other than that by the government has required some kind of permission. And the permissions granted have been generally in harmony with the plan. Opinions will differ, but mine is that were Griffin magically restored to us, and asked to give his views on the Canberra of 2011, he would be generally impressed. Of course, he would need a week or two to get used to other aspects of contemporary life, like air travel, the computer, television and the omnipresent motor vehicle, which mightn't impress him greatly. I would ask him after the shock of the first week.

In 1988 there came the first real change in the development of the national capital. Canberra had grown large enough to warrant a qualified form of self-government. One outcome was the creation of the National Capital Plan and the associated Territory Plan. The two plans divide responsibility for the development of the national capital, with the Commonwealth retaining control of the 'national capital' element, and the ACT Government given responsibility for what might be called the 'suburban and municipal' elements. This division has worked well, though from time to time there are disagreements and overlap. But because the Territory Plan is subordinate to the National Capital Plan, the Commonwealth's view tends to win through when there are arguments.

This division is now a permanent fact, as is the reluctance of the Commonwealth to fund the future development of the national capital in the comprehensive fashion of the 1960s and 1970s. At present Canberra is growing quickly, more quickly indeed than the country as a whole, and the need for infrastructure expenditure is great. It seems likely, moreover, that the growth will continue, if only as part of the trend toward urbanisation that is occurring everywhere in the world. The national capital is

likely to have half a million inhabitants before very long (the present population of Canberra and Queanbeyan combined is a little over 400 000), and it will pass one million inhabitants before the end of the century, if present trends continue.

Now you will encounter the view that the national capital as a place is simply a necessary evil, a consequence of Federation, and ought now to be ignored, since the building of it is done, in two senses. First, that the Commonwealth has been established, is more than 100 years old and is a success; and second, that the national capital itself is finished anyway, because the permanent Parliament House has been built and occupied, the ACT is self-governing, and its government can look after the city from now on.

That is not a silly position for people to take, but it overlooks two important points, each directly connected to Vision, Plan and Will. The first is that Griffin's vision was not simply of a national capital of great buildings of representation and government, law and collections, but of a human settlement set in a landscape. And aspects of Griffin's ideal have spread all over Australia, where some two-thirds of the housing stock has been built since 1960, and where outer suburbs everywhere have something of the look of Canberra's suburbs—the avoidance of the grid, a focus on people-friendly roads and layouts, neighbourhood schools and shopping centres, and so on. Griffin's vision is with us still. With respect to the national capital that means, in my view, that the Commonwealth has entered on an experiment, a hundred years old now, to build a city that shows what human thought, creativity and planning can do in providing an environment for human beings that is beautiful, effective and efficient, and in which creativity flourishes. It follows that the Commonwealth would not want to see parts of its national capital descend into squalor, as has occurred in parts of Washington.

I have not mentioned the slums of Washington DC because I dislike the city. On the contrary, I like it a great deal, and respond to the energy there and the sense of national purpose. I like capital cities, wherever they are, especially ours. But I worry, all the time, that indifference and inattention could lead to the development of very poor living conditions in our own national capital—without anyone ever intending such an outcome. So I think it important that the Commonwealth continue to have an overriding interest, not just in what you can see from Parliament House, but also in the quality of living in the capital. I can feel the slow slide towards assumptions that, for example, only the lake and the parliamentary vista are really important; the rest is simply local and should be planned and managed locally. This kind of argument occurs at some point, in different contexts of course, in the development of every new town. It is another moment where Vision, Plan and Will get pushed aside.

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The ACT Government is not funded to care for the national capital, and could not do so easily even if it were. The two spheres of government properly have different interests and different priorities. What is done in the national capital has to be of high quality, and all of Canberra has to look the part. If you drive here, or come by train, or by air, there should be a feeling of ‘arrival’. As I have to remind Canberra residents occasionally, the national capital belongs to every Australian. All Australians need to feel proud of its quality when they come here, because it represents themselves and their nation. It is the embodiment of the shared history, ideals and spirit of the Commonwealth of Australia. Overseas visitors also need to feel that ‘these people certainly know what they are doing’, and in my experience many overseas visitors are bowled over by the beauty and subtlety of the national capital. As one national leader said to me, having looked at the city from the top of Mount Ainslie, ‘That you people have done all this in only a hundred years is simply wonderful’.

It seems to me that for the next hundred years, we will need a renewal of the Vision, a renewed Plan and continuing Will. There are endemic problems—parochialism and jealousies are ever present in federations, and these sentiments can give rise to a feeling that ‘those people in Canberra’ shouldn’t have anything that one’s own constituency doesn’t have, though those who express such feelings are unaware that Canberra residents pay very high rates. The national capital is not finished, and while the Commonwealth owns every square metre of it, and the city continues to grow, it will never be finished. In order to build properly we will need a partnership between the Commonwealth and the ACT Government, a partnership built on shared values, and on a recognition that Australia’s national capital is already an outstanding success, and it should be no less so in a century’s time than it is now.



**Question** — I show visitors from overseas that vista from the War Memorial, which is unmatched in my view. I see in recent correspondence and articles in the *Canberra Times* that the National Capital Authority (NCA) has taken a right bollocking for its involvement in the monstrosities of the war memorials at Rond Terrace. To my mind the NCA got it very wrong indeed. Would you like to rebut or confirm?

**Don Aitkin** — My views, and those of my colleagues at the Authority, are irrelevant. The process used that resulted in those models in my view was a valid one. If we were doing it today we would go down a different path because in the last three years we have changed a great deal of the way the NCA operates and particularly in its engagement with the community. We have also proposed that the National Memorials

Committee be constructed in a different way and that it be serviced by us. We are now the secretariat for the National Memorials Committee. What occurred in the past (and none of us who are presently on the Authority was there) was valid. If we were doing it again today I wouldn't do it that way. That's the best answer I can give you.

**Question** — Back in the mid-1960s the then Department of the Interior was preparing against the day when a future government might decide that the ACT should have self-government and a report prepared then suggested that whatever form of self-government the ACT was ultimately to receive, it would be desirable if all planning remained with the federal government through whatever statutory authority was proposed. Would it have been better if that particular recommendation had been adopted or do you really believe we can make our bifurcated planning system work better than it works today?

**Don Aitkin** — It actually doesn't work too badly today and one reason is that the people in the ACT Planning and Land Authority (ACTPLA) share the same aesthetic and historic values that the people in the NCA have. When you get a problem it is something like the Gungahlin Drive extension, where you get two governments with a different sense of the right outcome. In that case the Commonwealth will always win because the Commonwealth's plan is superior to the Territory's plan. In practice our staff at the NCA work very well with the ACTPLA staff. There is very little disagreement. The problems that we face are the obvious ones. The Territory is poorly funded. It is very much today like the colonies were in the nineteenth century after the gold rushes. The colonies had then two forms of making money to provide service: one was to sell land and the other was to impose customs duties. Well Katy Gallagher's government can't impose customs duties so all they have got really is our rates and selling land. So for them, any time they can make some money out of selling some land, that enables them to build another baby health centre or whatever. That's the way they see it and they are operating in a very small vista of time.

For whatever reason I operate in very long vistas of time. I do see and think twenty, thirty, forty, fifty years ahead. I do think we can have a bifurcated planning system that does work well especially if we get the community to understand that that's what we are doing. So much of what is done now is knee-jerk reaction because you don't hear about it early enough to be able to set it in context. If you think that we've got the present footprint of the city (there's maybe five to ten per cent extra footprint) if there's a million people here there will be three people living where there is one now. How can we do that well? That's the problem.

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**Question** — Canberra bashing is still alive and well in the interstate capitals. What would be your opinion on the ways Australians look at their capital compared to the North Americans?

**Don Aitkin** — It is very similar. There is one difference and that is the American President is seen within the United States as being so powerful. It is part of your job as a father and mother to take your kids to Washington to see the White House and see where the President lives. We've got a bit of that. Probably we've got more of it than the Canadians have. The closer you are to the source of power the more confident you feel about the way the power is used; the further away you are the less knowledge you have and the less comfort you have with what is being done. So I think the Canadians like Ottawa less than Australians like Canberra, but there wouldn't be much in it.

**Question** — I think Canberra is now a less attractive city than it was thirty years ago. I think it is an excellent idea that Canberra needs to have money from the Australian taxpayer but that money needs to be wisely spent and it needs to be spent with a view to the capital itself. Internal items should be dealt with by the local government; they are not built for the nation as a whole. We need to seriously look at the future of Canberra. We need to say, 'what are we here for?' It is only a service centre. It doesn't produce anything. We need far better transport options. Otherwise the green space will be turned into car parks. It's a less lovely city that it was and maybe we need to make it a more lovely city again.

**Don Aitkin** — It is precisely to hear that kind of perspective and to hear it argued out and responded to that I would like to see the future of Canberra debated constantly. I don't have a particular response to what you've said. The cars are choking the city although nothing comparable to Sydney. It was lovely to hear good old mercantilism being used: that the whole population of Australia rests at the moment on the three per cent of the population who produce agriculture and pastoral products and the one per cent of the population who produce mining products. The rest of us are all paper pushers, really, and I don't think Canberra is any more or less that than Sydney or Melbourne or anywhere else is. It is not the country it was a hundred years ago.

## **Constitutional Recognition of Indigenous Australians\***

*Mick Dodson*

I would like at first to acknowledge the first Australians on whose ancestral lands we meet and I would also like to acknowledge them for the many thousands of years they have been in careful possession of this land and the way in which they've sustainably utilised its resources. I also want to pay my respects to their elders, past and present.

Ladies and gentlemen many of you may know of a panel that's scooting around the country at the moment talking to people about constitutional recognition of Aboriginal and Torres Strait Islander Australians. What I want to do today in this address is to examine, among other things, what might be the recipe for a successful referendum and how we might mix the ingredients of that recipe to both achieve the symbolic recognition in our Constitution that many of us desire, but also how we might make substantive change that is required to the Constitution to reset the relationship, positively, between the first Australians and the rest of the country.

This expert panel that I have mentioned will report to government by 1 December this year and that report will no doubt advise the government on how to give effect to Indigenous constitutional recognition. They are required also to report on the level of support from the Aboriginal and Torres Strait Islander peoples and from the broader community. They have terms of reference which require them to lead a broad national consultation and community agreement engagement program to seek the views of a wide spectrum of the community, including those who live in rural and regional areas. They are also to work closely with organisations such as the Australian Human Rights Commission, the new National Congress of Australia's First Peoples and Reconciliation Australia, all of whom have existing expertise and are able to engage on this issue. They are also required to raise awareness about the importance of this step of Indigenous constitutional recognition and they are meant to support ambassadors in the campaign to generate broad public awareness and discussion.

The government has also said to the panel that in performing their task they need to have regard to key issues raised by the community in relation to Indigenous constitutional recognition and on the form of constitutional change; the approach to a referendum that is likely to achieve widespread support; to report on the implications of any proposed changes to the Constitution; and finally, to the glee of constitutional

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 5 August 2011.



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law experts, to get their advice. I hasten to add I am not a constitutional law expert but being a lawyer I had to read the Constitution at some stage way back in the distant past, although I have been looking at it more carefully recently since this process has got underway.

So what I want to do today in light of that introduction is to examine some of the options that may be available for us in this proposed referendum but also to pose some questions. I am not sure if I am in a position to answer these questions, but I think we need to ask them, and the first question is perhaps—and these are not necessarily in logical order—what do we need to do to make this succeed and how do we make that happen? Many of those who were involved in the 1967 referendum, which is the most successful referendum in Australian constitutional history, are no longer with us, but we can learn from the processes that they went through, I think, to try and maximise our chances of succeeding this time around. Perhaps there is a more pressing question we need to ask of ourselves before we get into the nitty gritty of the options that might be available to us and it's this question: will this referendum or any of its propositions bring us closer together? Indeed, will it unify us? And perhaps, in other words, what exactly is the purpose of this exercise? Will it deal with what we Aboriginal and Torres Strait Islanders refer to as unfinished business? Indeed should it deal with that unfinished business? Or should we regard it as the beginning process, where we are looking to start now and refine into the future?

I think the terms of reference give us some insight into what might be the purpose of this exercise but to me it's not all that clear and, as I said, I am not sure if I can answer those questions. But I do think there are some key matters we need to found this process on, or to put a philosophical basis to this endeavour. If we are going to rearrange and reset the relationship between Aboriginal and Torres Strait Islander people, us the first nations peoples of this wonderful country of ours, is this the way to do it? Is this how we are going to solidify, unify and reset our affairs with the rest of the country, for those who have come here since 1788? Now I agree that this referendum should be about recognition, and I think perhaps we can all agree about that, but it cannot just be about recognition. I think just doing that would be an enormously wasted opportunity for us. But what should be the core of this exercise? The elements I speak of go beyond mere recognition.

Recognition itself is one of the key elements; it is the first of the three. But I would like to put it more elaborately because it must include an acknowledgement in the Constitution that we, the Aboriginal and Torres Strait Islander peoples, were here first, and not only here first, we were in possession of the country when the British Crown asserted its sovereignty over all our lands. If we recognise that we were in possession at that time it must also be acknowledged and recognised that the place

was taken from us, without our consent, and that was wrong and that question has never been addressed. This fact of recognition or fact of acknowledgement is really acknowledging our status, a status of Aboriginal and Torres Strait Islanders as the first peoples of this land, which will enable us to build a platform to build on, in my opinion.

The second key element that I want to mention goes to the question of identity, not just our Aboriginal identity, our Torres Strait Islander identity, this question of identity is about all of us. It's about our identity as Australians. So far as we are concerned, the first peoples of this land, we want our identity to be protected and respected within our legal and constitutional arrangements within our nation state. It is about us as a nation valuing these ancient identities and what that stands for, for us, a modern nation in the modern internet world—somewhere I suggest our Constitution isn't at the moment.

The final key element that should found our thinking on this referendum question is to do with citizens and citizenship. Now we, the Aboriginal and Torres Strait Islander peoples of this country, are not full citizens at present under our Constitution. Our Constitution allows the first Australians to be treated by the Parliament with racially discriminatory laws, laws that don't respect the principles of equality and laws that do not respect principles of non-discrimination. So we are not equal citizens, so the question has to be part of our thinking.

So I ask you to think about those elements when you think about eventually casting a vote on this question. So how do we achieve this? George Williams and David Hume<sup>1</sup> have given us some idea in a paper they both published and they say the following: firstly, that the question has to have bipartisan support. There has to be genuine popular engagement generating ownership for the populace, for those of our citizens who are entitled to vote. There has to be education around the question, and there has to be a great deal of clarity about the proposal and the message. There has to be a good referendum process. Of the 44 referenda we have had in this country, only eight have succeeded. I think it is safe to say if you examined all of those that failed, that one ingredient of this recipe at least had been breached.

I want to talk a bit about most things and looking at some of the practical issues that confront us, at the same time trying to speak of some of the opportunities that this constitutional referendum could afford us. I want to look at the whole gamut of possibilities, at least the ones I have looked at, from what I call the very minimalist position to the maximal position. It is what I call in your wildest dreams stuff. I want

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<sup>1</sup> George Williams and David Hume, *People Power: The History of the Future of the Referendum in Australia*, UNSW Press, Sydney, 2010.

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to firstly reject the minimalist approach and my preference is for incremental change with a view to long-term goals. One of the things we shouldn't do and what Williams and Hume should inform us is we should not be running the local government referendum question with this question. Just don't do it. It's dumb and it's going to increase the chances that both questions will fail. There will be a lot of arguments about that, but if the Parliament insists that that is what happens we have got to make sure that the two questions are clearly distinguishable from each other because they are both talking about recognition, recognition of local government and recognition of Aboriginal and Torres Strait Islander peoples. I don't think a proposal for local government should be tied with this referendum question because it muddies the waters with two proposals that are quite different. I won't accept arguments—I know I will be overridden—but I will not accept arguments of practicality and economy because of something I want to say later.

I do not think those sort of questions should inhibit us in really bringing our Constitution back to life, getting it out of the 1890s and getting it into the 21st century because we as a nation need to drag this instrument into the internet globalised age. In particular we need to think about how we accommodate the developments in the recognition and protection of the rights and interests of the world's indigenous peoples that's occurring internationally through the United Nations system and through other international forums. Because what is happening internationally, we like to be a part of it globally when it comes to trade and commerce and economics and politics but we are not very good at engaging internationally when it comes to things like our rights and particularly the rights of indigenous peoples.

Indigenous peoples worldwide are repositioning themselves within the nation states that they live in today, particularly in light of the overwhelming adoption by the UN General Assembly of the UN Declaration on the Rights of Indigenous Peoples. Australia was one of the four nations that voted against it in the General Assembly, but has since reversed its position on that and has now endorsed the declaration but we shouldn't be left behind in bringing it to reality here at home for Aboriginal and Torres Strait Islander peoples. I think in this context, in this pursuit, if you like, we have got to abandon our old settler colonial societal thinking, and come with a good heart to the task of resetting the relationship in line with what is now through this declaration the global standard. I think the education component of the awareness raising should include talking about terminology particularly as it is used in the Declaration of the Rights of Indigenous Peoples. A declaration that in the history of the United Nations has achieved the biggest ever 'yes' vote, a bit like our 1967 referendum. This is what the international community supports as the standard. We shouldn't be dragging the chain.

It is a fact of life we have lawyers. Lawyers will argue about the meaning of these things, as they have done. It's what lawyers do. I don't think that those things, their concerns, are insurmountable and unachievable, particularly for Australians. I think we can achieve just about anything if we set our minds to it and, as I say, if we come with a good heart, we'll do it. For example the use of the term 'peoples'. 'Peoples' in international law has a significant meaning. It means that you have a right to self-determination. Australia has endorsed the declaration. It uses that term and of course the term is being used by the national indigenous body, the new National Congress of Australia's First Peoples. Of course it invokes things that we are pretty shy talking about, or are turn offs to us when we start talking about human rights, or rights and interests. There is a significant portion of the population that are antagonistic towards talking about this stuff. We have to overcome that if we are fair dinkum about resetting relationships in this country.

We also have to be game enough to talk about terms like race, racism and racial. These are outmoded, outdated concepts. They are potentially inflammatory to the debate, but above all we should have a discussion and abandon this stuff and we shouldn't be talking about race in our Constitution. This is discredited language. It's being used in a context that is no longer valid or relevant. We talk more about cultural and ethnic differences these days. That's got nothing to do with race. After all, we are all members—me, you, people across the oceans on other parts of the planet—we are all members of the human race. So we shouldn't be frightened in the process to talk about these things.

There has been talk about a preamble and even, heaven forbid, in my view, a statement of values in the process thus far. Firstly I think we should tell the panel to forget about a statement of values, we are not ready for that. We weren't ready for it ten years ago and I think it's going to be more than ten years before we are ready. If you put that ingredient into the recipe it will cock up the cake. We don't need to do that now and we don't need, as I said, just to have a preamble. You know some lawyers say 'well people say stick something in a preamble'. We say 'well no, there is no preamble'. We would have to create a new preamble; the Constitution doesn't have a preamble. What might be considered a preamble is an Act of the British Parliament, the British Imperial Parliament of 1901. Some lawyers take a different view, but as I said that is the nature of lawyers. Put three lawyers in a room and you have five legal opinions. So it shouldn't just be that, and I think I have already indicated if we are going to have a statement of reconciliation I have indicated my preference for what it ought to contain and that ought to be in a new preamble.

There are also lawyers who argue that well if you want to insert a preamble you don't have to have a referendum so that is another issue. Are we wasting our time worrying

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about a preamble? But the lawyers aren't agreed on this and ultimately it's probably a question for a bunch of lawyers in another building not far from here. I think we should forget about having just a preamble and shouldn't muddy the waters with the idea of a statement of values. I say that about the statement of values because why put that question in with this question? It will just open the floodgates. Everybody will want something in there. It might be about their Christian heritage, or about the influence of migrants or about some other issue that we are never ever going to agree on because the list is endless. This could really derail the focus on the question we're trying to deal with here which is the recognition of the first Australians. If we want to do that down the track there will be other opportunities to have that debate. Perhaps when we become an inclusive republic with a new constitution, but that is not what we are on about at the moment. Some people (again lawyers) argued about the justiciability of the words in a preamble. I think we should trust our High Court on that question. I think in dealing with legal issues like this I would prefer them to the Parliament.

So a preamble of recognition would be both symbolic and address the first key element of my proposition. What about substantive changes and the Constitution? There are two highly offensive provisions in our Constitution and one is section 25, which gives the Parliament the power to disenfranchise members of a particular race and the other is subsection 26 of section 51, part of which was repealed in the 1967 referendum to remove reference to Aboriginal natives. I forget the exact words, but certainly Torres Strait Islanders weren't mentioned because they were the exception. The Commonwealth couldn't make laws with respect to Aboriginal people. The reference was removed. So the federal government now has that power and this is the power that allowed them on at least five occasions in the last two decades to suspend the Racial Discrimination Act and pass racially discriminatory laws against Aboriginal and Torres Strait Islanders only. I should add that power has never been used to discriminate against members of any other race. It has only ever been used to discriminate against Aborigines and Torres Strait Islanders.

So they are the two offending sections. Should we deal with both of them? I think we have got to do something substantive. Should we just repeal section 25? Leave it for another day to what we might put in there in its place? Should we repeal subsection 26 of section 51? I say yes. Some will say 'well, what happens to all those laws that were passed under that power?' Prior to 1967 the federal government passed something like 48 separate pieces of legislation that all had something to do with the affairs of the Aboriginal and Torres Strait Islander peoples. The federal parliament has never been without power to make laws for first Australians. Some say, well laws will fall over that have been passed under that power. I hope some of them do, like the Northern Territory emergency response legislation. Others that have been arguably of

some benefit to us, like the Native Title Act, should stand. I think there is sufficient precedent in the Constitution to save those things, to preserve those things. There is already precedent there at federation to save state constitutions, state laws etc.

Perhaps we just replace subsection 26 with a simple statement that says ‘for the peace, order and good government of the nation the federal parliament is empowered to make laws for Aboriginal and Torres Strait Islander peoples’. Or we could say ‘to make *beneficial* laws’, which would carry the message that we’re not talking about racial discrimination here. Repealing section 25 isn’t really going to do any damage. It has never been used in the 110 years of the Constitution. It has hardly ever even been referred to in judicial pronouncements. I think up until 1978 there had been three mentions of it as asides, irrelevancies, to judgements. It is not a provision we have sought to use to disadvantage or to disenfranchise people who happen to be from a different cultural or ethnic background so why have this offensive piece of draughtsmanship in our Constitution? It is an embarrassment to us. We should get rid of it.

The maximum position would include a new section 105b which would allow the federal government and the states and territories to enter agreements with representatives of Aboriginal and Torres Strait Islander peoples, primarily—but not exclusively—to deal with the unfinished business which is around status, identity, citizenship, recognition and finally to give us some time to discuss things. I mentioned earlier that we really don’t have much knowledge—unless you happen to be a constitutional lawyer or a law student—of our Constitution. A recent poll said that something like 58 per cent of Australians think we have a right to bear arms in our Constitution. It sends a message to me that we know more about what the Yanks have got in their constitution than we know about our own. So I think we have got to bring our Constitution to life, bring it into the 21st century. We should be having more frequent referenda. We should be examining this instrument and saying ‘it is time to bring this into the Facebook and the Twitter generation’.

This is what Iceland is doing. Iceland is throwing their constitution out and they’re bringing it into the 21st century and their consultation process includes the government running stuff through for comment through Twitter and Facebook and other ways of getting to people through the internet. It’s not about town hall meetings, although they are doing that as well, but not solely, and it’s not about news polls, it’s not about politicians getting up. It’s about the people saying, well look this is what we want. I think we should take our Constitution back. Take it back from the politicians and take it back from the courts and say look we want these things done because they are decent and proper things for us to do. It’s about our identity. It’s about us, we Australians. And we should tell politicians to stop running referenda with general

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elections. They're too highly politically charged and it's the wrong place to do it. We are not broke, we can afford separate referenda. We should get in the habit of saying mid-term between general elections we are having a referendum about X or Y. So we can all think about it rationally and sanely without some hysterical politician chasing you for your vote.

So anyway ladies and gentleman thanks for coming, and I hope these few thoughts might stimulate you into action.



**Question** — I noticed that when you started your speech you paid homage to the first Australians, not the traditional owners. Could you explain that please?

**Mick Dodson** — The term 'traditional owner' is used in a number of pieces of legislation throughout Australia, but it was first used in the federal law that is the Northern Territory Lands Right Act. It speaks of traditional owners and has a definition of tradition owners. To some people it's an artefact of anthropological thinking that has been grasped by lawyers and put into legal form and doesn't truly reflect the status in a way that the 'first peoples' or the 'first Australians' or 'first nations' does. Again, it is like native title, it's something that came over on the ships and it is not about our status before those ships arrived. We weren't called Australia back then but when we say first Australians everybody in this room would know who we were talking about. There are some Aboriginal and Torres Strait Islander peoples who object to that term. If I was in the Northern Territory I would say 'traditional owners'. In Victoria, the Victorian Government now has a Traditional Owner Settlement Act in relation to land settlements in Victoria and many Kooris in that state are comfortable with that term, but there are other people who aren't. So I was not just using a neutral term, I was using something that talks about, I think, the true status question.

**Question** — Would what you outlined today be achieved if we were to follow New Zealand and have a number of indigenous peoples directly elected into the federal parliament?

**Mick Dodson** — New Zealand can be distinguished from us in their legal and constitutional arrangement. They don't have a written constitution. A lot of their constitution is circumvention and they have a treaty of course—the Treaty of Waitangi—that has been elaborated and solidified in the legislation. They have a

unicameral system; they don't have an upper house. These are the differences that they have.

I do not have any problem with reserve seats as a proposition but I don't think it's a proposition we should be dealing with in this referendum. It's again one of those questions we need to deal with down the track, maybe in a new constitution where we have got the room and the space to have a proper debate about it and it's not bundled in with general elections and other referenda; that we actually have some clear air to fly in, or a bit of blue sea to navigate through. When it's bundled up with other stuff it tends to fail and our record shows that. If you were a corporation trying to change its constitution to fit in with modern practices and new technology and you had the sort of record we have of changing our Constitution you would have been out of business long ago. But the place to put that would be section 25 or perhaps not 25 exactly but in that chapter which deals with election to, and the constitution of, our Parliament.

**Question** — I think the referendum question should be kept very simple and the argument should be kept very simple. We should stay if we can out of the economic impact on individuals if people are worried about that. We should have some very strong arguments that go against those views. I take the carbon tax as an example. I think the Gillard Government is struggling to get the message across because it is complex and because people are worried about their hip pocket nerve. I think we could all probably draw a lesson out of that.

I remember the freedom marches of the early to mid-60s. I think we need a long lead time to sell the message not just an advertising blitz and I wonder whether we could perhaps take a leaf out of that earlier period and introduce something like that? Because as a young man that appealed to me and I hope it will appeal to many others.

**Mick Dodson** — We have got to get the process right and we have got to have enough time to raise awareness and build confidence for people that they are making an informed decision. The question should just be 'do you agree with inserting the words attached into the Constitution—yes or no?' You shouldn't split the question, shouldn't say do you agree with the preamble, do you agree with changing subsection 26? They have got to be joined together and you can only give one answer to the question.

**Question** — It just seems to me a no-brainer this constitutional consideration and the referendum. If we have a Constitution which at the moment enables Australian governments to prepare and implement discriminatively laws like the legislative response law and to suspend the Racial Discrimination Act, it is pretty obvious that there's overt discrimination associated with our Constitution. It just seems to me that



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it's black or white. You either agree with discrimination or you don't. And it just seems like a very simple process. Why we are having all this argument about preambles and stuff, I really don't know. And I note that Justice Kirby, for example, spoke to the Law Council a couple of weeks ago and he made a comment along the lines of when we voted in the 1967 referendum, which I did, we never thought we would ever see a Racial Discrimination Act being suspended as it was and having the soldiers go in and god knows what and really imposing a very patronising system on Aboriginal people. We've really gone wrong. I think it's a black-and-white question: we discriminate or we don't.

**Mick Dodson** — In relation to section 25 you say 'do you want to repeal this or not? Yes or no?' If you say no, you're actually supporting a racially discriminatory provision in the Constitution. No doubt, some people will say no. It may not be because they are racist, but because they just don't trust government on anything.

**Question** — You mentioned the possibility of 'beneficial' decisions to Indigenous people being acceptable. I would just be interested in your thoughts on who would decide whether it is beneficial or not?

**Mick Dodson** — Ultimately the arbiter of the meaning of the words in our Constitution is the High Court and I think they have done a pretty good job up till now and they can of course overrule previous rulings with subsequent judgement. So there is a safety net in a sense. But there is a huge amount of international human rights jurisprudence around these questions. They would guide our High Court. The international community has been dealing with this particularly since the Second World War. The Human Rights Council in its former incarnation as the UN High Commission for Human Rights. Their committees have been dealing with all of these questions. I'm not wedded to that word, but you need to be proscriptive but not prescriptive in the Constitution. It has got to be strong language, but it's really not useful to bring in trying to confine the court in its interpretation. What you want to do is to try to stop the court from saying 'yes these laws are valid' even though they're racially discriminatory, or discriminatory in some other way. Perhaps that might need eventually a provision in the Constitution that prohibits racial discrimination or entrenches the principles of equality and non-discrimination. But that is not a debate for now. If there is a new preamble that is in the terms that I suggest without any qualification, that will aid the judges in interpreting and they will look at the debates in Parliament, they will look at the second reading speeches, they will look at the vote and say the people voted. This is what we thought we did in 1967—that we were voting for the Commonwealth to make beneficial laws—but the courts did not take any notice of that. They went back to what the bearded white men of the 1890s and their conventions had in mind not what modern Australia has in mind, and what the

Australia of 1967 had in mind. I am sure it included the gentleman who spoke earlier who voted in that election. He can answer himself, but I'm sure most of them thought they were voting for beneficial stuff not for the racial discrimination to continue through the Parliament.



## Temporary Migration and its Implications for Australia\*

Peter Mares

With six million people or 27 per cent of the population born overseas Australia has—apart from the city-states of Singapore and Hong Kong—the highest proportion of overseas-born residents of any country in the world.<sup>1</sup> This reality is so entrenched, so normal, so much a part of our daily lives, that we rarely stop to consider how migration works and how it might be changing; to ask whether migration today is the same as it was ten, twenty or thirty years ago.

Of course we have an acrimonious debate about how to respond to asylum seekers arriving by boat, but that is a question of refugee protection and border control rather than migration. Important and politically fraught as the issue is, the arrival of asylum seekers by boat has only a small impact on the future shape of Australian society.

In terms of population size and demographic mix, migration is the main game and *skilled* migration is the increasingly dominant component in the mix.<sup>2</sup> The thrust of my argument in this lecture is that Australia's migration program is changing in quite fundamental ways. In fact we may be witnessing the biggest change since the abolition of the White Australia policy forty years ago, but these changes are not widely recognised or discussed. The implications of these changes are not entirely clear or predictable, but they may well be profound.

Let's start with multiculturalism.

In February 2011, the Minister for Immigration and Citizenship, Mr Chris Bowen, gave a speech on 'The genius of Australian multiculturalism'. It was an interesting speech, inasmuch as it sought to reclaim the language and the values of multiculturalism in political discourse after many years in which the M-word was

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 23 September 2011.

<sup>1</sup> Australian Bureau of Statistics, '6 million migrants call Australia home', media release 75/2011, 16 June 2011, online at <http://www.abs.gov.au/ausstats/abs@.nsf/Products/A6B6AC80B29DE8F3CA2578B000119758?opendocument>, accessed 13 September 2011.

<sup>2</sup> In 2011–12, confirming a long-term trend, the number of permanent skilled places in the migration program was increased by 12 000, while the number of family places rose by only 4050 'reinforcing the ... focus on skills'. Kruno Kukoc (First Assistant Secretary, Migration and Visa Policy Division Department of Immigration and Citizenship), 'Australia's migration programs: contributing to Australia's growth and prosperity', presentation to the Committee for the Economic Development of Australia (CEDA) discussion forum, 14 September 2011, online at [http://www.immi.gov.au/about/speeches-pres/\\_pdf/2011/2011-09-14-ceda-speech.pdf](http://www.immi.gov.au/about/speeches-pres/_pdf/2011/2011-09-14-ceda-speech.pdf).

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either studiously avoided by our elected representatives or replaced with formulations, such as ‘cultural diversity’.<sup>3</sup>

What interested me about the speech, however, was the way in which the minister sought to define Australian multiculturalism as being substantially different from other apparently failed models around the world. He said that Australian multiculturalism was distinguished from other varieties in three important ways.

The first distinguishing feature of Australian multiculturalism is ‘political bipartisanship’ which puts the policy ‘above the fray of the daily political football match’.<sup>4</sup> Whether this is entirely accurate—particularly in recent years—is a matter for debate, but it is not the concern of this presentation.

A second element of the genius of multiculturalism in this country is that it is ‘underpinned by respect for traditional Australian values’. Chris Bowen quoted former Prime Minister Paul Keating to illustrate his point: multiculturalism imposes a responsibility of loyalty and ‘the first loyalty of all Australians must be to Australia, that they must accept the basic principles of Australian society’. These principles include ‘the Constitution and the rule of law, parliamentary democracy, freedom of speech and religion, English as a national language, equality of the sexes and tolerance’.<sup>5</sup>

In another context, one might argue about whether Australian values are really substantially different from Italian values or American values or the values that underpin any other liberal democracy, but again I’ll leave that matter aside.

I do, however, want to emphasise a phrase in the Keating quote: he said the first loyalty *of all Australians* must be to Australia and the basic principles of Australian society.

‘*Of all Australians*’: that raises a question, which I would like you to bear in mind during the course of this presentation—what about ‘non-Australians’ who live in this country on a long-term basis? There are an increasing number of non-Australians who live amongst us; people who are neither citizens nor permanent residents. Do we have a call on their loyalty? If so, what do we offer them in return? What is the reciprocal basis on which such an expression of loyalty might be expected?

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<sup>3</sup> Chris Bowen, Minister for Immigration and Citizenship, ‘The genius of Australian multiculturalism’, address to the Sydney Institute, 17 February 2011, online at <http://www.minister.immi.gov.au/media/cb/2011/cb159251.htm>, accessed 9 August 2011.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

The third element of the genius of Australian multiculturalism identified by Minister Bowen—and the most important for my purposes today—is that Australian multiculturalism is ‘citizenship centred’. He points out proudly that Australia has one of the highest take up rates of citizenship in the OECD.<sup>6</sup>

This sets Australia apart from ‘some countries in Europe ... where people arrive from overseas as guest workers with little encouragement to take out citizenship ... [and] ... little incentive to become full, contributing members of that society’. The minister warns that such guest worker arrangements ‘can lead to a complex and entrenched social cohesion dilemma’. Fortunately, in Minister Bowen’s view, we are spared such risks because Australia is ‘not a guest worker society’. Rather ‘people who share respect for our democratic beliefs, laws and rights are welcome to join us as full partners with equal rights’.<sup>7</sup>

The minister is drawing here on the experience of migration to Australia in the second half of the 20th century. For much of that period, migrants arrived by ship and were often called ‘New Australians’. However much that expression was used to set recent migrants apart as different (with particular reference to non-British migrants) this terminology nevertheless indicated that a move to Australia was considered permanent. This is not to deny that significant numbers of migrants ultimately decided not to stay in Australia or stayed without taking out Australian citizenship, but serves to emphasise that in this period there were relatively few options for temporary migration to Australia, let alone anything that might have been termed ‘guest work’.

But in 2011 can we say as definitively and with as much certainty as Minister Bowen does, that Australia is not a guest worker society? Certainly Australia still has a large and substantial permanent migration program, but I will argue that old postwar model conjured up by the minister’s words has now been superseded. While it has not been replaced with a ‘guest worker’ system per se, temporary migration—including temporary migration *primarily for work*—is now a permanent feature of the policy landscape.

My thesis is that our analysis has not caught up with this changed reality and we need to start thinking critically about what this might mean for Australian society—for multiculturalism and indeed for the particularities and peculiarities of our liberal democracy.

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<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

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## Forms of temporary migration

Who are these ‘non-Australians’ who live and work amongst us? There are more than one million of them, so they account for almost five per cent of the total population.<sup>8</sup> As I said, they are neither citizens nor permanent residents, but they reside in Australia lawfully, on a long-term basis and with work rights. I have tried to invent a snappy acronym to describe them—a term that encapsulates their contingent status in Australia—simultaneously long-term *and* temporary. I came up with ‘long-temps’ but that makes them sound like replacement office staff. I also thought of ‘tempi-dents’, but that conjures up images of artificial teeth.

So I will stick to describing and differentiating them by their visa status, which is the most accurate way to proceed, since this is in fact a diverse population that cannot be easily lumped together.

They fall into four main categories: working holiday makers, international students, skilled workers on temporary 457 visas and New Zealanders. Not all of these people would be working. Some are children, some are stay-at-home spouses and some are students fully supported by scholarships or by their families overseas. Some work intermittently, like backpackers supplementing their savings so they can stay on the road longer, or students working only in semester breaks. Nevertheless, collectively these four groups now account for about ten per cent of the total workforce. Since they are on average much younger than the general population, their role in the labour market is particularly pronounced in certain age brackets. A calculation prepared by the Department of Immigration and Citizenship concluded that working holiday makers, skilled workers on 457 visas and international students now make up around one fifth of the total labour force aged between 20 and 24.<sup>9</sup> If you included New Zealanders in this calculation then the proportion would be even higher.

So let’s take a closer look at the four main categories of temporary residents with work rights, beginning with working holiday makers.

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<sup>8</sup> The total number of international students, New Zealanders, working holiday makers and 457 visa holders present in Australia on 31 December 2010 was 1 080 677. Compilation of data supplied in tables 4.1, 4.5, 4.6 and 4.7 in *Immigration Update*, July to December 2010, Department of Immigration and Citizenship, Canberra, 2011, online at <http://www.immi.gov.au/media/publications/statistics/immigration-update/update-dec10.pdf>.

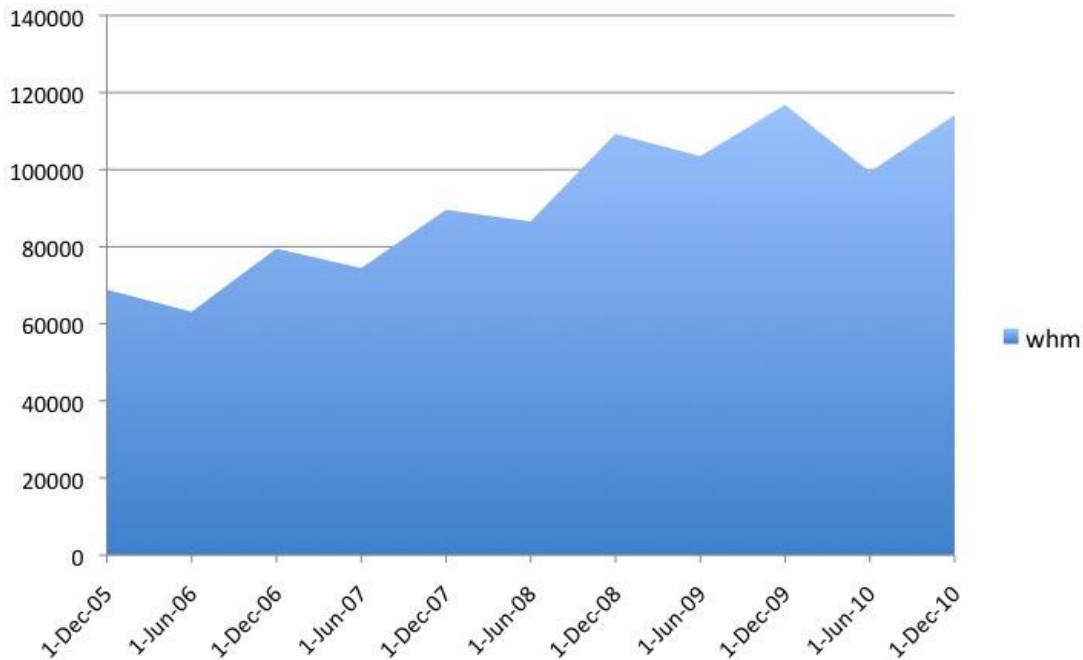
<sup>9</sup> Mark Cully, ‘Migrant labour supply: its dimensions and character’, paper presented to the Australian Labour Market Research Workshop, University of Sydney, 15–16 February 2010. The figure varies between 4.2 per cent and 6.4 per cent of the overall labour force and between 17.9 per cent and 22.3 per cent of the labour force in the 20–24 year old age bracket, according to the assumptions made about how active these temporary long stay migrants are in the workforce.

*Working holiday makers*

The Working Holiday visa is valid for 12 months and open to travellers aged 18–30 from 19 countries or territories with which Australia has a reciprocal relationship.<sup>10</sup> More restrictive reciprocal ‘work and holiday’ arrangements are in place with seven other countries.<sup>11</sup>

The Working Holiday scheme is intended to ‘encourage cultural exchange and closer ties ... by allowing young people to have an extended holiday, and supplement their funds with short-term employment’.<sup>12</sup>

**Chart 1: Working holiday makers (stock) 2005–10**



The take up of the scheme has grown steadily and the number of working holiday makers present in Australia at any one time has risen by 66 per cent in the five years from 2005 to 2010 (chart 1), up from around 69 000 (68 867) to more than 114 000

<sup>10</sup> Department of Immigration and Citizenship, ‘Fact sheet 49—Working Holiday Program’, online at <http://www.immi.gov.au/media/fact-sheets/49whm.htm>, accessed 9 August 2011. The Working Holiday visa is available to passport holders from Belgium, Canada, the Republic of Cyprus, Denmark, Estonia, Finland, France, Germany, Hong Kong SAR, the Republic of Ireland, Italy, Japan, the Republic of Korea, Malta, the Netherlands, Norway, Sweden, Taiwan and the United Kingdom.

<sup>11</sup> Bangladesh, Chile, Malaysia, Indonesia, Thailand, Turkey and the United States. Department of Immigration and Citizenship, ‘Fact sheet 49a—Work and Holiday Program’, online at <http://www.immi.gov.au/media/fact-sheets/49awhp.htm>, accessed 9 August 2011.

<sup>12</sup> Department of Immigration and Citizenship, ‘Fact sheet 49—Working Holiday Program’, op. cit.



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(114 158).<sup>13</sup> The two largest source countries for working holiday makers are the UK and South Korea, which between them account for about 40 per cent of the visas issued each year, followed by Germany, France, Ireland, Taiwan, Canada and Japan, which make another 45 per cent of the visas issued.

Most working holiday makers probably spend more money in Australia than they earn during their trip; the median length of stay is 209 days and the vast majority depart Australia before their visas expire. The program helps to promote tourism. It is also a reciprocal scheme that affords similar opportunities to young Australians who travel overseas. So I am not suggesting that there is anything inherently wrong with the working holiday maker scheme, that it is bad policy or presents a major problem.

However, looked at from another perspective, the scheme has been increasingly instrumentalised by government to address labour market issues. For example, working holiday makers are now eligible for a second 12-month visa if they undertake at least three months of ‘specified work’ in an ‘eligible regional Australian area’. Initially this was done to encourage travellers to help meet labour shortages in seasonal agriculture, particularly during fruit and vegetable harvests. However the list of industries that qualify as ‘specified work’ has been repeatedly extended and now includes plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction.<sup>14</sup> Similarly, the list of ‘designated regional areas’ is a long one, and essentially covers all of Australia apart from the ACT and eight major urban centres (Sydney, Wollongong, Newcastle, the NSW Central Coast, Melbourne, Brisbane, the Gold Coast and Perth).<sup>15</sup>

Also working holiday makers mostly enter the job market at lower wage rates and their profile in the labour force is ‘clearly biased towards lesser-skilled jobs’.<sup>16</sup> An unpublished departmental survey found that the most common jobs held by working holiday makers were farmhand, waiter, cleaner, kitchen hand and bar attendant, accounting for about 60 per cent of all the jobs undertaken.<sup>17</sup> In the same survey, more

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<sup>13</sup> Unless otherwise stated all data used in these charts are stock figures—that is the number of people in these visa categories actually present in Australia on the dates in question—rather than the number of visas issued in a particular year. The statistics are taken from the regular *Immigration Update* produced by the Department of Immigration and Citizenship and available online at <http://www.immi.gov.au/media/publications/statistics/>.

<sup>14</sup> Department of Immigration and Citizenship, ‘Working Holiday—specified work’, online at <http://www.immi.gov.au/visitors/working-holiday/417/specified-work.htm#a>, accessed 9 August 2011.

<sup>15</sup> Department of Immigration and Citizenship, ‘Working Holiday—regional Australia postcode list’, online at <http://www.immi.gov.au/visitors/working-holiday/417/postcodes.htm>, accessed 9 August 2011.

<sup>16</sup> Cully, op. cit.

<sup>17</sup> *ibid.*

than a third of working holiday makers reported being paid at rates below the federal minimum wage (of \$13.74 per hour at the time).<sup>18</sup>

There is evidence that the net employment effect of working holiday makers is positive—that their presence in Australia generates more jobs than they take up. But their significant numbers at the lower end of the labour market and their willingness to accept—or incapacity to resist—pay at rates below the legal minimum wage, nevertheless raises an interesting question: to what extent are these working travellers displacing locals who are ‘in direct competition for the same kinds of work’?<sup>19</sup> The group most at risk of being displaced would be low skilled school leavers exiting the education system and entering the workforce for the first time. It is worth remembering that despite Australia’s strong economy, the unemployment rate is 15.6 per cent for 15–19 year olds and 10.2 per cent for 15–24 year olds (in July 2011).<sup>20</sup>

### *International students*

Similar questions can be posed in relation to international students, the second major group of long-term temporary residents in Australia, who have the right to work up to twenty hours per week during term time and longer in semester breaks. Overall the net employment impact of international students is positive—they generate more jobs than they fill. However if you chat to a taxi driver or the person behind the counter at a late night convenience store or the waiter serving a meal in an Asian restaurant, it quickly becomes obvious that international students now constitute a significant proportion of the low status, casual workforce in the contemporary service economy. Again, there is a view—though not one I think has yet been convincingly proved or disproved—that international students displace local workers in this sector and exacerbated the problem of youth unemployment.<sup>21</sup>

As with the other categories on temporary migrants, international student numbers grew rapidly during the first decade of this century before a sharp turn down in the past few years. Even after the fall in new commencements the stock of international students in Australia on 31 December 2010 was 90 per cent higher than five years earlier (291 199 compared to 152 622).

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<sup>18</sup> *ibid.*

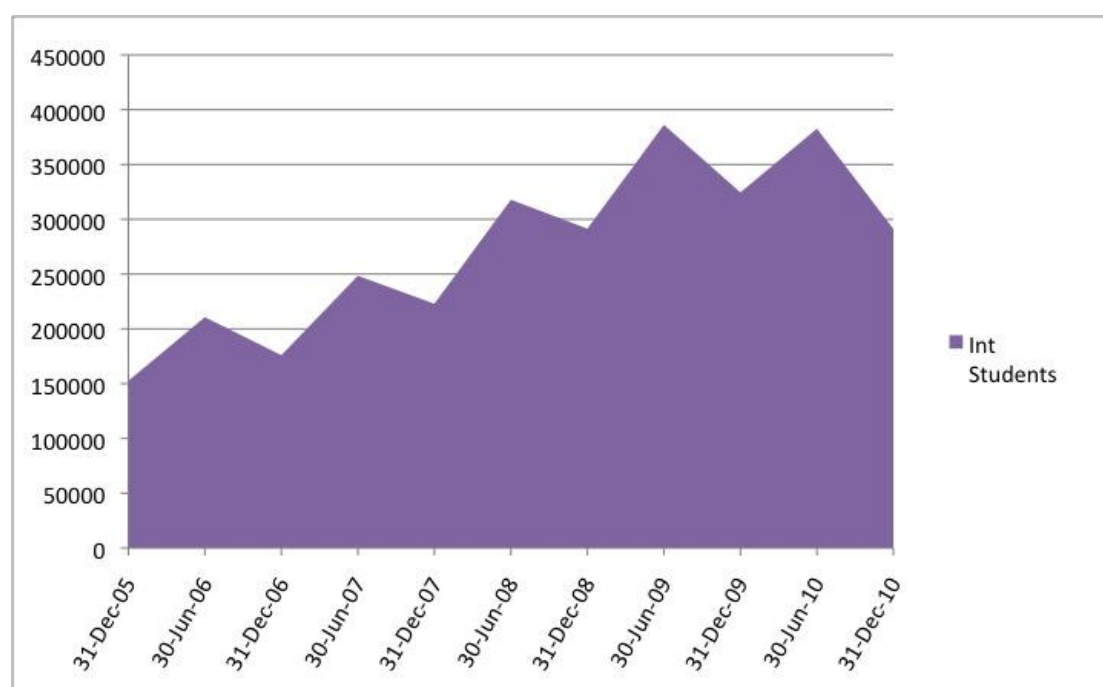
<sup>19</sup> *ibid.*

<sup>20</sup> Australian Bureau of Statistics, Labour Force (catalogue number 6202.0), July 2011, tables 13 and 17.

<sup>21</sup> Bob Birrell, Ernest Healy, Katharine Betts and Fred T. Smith, ‘Immigration and the resources boom mark 2’, Monash University Centre for Population and Urban Research, research report, July 2011, p. 11, online at <http://arts.monash.edu.au/cpur/publications/documents/immigration-policy-13-july-2011.pdf>, accessed 18 August 2011.

A number of factors contributed to the sudden drop in new overseas student commencements—the high dollar, highly publicised attacks on students (Indian students in particular), the global downturn and the changes to policy which essentially broke the nexus between study in Australia and permanent residency, removing a carrot that had drawn many students here in the first place. As has been well documented, when study and migration were directly linked under the Howard Government, this created perverse incentives and led to unintended outcomes, including an explosion of private training colleges offering vocational courses of sometimes dubious quality that promised the shortest possible route to permanent residency.

**Chart 2: International students (stock) 2005–10**



The link between study and migration contributed to a blow-out in valid applications for permanent residency. By 2009 the department had on hand 137 500 valid applications for independent general skilled migration. That is more than two years supply of migrants in that stream of the program, with 9000 new applications coming in every month.<sup>22</sup> The program was in danger of being overwhelmed.

One of the changes made to manage that problem was priority processing. Introduced from the beginning of 2009 and amended several times since, priority processing fundamentally changes the way in which applications for permanent residency are

<sup>22</sup> Department of Immigration and Citizenship, '2010–11 migration program planning: consultations with key state and territory representatives December 2009 to July 2010', presentation, slide 14 of 22.

dealt with. Instead of applications being considered in the order in which they are lodged, as in the past, they are now sorted into five different categories in line with Australia's perceived economic needs. In descending order of priority these categories are:

1. Applicants sponsored by an employer under the Regional Sponsored Migration Scheme or applying for a Skilled-Regional visa (subclass 887)
2. Applicants sponsored under the Employer Nomination Scheme
3. Applicants nominated by agencies of state or territory governments for occupations listed on their respective migration plans
4. Applicants with an occupation on the new Skilled Occupation List (SOL Schedule 1 in effect from 1 July 2011)
5. All other applicants<sup>23</sup>

When he introduced priority processing former Immigration Minister Senator Chris Evans said the old system that served everyone in order was 'just like pulling a ticket number from the dispenser at the supermarket deli counter'.<sup>24</sup> It 'didn't make any sense', he said, that Australia was 'taking hairdressers from overseas in front of doctors and nurses'.<sup>25</sup> This may be true from a national interest perspective, but from the perspective of procedural fairness priority processing has had distressing outcomes for individual applicants. The changes were applied to visa applications that had already been lodged, with the result that tens of thousands of aspiring migrants are facing indefinite limbo. They are stuck in 'category 5'—the lowest priority group—and any new higher priority application entering the system is processed ahead of them. In effect it is like being at the back of a queue and never moving forward, watching helplessly as newcomers constantly join the line ahead of you.

There are 37 200 people currently resident in Australia who are in the priority 5 group—almost all of them former international students who have graduated from Australian colleges and universities. More than 10 000 (10 570) have already waited more than two years for their applications for permanent residency to be considered.<sup>26</sup> Let me be clear—these are people whose applications were valid at the time they were

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<sup>23</sup> Department of Immigration and Citizenship, 'Fact sheet 24a—priority processing for skilled migration visas', online at [http://www.immi.gov.au/media/fact-sheets/24apriority\\_skilled.htm](http://www.immi.gov.au/media/fact-sheets/24apriority_skilled.htm), accessed 9 August 2011.

<sup>24</sup> Senator Chris Evans, Minister for Immigration and Citizenship, 'Changes to Australia's skilled migration program', address presented at the Australian National University, 8 February 2010, online at <http://www.minister.immi.gov.au/media/speeches/2010/ce100208.htm>, accessed 16 September 2011.

<sup>25</sup> Senator Chris Evans, doorstep interview, Canberra, 8 Feb 2010, online at <http://www.minister.immi.gov.au/media/speeches/2010/ce100208a.htm>, accessed 16 September 2011.

<sup>26</sup> Figures supplied by the Department of Immigration and Citizenship via email in response to a question by the author, 7 July 2011.

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lodged—they had the professional qualifications, language skills, age profile, health and character checks to score high enough in the migration points test to qualify for permanent residency. But their applications have been put to the bottom of the pile and will remain there for the foreseeable future since all applications in the other four higher priority categories will always be processed ahead of them and new applications enter the system all the time.

The Department of Immigration and Citizenship wrote recently to members of this lowest priority group saying that it ‘expects to commence processing of some priority group 5 applications in this program year’. However the same letter warned ‘many priority group 5 applicants will still have a long wait for visa processing’.<sup>27</sup>

In the meantime, they live in Australia on bridging visas, with permission to work but without the right to travel overseas, unless they have a substantial reason to do so—such as the illness or death of a close relative, or to meet the requirements of their employer. Nor can they sponsor relatives to join them in Australia. The result is that wives and husbands are forced to live apart; couples planning to marry must postpone their wedding indefinitely. In some cases, parents must live apart from their children left behind with relatives while they completed their studies in Australia.

Those relegated to priority group 5 could of course give up their dream of permanent residence at any time and return to their countries of origin—but if they do so then they will forfeit the visa processing charge paid to the Australian Government (currently set at \$2960), plus any other moneys invested in their application—potentially thousands of dollars in professional migration advice, and hundreds more in health checks, police checks, language tests and skills recognition. That is not to mention the amount that they have invested in an Australian education as full fee paying students or any emotional or psychological commitment they may have made to Australia as a nation.

Since I began reporting on this issue almost two years ago,<sup>28</sup> I have been in touch with scores of applicants from a broad range of backgrounds, including a Brazilian expert in international trade negotiations who speaks four languages fluently, a medical scientist from France engaged in cancer research, an aspiring Chinese entrepreneur with a law degree and masters in translation and interpreting, a Sri Lankan IT graduate working in the health industry, and a German anthropologist whose PhD was paid for by the Australian taxpayer and who is an expert in, of all things, refugee issues in Malaysia. I have also come across cooks and hairdressers—all of them

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<sup>27</sup> Department of Immigration and Citizenship, ‘Information regarding your application for a Subclass 885 Skilled—Independent Visa’, 13 July 2011. Copy supplied to the author by an informant.

employed and some hoping to establish their own businesses in Australia, if their visa uncertainty is ever resolved.

Let me just briefly outline two of their stories for you. Originally from China, Xiru Li submitted his application for permanent residency three years ago and is still waiting for an answer. He first came to Australia in 2002 at age of 17 and completed two years of high school, before studying a degree in business administration at Macquarie University and a masters in Business Law at the University of Sydney. Xiru Li estimates that his family invested at least \$200 000 in his Australian education. He hopes to build a career in Australia in business or financial services but has found it hard to get a job in line with his qualifications while stuck on a bridging visa so Xiru Li works as a mortgage broker. Aged 27, Xiru Li has lived in Australia for more than a third of his life.

‘Helen’ first came to Australia on holiday. She liked the country so much that in 2006 she chucked in her office job in the UK, sold her house and moved her entire family to Australia to embark on a new career by studying hairdressing. She paid \$10 000 in fees to attend a private college that turned out to be little more than a shop front. She complained to various authorities to little effect, left after six months and did not receive any kind of refund, instead investing another \$17 000 at a different, more professional college. Helen has been constantly employed in salons since qualifying in her trade, but her application for permanent residency, lodged two and a half years ago, is the lowest priority for processing. When Helen arrived in Australia her son ‘Nick’ was 15 years old. Now he is 20. He has finished school but if he wants to study at a tertiary level he has to pay the full fees that apply to an overseas student. Nick has tried unsuccessfully to find an apprenticeship but employers are wary of taking him on because of his temporary visa status. Soon Nick will be 21 years old. That means he will no longer be considered as Helen’s dependent for the purposes of her family’s application for permanent residency. As a result he will have to apply for permanent residency independently, but he has neither the skills nor qualifications to succeed.

Xiru Li, Helen and other international student graduates stuck on the bottom rung of the priority processing list are at risk of becoming permanently temporary—living and working in Australia long term, contributing to our economy and our society, but kept at arm’s length and unable to settle.

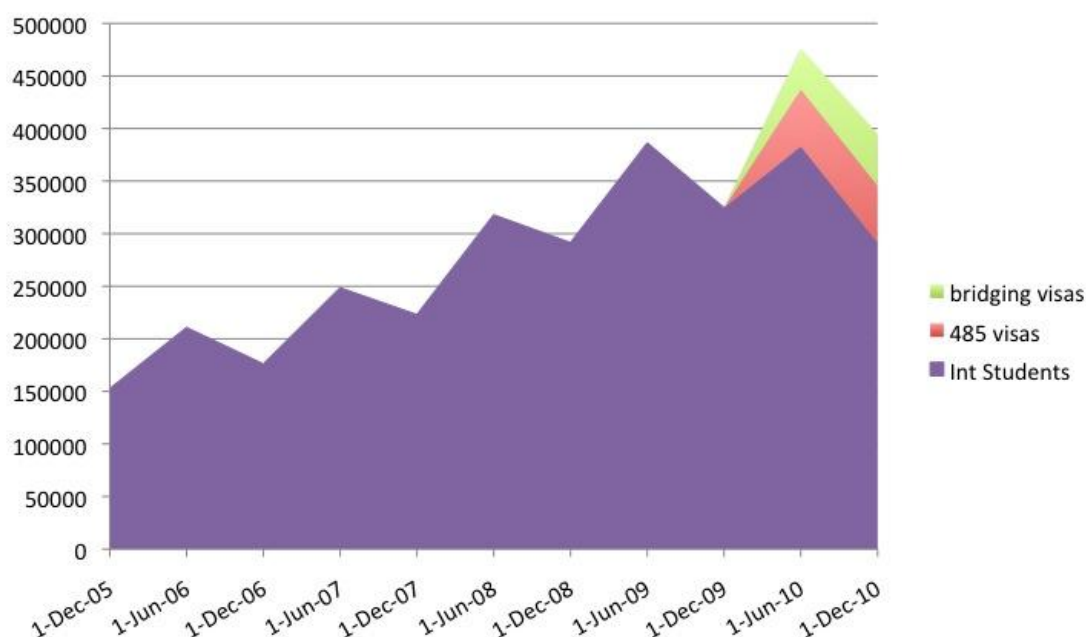
In addition to those on bridging visas and waiting for their permanent residency applications to be considered, there is another group of 62 000 international student

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<sup>28</sup> See for example Peter Mares, ‘A blockage in the skilled migration pipeline’, *Inside Story*, 3 November 2009, online at <http://inside.org.au/a-blockage-in-the-skilled-migration-pipeline/>.

graduates who have been issued with, or who have applied for 18-month long 485 Skilled–Graduate (Temporary) Visas.<sup>29</sup>

**Chart 3: International students and student graduates and bridging and 485 visas**



The Department of Immigration’s published service standard for the processing of these 485 visa applications is 12 months.<sup>30</sup> A 12-month wait to be issued with an 18-month visa! These 62 000 graduates also aspire to permanent residency, but do not meet the criteria for skilled migration. In theory the 485 visa allows them to ‘to gain skilled work experience or improve their English language skills’.<sup>31</sup> At the end of the 18 months, some may meet the criteria, others will not. In the meantime, like their contemporaries in priority group 5, they live and work in Australia on a temporary basis, paying taxes but ineligible for most government benefits, excluded from voting or running for office, and with no formal representation at any level of our political process.

#### *457 visas*

The third category of long-term but not permanent residents with work rights can be more correctly identified as temporary migrant workers—they are skilled workers on 457 or ‘business (long-stay)’ visas.

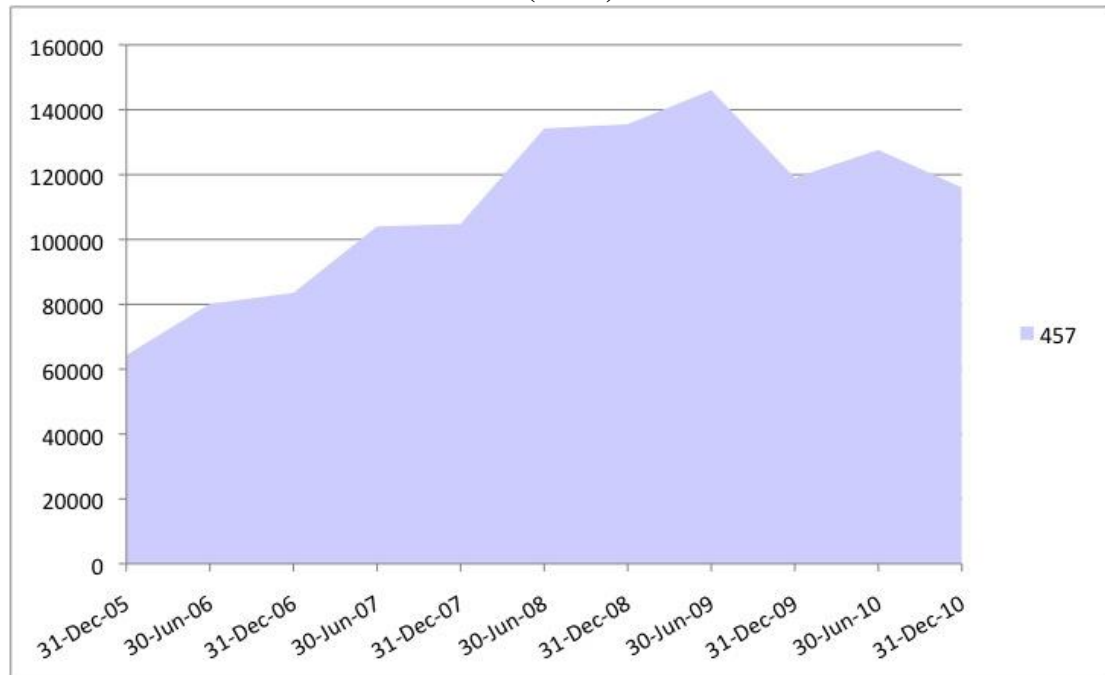
<sup>29</sup> Statistics supplied by Department of Immigration and Citizenship officers by email, 12 August 2011, in response to a question by the author.

<sup>30</sup> *ibid.*

<sup>31</sup> Department of Immigration and Citizenship, ‘Skilled—Graduate (Temporary) Visa (Subclass 485)’, online at <http://www.immi.gov.au/skilled/general-skilled-migration/485/>, accessed 19 August 2011.

Conceived under the Keating Labor government and formally introduced soon after John Howard led the Liberal–National Party Coalition to power in 1996, the 457 visa was initially intended to be a transitional measure to fill temporary skills gaps in the Australian labour market until the domestic education and training system could catch up with demand. But in the years after it was created, use of the 457 visa category grew dramatically. Although numbers fell back during the global financial crisis, the stock of 457 visa holders in the country in 2010 was still almost double that of five years earlier (up from 64 340 to 116 012) (chart 4).

**Chart 4: 457 visa holders in Australia (stock) 2005–10**



There was a sharp increase in new 457 visas issued last financial year (2010–11 up 34 per cent year-on-year). If this trend continues then the annual *temporary* skilled migration intake may soon overtake the annual *permanent* skilled migration intake, as it did once before 2007–08, since permanent migration is subject to an annual cap and temporary migration is not (chart 5).

Further growth in temporary skilled migration will be encouraged by recent changes to government policy.

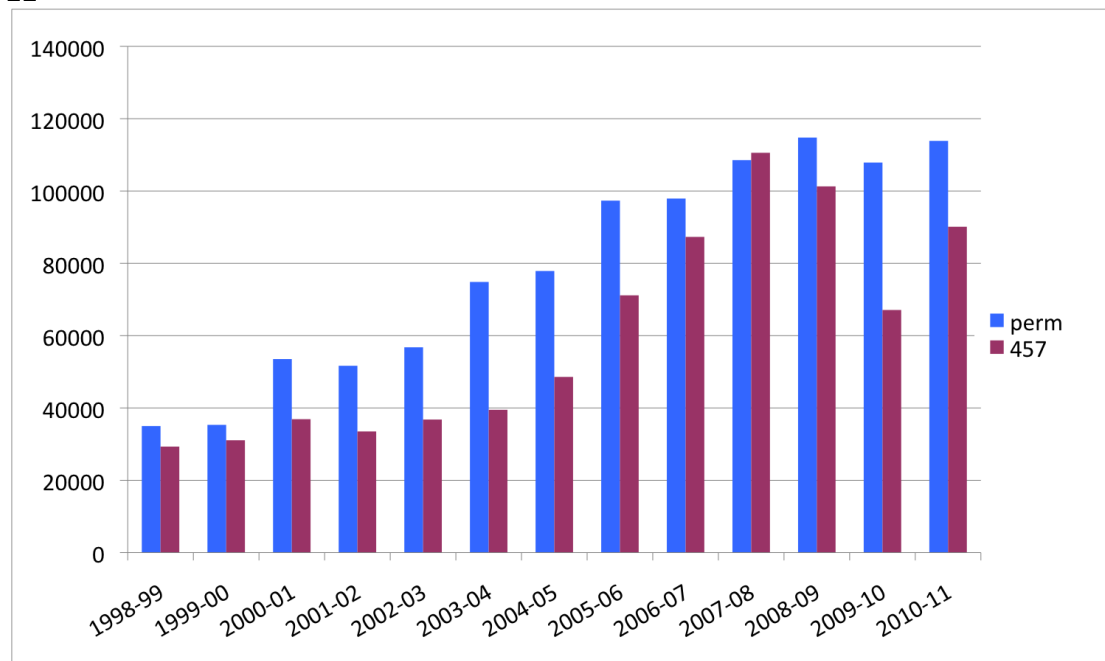
In the 2011–12 federal budget the government committed an extra \$10 million in the administration of the 457 program to set up a new processing centre in Brisbane with the aim of cutting down the median processing time for 457 visas from an already speedy 22 calendar days to just 10 days.<sup>32</sup> It is a stark contrast to the 12-month

<sup>32</sup> Department of Immigration and Citizenship, ‘Employer Sponsored Workers—additional funding for 457 visa processing’, online at <http://www.immi.gov.au/skilled/457-additional-funding.htm>,



processing time for student graduates applying for a 485 skilled graduate visa, let alone the indefinite wait for permanent residency faced by those assigned to category 5 under the priority processing system.

**Chart 5: Permanent skilled migration entry vs temporary skill 457 visas 1999–11<sup>33</sup>**



The government has also introduced a new form of temporary migration specifically designed to address spikes in demand for labour flowing from the resources boom, especially during the construction phase of major projects. This new mechanism is called an Enterprise Migration Agreement or EMA.

EMAs will be ‘available to resources projects with capital expenditure of more than two billion dollars and a peak workforce of more than 1500 workers’.<sup>34</sup> EMAs can encompass not only skilled but also semi-skilled labour—that is, not just occupations with an Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill level of 1, 2 or 3 (professions like engineering for example, or skilled trades), but also ANZSCO skill levels 3 and 4 (certificate level qualifications).

accessed 9 August 2011 and Chris Bowen, Minister for Immigration and Citizenship, ‘Budget 2011–12: new temporary migration agreements to further address skills demand’, media release, 10 May 2011, online at <http://www.minister.immi.gov.au/media/cb/2011/cb165283.htm>, accessed 26 September 2011.

<sup>33</sup> Data used in this chart was assembled from two sources accessed on the Department of Immigration and Citizenship website: annual reports of the department (<http://www.immi.gov.au/about/reports/annual/>) and the ‘Subclass 457—Business (Long Stay) Visa statistics’, (<http://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm>).

<sup>34</sup> Department of Immigration and Citizenship, ‘Fact sheet 48a—Enterprise Migration Agreements’, online at <http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm>, accessed 22 August 2011.

The government maintains that this will not displace workers or reduce domestic skills formation, since to be approved for an EMA projects will need to develop a comprehensive training plan:

- commit to training in occupations of known or anticipated shortage;
- commit to reducing reliance on overseas labour over time, with particular focus on semi-skilled labour;
- demonstrate that training strategies are commensurate with the size of the overseas workforce used on a project;
- demonstrate how training targets will be measured and monitored and enforced with contractors.

In addition, companies using EMAs are subject to the same requirement as employers using the 457 program, that they must either:

- contribute two per cent of payroll to a relevant industry training fund;
- or
- spend one per cent of payroll on training their Australian employees.

The government also created a new special category of Regional Migration Agreements (RMAs): ‘custom-designed’ and ‘geographically based’, RMAs are designed to give regional employers ‘streamlined access to temporary and permanent’ migrant workers (both skilled and semi-skilled) ‘where local labour cannot be sourced’.<sup>35</sup> As with 457 visas and Enterprise Migration Agreements, employers using RMAs will be required to commit to domestic training.

Will the conditions attached to these temporary migration programs really result in increased training and skills formation for the *domestic* population? Or do such schemes make it is easier for employers to hire offshore rather than to train locals—particularly locals who may come from disadvantaged backgrounds and who may require fairly intensive assistance? I do not pretend to know the answer to this question, but I think it is a question that we need to ask as the role of temporary migrants in our labour force continues to grow.

And I anticipate that there will be a continuing increase in long-term temporary migration as the politics of population influences policy.

The permanent migration intake was increased this year by almost 10 per cent; up from 168 700 to 185 000 places to the largest program (in absolute terms) in

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<sup>35</sup> Department of Immigration and Citizenship, ‘Regional Migration Agreements’, online at <http://www.immi.gov.au/skilled/regional-migration-agreements.htm>, accessed 16 September 2011.

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Australia's history.<sup>36</sup> But if the 'big Australia' debate at the last federal election is any indication of popular views, then unless they become far more adept at dealing with such issues as traffic congestion, environmental protection, urban amenity and housing affordability, future governments, whether Coalition or Labor, may find it difficult to increase the annual permanent migration intake, particularly at certain stages in the electoral cycle. On the other hand, there is concerted pressure from business to import skilled labour to feed the mining boom. Skills Australia forecasts a potential shortfall of 2.4 million workers over the next four years as 'an unprecedented pipeline of resource projects worth \$132 billion is developed'.<sup>37</sup> The anticipated shortfall of skilled personnel rises to 5.2 million workers in 2025.<sup>38</sup>

I should point out that the Skills Australia numbers quoted here are at the top end of projections and assume an ambitious economic growth rate of close to four per cent per annum. The assumptions behind the report have not gone unchallenged. The link between major resource developments and the need for high levels of skilled migration has also been questioned, since mining is a capital—not a labour intensive—industry, and the biggest demands for workers will occur in the construction phase of mining projects, rather in long run operations.<sup>39</sup>

Nevertheless the squeeze between business pressure on the one hand and popular antagonism towards increased migration on the other, is likely in my view to produce a policy compromise in which temporary labour migration increases under the 457 program, EMAs, RMAs and perhaps other temporary migration schemes, which are not subject to any caps or quotas and which tend to happen below the media radar, particularly in regional and remote Australia. I think of this as a Clayton's immigration—the migrants you have, when you're not having migrants.

It is important to note that Australia's 457 program is qualitatively different from most other temporary migration schemes around the world. In Singapore, for example:

unskilled temporary migrant workers ... do not have the right to marry, or cohabit, with a Singapore citizen or permanent resident. Female non-resident workers are also required to undergo mandatory pregnancy tests

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<sup>36</sup> Department of Immigration and Citizenship, '2011–12 migration program', online at [http://www.immi.gov.au/skilled/\\_pdf/migplan11-12.pdf](http://www.immi.gov.au/skilled/_pdf/migplan11-12.pdf).

<sup>37</sup> Louise Dodson, 'It's a 2.4 million problem', *Weekend Australian Financial Review*, 14–15 May 2011, p. 27.

<sup>38</sup> *ibid.*

<sup>39</sup> Birrell, Healy, Betts and Smith, *op. cit.*

every six months, with the threat of immediate deportation in the case of a positive test result.<sup>40</sup>

Many labour migration schemes are restricted to single workers. Bangladeshi labourers or Sri Lankan maids working in the Gulf states generally travel alone and are often separated from family for years at a time. By contrast 457 visa holders can bring immediate family members with them to Australia and their spouses are also allowed to work. Workers on 457 visas are entitled to the same wages and conditions as their Australian counterparts and in recent years the federal government has enhanced these protections and the enforcement mechanisms that go with them.<sup>41</sup>

Nonetheless, foreign workers on the 457 scheme necessarily have diminished rights compared to Australian citizens or permanent residents. They cannot switch jobs as easily as their Australian counterparts because to be without work for 28 days means to be without a sponsor and will result in them being in breach of their visa conditions and liable for removal from Australia. Similarly, their ability to make use of such legal protections as unfair dismissal rights is severely curtailed.

Holders of 457 visas cannot be automatically compared with the guest workers or *Gastarbeiter* employed in the Federal Republic of Germany in the postwar period, since there is at least a potential path to permanent residency. Indeed considerable numbers of 457 visa holders have availed themselves of this option. Chart 6 shows that the number of 457 visa holders becoming permanent residents can be as high as half the number of new 457 visas issued any given year.

However a simple mathematical calculation makes clear that the path to permanent residency cannot be open to all. If it were the entire annual skilled migration program would be taken up with 457 visa holders with no room for applicants of any other type.

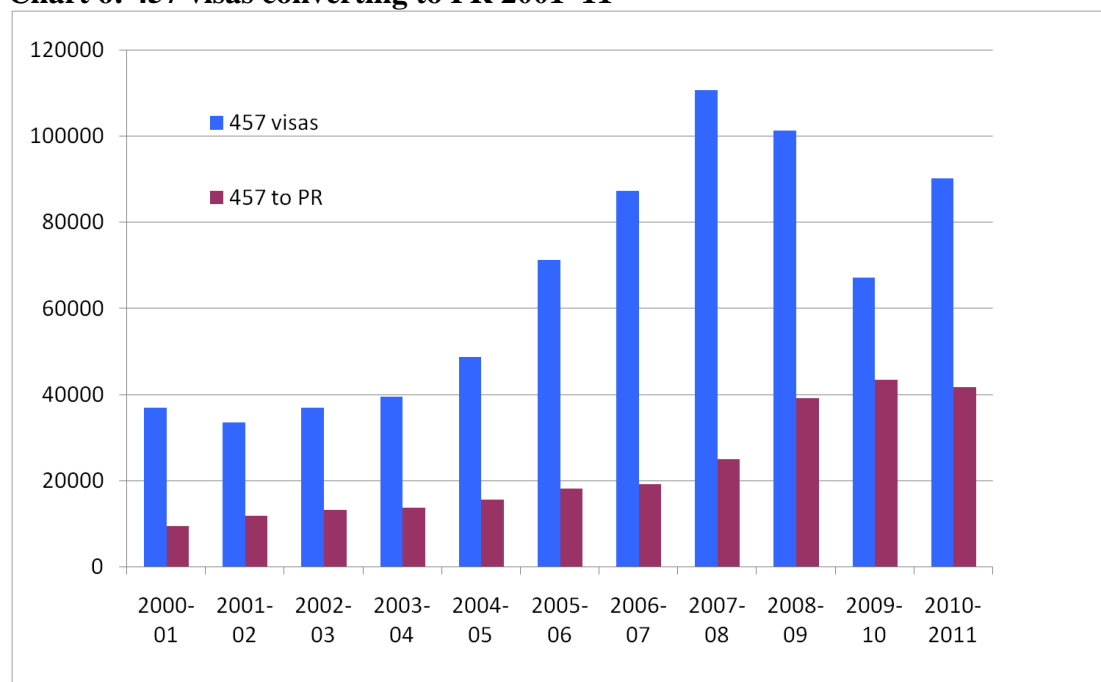
Given that the permanent migration intake is capped and the temporary migration intake is not, there is a risk here of an accumulating level of unmet demand—that is, of an emerging backlog of 457 visa holders who are seeking to become permanent residents but whose numbers overwhelm the annual permanent migration intake. In such a situation these 457 visa holders could well find themselves stuck indefinitely in a processing queue while they wait for their applications to be considered: exactly the situation that has arisen in relation to international student graduates in priority processing category 5.

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<sup>40</sup> M. Ruhs and H. Chang, 'The ethics of Labor immigration policy', *International Organization*, no. 58, winter, 2004, p. 72.

<sup>41</sup> Peter Mares, 'The permanent shift to temporary migration', *Inside Story*, 17 June 2009, online at <http://inside.org.au/the-permanent-shift-to-temporary-migration>, accessed 9 August 2011.

**Chart 6: 457 visas converting to PR 2001–11<sup>42</sup>**



An alternative scenario is that increasing numbers of temporary migrant workers apply for a second or even a third 457 visa. This could see temporary skilled migrants working in Australia for periods of eight years or more. In such a case they would increasingly come to resemble the West German *Gastarbeiter*—paying tax, contributing to the society, but never receiving the benefits of permanent residency, let alone the voting rights that go with citizenship. Like student graduates stuck in the processing queue, they are in danger of becoming permanently temporary.

Is this the situation emerging in Australia?

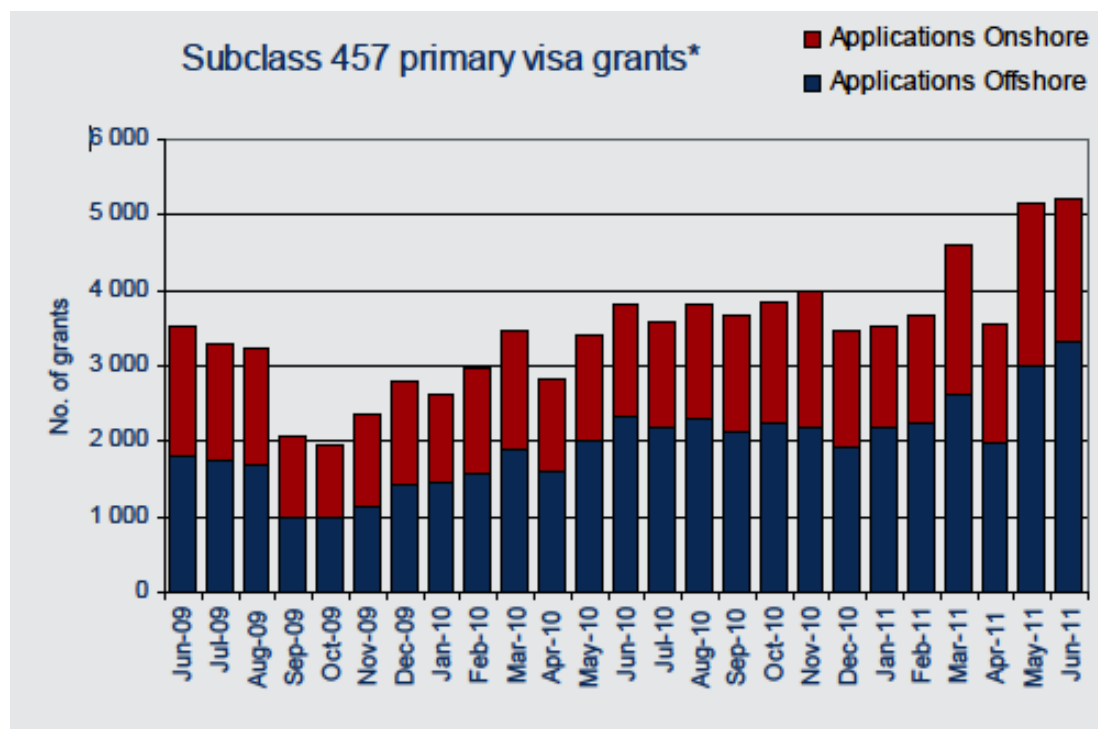
According to departmental figures, only 6390 temporary migrant workers have been here on 457 visas for more than four years, and just 1080 of them have been here for longer than six years.<sup>43</sup> So at this stage you could conclude that the potential ‘guest worker’ issue I’m flagging is not a significant problem—or at least not yet. However it is important to note that a significant proportion of 457 visas are issued on-shore (the proportion was 43.2 per cent of all applications granted in the 2010–11 program year)<sup>44</sup> (chart 7).

<sup>42</sup> Data used in this chart was assembled from two sources accessed on the Department of Immigration and Citizenship website: annual reports of the department (<http://www.immi.gov.au/about/reports/annual/>) and the Subclass 457 Business (Long Stay) Visa Statistics (<http://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm>).

<sup>43</sup> Data provided by email, 22 August 2011, in response to an inquiry from the author.

<sup>44</sup> Department of Immigration and Citizenship, ‘Subclass 457 state/territory summary report 2010–11 to 30 June 2011’, online at <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun11.pdf>, accessed 9 August 2011.

Chart 7: 457 visa grants off-shore/onshore<sup>45</sup>



This indicates not only that some workers are rolling over visas, but also that an increasing proportion of new 457 visas are granted to other visa holders already in Australia—like international students and working holiday makers.

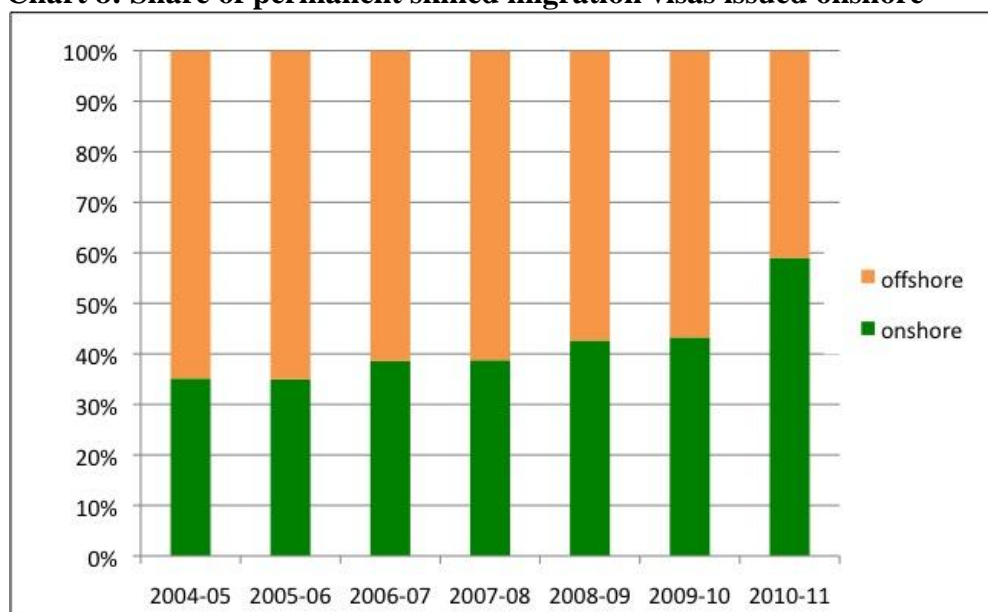
So what appears in the statistics to be a four-year stay on a 457 visa, may in fact be a seven-year period of temporary residency in Australia, including three years of undergraduate study, before the 457 visa was granted. This points to two other substantial shifts in the nature of Australia’s migration program in recent years that have gone almost unnoticed in the broader community: the rise of ‘two-step’ and ‘employer sponsored’ migration.

*Two-step and sponsored migration*

A significant proportion of temporary long-stay migrants do not leave Australia when their visas expire, but change their status. So, for example, a graduating student might move on to a 457 visa or a 457 visa holder might become a permanent resident. The proportion of ‘new’ permanent migrants who are actually ‘old’ temporary migrants has been steadily increasing. In the skilled migration program last year (2010–11), 59 per cent of permanent residence visas in were issued onshore (chart 8).

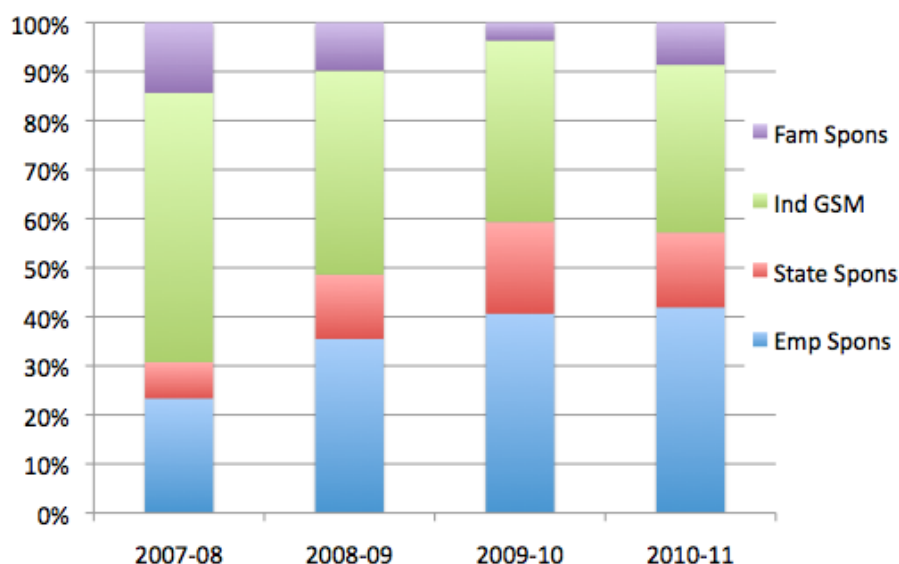
<sup>45</sup> *ibid.*

**Chart 8: Share of permanent skilled migration visas issued onshore<sup>46</sup>**



This trend to two-step migration is directly linked to a rise in employer sponsorship. In the past, most migrants applied for permanent residency in Australia independently—based on their qualifications, skills and experience. Now they are increasingly sponsored by their employers, or nominated by state and territory governments (chart 9).

**Chart 9: Growth of sponsorship as a proportion of permanent skilled migration<sup>47</sup>**

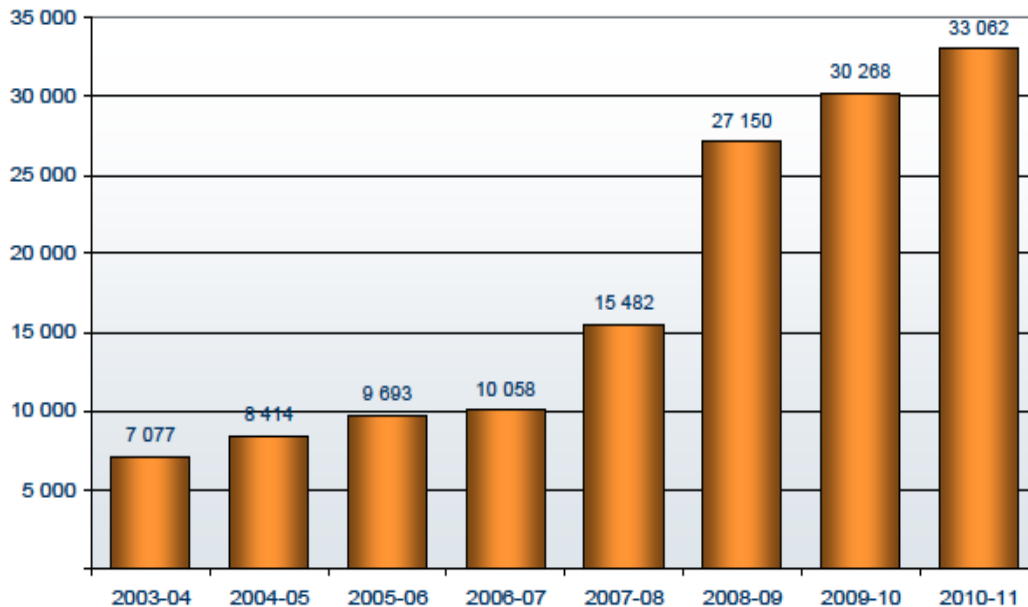


<sup>46</sup> Data sourced from annual Department of Immigration and Citizenship publications: statistics for 2004–05 to 2006–07 taken from *Immigration Update*; statistics for 2007–08 to 2010–11 taken from ‘Migration program report’, <http://www.immi.gov.au/media/statistics/statistical-info/visa-grants/>.

<sup>47</sup> Data taken from Department of Immigration and Citizenship annual publications ‘Migration program report’, 2007–08 to 2010–11.

There are two components of employer sponsored permanent migration and both have been growing rapidly. The first is the Employer Nomination Scheme (ENS) (chart 10), which allows employers anywhere in Australia to sponsor skilled foreign workers for permanent residence in a broad range of occupations, provided they offer an annual salary of at least \$49 330 (or \$67 556 for certain information technology positions).<sup>48</sup>

**Chart 10: Growth of the Employer Nomination Scheme (ENS)<sup>49</sup>**



The second main component of employer sponsored migration is the Regional Sponsored Migration Scheme (RSMS) (chart 11), which allows employers ‘in regional, remote and low population growth areas in Australia’ to sponsor applications for permanent residence. The definition of regional is fairly generous—Perth has just been added to the list of eligible areas, so regional sponsorship now incorporates all of Australia except ‘Sydney, Wollongong, Newcastle, Melbourne, Brisbane and the Gold Coast’.

The selection criteria are also more generous: any skilled occupation can be considered, as long as the nominated position offers an annual salary that ‘meets any applicable Australia award or relevant legislation’ and the visa applicant holds ‘an appropriate Australian diploma-level or higher qualification’. In exceptional or

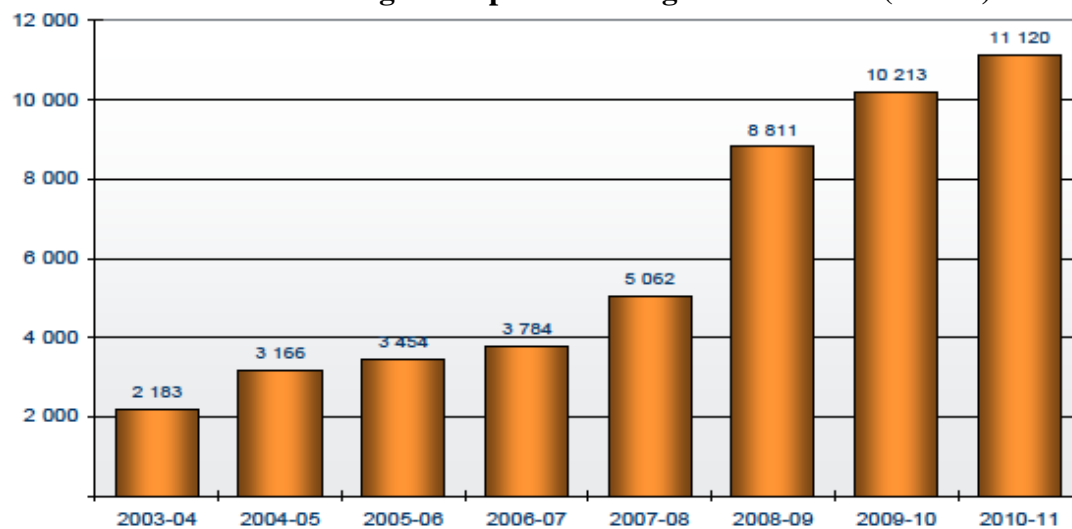
<sup>48</sup> Department of Immigration and Citizenship, ‘Discussion paper: review of the permanent employer sponsored visa categories’, August 2011, online at [http://www.immi.gov.au/media/publications/discussion-papers/\\_pdf/discussion-ens.pdf](http://www.immi.gov.au/media/publications/discussion-papers/_pdf/discussion-ens.pdf), accessed 27 August 2011.

<sup>49</sup> Department of Immigration and Citizenship, ‘2010–11 migration program report’, online at <http://www.immi.gov.au/media/statistics/pdf/report-on-migration-program-2010-11.pdf>, Figure 7: Employer nomination scheme outcome 2003–04 to 2010–11—visa grants.



compelling circumstances employers can nominate semi-skilled workers or workers without diploma level qualifications.<sup>50</sup>

**Chart 11: Growth of the Regional Sponsored Migration Scheme (RSMS)<sup>51</sup>**



Increasing the role of employer sponsorship in skilled migration is a deliberate government policy designed to shift Australia from a ‘supply-driven’ to a ‘demand-driven’ migration program. The changes were originally conceived under former Immigration Minister Senator Chris Evans, who said the shift was designed to ensure that Australia gets ‘the skills that are actually in demand in the economy, not just the skills that applicants present with’.<sup>52</sup> Or putting it more bluntly, he said ‘we don’t want people coming in and adding to the unemployed queue’. Rather ‘employers and state governments and the Commonwealth pick the people who we need’.<sup>53</sup>

There are many advantages to a sponsored ‘two-step’ or ‘try-before-you-buy migration’ process. It allows employers to test a visa applicant’s ‘work skills before sponsoring them for permanent residence’ while temporary migrants ‘have an opportunity to assess their employers and Australia’ before making the decision to stay.<sup>54</sup> There is a potential downside however, as identified by industrial relations commissioner Barbara Deegan in her review of the 457 visa program. The employer’s ability to give or withhold sponsorship is very powerful and makes temporary migrants who ‘have aspirations towards permanent residency’ particularly ‘vulnerable

<sup>50</sup> Department of Immigration and Citizenship, ‘Discussion paper: review of the permanent employer sponsored visa categories’, op. cit., pp. 6, 18–19.

<sup>51</sup> Department of Immigration and Citizenship, ‘2010–11 migration program report’, op. cit., Figure 8: RSMS outcomes 2003–04 to 2010–11—visa grants.

<sup>52</sup> Evans, ‘Changes to Australia’s skilled migration program’, op. cit.

<sup>53</sup> Evans, doorstop interview, 8 February 2010, op. cit.

<sup>54</sup> Department of Immigration and Citizenship, ‘Discussion paper: review of the permanent employer sponsored visa categories’, op. cit., p. 11.

to exploitation as a consequence of their temporary status'.<sup>55</sup> They may put up with 'substandard living conditions, illegal or unfair deductions from wages, and other similar forms of exploitation' in order not to jeopardise potential employer sponsorship. The situation is 'exacerbated where the visa holder is unable to meet the requirements for permanent residency via an independent application',<sup>56</sup> which will increasingly be the case, since the government has made it much harder to qualify for independent skilled migration.

It has done this by cutting back the list of skilled occupations under which a migrant can qualify independently for permanent residency, and by lifting the threshold for English language competency under the new skilled migration points test.<sup>57</sup> These measures will further accelerate the shift towards employer-sponsored migration as the dominant path to permanent residency.

### *New Zealanders*

I come finally to the fourth group of long-term temporary migrants in Australia—New Zealanders, whose numbers have grown 24 per cent over the past five years. The growth is not as dramatic as with the other three groups I've discussed, but comes off a much higher base. So from around 450 000 (452 067) New Zealanders resident in Australia in 2005, we now have about 560 000 (559 308)—an increase of 110 000 Kiwis in five years.

Again it might seem strange to talk about New Zealanders as 'temporary migrants', since their entry into Australia is part of a long-standing reciprocal agreement between the two countries and they can stay for as long as they choose with no need to renew visas. And as Prime Minister Julia Gillard put it in her speech to the New Zealand Parliament in February 2011, 'New Zealand ... is family',<sup>58</sup> a sentiment often repeated in the wake of the Christchurch earthquake a few weeks later.

Whether or not New Zealanders are truly 'family' might depend on your definition. After the Queensland floods and the devastation of Cyclone Yasi, many long-term New Zealand residents of Queensland felt themselves to be treated at best as poor cousins. Having lost homes, businesses and possessions, they discovered that they

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<sup>55</sup> Barbara Deegan, 'Visa subclass 457 integrity review final report', Department of Immigration and Citizenship, October 2008, online at <http://www.minister.immi.gov.au/media/media-releases/2008/457-integrity-review-report.pdf>, p. 23.

<sup>56</sup> *ibid.*, p. 49.

<sup>57</sup> To a minimum benchmark of level 6 under the International English Language Testing System (IELTS) with extra points for level 7 (+10 points) or level 8 English (+20 points).

<sup>58</sup> James Massola, 'PM applauded as she declares apple war truce in historic speech to New Zealand MPs', *Australian*, 16 February 2011, online at <http://www.theaustralian.com.au/national-affairs/foreign-affairs/pm-declares-apple-war-truce-in-historic-speech-to-new-zealand-mps/story-fn59nm2j-1226006860786>, accessed 9 August 2011.

were not eligible for emergency government payments designed to help them keep their heads above water until they could re-establish their lives.<sup>59</sup>

**Chart 12: New Zealanders in Australia (stock) 2005–10**



After considerable lobbying on both sides of the Tasman, an ex-gratia payment was extended to them, but the experience has opened the eyes of many New Zealanders resident in Australia to what they see as structural discrimination resulting from legal changes over the past two decades. First was the introduction in 1994 of the Special Category Visa for New Zealanders, which changed the status of New Zealand citizens living in Australia, so that they were no longer automatically treated as de facto permanent residents. Then came legal changes resulting from the *Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001*.

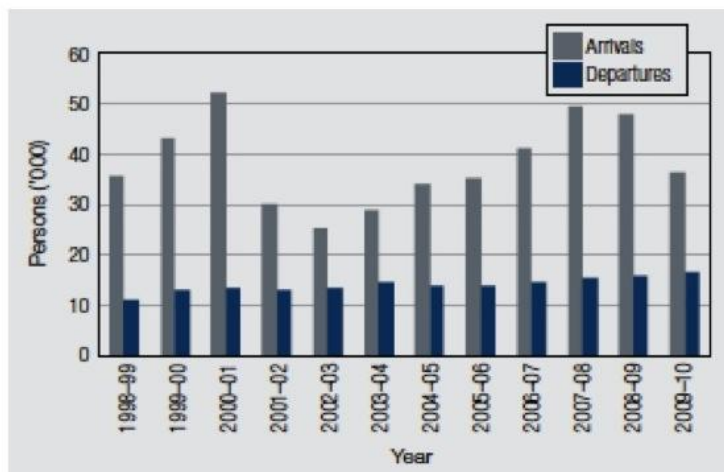
As its title suggests, the 2001 amendment was designed to limit the rights and entitlements of New Zealand citizens living in Australia. Specifically it prevents them accessing certain social security payments. This is understandable from an Australian government perspective since at the time there were about eight times as many New Zealanders living in Australia as Australians living in New Zealand.<sup>60</sup> The Australian Government was concerned that Australia's welfare system was a magnet drawing New Zealanders across the ditch. 'Australian officials expected New Zealand

<sup>59</sup> ABC Radio National, 'Kiwis in Australia', *Life Matters*, 28 July 2011, online at <http://www.abc.net.au/rn/lifematters/stories/2011/3279521.htm>, audio accessed 9 August 2011.

<sup>60</sup> 'Kiwis overseas', *The Encyclopedia of New Zealand*, online at <http://www.teara.govt.nz/en/kiwis-overseas/4>, accessed 20 September 2011.

migrants to halve under the new restrictions',<sup>61</sup> which indeed they did, although numbers have increased again subsequently (chart 13).

**Chart 13: New Zealand permanent and long-term arrivals and departures 1998–99 to 2009–10<sup>62</sup>**



Source data: OAD Statistics, DIAC

The knock-on effects of these changes for some individual New Zealanders have been profound. The National Welfare Rights Network gives the example of ‘Toby’, who came to Australia with his family in 2008 aged 14:

Two years later he left his family due to family violence and moved into a refuge. As he is here on a New Zealand passport he is not residentially qualified for Youth Allowance or Special Benefit.<sup>63</sup>

Toby survives with the support of a charity.

Depending on which state they live in the children of non-protected New Zealand citizens (that is those not already resident in Australia on 26 February 2001 when the amendment came into force) may not be entitled to disability services. The *Brisbane Times* recently reported that:

19-year-old cerebral palsy sufferer Hannah Campbell, who has lived in Australia for five years, has been refused financial assistance to attend day

<sup>61</sup> *ibid.*

<sup>62</sup> Department of Immigration and Citizenship, ‘Population flows: immigration aspects 2009–10 edition’, 2011, p. 80.

<sup>63</sup> National Welfare Rights Network, ‘Observations on Australia’s performance regarding its social security obligations under clauses 26 and 27 of the United Nations Convention on the Rights of the Child’, December 2010, online at <http://www.welfarerights.org.au/Policy%20papers%20%20submissions/NWRN%20CROC%20Report%202010.doc>, accessed 20 September 2011.

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care—even though her father, Dave, has been working as a Toowoomba bus driver and paying Australian taxes.<sup>64</sup>

Assistance may even be denied to children who were born in Australia to New Zealand parents, since it is only after ten years continuous residence that a child is eligible to become an Australian citizen in his or her own right.

Unemployed, working-age children of New Zealand parents are unable to access benefits or the support and training opportunities that accompany Centrelink registration and children of ‘non-protected’ New Zealand citizens must pay upfront for university study and cannot access the HECS-HELP deferred payment scheme. Nor do they qualify for the 20 per cent discount on paying up-front fees.<sup>65</sup>

New Zealanders on Special Category Visas cannot apply for public sector jobs that require citizenship or permanent residency. This has led to situations where they have been denied employment by state agencies like the police or fire services, or where those agencies have had to seek special amendments to their own rules of employment in order to recruit New Zealanders resident in Australia. Non-protected New Zealand residents of WA, Victoria and Queensland are denied access to public housing. And of course New Zealanders resident in Australia are not eligible to vote in federal or state elections.

In short, many New Zealanders feel that Australian policy has made them into ‘an underclass’.<sup>66</sup>

It might be objected that if New Zealanders are so concerned about their situation, then they should become permanent residents of Australia or take out citizenship. But this is no straightforward matter. New Zealanders can remain living and working in Australia as long as they like but the Special Category Visa does not confer residency rights, regardless of their length of stay. If New Zealanders wish to apply for permanent residency, then they will be assessed on the same criteria of health, age, skills and education as all other skilled migrants. This means for example that unprotected New Zealanders aged over 45, or those with limited qualifications, are highly unlikely to ever be eligible for permanent residency, let alone citizenship.

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<sup>64</sup> Cosima Marriner, ‘Kiwis stuck in one-way welfare street’, *Brisbane Times*, 24 April 2011, online at <http://www.brisbanetimes.com.au/queensland/kiwis-stuck-in-oneway-welfare-street-20110423-1dsfm.html#ixzz1PKysT2zt>, accessed 9 August 2011.

<sup>65</sup> Department of Education, Employment and Workplace Relations, ‘Information for Commonwealth supported students: HECS HELP 2011’, online at [http://www.goingtouni.gov.au/NR/rdonlyres/06523655-0868-4623-B3E9-BE53220E9AA5/0/2011\\_HECSHELP\\_booklet.pdf](http://www.goingtouni.gov.au/NR/rdonlyres/06523655-0868-4623-B3E9-BE53220E9AA5/0/2011_HECSHELP_booklet.pdf).

<sup>66</sup> Maori-in-Oz website, Sample letter to the Australian prime minister, online at [http://www.maori-in-oz.com/index.php?option=com\\_content&task=view&id=1544&Itemid=254](http://www.maori-in-oz.com/index.php?option=com_content&task=view&id=1544&Itemid=254), accessed 9 August 2011.

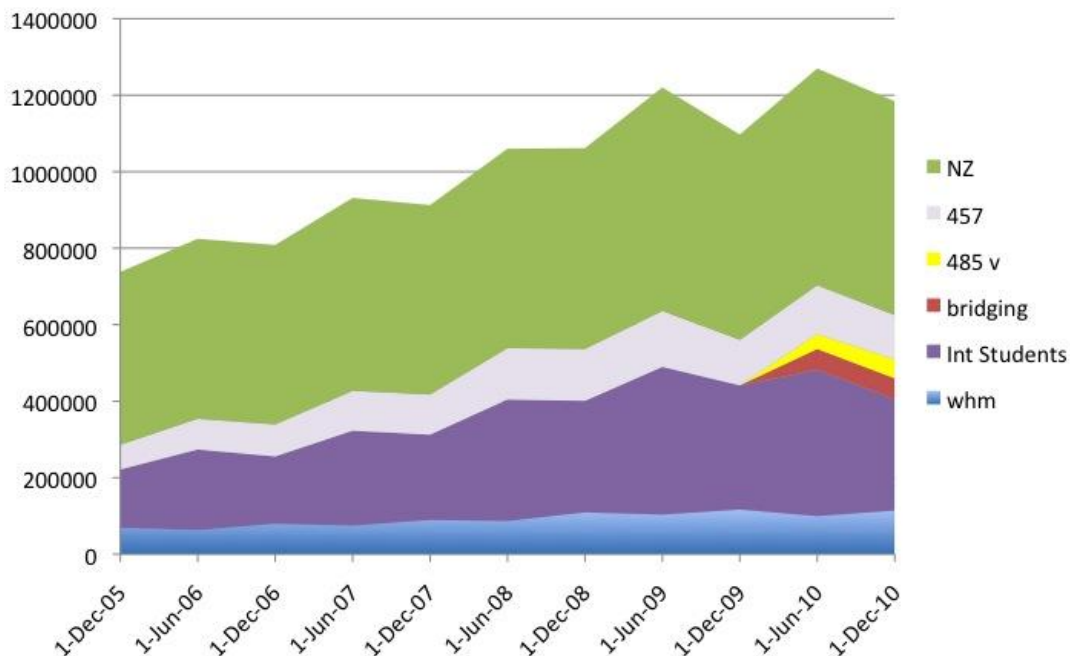
On one level it might seem fair that New Zealanders are not given any special advantages over other nationalities when seeking Australian residency or citizenship. But compare this to the reverse situation: Australian citizens living in New Zealand become eligible to apply for citizenship, tertiary student allowances and student loans, as well as all social security benefits after a qualifying period of two years residency.

The Special Category Visa that confers on New Zealanders the option to live and work indefinitely in Australia runs the risk of creating another group of long-term residents who are in effect, permanently temporary and whose rights and entitlements are curtailed as a result.

### Conclusion

In this presentation I have identified some fundamental changes to Australia's migration program, in particular the rise of temporary migration. Long-term temporary residents in Australia fall into four main categories—working holiday makers, international students, temporary migrant workers and New Zealanders—and together they number more than one million people or about five per cent of the Australian population. While the number of these temporary residents present in Australia at any one time peaked a couple of years ago, the total is still more than 60 per cent higher today than in 2005 (chart 14).

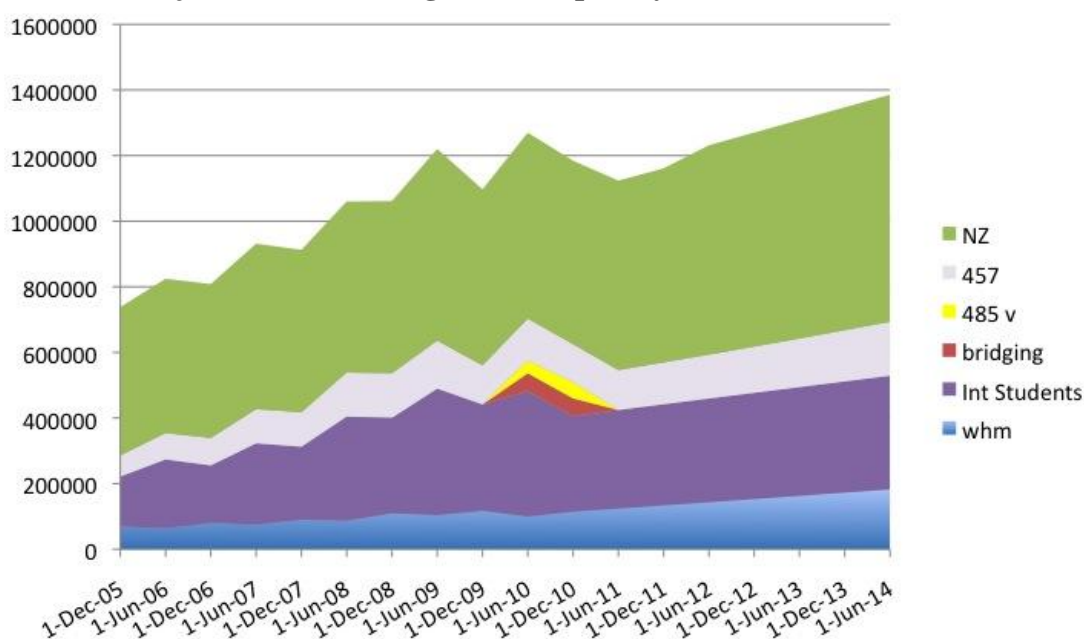
**Chart 14: Temporary and bridging visas (stock) 2005–10**



It is my contention that numbers will grow in the future. This is not predetermined: young working holiday makers may decide to stay in Ireland or South Korea rather than venture to the Great South Land; New Zealanders may decide their economic

prospects are better at home; Australian businesses may lose their appetite for importing temporary foreign workers. But I doubt it. Until this week, it was perhaps more likely that enrolments of international students would continue to fall, but the federal government's response to the Knight Review of the Student Visa Program has changed that. The government is now offering temporary work visas to any international students who complete a degree at an Australian university: a two year visa for a bachelor degree, a three year work visa for a masters degree and a four year work visa for a PhD.<sup>67</sup> Combined with other changes to international student visas this is likely to make study in Australia more attractive and increase student numbers resulting in a further increase in the stock of long-term temporary migrant workers present in Australia at any one time.

**Chart 15: Projected stock of long-term temporary residents 2005–14<sup>68</sup>**



Projections by the Department of Immigration and Citizenship—made prior to the recent changes to student visas—already predicted steady growth in the number of long-term temporary residents out to 2014 (chart 15). Growth was not anticipated to be as rapid as in past, but numbers would still outstrip overall population growth, so

<sup>67</sup> Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations and Chris Bowen, Minister for Immigration and Citizenship, 'Boost to international education sector in response to Knight Review', joint media release, 22 September 2011, online at <http://www.minister.immi.gov.au/media/cb/2011/cb172439.htm>, accessed 23 September 2011.

<sup>68</sup> Figures to 31 December 2010 are actual stock from Department of Immigration and Citizenship annual *Immigration Update* reports. Figures from 31 December 2010 to 30 June 2014 are estimates based on DIAC 'The outlook for net overseas migration', May 2011. However, 457 figures have been discounted by 50 per cent to account for 457s transitioning to PR. Data for dates 31 December 2012 and 31 December 2013 are mid-points between DIAC June data projections.

that by 2014 the total number of temporary residents in Australia will be approaching 1.4 million people.

The question is does this matter? Does it matter if we have a growing number of temporary migrants living amongst us? After all, we live today in a far more educated, globalised and mobile world. Temporary movement across borders to take up a job, pursue a career, gain experience or study is part of contemporary life. Australians are also going overseas in record numbers to live, study and work for long periods of time.

There is also a great deal of churn in this population of long-term temporary residents. The Canadian backpacker who is here in June 2007 is not the same Canadian backpacker who will be here in June 2014. The turnover of international students and temporary migrant workers is slower, but generally they too leave Australia and return home when their visas expire. New Zealanders may stay longer but they can come and go as they please. We have made no promises to these groups, and we owe them no legal obligations in relation to permanent residency. The terms of the deal are clear: come to Australia to study, work, live for a period of time and while there may be the potential of permanent residency down the track, that is not an automatic right or expectation.

Perhaps I am making a mountain out of a molehill. But a number of trends apparent from my survey of temporary migration give pause for thought.

The first is the tendency for what might be called visa policy creep: that is, a visa initially created for one quite specific purpose, ends up being expanded to achieve a different end. This is most evident in the Working Holiday visa, which has been used to address labour market issues in regional areas and in the 457 visa, which is no longer a stop-gap measure to provide a breathing space for our training system but a mechanism to respond rapidly to changing business demands for skilled labour (and which is being supplemented with new forms of temporary labour migration like Enterprise Migration Agreements).

The second tendency is for numbers to increase, quite rapidly, once these uncapped temporary visa categories are created. This is not surprising when there are strong incentives to take advantage of the opportunities these visas offer: to employers and foreign workers, to tertiary institutions and overseas students.

The third tendency is for government to respond to the increase in numbers by adjusting policy in ways that limit the rights and entitlements of temporary migrants when they become administratively or politically inconvenient. The legislative change affecting New Zealanders resident in Australia is one example; the introduction of



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priority processing to indefinitely delay valid permanent residency applications by international student graduates is another. It could be argued in relation to 457 visa holders that the trend has gone the other way: since the election of the Rudd Government the 457 scheme has been subjected to more stringent rules, inspections and safeguards. These changes were made in response to recommendations contained in a report into the integrity of the 457 scheme commissioned by the federal government.<sup>69</sup> However, other recommendations, which would have enhanced the rights of 457 visa holders and expanded the opportunities for permanent residency, were not taken up.<sup>70</sup>

My biggest concern is that the growth of temporary migration, coupled with restrictions in the growth of the annual permanent migration intake, will have the unintended but damaging consequence of creating a growing group of long-term residents of Australia who are in a kind of limbo, like that experienced already by the international student graduates stuck in priority processing group 5. This could happen, for example, if the number of 457 visa holders seeking permanent residency continues to increase and outstrips the annual migration intake, creating another major backlog in the system. We could see growing numbers of international student graduates, 457 visa holders, New Zealanders and others forming attachments to Australian citizens and then seeking spousal visas—particularly if there is a long wait for skilled migration—and this would create a backlog of applications in the spousal and family migration program as well.

Still, it might be argued that the numbers are relatively small and so that even if there are some disgruntled individuals, some losers in the 21st century Australian migration system, the issue is not that serious. Leaving aside the fact that such an argument shows scant regard for the rights of the individual, I would suggest that the numbers involved are not trivial.

It is interesting to make a quick comparison to West Germany in the mid-1970s. The recruitment of workers under West Germany's *Gastarbeiter* program was formally ended in 1973—after it became clear to federal authorities that 'foreign labour was beginning to lose its mobility, and social costs (for housing, education and healthcare) could no longer be avoided'.<sup>71</sup> At this time, the minority population in the Federal Republic of Germany—that is foreign residents, not naturalised—was around four million—or about 6.6 per cent of the population.<sup>72</sup> It is not vastly different to five per cent of Australia's population today who are temporary migrants. Of course most

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<sup>69</sup> Deegan, 'Visa subclass 457 integrity review final report', op. cit.

<sup>70</sup> Mares, 'The permanent shift to temporary migration', op. cit.

<sup>71</sup> Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd edn, Palgrave Macmillan, Basingstoke, 2003, pp. 71–2.

<sup>72</sup> *ibid.*, p. 73.

temporary migrants do not want to stay in Australia permanently; but most guest workers went home too, only a minority remained in West Germany.

I have argued that the number of temporary residents in Australia will continue to increase. True, it will not be the same individuals who make up that group—there will be a high degree of turn-over as some migrants leave and others arrive. Nevertheless, like the *Gastarbeiter* in West Germany, this changing group will still represent a continuous *cohort* of people, a permanent social group with varied but particular interests, who have no formal representation in our political system. For the purposes of government administration they are regarded as non-Australians. The popular view of this cohort is likely to replicate their formal status—as not belonging to this society and not accruing rights within it—let alone amassing affections and attachments. There is a risk that temporary migrants will be regarded as a useful economic input that can be discarded when no longer required. As ‘guests’, offered an opportunity to ‘work’, they should do so without complaint, or risk being perceived as ungrateful and troublesome when they refuse to act like machines and exhibit instead the wants and desires of human beings.

The problem is that human beings cannot be reduced to units of production in the mining industry or export dollars for the education sector.

As the Swiss playwright, Max Frisch said so memorably about guest workers in Europe in the 1960s, ‘*Man hat Arbeitskräfte gerufen, und es kamen Menschen*’—‘We called for labour power and people came’.<sup>73</sup> The longer temporary residents stay in Australia, the more likely they are to build up a bundle of connections—emotional, psychological, cultural and financial—connections that bind them here, and which bring with them expectations of some kind of reciprocity on behalf of the Australian state. This is the contradiction inherent in temporary migration identified by Stephen Castles and Mark Miller: schemes are devised on the basis that the sojourn will be limited and that ‘the legal distinction between the status of citizen and of foreigner’ will provide a clear criterion for conferring them with different levels of political and social rights. However with the passage of time come ‘inexorable pressures for settlement and community formation’.<sup>74</sup>

This is not to say that every foreign citizen who comes to Australia for an extended stay should have the right to remain permanently. Nor am I suggesting that we should end all temporary migration. I am just flagging the tensions that arise when a

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<sup>73</sup> Max Frisch, ‘Überfremdung’ in *Öffentlichkeit als Partner*, Frankfurt am Main, Suhrkamp Verlag, 1975, p. 189.

<sup>74</sup> Castles and Miller, *op. cit.*, p. 72.

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government, in pursuit of the national interest, opens its borders to migrants without offering them the benefits of citizenship.

Over time, as temporary residents work, pay taxes and contribute to society in other ways, we start to move from the realm of technical legal rights, to the realm of ethical and moral rights. At what point should a person have the right to become an Australian? Our law makers have answered this question in one limited way: a child born in Australia to foreign parents, who lives in Australia continuously for ten years, acquires the right to claim Australian citizenship. Why ten years and not five or fifteen? Why does the same right not flow to a child who is born overseas but arrives in Australia at the age of one month? Why should adults not acquire similar rights after long periods of residence?

I do not know the answers to these questions but I think they are questions that we need to discuss.

The changes to Australia's skilled migration program—the increase in temporary and employer-sponsored migration—are designed to be 'highly responsive to emerging skill needs' and to 'benefit productivity growth, participation and economic growth in general'.<sup>75</sup> In statistical terms, they appear to be working: employer sponsored and temporary 457 skilled migrants earn wages well above the Australian average and are far more likely to be in full-time skilled work. However I become uneasy when I hear phrases like this: it is crucial to harness 'the benefits and value that Australia derives from each program place'.<sup>76</sup> We are in danger of focussing on the 'Arbeitskräfte'—the labour power—and losing sight of the 'Mensch'—the human being.

In conclusion I'd like to share some quotes that I think could guide us when we consider the growth of temporary migration and our policy responses to it. A true multiculturalism will be one that invites:

every individual member of society to be everything they can be ... supporting each new arrival in overcoming whatever obstacles they face as they adjust to a new country and society and allowing them to flourish as individuals.<sup>77</sup>

This is important because 'if people do not feel part of society, this can lead to alienation and, ultimately, social disunity'.

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<sup>75</sup> Kukoc, *op. cit.*, pp. 2, 6.

<sup>76</sup> *ibid.*, pp. 5, 13.

<sup>77</sup> Bowen, 'The genius of Australian multiculturalism', *op. cit.*

Those are the words of the Minister for Immigration and Citizenship, Chris Bowen, from his speech on multiculturalism that I quoted at the beginning of this paper.



**Question** — My question relates to labour market testing that employers may or may not have to do in order to bring in temporary migrants. We often hear that there is a skills requirement from the mining industry. The mining industry employs less than two per cent of the workforce and their training of apprentices is less than half the industry average. I'm wondering what tests do employers have to pass in order to bring in outsiders?

**Peter Mares** — There's no labour market testing. So there is no testing of the local labour market for either the enterprise migration scheme or the 457 scheme, but there are a range of other requirements on employers which go to probity and record and things like that. One thing I would say about the 457 scheme is it was subject to a great many abuses and the Rudd Government, after the review by Barbara Deegan, did introduce much tighter monitoring and higher penalties and so on and I haven't looked at that question of abuses in detail lately, but the abuses do seem—this is very anecdotal from my reading of it—to have been reduced. So I think the scheme is being operated more tightly, but one thing the trade unions would like to see is more labour market testing in particular areas as to whether it is appropriate. So you do have this division between regional and non-regional but, as I said, in most cases 'regional' is almost anywhere in Australia apart from Melbourne, Sydney, the Gold Coast, Brisbane, Canberra, Newcastle and Wollongong. So, for example, Perth was recently added to the regional category because employers in Perth were complaining about the lack of labour because of the mining industries sucking labour out of Perth.

**Question** — I see a problem with the ethical and moral issues in relation to the various types of immigration programs, because what we are using in effect is other countries' taxpayers to actually fund the progress in Australia. When we look at 457 visas and some of the other visas as well, there is a demand from industry to import trained people and there is no investment on the part of the mining organisations for them to actually invest in training and education themselves. With mining in particular, they go through boom and bust so we've got a situation where we have got a lot of workers being imported on their whim by the government and subsequently being dropped when the industry busts.

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**Peter Mares** — That is exactly why the 457 visa is seen as a good thing, because it is flexible. When there is a sharp spike in demand for labours as there is with the resources boom, that can be met by bringing in skilled migrant labour on a 457 visa and if that drops off, it can be reduced again. That's the theory. In fact, the 457 visa numbers did drop significantly during the global financial crisis. Demand for them here in Australia went down significantly, so that would be the economic justification.

As to the ethical issues around importing skills paid for by other countries' taxpayers, I'm sure the government could see that from a national interest perspective it is a very sensible idea. It's what's often referred to as brain drain and there is very interesting literature around this question. It's not a straightforward question of us just pinching all the doctors and nurses from the Philippines. It's more complicated than that. For one thing, who are we to tell a doctor or a nurse in Zimbabwe that they should work on next to no pay when they have an opportunity to improve their personal and family situation by working for much better pay in Australia? That's another side of the ethical dilemma.

Another part of it is that the demand for skilled labour from a country like the Philippines results in a huge boost in training of exactly that type of skilled labour in that country, so that to meet that market you get a boost. I'm not saying this is unproblematic at all, there are lots of ethical issues involved, particularly when you start seeing Australia attracting nurses from small Pacific Island states, for example, where the replacement for those nurses will be much harder to achieve and there are various ethical suggestions around for dealing with this. The health sector is one of the biggest users of 457 visas, so it is state and territory governments, not just the mining industry that uses these visas. There are suggestions that, for example, there should be investment back into the source countries' education training system by Australia or by employers or that the skilled workers we bring in be under some type of program where they go back to work in their own country. There are various quite innovative ways in which we can approach the ethical issues you have raised.

**Question** — My question relates to the human circumstances of people on 457 visas. You mentioned that people seeking extensions of 457 visas may be beholden to employers and subject to less than satisfactory conditions and circumstances. Is there any public scrutiny or investigation of exploitation of people on these sorts of visas?

**Peter Mares** — Well as I said in response to the earlier question, the Rudd Government tightened up the monitoring quite considerably and put more resources into monitoring and the Fair Work Ombudsman and trade unions have been quite active in this area. I think the area in which the biggest problem arises is not so much renewing the 457 visa, but trying to move from 457 to permanency in terms of the

power differential that creates between employer and worker. Now this isn't to denigrate all employers of 457 visas and most often the employer is keen to keep the worker because they have already worked for the business for some time, they have built up skills and knowledge, all that sort of thing. But we did see the biggest abuses were in areas of trades. For example, chefs employed by restaurants, including here in Canberra. There was one notorious example of a 457 visa holder who complained about his situation to the immigration department and his boss then tried to kidnap him and take him to the airport. Luckily, their car was stopped for speeding on the way to Sydney and the Filipino chef involved managed to make his case known to the police officer who had pulled them over. So abuses have existed and I haven't done any detailed research recently but I think the situation is better than it was before with the various new mechanisms that were brought in.

**Question** — Have you had any opportunity to reflect on the situation here and in the United States, for example, which is also a big market for temporary migrants and whether there are any comparisons to be made in that regard?

**Peter Mares** — I think the situation is very different in the sense that while we hear a lot about illegal arrivals in relation to boats, Australia in relative terms does not have a problem with undocumented migrants or what in popular parlance would be called 'illegals'. That is, people living in Australia without authorisation. There are around sixty thousand overstayers—that is, people who have come to Australia on a legitimate visa like a tourist visa or a student visa and then haven't left when their visa expired. Fifty to sixty thousand is a tiny number in terms of overall population compared to the US where you have ten million undocumented migrants. The much more deregulated labour force in the US makes it much more possible to survive, albeit in very tenuous circumstances, as an undocumented migrant in the US. Our immigration department knows everyone who enters this country, because we have a universal visa system. They know when people haven't left. There are no land borders. We have quite a sophisticated mechanism for tracking down overstayers and finding them. In that sense it is quite different, and the US has a whole lot of other temporary migrant programs, and some are skilled and so on. The big difference is that we don't have that undocumented labour force who are much more vulnerable. International students do get ripped off in some jobs in Australia, but they do have recourse, we do have laws, we do have a more regulated labour market, there are places they can go to, the Fair Work Ombudsman and so on. Much more so than if you were illegal where you can't bring yourself to the attention to authorities because you undermine your own ability to stay in the country.

**Question** — It's interesting that you mentioned the Philippines, because the Philippines has nine million Filipinos overseas and about four million of them are

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temporary workers and so the duty of the government is to protect migrant workers and not to exploit them as labourers. I'd like to ask what are some of the bilateral agreements between the Australian Government on a government to government arrangement where the processing of migrants is protected not just by the receiving country but also but the source country?

**Peter Mares** — I would say that the Philippines has led the world in relation to attempting to extend protection to its own workers. The Philippines has been a major exporter of labour, including quite a lot of skilled labour, for quite some time. And so the Philippines is ahead of many other countries in terms of thinking about these issues. Australia doesn't have any bilateral agreements of that nature to my knowledge, the exception being the very small Pacific Seasonal Worker Pilot Scheme. I distinguish it from long-term temporary migration because it is a circular program. I did quite a lot of research on it a few years ago. That's an idea in which you would have people come from Pacific Islands and there is a memorandum of understanding between Australia and that country and they would work for three or four months in a seasonal labour job like fruit picking. This is partly a development initiative because as we know there are high levels of unemployment and a youth bulge in the Pacific and this is a way of trying to extend that back. In my view it is better from an Australian perspective for Pacific Islanders to be taking those sorts of jobs than, say, Canadian backpackers. That program is very specific, small scale and in its pilot stages but I understand it is beginning to pick up speed. It is very successful in New Zealand where they have a similar program.

So apart from that there is the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and a whole lot of countries have ratified that but they are all migrant labour sending countries, not migrant labour receiving countries. The convention is meaningless until recipient countries like in Europe, America and Australia ratify that convention.

# **The Evolving Role and Mandate of the Australian National Audit Office Since Federation\***

*Ian McPhee*

## **Introduction**

My predecessor, Mr Pat Barrett AO, in giving the Senate Occasional Lecture in June 2002, focused on accountability in the 21st century and how the Australian National Audit Office (ANAO) assists the Parliament and the wider Australian public sector more generally. Understandably, there will be a flavour of this in my paper today. However, as this year, the 110th anniversary of the ANAO, is a significant milestone in our history, I propose to look back to our beginnings and then look forward to see how the office is positioning itself to meet the challenges of auditing in a rapidly changing and increasingly complex public sector in the 21st century.

Paramount to the course the office has always set has been a strong focus on its responsibilities to the Parliament and the public.

## **110 years and still going strong**

The first Commonwealth Parliament created the office of Auditor-General in 1901 as an independent public official with wide powers of investigation to scrutinise Commonwealth administration and provide independent, impartial assessments on the state of the public accounts.

The *Audit Act 1901* was the fourth piece of legislation passed by the Parliament; it followed the passage of two Supply Acts and the Acts Interpretation Act. Thus, the office had its genesis in the earliest days of federation with the Treasurer of the day, Sir George Turner, in introducing the Audit Bill into the House of Representatives on 19 June 1901, describing it as a bill the legislature need to enact in order that ‘the work of the Government may be properly carried on’.<sup>1</sup>

The original Act stipulated the personal powers, duties and responsibilities of the single statutory office holder and enabled the Auditor-General to appoint inspectors and accounting officers to assist with the execution of his duties and responsibilities. Additionally, the Auditor-General was able to delegate his authority to inspectors but,

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 14 October 2011. The author acknowledges the assistance of Ron Richards and other colleagues in the office with the preparation of this address.

<sup>1</sup> House of Representatives debates, 19 June 1901, p. 1247.



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importantly, the Auditor-General retained the sole responsibility for reporting the findings of audits to Parliament.<sup>2</sup>

On his appointment as the first Commonwealth Auditor-General, John Israel began establishing the Federal Audit Office in 1902, initially a central office for coordination purposes and, within a short period of time, 16 full-time staff were appointed. He then moved to establish state branch offices and develop procedures to ensure consistency of approach across the span of Commonwealth responsibilities.<sup>3</sup> The Auditor-General was assisted in undertaking audits during this early period by contracted staff from the existing state Audit Offices.<sup>4</sup> By 1905, all audits were conducted by the Auditor-General's own staff adopting standardised audit approaches.

Hence, the Australian National Audit Office is one of only a handful of Commonwealth entities that can trace their origins back to federation—the others are: the departments of Prime Minister, Foreign Affairs (External Affairs), Attorney-General, Treasury and Defence, as well as the High Court (although the first bench was appointed in 1903 after the passage of the *Judiciary Act 1903*).

### **The ANAO across the years**

As you would expect for an organisation that has been operating since federation as 'an essential element of our system of democratic government'<sup>5</sup>, there have been a number of significant shifts in our mandate and in the audit approaches used to fulfil our statutory responsibilities.

There have also been 14 Auditors-General to date, the first, Mr John Israel, holding office for 25 years; age retirement was introduced following Mr Israel's term and today there are 10-year non-renewable terms for the Auditor-General. A list of all my predecessors as Auditor-General, and their particular contributions to the office, is attached to this paper. To date, all Auditors-General have been male but given the composition of my office and the Australian Public Service today, where at least 50 per cent of staff are women, I am confident that this run won't extend too much longer.

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<sup>2</sup> John Wanna, Christine Ryan and Chew Ng, *From Accounting to Accountability: A Centenary History of the Australian National Audit Office*, Allen & Unwin, Sydney, 2001, p. 11; While the Auditor-General has the ability today to delegate reporting to Parliament to others in the office, I have chosen not to do so due to the special relationship between the Auditor-General and the Parliament.

<sup>3</sup> Wanna, Ryan and Ng, op. cit., p. 19.

<sup>4</sup> *ibid.*

<sup>5</sup> Pat Barrett, 'Auditing in a changing governance environment', *Papers on Parliament*, no. 39, December 2002, p. 73.

*The 100 per cent check era*

In the early days of the Audit Office accountability was perceived as the complete checking and reporting of all transactions through government.

The *Audit Act 1901* was very specific about the Auditor-General's duties and, although Parliament chose not to stipulate the way in which the Auditors-General should carry out their duties, the Act directed the Auditor-General to examine and check every cash sheet statement, payments and receipts, to verify their legality and accuracy. Since the Act in various sections referred to such words as 'all', 'every', 'in full' and 'whole', the Audit Office in the early 1900s adopted a 100 per cent transaction-based approach to audit the established Commonwealth departments.<sup>6</sup>

As you can imagine, during this early period the auditors were busy. As an example, for the year 1902–03:

the Expenditure Branch (with only five clerks) processed and audited 257,479 receipts, vouchers and papers concerning expenditures plus 128,000 supporting documents (raising 1,413 queries). The Revenue Branch (with just two clerks) processed and checked 35,269 documents (departmental returns, statements, bank sheets) as well as being 'engaged in outside inspections of Revenue, Stock and Paying Officers' Accounts'.<sup>7</sup>

During the incumbency of the first three Auditors-General in particular, the practices of auditing largely consisted of simple bookkeeping examinations, 'checking transactions, verifying accounts, checking vouchers and stores requisitions against stocks, counting equipment and minor assets, and weighing gold and other precious metals'. The audits also investigated the legality and statutory authority of transactions.<sup>8</sup>

Occasionally 'major' frauds were uncovered; one celebrated case was detected in 1914 at the Melbourne Post Office. This involved erasing the cancelled stamp and the date stamp imprints from presented postal notes and then 'reusing' them—the fraud was calculated to total 662 pounds 5 shillings and 6 pence.<sup>9</sup>

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<sup>6</sup> John Wanna and Christine Ryan, 'An impeditive administrative culture? The legacy of Australia's first Auditor-General on the Australian Audit Office', *Australian Journal of Politics and History*, vol. 49, no. 4, December 2003, p. 472.

<sup>7</sup> Auditor-General's Office, Annual report, 1902–03, p. 138, cited in Wanna and Ryan, 'An impeditive administrative culture?', op. cit., p. 472.

<sup>8</sup> Wanna, Ryan and Ng, op cit, p. 26.

<sup>9</sup> *ibid.*, p. 30.

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There were many challenges during this early period; two of note were the introduction of commercial activities of government and the impact of the First World War.

Firstly, in 1913, the Post Office produced its own accrual financial statements and submitted them for audit and, in the same year, there was the challenging task of auditing the first commercial public financial institution, the Commonwealth Bank. While the Post Office had been audited since 1902, the Auditor-General was confronted in 1913 ‘with a set of financial statements produced in accrual format—with assumptions made about depreciation, liabilities, creditors and debtors’, thus presenting the Audit Office with considerable problems of interpretation and verification.<sup>10</sup>

As mentioned, the second challenge during this period was the expansion of Commonwealth activities due to the outbreak of the First World War. The growing decentralisation of Commonwealth administration was another issue to be taken into account. The 100 per cent checking regime did not suit these changing circumstances of Australian public administration with the Audit Office increasingly falling into an audit backlog. The audit model developed for the new nation failed to be robust enough to cater for the exigencies created by the First World War and a rapidly expanding Commonwealth sector.

With the onset of the war, there was a dramatic expansion in the activities and expenditure of Defence. As a consequence, the extent of the audit function increased to a scale not envisaged at federation. However, the office maintained its painstaking and comprehensive audit practices. For example, the Audit Office pursued the verification of all wages payments made by the Department of Defence, insisting that pay sheets be returned from overseas and checked to ensure they were signed off and that all procedures were followed. In a similar vein, the auditors insisted on checking the purchase of rifles, and accounts for empty cartridge cases were also examined. It has been told that audit inspectors also demanded to see the returned empty cartridge boxes as proof their contents had been used.

It was not until the 1920 amendments to the Audit Act that the 100 per cent check requirement was formally abolished. The then Treasurer (and former prime minister) Sir Joseph Cook argued that the Auditor-General should be given greater discretion to dispense with parts of detailed audits as considered appropriate (and not, as in the 1906 amendments, be required to seek the Treasurer’s permission to dispense with detailed audit work). In moving the amendments, Cook told Parliament:

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<sup>10</sup> *ibid.*, p. 31.

We relieve him of all the sections which fetter him now, and say to him, as one should say to any auditor: ‘Conduct your own audit in your own way, so long as you take care that the moneys which you audit have been voted by Parliament, and see that they are being spent in a constitutional manner’. Those are the only two limitations we propose to place upon him, ceasing henceforth from giving him directions as to the manner in which he shall conduct his audit.<sup>11</sup>

### *Moving the office to Canberra*

The Audit Office moved from Melbourne to Canberra in 1935 in line with government policy at that time—the office was relocated to the Commonwealth Offices at West Block. As with other departments going through the relocation process, moving to Canberra caused accommodation issues with many staff being accommodated in Canberra hostels as an interim measure. Both the Hotel Kurrajong and Acton Guest House were used for this purpose. As an aside, when I moved from Queensland as a cadet with the office in 1972, I was accommodated in the old Macquarie Hostel for a time (opposite the location of the ANAO today at 19 National Circuit, Barton).

### *The first big shift in the audit mandate—efficiency audits*

From federation to the early 1970s there still was a predominant focus in audit work towards assessing financial compliance with the relevant laws and regulations. However, there were moves afoot to place program evaluation and audits which focused on performance on the public sector management landscape.

The 1976 Coombs Commission, the Royal Commission on Australian Government Administration (RCAGA), was the genesis for program evaluation and performance auditing in the Australian federal sphere and, as one commentator observed:

Not only did this study [Coombs Report] pave the way for program evaluation, but it was also among the most instructive Australian government inquiries in identifying organisational diagnosis, and a form of benchmarking, as vital aspects of improvement of public sector administration. The Commission’s Task Force on Efficiency described an agenda of reform, including performance audit and new public management...<sup>12</sup>

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<sup>11</sup> House of Representatives debates, 7 May 1920, p. 1924; These are matters to which today’s audits of financial statements still pay particular attention.

<sup>12</sup> Colin A. Sharp, ‘Development of program evaluation in Australia and the Australasian Evaluation Society—the early decades’, *Evaluation Journal of Australasia*, vol. 3, no. 2, December 2003, p. 7.

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With the announcement of the RCAGA, the then Auditor-General, Duncan Steele Craik, was quick to seize the opportunity to place efficiency audits on the agenda, arguing that parliamentary scrutiny would be greatly improved if a fresh approach to the role of the Auditor-General could be engineered allowing Parliament to have ‘independent and expert advice on the degree of economy and efficiency achieved in government financial administration’.<sup>13</sup>

Steele Craik presented two submissions to RCAGA, and in his evidence given in October 1976 he commented that the *Audit Act 1901* required the Auditor-General to:

conduct detailed and searching examinations of government financial transactions, but it did not enable him to go behind the mere verification of the proper authorisation and conclusion of those transactions. It gave him no specific authority to evaluate such important considerations as ‘value for money’, unproductive expenditure, economy, efficiency or program achievement.<sup>14</sup>

In its report, the RCAGA came to the view that if, as the commission proposed, departmental managers were to be given a ‘clearer responsibility for their managerial functions and greater freedom and discretion to perform them’, it was important that the quality of their performance be ‘subject to critical review’.<sup>15</sup> The commission proposed that there should be a regular program of efficiency audits in which departmental performance would be assessed.<sup>16</sup>

The commission saw little merit in creating a new agency to undertake this task when institutions already existed to perform like or similar functions. After canvassing whether Treasury or the Public Service Board may be best placed to undertake this function, the commission judged that it would be most appropriate for the role of the Auditor-General to be extended to conduct efficiency audits, as it is similar in principle to the audit function currently performed.<sup>17</sup> The commission also made the point that:

The Auditor-General has ... a traditional independence and a link with the legislative and historical authority of Parliament that is essential to one

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<sup>13</sup> Wanna, Ryan and Ng, op. cit., p. 114.

<sup>14</sup> *ibid.*, p. 114.

<sup>15</sup> Royal Commission on Australian Government Administration, *Report*, Australian Government Publishing Service, Canberra, 1976, p. 46.

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*, p. 49.

whose task is to assess the performance of the executive arm of government.<sup>18</sup>

The RCAGA recommended the Audit Office be charged with responsibility for undertaking efficiency reviews, and also that departments themselves regularly conduct efficiency reviews.<sup>19</sup> Steele Craik was also successful in obtaining support from within government (including the head of the Department of the Prime Minister and Cabinet) who were able to persuade the Fraser Government to accept Coombs' recommendations against Treasury advice.<sup>20</sup>

Thus, Steele Craik's lasting legacy was persuading the government to pass legislation which allowed the Audit Office to undertake efficiency audits, and the *Audit Act 1901* was amended in 1979 to provide for this expanded mandate.

It is important to observe here that the office does not have a role in commenting on the merits of government policy in its audits but rather is focused on assessing whether government programs have been implemented, efficiently and effectively, in accordance with legislation and government policy. In situations where, as an incidental aspect of an audit, we observe aspects of government policy that would benefit from a review, we have recommended departments consider the position and, as appropriate, provide advice to the responsible minister. For me, this is a responsible position for the office to take in such circumstances.

#### *A rocky start but eventual success for efficiency audits*

With the extended mandate granted to the Auditor-General, efficiency audits were conducted by a separate team of multi-disciplined professionals. These audit reports were, and still continue to be, tabled separately in Parliament. Steele Craik always argued that a long lead time was necessary to evaluate the success of the new mandate and the efficiency audit division (referred to internally as the 'golden' division by the other audit divisions due to their perceived special treatment within the office). After a few false starts, the constant cloud of external reviews and some criticisms from the then Joint Committee of Public Accounts (JCPA), it was, essentially, not until 1990 that the 'bedding down' of the efficiency audit function was achieved.

The JCPA conducted a comprehensive review into the Australian Audit Office in 1989 and the resulting report *The Auditor-General: Ally of the People and Parliament* (Report 296) contained many recommendations including, importantly, that the

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<sup>18</sup> *ibid.*

<sup>19</sup> Wanna, Ryan and Ng, *op. cit.*, p. 115.

<sup>20</sup> *ibid.*

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Auditor-General continue to have responsibility for efficiency audits.<sup>21</sup> The committee also recommended a range of measures, subsequently reflected in a new Auditor-General Act, to strengthen the independence of the Auditor-General, namely:

- a) audit legislation state unequivocally that the Auditor-General is an officer of the Parliament in order to emphasise the Auditor-General's relationship with the Parliament;
- b) the right of the JCPA to veto the person proposed by the government to be appointed—the only appointment where a parliamentary committee currently has such a veto;<sup>22</sup>
- c) a 10-year, non-renewable, term of appointment for the Auditor-General;
- d) the Parliament to have a key role in considering the resources allocated to the office—implemented through amendments to the *Public Accounts and Audit Committee Act 1951*; and
- e) the Australian Audit Office to be renamed the Australian National Audit Office.

The new legislation, which was under development from the early 1990s until its enactment in 1997, was seen as contemporary, principles-based legislation to provide the Auditor-General with a strong mandate to perform his or her responsibilities effectively. As an aside, I was working in the Finance Department at the time and endeavouring to get a higher priority for the introduction of the three pieces of legislation to replace the *Audit Act 1901* (namely the Financial Management and Accountability Bill, the Commonwealth Authorities and Companies Bill and the Auditor-General Bill) when a senior minister of the then Labor government, explaining the then priority allocated to the legislation, commented that the issue of the new package of legislation 'was not showing up in the door-knocks'.

Nevertheless, after a long gestation period and three separate inquiries by the then Joint Committee of Public Accounts, the legislation came into effect on 1 January 1998 providing a solid financial statement and performance audit mandate (comprehending both efficiency audits and smaller project audits)<sup>23</sup> with the only real carve-out being in relation to performance audits of Government Business Enterprises (GBEs)—which required an 'invitation' from the Joint Committee of Public Accounts

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<sup>21</sup> Joint Committee of Public Accounts, Report 296, *The Auditor General: Ally of the People and Parliament: Reform of the Australian Audit Office*, AGPS, Canberra, 1989, p. 131, paragraph 11.7.

<sup>22</sup> *ibid.*, p. xviii. The government has agreed to a recommendation of the report of the Joint Select Committee on the Parliamentary Budget Office, *Inquiry into the Proposed Parliamentary Budget Office* (Canberra, March 2011), that this arrangement also apply to the appointment of the proposed Parliamentary Budget Officer.

<sup>23</sup> Joint Committee of Public Accounts, Report 296, *op. cit.*, p. 139, paragraphs 11.33 and 11.34.

and Audit (JCPAA) for the Auditor-General to perform such audits.<sup>24</sup> The basis for the carve-out was fairly thin then—namely that the focus of GBE accountability in future was to be on results rather than on processes involved in managerial decision-making—and, against this background, the government considered there was little to be gained by subjecting GBEs to efficiency audits as the discipline to be efficient is imposed through the focus on targets and related performance measurement.<sup>25</sup> The argument for this carve-out from the Auditor-General's mandate is even thinner today, particularly as the stable of GBEs has more than halved to seven<sup>26</sup> following asset sales, but still include some significant public sector entities.

In the ANAO's submission to the recent inquiry by the JCPAA into our legislation, the ANAO argued that the Auditor-General should have the discretion to undertake performance audits of GBEs, which the committee agreed with—essentially making the case for the Auditor-General to have the complete discretion to undertake performance audits of any Commonwealth-controlled entity.<sup>27</sup> I make further reference to the JCPAA's support for enhancing the mandate of the Auditor-General later in this paper.

#### *Auditing the financial statements of government agencies*

As I indicated earlier, the Auditor-General was first required to audit and report on commercial financial statements in 1913 (the Commonwealth Bank and the Post Office).

It was not until November 1992 that Australian Government public sector departments and agencies moved to adopt accrual accounting. Prior to that, they had presented information on a cash or modified cash basis. All statutory authorities have reported on an accrual basis since 1986, although some were earlier adopters.

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<sup>24</sup> *The Auditor-General Act 1997* provides that the Auditor-General may conduct a performance audit of a GBE if the responsible minister, the Finance Minister or the JCPAA requests the audit. The Act also states that nothing prevents the Auditor-General from asking these parties to make a request to undertake an audit.

<sup>25</sup> See government response to JCPA Report 296, *Reform of the Australian Audit Office*, October 1989.

<sup>26</sup> Australian Government Solicitor, Australian Postal Corporation, Defence Housing Authority, NBN Co. Limited, ASC Pty Ltd, Medibank Private Limited, and the Australian Rail Track Corporation Limited.

<sup>27</sup> See the submission by the Australian Audit Office to the Joint Committee of Public Accounts and Audit inquiry into the *Auditor-General Act 1997*, April 2009 (online at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jcpaa/agact/subs.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/agact/subs.htm)), and JCPAA Report 419 (*Inquiry into the Auditor-General Act 1997*, Canberra, December 2010, online at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jcpaa/agact/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/agact/report.htm)) which recommends that the Auditor-General is able to audit any Commonwealth-controlled entity including Commonwealth-controlled companies and their subsidiaries.



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The adoption of accrual reporting for agencies was a big decision at the time, because it marked recognition that the traditional approach to accounting and reporting had its limitations. At the time, budget accounting (on a cash basis) ruled supreme and the emergence of accrual accounting concepts was not universally warmly embraced. But, over time, accrual accounting and then accrual budgeting were seen to be important elements in a suite of public sector reforms directed to improving the efficiency and responsiveness of government services, and enhancing the accountability for the use of public resources.<sup>28</sup>

In the early years, recognising there were unresolved issues and less than full acceptance of the benefits of accrual accounting, the then Department of Finance adopted an incremental approach to the expansion of disclosure requirements relating to assets and liabilities in agency financial statements. In this way, Finance conditioned public sector agencies to a more comprehensive basis of reporting. This approach also allowed the ANAO to adjust to the new requirement and adequately resource our financial audit statement audit coverage.

Even when it was decided by the Finance Minister in 1992 to adopt full accrual reporting, agencies were allowed several years to produce their first set of accounts on this basis. As it turned out, 10 agencies reported on an accrual basis in 1992–93, approximately 20 in 1993–94 and the remaining agencies in 1994–95. The first accrual-based ‘whole of government’ statements that were audited were for the 1996–97 financial year, and followed a two-year trial period when unaudited financial statements were published.<sup>29</sup>

The ANAO now audits and reports on some 260 financial statements of Commonwealth entities and on the Australian Government as a whole. Accounting and auditing standards have become much more demanding and staff of the office are required to be across many more challenging accounting and presentation issues today than they did in the earlier years of accrual reporting.

I sign the audit opinions on the financial statements of the Australian Government and ten of the most significant government entities including the Reserve Bank of Australia, the Future Fund, Australia Post, the Australian Broadcasting Corporation and a number of significant departments; my senior staff sign the balance of the audit opinions under delegation. I can assure you I am very conscious of the responsibility that comes with signing such opinions, and my senior staff and team members are

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<sup>28</sup> Ian McPhee, *Financial Management in the Public Sector—How Accrual Accounting Enhances Governance and Accountability*, presentation to the CPA Australia Public Sector Finance and Management Conference, Canberra, 17 August 2006, p. 1, online at [http://www.anao.gov.au/uploads/documents/Financial\\_Management\\_in\\_the\\_Public\\_Sector2.pdf](http://www.anao.gov.au/uploads/documents/Financial_Management_in_the_Public_Sector2.pdf).

<sup>29</sup> *ibid.*, pp. 2, 3.

conscious of their responsibilities as well. We understand that the Parliament and the wider community take confidence from our work and our audit opinions.

*Expanding the ANAO's activities to include guidance on better practice in public administration*

In addition to our financial statement and performance audit work, the ANAO has continued to develop its audit products and services to act as a catalyst for improving public administration. Our highly regarded series of Better Practice Guides (BPGs) were introduced in 1987 by John Taylor AO, the then Auditor-General, the first being a Best Practice Guide on Asset Management. The BPGs were designed to give examples of sound practice that should be adopted by the whole of the Australian public sector. Initially the BPGs were produced on an ad hoc basis but in later years they have become an integral part of our performance audit strategy.

We reinforce our audit findings and recommendations through the publication of our BPGs which are specifically designed to provide practical, workable guidance to promote better practice in specific areas of public administration. The guides are seen as 'bibles' in some areas of public administration—they are certainly warmly received by public sector agencies. In fact, some agencies would prefer we produced more BPGs and less audits!

**The ANAO in more recent years**

The ANAO today has a staff of some 350 people and a budget of \$78 million. This represents 0.01 per cent of the combined revenues and expenses of the Australian Government. In my view, this is a modest price to pay for the assurance provided by the ANAO.

Our vision is to be 'an international leader in the provision of independent public sector audit and related services'.<sup>30</sup>

As I will touch on shortly, we do not duck auditing contentious topics.<sup>31</sup>

We seek to operate efficiently, as you would expect, and to improve our own performance over time. We seek to maintain effective relationships with agencies and government, and generally do most of the time. We have wide-ranging powers of

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<sup>30</sup> ANAO, *Corporate Plan 2010–2013*, Canberra, June 2010, online at <http://www.anao.gov.au/About-Us/Corporate-Plan>.

<sup>31</sup> In this context, I agree with Tony Harris, former Auditor-General of NSW, who said 'Auditors-General who avoid topics which fall within their mandate just because they are contentious fail the community'.

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access to all documents created by government and may take evidence on oath from any person to aid the conduct of audits of Commonwealth entities. That said, it is quite rare for the office to be required to formally seek documents or take evidence on oath. Most parties understand we have very broad powers and generally see merit in cooperating.

I have only used my formal powers to take evidence on oath on a small number of occasions in more than six years. The most recent, and high profile, was report no. 1 of 2009–10, *Representations to the Department of the Treasury in Relation to Motor Dealer Financing Assistance*<sup>32</sup>, where there were questions raised in the Parliament, and the media, concerning financing assistance for individual motor dealers and, in particular, whether one representation made by an acquaintance of the then Prime Minister had received favourable treatment. This led to questions as to whether the then Prime Minister and/or Treasurer may have misled the Parliament. I was asked to conduct an urgent investigation into these allegations.

The audit found that favourable treatment had not been given to the Prime Minister's acquaintance. Rather, the audit highlighted failures in the Treasury's implementation of the assistance scheme, and raised serious questions about the conduct of the senior departmental official primarily responsible for the implementation of the policy response to motor dealer industry liquidity issues, including improper use being made of confidential information by that official.

In these sensitive audits, we have discussions with ministers and the CEO of responsible agencies to make sure we have a clear understanding of the issues to inform our report. Evidence was taken on oath from the then Prime Minister, the Treasurer and other key identities involved. I felt it was important to use the full extent of the powers the Parliament had provided me to get to the bottom of the central issue on which the audit was focused. In addition to gathering evidence in this way, the audit involved forensic analysis of email traffic between the various ministerial officers, the Treasury and the Department of the Prime Minister and Cabinet. I should also add that this audit was completed in six weeks from declaration to tabling, which was a herculean task by the audit team<sup>33</sup> considering the work involved and the time allowed for respondents to provide comments on the draft report before tabling.

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<sup>32</sup> ANAO, Audit report no. 1, 2009–10, *Representations to the Department of the Treasury in Relation to Motor Dealer Financing Assistance*, Canberra, 2009, online at [http://www.anao.gov.au/uploads/documents/2009-2010\\_Audit\\_Report\\_1.pdf](http://www.anao.gov.au/uploads/documents/2009-2010_Audit_Report_1.pdf).

<sup>33</sup> The audit team: Brian Boyd, Alicia Hall, Nicola Rowe, Heather Rae, Samuel Casey, and Brendan Mason.

The largest performance audit the ANAO has ever prepared was the three-volume 1200-page report *Performance Audit of the Regional Partnerships Programme*<sup>34</sup>, which included 12 case studies. The audit highlighted a poor standard of administration of the Regional Partnerships grants program and some bias in the distribution of grants to recipients in seats held by the then government. Of particular note in these respects was the significantly higher tempo of funding applications, project approvals and announcements that occurred in the eight months leading up to the calling of the 2004 federal election, compared to the remainder of the three years examined by the ANAO. A surge in grant approvals and announcements occurred during this period notwithstanding that many of the projects recommended and approved for funding were under-developed such that they did not demonstrably satisfy the program assessment criteria.

The report was also a little controversial in being tabled out of session just ten days out from a federal election. The decision to table the report at this time was not a difficult decision for me to make because to table such a report after the election on a program for which the government was accountable would have made the office appear limp; particularly when the office has had a history of tabling reports out of session in the caretaker period and given the extensive consultation that had occurred with the administering department and responsible ministers to ensure that they were provided with every opportunity to provide their perspective on the issues raised by the audit. While the timing of the report aroused some comment at the time, most appreciated there was really no choice here.<sup>35</sup>

The ANAO has followed this audit with a series of audits on grant administration showing how the approach to assessing grant applications and making recommendations to ministers needed serious improvement. In 2009, the government responded with a substantially upgraded framework for the administration of grants. Key requirements are that:

- guidelines be developed for new grant programs;
- unless specifically agreed otherwise by ministers, competitive, merit-based selection processes should be used, based upon clearly defined selection criteria;
- ministers not approve a grant without first receiving agency advice on the merits of the proposed grant; and
- the basis of any grant approval (in addition to the terms) be recorded.

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<sup>34</sup> ANAO, Audit report no. 14, 2007–08, *Performance Audit of the Regional Partnerships Programme*, Canberra, 2007, online at <http://www.anao.gov.au/Publications>.

<sup>35</sup> The JCPAA, in Report 419, considered whether the Auditor-General should retain the discretion to table reports in a caretaker period. The committee did not recommend any change to the existing arrangements.

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Another audit causing my name to drop off a few Christmas card lists for a while was the performance audit of parliamentary entitlements tabled in September 2009, which was the third time the ANAO has undertaken a comprehensive examination of entitlements provided to parliamentarians. The audit report drew attention to an entitlements framework that is difficult to understand and manage for both parliamentarians and the Department of Finance and Deregulation, a system that involved limited accountability for entitlements use and a relatively gentle approach by the department to entitlements administration. A positive outcome of this audit was that the government made some decisions concerning the reform of certain entitlements and agreed to a ‘root and branch’ review of the entitlements framework.

We have also undertaken some very important reviews of major Defence acquisition projects and government advertising to strengthen public administration in these areas which, historically, have had their issues. There are many other areas where our contribution has made lasting improvements to the way programs are delivered by agencies.

While the Defence Department has been on the receiving end of some of our more critical audit reports, I do want to recognise the efforts of the department in overcoming the most significant financial reporting issues any agency had in preparing their financial statements on an accruals basis. While the department went through a dark period in 2004 and 2005 when we issued a disclaimer of audit opinion on the department’s financial statements due to the levels of uncertainty with respect to the information reported, the then minister and department took up the challenge to remedy their accounts and many of the underlying systems issues to allow a clear audit opinion to be given. This wasn’t just about overcoming the financial statements issues, but was seen as a matter that affected the department’s credibility when it came to a much broader range of budgetary and financial matters. It was a credit to those involved including Ric Smith (Secretary), General Peter Cosgrove (Chief of the Defence Force) and the staff in the Defence organisation. My staff also put in a very substantial effort to ensure Defence received timely feedback on their approach to remediation, and the audit results. It was a very good case study of how an agency, with effective leadership and working to a clear strategy, in consultation with the ANAO, can turn a challenging situation around.

Our work underlines the importance of public sector entities giving emphasis to the fundamentals of leadership, governance and management. It seems we all need to be reminded of this. In a different context, a recent study<sup>36</sup> of hundreds of financial crises

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<sup>36</sup> Ross Gittins, ‘Economic history ignored leads to the inevitable’, *Sydney Morning Herald*, Weekend Business, Opinion, 3–4 September 2011, p. 10, online at <http://m.smh.com.au/business/economic-history-ignored-leads-to-the-inevitable-20110902-1jps9.html>.

in 66 countries over 800 years found oft-repeated patterns that the study indicates ought to alert economists when trouble is on the way. As Ross Gittens of the *Sydney Morning Herald* has said, one thing stops them waking up in time: their perpetual belief that ‘this time is different’.<sup>37</sup>

While our audits only traverse 110 years, there are indications that when things go astray, common features include poor oversight, lack of adequate risk management and inadequate score-keeping systems. And we keep seeing the same issues, while the responsible public sector managers may be believing ‘this time is different’.

Our audit reports tend to be understated for effect, and we have consciously reduced the number of recommendations we produce to focus only on significant matters. Some agencies have suggested, tongue in cheek, that it is their improved performance which has led to the reduction in recommendations. While there is no doubt some truth in this, it would be too early for most agencies to be walking to the winner’s circle just yet!

It is quite rare for agencies not to agree with our conclusions and recommendations—a reflection of the strength of our understanding of their programs and our willingness to engage with agencies on key issues—to listen to their perspective and weigh the key management, regulatory and financial considerations and reach a conclusion.

We work hard to improve the quality of our audits, year on year, by investing in professional development of our staff, providing solid technological support to our audit teams and access to key specialist resources under panel arrangements. I can say that the pursuit of cost-effective approaches to delivering better quality services is never far from my mind.

We are looking to not only produce quality reports but to maximise the leverage from each report. We endeavour to answer the ‘so what’ question: ‘So what do all these findings mean?’ This is to draw out, where significant, generic messages of importance for all agencies, even though our audit may be directed to a single program.

### **The next big shift proposed for the audit mandate—JCPAA Report 419**

A strong indication of the standing of the office and the value of the work it has undertaken over the years is the support shown by the JCPAA, particularly in its

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<sup>37</sup> *ibid.*, p. 10.

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Report 419<sup>38</sup> tabled in December 2010, to recommend an extension of the Auditor-General's mandate, particularly in relation to:

- providing explicit authority to conduct assurance engagements, such as the Major Projects Review, including providing the same information-gathering powers that exist for the conduct of performance audits;
- enabling the Auditor-General to review an agency's compliance with its performance indicators, specifically:

That the Act be amended as necessary to enable the Auditor-General to review an agency's compliance with its responsibilities for a sub-set of performance indicators. Proposed performance indicators to be audited should be identified annually by the Auditor-General and forwarded to the Parliament, via the JCPAA for comment, in a manner similar to the annual performance audit work program for the ANAO. The Auditor-General should be resourced appropriately to undertake this function.

- enabling the Auditor-General to audit any Commonwealth-controlled entity, including Commonwealth-controlled companies;
- including standard clauses in all funding agreements between the Commonwealth and other levels of government to provide the Auditor-General access to all information and records, and the ability to inspect the work on all projects relating to the use of Commonwealth funds under those agreements;
- enabling the Auditor-General to conduct performance audits of state and territory entities that receive Commonwealth funding where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements if a minister or the JCPAA requests the audit (commonly called powers to 'follow the money'); and
- enabling the Auditor-General to conduct performance audits of contractors that are engaged to assist in the delivery of Commonwealth programs.

These recommendations recognise that the world has moved on since the 1997 legislation was enacted and in the way the Commonwealth and states/territories interact, and are expected to interact in the future. Significantly, they also underline that the Commonwealth Parliament needs to be appropriately informed about the delivery of services by other jurisdictions funded by the Commonwealth. There is a

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<sup>38</sup> Joint Committee of Public Accounts and Audit, Report 419, op. cit., pp. xv–xvii.

need for more visibility over how effectively Commonwealth resources are being deployed.

Government in Australia is powerful and has command of a very substantial level of resources relative to those of the Parliament or, as Andrew Murray said more directly in his recent Senate Occasional Lecture:

Parliament has to do battle against the dark arts, against that which is wrongly hidden, that which is not what it seems, and performance that is not good enough. History's lessons require them to be wary of those who rule and the might of the state.<sup>39</sup>

Through measures such as those proposed by the JCPAA, the Parliament will be better informed of the performance of programs funded by appropriations the Parliament has authorised.

Mr Robert Oakeshott MP, the Member for Lyne and chair of the JCPAA, introduced a private member's bill, the *Auditor-General Amendment Bill 2011*, into Parliament on 28 February this year designed to give legislative effect to the committee's recommendations.

The legislation, as amended, has now been passed by the House of Representatives, and the proposed legislation is being debated by the Senate.

These amendments to the audit legislation are certainly the most significant since the office was given the performance audit mandate and, in some ways, more wide-ranging as it is proposed that the Auditor-General be able to assess the performance of the recipients of Commonwealth Government funding and contractors engaged to assist with the delivery of government programs and activities. Such changes, if enacted, will bring with them the responsibility on the Auditor-General and the office to exercise the powers judiciously in those areas which are significant to the delivery of programs being administered by jurisdictions with funds provided by the Commonwealth and in relation to contractors where performance is central to the delivery of programs and activities. The legislation anticipates that audits of state or territory recipients of Commonwealth funding will be undertaken only at the request of the JCPAA or a minister. I may also request the JCPAA or a minister to make such a request. The proposed legislation does not substantively change the position with respect to the audits of GBEs by the Auditor-General—it seems such an amendment

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<sup>39</sup> Andrew Murray, 'Budgets and Finance: Sunlight and the Dark Arts', *Papers on Parliament*, no. 56, July 2011, p. 124.



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to give the Auditor-General the authority to undertake a performance audit of a GBE, at his or her discretion, may have to await another day.

### **ANAO contribution internationally**

As a highly respected audit office amongst our peers, the ANAO also makes an important contribution to the improvement of public sector auditing internationally. My office is active in a range of international and regional groupings of supreme audit institutions which provide for ongoing interaction, the opportunity to build institutional linkages, and the chance to share our insights. The primary international body is the International Organization of Supreme Audit Institutions (INTOSAI) and the ANAO is also an active member of both the Asian Organization of Supreme Audit Institutions (ASOSAI) and the Pacific Association of Supreme Audit Institutions (PASAI). An important indicator of our standing internationally comes through our involvement in peer reviews of other Supreme Audit Institutions. In 2009–10, the ANAO led a peer review of the Office of the Auditor General of Canada and this year we have been invited by the supreme audit institution of India to lead a peer review of its performance audit function.

Closer to home, and like a number of other Australian Government agencies, the ANAO is also currently engaged in capacity development programs with specific countries in our region, primarily Indonesia and Papua New Guinea, funded through Australia's official aid program. Our relationship with the Indonesian Board of Audit (the Badan Pemeriksa Keuangan, or BPK) dates back to the Boxing Day Tsunami of 2004 when, as part of the Australian Government's response to assist Indonesia, support was also offered to strengthen public sector institutions. We have maintained an ongoing relationship since then and currently have an ANAO SES officer deployed into the BPK to assist with our program of technical and managerial exchanges.

The ANAO has had an even longer association with the Papua New Guinea Auditor-General's Office (PNG AGO), dating back to times when the Commonwealth Audit Office held responsibilities for auditing Australian territories. Since the late 1990s, both offices have maintained a twinning program funded by the Australian aid program. Known as the Papua New Guinea–Australia Audit Offices Twinning Scheme (PAAOTS), this program has provided the opportunity for regular exchange between the two offices and, as at 2011, approximately 20 per cent of the current staff of the PNG AGO have been able to spend some time on exchange in Australia. Our presence in PNG is strengthened through the Strongim Gavman Program which is also funded through the Australian aid program. As part of this whole of government aid effort, the ANAO has deployed another SES officer into the PNG AGO to assist with a range of capacity-building activities designed to strengthen the role of the AGO in improving public sector financial management in Papua New Guinea.

Through this range of activity, my office is able to maintain a valuable presence internationally which reflects well on Australia. It also offers excellent and varied opportunities for the ANAO to make international contributions.

### **Concluding remarks**

At the heart of the effectiveness of the role of the Auditor-General is the legislative mandate that provides for the charter and independence of the office, and the powers to be able to obtain access to government information and report independently to the Parliament. The independence is critical to success, allowing the Auditor-General to report on government administration without fear or favour.

Such reports assist the Parliament to hold the executive government to account and inform the wider Australian community of the state of public administration.

The charter of the office has expanded in the past 110 years to grow from a focus on financial matters to include performance auditing, with the prospect of the office being able to ‘follow the money’, if Parliament supports the legislation currently before the Senate.

Critically important to an effective audit office is an effective relationship with the JCPAA because the committee informs the Auditor-General of the Parliament’s audit priorities and has a role in recommending the resource levels for the ANAO in parallel with the government’s own budgetary processes.

In discharging my responsibilities, I am very conscious that I do so with a clear view of not only the Parliament but also the citizens of Australia. We look to see that programs are appropriately implemented with wide considerations of public interest and consistent with legislation and government policy.

I receive correspondence from members of the public and we always endeavour to respond in a manner that is helpful. I have a correspondent, Arthur from regional Victoria, who drops me a line each year to find out the government’s revenue and financial results—it’s always very nice to hear from Arthur. Other correspondents suggest audit topics or bring their concerns about particular aspects of administration to my attention. While we are not always able to resolve all of the issues raised with us, the contact from members of the public is valued and underlines to my office the importance of our role to act in the public interest.

During my time as Auditor-General, we have managed to maintain effective working relationships with key stakeholder groups. We are fortunate to meet many members of Parliament as they become involved in parliamentary committee work early in their

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careers in Parliament. This assists greatly at a later time when they become ministers and audit issues arise in their portfolios.

It is important that I should also indicate that no government minister or other member of Parliament has ever sought to improperly influence my presentation of audit findings. As you would expect, from time to time there have been fairly robust discussions where ministers and CEOs have strongly presented their perspective, but properly done, this generally adds to the understanding of the issues on both sides. Occasionally, it also adds a bit of colour, but most importantly it reflects well on our system of government here in Australia and the respect for our institutional arrangements.

In August this year, the Prime Minister sent the ANAO a message on the occasion of our 110th anniversary celebration where she reflected ‘with admiration and gratitude on the truly remarkable contribution to public administration made by the Australian National Audit Office over 110 years’. The Prime Minister generously recognised the rigour and independence of our work, and the contributions we are making to support improved governance in our region, especially Indonesia and Papua New Guinea.

The ANAO has moved with the times. Today it has a broad mandate, is appropriately resourced to allow me to discharge my responsibilities as Auditor-General and, through its work, assists the Parliament to hold the executive government to account, and brings about considerable changes in public administration for the better. This position is the result of strong support from the Parliament and citizens of Australia, respect from successive governments, and the dedication and commitment of staff of the office. With the challenges ahead of the public sector in better delivering public services and providing advice on policy solutions in an increasingly complex world, the role of the office will be even more important in the years ahead.

## Appendix

### Former Auditors-General and their contributions

Each of my predecessors provided independent and impartial reporting on Commonwealth administration and gave independent assessments on the state of public accounts. The Parliament and the public have benefited from these contributions to improve public administration and provide assurance in relation to the use of taxpayers' funds.

The former Auditors-General and their major contributions to the office can be summarised as follows:

<b>Pat Barrett AO (1995–2005)</b>	<p>Mr Barrett made a significant contribution to public administration, auditing and to the related matters of governance and risk management. He worked to ensure that the ANAO was well respected by the Parliament, the Joint Committee of Public Accounts and Audit (JCPAA) and public sector entities. A significant achievement during his tenure was the introduction of the new <i>Auditor-General Act 1997</i>.</p> <p>Mr Barrett placed his emphasis on making practical recommendations to improve public administration. He has written extensively on auditing, accounting and public administration and presented to many conferences and seminars—he saw this as an appropriate way of promoting the findings and recommendations of his audit reports.</p>
<b>John Taylor AO (1988–95)</b>	<p>Mr Taylor initiated a strategic review of the ANAO's operations and he identified the key audit deliverables of the office. He subsequently organised the ANAO into two business groups aligned to the two major audit deliverables produced for the Parliament (performance audits and financial statement audits).</p> <p>Mr Taylor also adopted a more centralised operational approach, closing a number of the regional offices. Mr Taylor took pride in furthering the independence of the office, strengthening the impact of performance audits, and developing the capabilities of the office through the increased use of specialist staff and private sector accounting firms to assist with workload peaks.</p>

	<p>Early in his tenure Mr Taylor changed the name of the office to the Australian National Audit Office consistent with the recommendations of the JCPAA.</p>
<p><b>John Monaghan AO (1985–87)</b></p>	<p>Mr Monaghan instituted a revised reporting regime to better reflect his specific responsibilities on reporting the findings of audit examinations and inspections conducted under the Audit Act as well as providing an opinion on the government’s financial statements. He also initiated an annual report of the Australian Audit Office to the Parliament.</p> <p>During his tenure the office acquired its first personal computers for the planning and conduct of audits as well as introducing ‘computer assisted audit techniques’ which were seen as essential in minimising the level of risk in providing audit opinions. Mr Monaghan was a strong advocate in seeking to secure an adequate resource base for the office.</p>
<p><b>Keith Brigden AO (1981–85)</b></p>	<p>Mr Brigden brought new perspectives to performance auditing. Responding to broader public sector concerns surrounding the performance audit function, he disbanded the efficiency audit division and integrated the function back into the other audit divisions. He also turned his attention to the audit methodology being employed and commenced documenting the audit procedures and developing a framework for conducting performance audits—a framework that has been generally retained and refined.</p> <p>Mr Brigden changed the name of the office from the Auditor-General’s Office to the Australian Audit Office.</p>
<p><b>Duncan Steele Craig OBE CB (1973–81)</b></p>	<p>Mr Craig brought significant and lasting change to the Australian Audit Office. He led the Audit Office through a cultural change from a compliance audit approach to one with an emphasis on efficiency and value for money considerations. His priorities were geared towards reviewing the efficiency of government programs and eliminating waste in government spending.</p> <p>In addition to being instrumental in gaining a mandate from government for the Audit Office to conduct efficiency audits</p>

	<p>of government agencies and programs, he also initiated the development of the new General Audit Manual and the associated introduction of systems-based auditing.</p>
<p><b>Victor Skermer CBE (1961–73)</b></p>	<p>Mr Skermer’s long tenure as Auditor-General saw the office’s responsibilities expanding and he referred to the increasing workload as ‘voluminous’ and ‘unrelenting’. The challenges associated with the introduction of automatic data processing were a highlight of this period.</p> <p>With the emergence of more effective internal audit functions, Mr Skermer considered that the main focus of the office’s work was ‘post audits’—higher level test auditing conducted after the results of departmental internal audit were finalised. Mr Skermer actively engaged with the Joint Committee of Public Accounts to discuss his responsibilities as well as the issues he was confronting.</p>
<p><b>Harold Newman CBE (1955–61)</b></p>	<p>Mr Newman’s tenure as Auditor-General saw a focus on the approach taken in conducting audits with a change in emphasis given to the relationships with stakeholders and clients. His policy was that the audit of public finances, at its highest level, must be based on close cooperation by the Audit Office with the executive and the administration. He placed great emphasis on rectifying a matter of audit concern quietly rather than making the news headlines.</p>
<p><b>James Brophy ISO (1951–55)</b></p>	<p>Mr Brophy’s time as Auditor-General was marked by his insistence on the independence of the Audit Office and his refusal to certify the accounts of agencies which did not meet his exacting standards. He urged the government to expand and clarify his powers and took pride in the early submission of his annual reports.</p> <p>Mr Brophy was a keen advocate of increased parliamentary scrutiny of public accounts and supported the re-establishment of the Public Accounts Committee which disbanded as an economy measure in 1932.</p>

<p><b>Albert Joyce CBE (1946–51)</b></p>	<p>Mr Joyce placed emphasis on improving the effectiveness of the office and enhancing the audit skills of staff through regular job rotations and the consolidation of ad hoc audit instructions into the first, formal comprehensive audit manual (in 1951) titled: the <i>Manual of Audit Instructions</i>. This manual set out the general principles to be followed in carrying out audits.</p> <p>Mr Joyce raised significant concerns about the poor state of ordnance stores accounting in the Department of the Army and the denial of audit access to income tax files.</p> <p>Mr Joyce proposed that the Audit Act be amended to clarify and empower the Auditor-General to be responsible for an ‘effective audit of all Commonwealth revenue accounts’.</p>
<p><b>Ralph Abercrombie OBE (1938–46)</b></p>	<p>Mr Abercrombie’s tenure as Auditor-General spanned the Second World War. During this time Mr Abercrombie was credited with maintaining tough accounting and administrative standards in the face of daunting shortages of experienced staff. At the outbreak of the war Mr Abercrombie was concerned that he was not provided with the authority to inspect the records of private contractors, particularly in relation to ‘cost-plus’ contracts (an issue finally settled in the 1990s).</p> <p>After auditing in these challenging times, Mr Abercrombie’s views were instrumental in convincing the government to introduce major amendments to the Audit Act (passed in 1948). Mr Abercrombie introduced a new spirit of cooperation, preferring to work cooperatively with the government. His style was described as one of collaboration but not softness.</p>
<p><b>Herbert Brown (1935–38)</b></p>	<p>Mr Brown reluctantly agreed to relocate the Audit Office from Melbourne to the West Block offices in Canberra. Moving to Canberra caused significant disruption to staff, with transferees spending periods of temporary accommodation in the Hotel Kurrajong and the Acton Guest House on their relocation.</p>

	<p>In line with his predecessors' approach, Mr Brown was outspoken on issues such as the government's policy towards pensions being too generous.</p>
<p><b>Charles Cerutti CMG (1926–35)</b></p>	<p>From the outset, Mr Cerutti was a harsh critic of government waste. In charge of scrutinising the nation's finances during the worst years of the Depression, he recommended that public expenditure be reduced, as well as advocating cuts in private spending on non-essentials. He also argued for a contributory system of old-age pensions to help workers provide for their retirement.</p> <p>His reports regularly expressly complained that the Treasurer's annual statements of receipts and expenditure lacked sufficient clarity.</p>
<p><b>John Israel ISO (1901–26)</b></p>	<p>On his appointment as the Commonwealth's first Auditor-General, Mr Israel began establishing the Federal Audit Office in Melbourne. His immediate tasks were to recruit sufficient qualified staff, establish branch offices in the states and develop the procedures necessary to ensure consistency across the breadth of Commonwealth activities.</p> <p>At this time, the Audit Office undertook 100 per cent verification procedures which created a large workload which was compounded by the steady growth in accounts and records, and the need to audit accounts produced in an accrual format following the creation of the Postmaster-General's Department (1902) and the Commonwealth Bank (1912).</p> <p>Mr Israel was fiercely independent and, on occasions, had a testing relationship with executive governments.</p>



**Question** — My question is really about the workload of the office. Even without the Oakeshott Bill and its implications for the work you'll be able to do in the future, there's an enormous range of auditing work that you could do. Could you say



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something about how you go about setting the audit priorities each year and your relationship with the Public Accounts Committee in determining your workplans?

**Ian McPhee** — Certainly I was fortunate in the early days of the Labor government to get an increase in resources for my office. Having worked in the Finance Department and the Audit Office over the years, I have worked out that there is a sort of a honeymoon period in which one has to act to get support from government for additional resources for an organisation like mine. I was very lucky that Senator John Faulkner was the Special Minister of State and Lindsay Tanner I knew quite well and so with their support and with some support within the bureaucracy we managed to get additional resources because I was quite concerned about the resourcing position of the audit office. The reality in my world is that you must resource the financial statement work because we have got a statutory responsibility there. The balance of the office is on the performance auditing so if you ever need to shift resources traditionally that had been from the performance audit to the financial statement audit and so our performance audit program is reducing. With the additional resources we are appropriately resourced. The way the office is structured we do just over 50 performance audits a year plus the 260 financial statement audits. The whole organisation is designed to produce about that many reports. Any more, I think, would be quite challenging and I think quite frankly 50 reports is probably sufficient for the Public Accounts Committee to be able to absorb as well.

Each year we have a very open planning process to determine the audit program for the performance audits. We clearly have our own research areas. We keep an eye on the press, we try and focus on those issues that are significant and we pick on particular themes. In areas where we think public administration seriously needs to improve we tend to do a series of audits. Grants administration is the classic case and we have tried to do a bit of work in Defence and defence acquisitions, again to try and highlight the particular themes and areas that Defence can work on. We have an open planning process. We say well this is our draft plan. We ask agencies, we ask parliamentary committees through the Public Accounts Committee for any feedback on the program, any suggestions, and at the end of the day of course it is my decision to decide the particular program.

One of the issues that we find quite challenging is making sure we continue to get quality staff. It is not a case of just filling positions. We are a bit light on at the moment and I would like to have some more staff but we are pretty choosy about who we select so we will just keep going until we get the right ones. We provide a lot of training and support but it is tough. Doing this auditing is not for everyone. The training you get in auditing is very good for life skills as well. You learn to look after yourself. You learn to work out the wheat from the chaff.

In terms of working with the committee it's quite special for me to have a relationship with the parliamentary committee. It is a statutory relationship but it is an ongoing relationship. I have private meetings with the committee from time to time and it's a very sound relationship. Every organisational structure has got benefits but also downsides and the whole plan is to maximise the positives in organisational arrangements and compensate for the downsides. One of the things about being an independent officer with strong powers of independence is it allows me to report directly without fear or favour to do the job that the Parliament expects. The downside of that independence is that no one is all that close to you. If you are a secretary you have a minister and a hierarchy. We don't have anyone really sitting over the top of me other than the Public Accounts Committee. The Public Accounts Committee is the closest thing I have to a group who can provide constructive feedback to me. The very valuable thing is that from time to time when I have needed assistance on resources the committee has been right there to write to the Treasurer or the Finance Minister or the Prime Minister as well as to provide the support for my office. I actually think it is quite a useful and productive model and I know some other statutory office holders would like to have equivalent arrangements in place either with the Public Accounts Committee or similar committees.

**Question** — You've emphasised the independence of the office, and its role in the holding of the executive to account. You also referred to the role of the Auditor-General as an officer of the Parliament. As I understand it the objective of that arrangement is to secure the independence of the office from the executive. Another view which was canvassed at the time was that there was a risk that it would involve the Auditor-General more in the partisan politics of the Parliament. Can you comment on what difference the Auditor-General being an officer of the Parliament makes and the merits of that approach?

**Ian McPhee** — When the legislation was passed making the Auditor-General an independent officer of the Parliament, the point was made in the explanatory memorandum that this was symbolic. It carries no more weight than that but it was underlining the importance of the Auditor-General's role with the Parliament. I found it very reinforcing. Neither the government nor the Parliament can direct me in any of the audit activities I undertake, but it underlines to me, if it needed to be underlined, the relationship I have is directly with the Parliament and to allow the Parliament to hold the executive government to account through the reports I provide. So it's strengthening rather than weakening that proposal. I think there are other statutory office holders who would like to be in a similar position to me and I very much appreciate the support that that recommendation from the Public Accounts Committee has given to my office.

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**Question** — Under present legislation, do you at times have collaborative audits with the relevant state office when they need to look at state bodies and under the proposed legislation of Mr Oakeshott, would there be practical difficulties delineating your role compared to that of the state audit office?

**Ian McPhee** — Some of the proposals to ‘follow the money’ haven’t been universally applauded and there has been some concern expressed by state auditors-general that we could be bumping into each other. I think that the reality is that if we get the power it will be judiciously used and it will be with a particular focus on Commonwealth administration and what the Commonwealth is seeking to achieve through providing the states with the funds. I think it can be managed and I would propose to write not only to state auditors-general but premiers’ departments in each of the states if the legislation goes through to set out an approach we would take with these new powers should we get them.

But that aside, there are other opportunities for us to collaborate in audits. In the past we have endeavoured to work collaboratively on audits but it hasn’t been a great success because priorities tend to be different. Something might be important for me but may not be important for a state auditor-general who may say ‘well actually, I’m interested in that, Ian, but I don’t have the resources at the moment to allocate to that’. So it involves cooperation and the auditors-general in Australia are keen to cooperate more. One of the existing problems we have is the legislation that governs my role is quite restrictive, understandably, in what information I can share with other parties not directly related to the audit. So I get full access to government information but there are restrictions on what I can pass on, for instance, to a state auditor-general. I can certainly pass on the audit objectives, the audit criteria and I can agree on timing approaches but when it comes to passing on information that I have gained using my audit powers, then clearly there are real constraints on me.

The Queensland Auditor-General, interestingly, following the Queensland Public Accounts Committee’s recommendation, has now got the power to be able to share information he collects under his Act with other auditors-general if he believes that is in the public interest. I think that is an interesting development which no doubt in time we at the Commonwealth level would want to look at and I’m sure the Public Accounts Committee will be interested in that as well. I have to say that there are some issues around that because we have great powers to collect information on the executive government and executive governments may be interested to know under what circumstances an Auditor-General would decide to pass that information on to another jurisdiction.

In places like Canada the national auditor and the provincial auditors do work together on collaborative audits and it is not a case of either collaborative audits or 'follow the money', they can be doing both style of audits. The Australian area auditors-general meet twice a year and we exchange information and approaches. Those of you who paid attention to the consideration of the Building the Education Revolution program in this Parliament will know there were considerable concerns about some of the areas in the state delivery in that program. The 'follow the money' is to allow in such circumstances the Commonwealth Auditor-General to have a closer look at the performance of the state organisation with the Commonwealth moneys and report back to the federal parliament.

The Commonwealth is trying to work under the Council of Australian Governments (COAG) arrangements much more closely with the states to be clear about responsibilities and similarly the use of the 'follow the money' for contractors. Once upon a time the Commonwealth, using its own staff, used to do a whole lot more functions than it does today. Today it outsources many responsibilities. On some occasions there might be a case for the Auditor-General to look at the performance of some of those entities doing important functions that utilise Commonwealth funds. And so I think it is a sign of the times and it will be a useful addition to the mandate of the Auditor-General should the Parliament agree to pass the legislation.

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## **‘Faithful Representations’: 100 Years of the Historic Memorials Collection\***

Kylie Scroope

December 2011 marks the centenary of the first national art collection established by the Commonwealth of Australia—the Historic Memorials Collection (HMC). The establishment of this collection in 1911 also set in place the foundations for other important collecting institutions such as the National Gallery of Australia, and the National Portrait Gallery.

Today I intend to outline a brief history of the establishment of the collection, and then examine a selection of portraits from the collection, including some that are rarely seen publicly, and are currently being exhibited here at Parliament House to celebrate this centenary.

The story of the HMC is also a story about the intersection of art and politics and the importance of this connection was never more evident than in the period leading up to the establishment of the collection in 1911. One hundred years ago Australia was still very much a new nation, and to properly understand the origins of the HMC, we need to look back on the preceding decades, particularly the period leading up to federation in 1901.

The federation movement was marked by dissent and the competing priorities and interests of the separate colonies, but had arisen out of a growing sense of idealised national identity in the late 19th century. One of its key proponents, the future prime minister Alfred Deakin, said that federation ‘must always appear to have been secured by a series of miracles’.<sup>1</sup>

Australian constitutional historian Helen Irving has written convincingly about how the people of the states first had to *imagine* the idea of a nation called Australia,

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<sup>1</sup> Alfred Deakin writing on 14 September 1900 in *The Federal Story* (1900). Cited in David Headon and John Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne University Press, Carlton South, Vic., 2000, p. 141.

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before that nation could exist.<sup>2</sup> That process of imagining the country into existence occurred at a number of levels.

The drafters of the Australian Constitution—lawyers and politicians—built support for their cause on a sense of common identity that was very much about promoting allegiance to a vision of a dominant, white, British culture; and convincing their constituents that in uniting the colonies, the freedom and economic security of the new nation would be assured. With the benefit of hindsight we can say they seem largely to have gotten it right. However, as we know, politicians promising a brighter future will not necessarily automatically win public support.

I want to quickly divert here to reflect on two names that keep recurring when examining the origins of the HMC—on the political side, Alfred Deakin, and on the artistic side, Tom Roberts. The possible points of connections between these two men, and to a lesser extent some of the other major players who were their colleagues in art and politics during this period, are intriguing. On the surface, Roberts and Deakin appear to have quite a lot in common. Deakin was born in 1856 in Collingwood, Melbourne. Roberts was also born in 1856, in Dorset, England, and came to live in Collingwood, Melbourne at age 13. Both men liked to read and write, and moved in literary and artistic circles. Deakin also became engaged with spiritualism and philosophy. Both became leaders in their fields, acting as teachers and mentors to others in their circle, and worked hard to promote causes that they passionately believed in.

Deakin's biographer, J.A. La Nauze, suggests that Roberts and Deakin probably first met in 1901,<sup>3</sup> while Roberts was working on his *Big Picture* (I will talk more about that painting later), but I find it tempting to speculate that they could have met earlier. Melbourne was certainly a much smaller place then that it is now. I haven't found any historical references suggesting that they met often, but they definitely corresponded regularly, over a period of more than ten years. La Nauze notes that their letters indicate a friendly informality, and suggest that they each regarded the other as an intellectual peer. By far the most striking thing that they shared in common was an enthusiasm for documenting and reporting the characters and events of their time. Deakin wrote extensively throughout his life keeping diaries and notebooks. His writings about the federation movement, including character studies of many of the leading figures of that time, provide insight into the processes that were at work. Roberts, through his painting, also attempted to capture some of the history of the

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<sup>2</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, Cambridge, 1997—see particularly chapter 2.

<sup>3</sup> J.A. La Nauze, *Alfred Deakin: A Biography*, Melbourne University Press, Carlton, Vic., 1979, p. 231.

evolution of the nation, and his portrait character studies similarly attempted to capture a record of 'types'<sup>4</sup> (e.g. his *Church, State and Law* triptych).

But returning again to Helen Irving's theme of imagining the nation—the efforts of the federationists in capturing the public imagination were substantially assisted by the creative and sporting elements of society. Irving writes about the flowering of distinctively nationalist literature, poetry and music, as well as a distinctive sporting culture. Visual arts also played a vital role—and none more so than the members of what we now know as the Heidelberg group of artists (also known as the Australian Impressionists).

Irving notes that:

the movements for political and cultural nationalism were, inevitably, in advance of popular demand. They were led at the start by a small elite circle whose quest was to forge a distinctive Australian national character out of diffuse British references and leanings.<sup>5</sup>

Irving doesn't name the members of this elite circle—but I am reasonably confident she might include Alfred Deakin and Tom Roberts as part of their number.

In 1894, Roberts' colleague, the artist Arthur Streeton, wrote in a federalist journal *Commonwealth* that it seemed 'as though Federation were unconsciously begun by the artists and national galleries'.<sup>6</sup>

Certainly, Roberts and his peers articulated a new representation of Australian landscape and people through some of their key works of the 1880s and 1890s. While undoubtedly influenced by European art trends in impressionism, theirs was a different kind of work. Through their conscious depiction of harsh, hot sunlight, bleached colours, and uniquely sparse and spindly Australian vegetation, they purposefully set out to create a new, uniquely Australian style of art. We can see this exemplified in paintings such as *Near Heidelberg*, painted by Arthur Streeton in 1890, and Charles Conder's *Summer Idyll* of 1889.

Likewise, they celebrated the value of a characteristically Australian form of human endeavour, and helped mythologise the notion of the Australian bush character, shaped by the hardships that faced those who settled in it—for example, *Down on his*

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<sup>4</sup> Further analysis of Roberts' portrait series of Australian types can be found in: Humphrey McQueen, *Tom Roberts—Panel Portraits*, an undated article online at [http://home.alphalink.com.au/~loge27/roberts/roberts\\_panels.htm](http://home.alphalink.com.au/~loge27/roberts/roberts_panels.htm).

<sup>5</sup> Irving, op. cit., p. 35.

<sup>6</sup> Arthur Streeton, quoted by Irving, op. cit., p. 34.

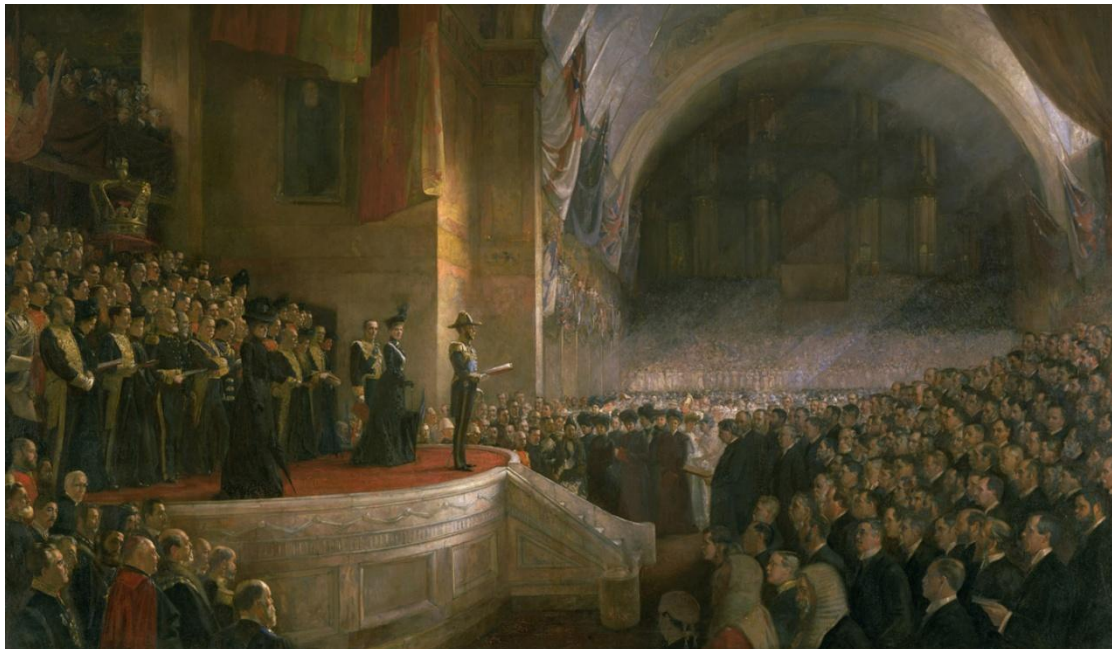


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*Luck* by Frederick McCubbin in 1889, and *A Break Away!* painted by Roberts in 1891.

Eventually, the grand vision of the federal movement was realised, and the new nation of Australia came into existence on 1 January 1901 in Centennial Park, Sydney, amid great ceremony and celebration.

The enthusiasm of the January celebrations in Sydney, were echoed in Melbourne in May, when the first Parliament was opened by the Duke of Cornwall and York. Tom Roberts captured this moment in his epic history painting, colloquially known as the ‘*Big Picture*’, which hangs just outside this room where I am speaking today. The *Big Picture* is not formally part of the HMC; however, I believe that this painting, and its creator Tom Roberts, are such critical components of the story of establishment of the HMC, that they deserve special mention.



Opening of the First Parliament of the Commonwealth of Australia by HRH The Duke of Cornwall and York (later King George V), 9 May 1901, 1903 by Tom Roberts (1856–1931). Courtesy of Parliament House Art Collection Canberra, ACT.

The painting was commissioned by a group of Melbourne businessmen who intended it as a gift to the new king, Edward VII. Roberts was not the first artist commissioned but when the first choice, J.C. Waites, backed out, Roberts stepped in. Roberts had to undertake a minimum of 250 individual portraits (eventually it amounted to 269 named individuals). It took him over two years to complete the work, required extensive travel in Australia and England, and resulted in a monumental canvas—at just over five metres by three metres.

He completed the painting in 1904, whereupon it was presented to the King, and it remained in England, in St James Palace, until 1958. The painting was eventually returned to Australia following persistent lobbying from a number of parliamentary figures, and is now on permanent loan to the Australian Parliament from the Royal Collection.

The painting has received mixed reviews over time—it certainly lacks the vitality and liveliness that is so engaging in some of Roberts' individual portraits. It is also often cited as the catalyst for Roberts entering a dark period in his artistic career. Roberts himself wrote in letters to his friends about the effort it cost him to complete the work; however, he equally regarded it as something of a personal mission to record what he saw as a momentous occasion. Personally, I think it has been unfairly judged. True, it is a darker and more sombre work than most of Roberts' other paintings, but he was accurately depicting the state of mourning of the guests attending the function.<sup>7</sup> Its scale, and the volume of detail it contains, are such that it requires close study to be properly appreciated. Certainly it demonstrates technical mastery in maintaining accurate proportion, scale and perspective across such a vast group of figures.

Interestingly, both Tom Roberts and Frederick McCubbin were invited guests at the opening event—possibly in recognition of their role in shaping the public imagination of the new nation—probably an indication of their continuing association with politics, and their prominence in Melbourne society as artists.

Moving forward, politicians got on with the business of governing, and the leading artists of the day attempted to consolidate their successes and pursue new artistic fields. Many of Australia's leading artists headed to Europe to try their fortune, with varying degrees of success.

In the decade from 1901 to 1911 Australia had five different prime ministers (with Alfred Deakin serving three separate terms of office and Andrew Fisher serving two terms). Parliament passed the Immigration Restriction Act, Australian troops were sent to the Boer War, the High Court was established, the world's first feature film *The Story of the Kelly Gang* was made, and the US Navy's 'Great White Fleet' visited Australia.

Throughout that decade, the topic of appropriate recognition of the people and events associated with the formation of the Commonwealth was periodically discussed in the new Parliament.

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<sup>7</sup> Queen Victoria had died in January 1901.

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One of the primary advocates for some form of commemoration was artist Tom Roberts. Self-interest may have been part of his motivation, but no doubt his sincere belief in the importance of creating records for posterity, as demonstrated by his effort in completing the *Big Picture*, was also a factor.

Roberts wrote to Alfred Deakin in March 1910, ‘let me ask you to consider the importance of acting early ... and let these records be painted ... to give faithful representations of the first leaders of the Commonwealth’, further noting that:

it disturbs me to think that most of you are likely to go on till the inevitable comes, and leave behind nothing that will give the future anything that will show what you all were as men to look at.<sup>8</sup>

Deakin subsequently sent a copy of Roberts’ letter to Prime Minister Andrew Fisher, who told the Parliament in October 1911 that the government hoped to preserve ‘likenesses of the prominent statesmen of Australia’.<sup>9</sup> Two months later the Historic Memorials Committee was established as a ‘committee of consultation and advice in reference to the expenditure of votes for the Historic Memorials of Representative Men’<sup>10</sup>, and the government allocated 500 pounds to commence this work.

I should comment here on the very specific gender reference—it is accurate, in that the HMC is very much a collection about men. Almost all the portrait subjects are male and almost all the artists commissioned to complete portraits have been male.

The committee consisted of the Prime Minister (as chair) as well as the President of the Senate, Speaker of the House of Representatives, Vice-President of the Executive Council, Leader of the Opposition, and the Leader of the Opposition in the Senate. (The make-up of the committee is still the same in 2011.) One of their early actions was to agree on a list of eminent men whose portraits should be painted, with the first portrait to be that of Sir Henry Parkes, who had died before the Constitution took effect. They also recognised a need for specialist expertise, and quickly established the Commonwealth Art Advisory Board (CAAB), to provide advice on the selection of suitable artists and to assess the quality of completed portraits.

The establishment of the committee and collection attracted considerable public attention and was not without controversy.

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<sup>8</sup> Tom Roberts, letter to Alfred Deakin, 11 March 1910, National Archives of Australia, NAA: A2, 1912/2035.

<sup>9</sup> House of Representatives debates, 5 October 1911, p. 1130.

<sup>10</sup> Federal Executive Council minute paper, National Archives of Australia, NAA: A1573, 1911/1, Attorney-General’s Department vol 1 (PT).

The *Sydney Morning Herald*, in September 1909 (Deakin was Prime Minister at that time, and Fisher was Leader of the Opposition) reported that:

Mr Deakin is to be congratulated on his decision to ... make some provision for a gallery of national portraits. The form of words used by the Prime Minister in announcing his readiness to take this step, however, suggests a doubt as to whether he has in mind memorials to other than the political leaders of the Federal movement.<sup>11</sup>

In August 1912, the *Brisbane Courier* took up a similar argument (by now it was Fisher's turn again to be prime minister):

Some men are born to greatness; others have it thrust upon them—and others thrust it upon themselves. The Historic Memorials Committee, of which the Federal Prime Minister is chairman, has approved of a report of an Art Advisory Board in connection with the perpetuation of the memories of Australia's great men... Some of the names in the list are quite correctly included, but quite a number have no claim yet to be classed with the Immortals ... Many of the really great names are ignored. In vain one looks for something to suggest remembrance of great explorers, poets, or authors. They are ignored so that the politicians, big and little, may be glorified.<sup>12</sup>

At this point, I will shift from considering the general history of the HMC, to examine a selection of portraits from the collection.

First, the portrait of Alfred Deakin by Frederick McCubbin. Perhaps the most surprising thing about this portrait is that it was not painted by Tom Roberts, given their apparent friendship and shared idealism. Roberts would seem to have been the obvious choice for the commission—but he was by then still living in England, and there had been some controversy about the HMC using artists based in England



The Hon. Alfred Deakin, 1914 by Frederick McCubbin (1855–1917). Courtesy of Parliament House Art Collection Canberra, ACT.

<sup>11</sup> *Sydney Morning Herald*, 4 September 1909, p. 12, retrieved from the National Library of Australia 'Trove' website: <http://trove.nla.gov.au/newspaper>.

<sup>12</sup> *Brisbane Courier*, 20 August 1912, p. 6, retrieved from the National Library of Australia 'Trove' website: <http://trove.nla.gov.au/newspaper>.

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rather than granting commissions to artists living in Australia.

The *Australian Dictionary of Biography* entry for Deakin describes him as a memoirist, barrister, federationist, irrigationist, journalist, newspaper editor, land speculator, politician, and spiritualist.<sup>13</sup> He was known as a skilled orator and is often credited for helping popularise the federation cause. Deakin took a great interest in promoting arts and literature. He became Australia's second prime minister in 1903, and served again as prime minister twice more. However, his political career apparently took a heavy toll and affected his health. By the time this portrait was painted, he was unwell, and possibly suffering the early stages of dementia. He died in 1919.

McCubbin was an Australian-born artist (also of Melbourne origin) who worked closely with Tom Roberts, Arthur Streeton and Charles Conder in the 1880s and 1890s. In the early 1900s he was at the height of his artistic powers and excelled as a landscape painter, but also painted figures. The portrait of Deakin is McCubbin's only inclusion in the HMC, and is currently on display at the National Portrait Gallery, in an exhibition celebrating the centenary, with three other early HMC portraits—the portrait of Andrew Fisher by Emanuel Phillips Fox, Henry Parkes by Julian Ashton, and the remarkable portrait of King Edward VII by George Lambert. I would encourage you all to take time to look at these portraits while they are there.

Time does not allow a comprehensive review of the collection, so I will instead focus on some of the more significant portrait artists, and some of the 'stand-out' portraits in the collection.

Sir William Dargie (1912–2003) is an outstanding figure in Australian portraiture with a career that started in the 1930s and continued through most of the 20th century. Dargie is perhaps best known for his portrait of Queen Elizabeth II, painted in 1954. The painting was not commissioned by the Commonwealth, but was presented as a gift for the Historic



Her Majesty Queen Elizabeth II, 1954 by Sir William Dargie (1912–2003). Courtesy of Parliament House Art Collection Canberra, ACT.

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<sup>13</sup> R. Norris, 'Deakin, Alfred (1856–1919)', *Australian Dictionary of Biography*, National Centre of Biography, ANU, <http://adb.anu.edu.au/biography/deakin-alfred-5927/text10099>.

Memorials Collection. Dargie won the Archibald Prize eight times between 1941 and 1956, and was an official war artist during World War II. Dargie painted in a style known as 'tonal realism' and was substantially influenced by Max Meldrum, and A.D. Colquhoun (both artists also represented in the HMC). He also played an important role in art administration and education, serving on many boards and councils. Most notably, he served as a long-term member (and eventually chair) of the Commonwealth Art Advisory Board (which advised the HMC) during the 1950s and 60s, when it played an important role in acquiring artworks for the national collection (most now held in the National Gallery collection).

In total, Dargie completed eleven portraits for the Historic Memorials Collection (a number that seems unlikely to ever be eclipsed). His HMC subjects include Prime Ministers Arthur Fadden and John McEwen, Dame Enid Lyons, and Governors-General Sir William Slim and Lord Casey, as well as the famous and much loved painting of Queen Elizabeth II.

Bryan Westwood (1930–2000) has eight portraits in the HMC, and was twice a winner of the Archibald Prize. He was largely self-taught, and did not start painting until he was well into his 30s. He travelled extensively, and spent periods living in Europe and America. His work is usually described as 'photo-realist' and he painted



very finely detailed, meticulously realistic portraits. In teaching himself how to paint, he studied the work of 'old masters', particularly Velazquez. One of the things I find particularly engaging about Westwood's portraits, is that he was one of the first HMC portraitists to encompass a more personal dimension to the portraits—sometimes by including objects with specific personal associations, or by posing his subjects in more reflective and individual ways. See for example his beautifully painted portrait of Sir Magnus Cormack, former President of the Senate, painted in 1973, and Sir Anthony Mason, former Chief Justice, painted in 1992.

The Hon. Sir Magnus Cameron Cormack KBE, 1973 by Bryan Westwood (1930–2000). Courtesy of Parliament House Art Collection Canberra, ACT.

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Robert Hannaford (born 1944) has completed nine commissions for the HMC, including a major work in 2001, depicting the centenary sitting of Parliament in the Melbourne Exhibition Building—an homage to Tom Roberts', and displayed alongside the *Big Picture*, in Parliament House. Hannaford's HMC portraits include Prime Minister Paul Keating, painted in 1997, and Governor-General Sir William Deane, painted in 2001. Unlike many other recent HMC portrait artists, Hannaford paints primarily from life, usually requiring his subjects to make themselves available for a week or more for portrait sittings—no easy feat if they are still in office.



Centenary of Federation Commemorative Sitting of Federal Parliament, Royal Exhibition Building, Melbourne, 9 May 2001, 2003 by Robert Hannaford (1944–). Courtesy of Parliament House Art Collection Canberra, ACT.

HMC portraits have occasionally been entered in the Archibald Prize, and at least three times have been winners. These three portraits, representing very different periods, and different styles of portraiture are: Max Meldrum's 1939 winning portrait of Speaker George Bell, Joshua Smith's 1944 winning portrait of Speaker John Rosevear, and Clifton Pugh's 1972 winning portrait of Prime Minister Gough Whitlam. The Whitlam portrait was not commissioned for the HMC, but purchased at the suggestion of Mr Whitlam himself. Interestingly, it is probably one of the least realist portraits in the collection.

As mentioned previously, women are very much in the minority in the HMC, both as subjects and artists. However, they do appear from time to time. The first two portraits depicting women were William Dargie's portrait of Enid Lyons from 1951, and Archie Colquhoun's portrait of Senator Dorothy Tangney from 1946, commemorating

their respective status as the first female member, and the first female senator in the Australian Parliament. Some of the significant women artists represented in the collection include Judy Cassab, who painted portraits of Speaker James Cope in 1973, and Chief Justice Sir Harry Gibbs in 1992. June Mendoza painted a distinctively informal portrait of Prime Minister John Gorton in 1971, and Speaker Billy Snedden in 1984. Mendoza also painted the first sitting of the House of Representatives in this building, in 1988 (completed in 1990).

After the early flush of activity in the period between 1912 and 1920, two world wars and the Great Depression intervened and limited the capacity of the Historic Memorials Committee to meet regularly. Constrained finances also affected the rate at which new portraits were commissioned. Despite this, the collection continued to grow, with the primary focus remaining largely on political figures. Portraits of all governors-general, chief justices of the High Court, prime ministers, and presiding officers of the Parliament have been acquired. In addition to this core group, portraits of other important figures have occasionally been added, such as monarchs, early explorers, and literary figures, and paintings depicting special events, such as the opening of Parliament in Canberra in 1927, and the opening of the new Parliament House in 1988.

Portraits have also been commissioned or purchased of individuals who in some manner represent a parliamentary 'first' such as the first women (already mentioned—Enid Lyons and Dorothy Tangney), as well as the first Indigenous Australian elected to Parliament, Senator Neville Bonner, whose portrait was painted in 1979 by Wes Walters.

Today, the Historic Memorials Collection includes almost 250 artworks. The majority are portraits, by eminent Australian artists. In addition to names I have already listed, the HMC includes works by Julian Ashton, George Lambert, John Longstaff, William McInnes, and Ivor Hele. Other significant artists commissioned more recently include Albert Tucker, Sam Fullbrook, Bill Leak, Peter Churcher, Paul Newton, Jiawei Shen, and Rick Amor. Male artists and male subjects are still dominant but with a female prime minister and a female governor-general currently in office, the numbers of women represented in the collection will soon be boosted.

As well as recording Australia's political history, the collection also reveals changes in the history of portraiture in Australia. As we have seen, the earlier portraits were often sombre in tone and reflected the dignity of the office held by the sitter, borrowing heavily from formal European portraiture. Over time, portraits have tended to become less formal and capture more of the personality of the sitter, sometimes including objects with personal associations, as well as the regalia of office.



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The Historic Memorials Collection is a valuable and continuing record of the history of politics and portraiture in Australia. Its centenary provides an opportunity to reflect on the way individual political leaders are portrayed, and how they are viewed by the broader community that the Parliament represents. I hope you can all find time to view some of the portraits in the collection—a large number can be seen here at Parliament House, as well as at Old Parliament House, the High Court, and the National Portrait Gallery.



**Question** — You mentioned that Tom Roberts measured people when he was making the *Big Picture*? Do you have any information on how he went about it?

**Kylie Scroope** — We do know he travelled widely so he visited a number of states in Australia to meet with the people who were represented in the picture. I gather some people were not very happy with the idea. There have even been suggestions that they might have tried to cajole him into reducing their girth, for instance. I suspect there would have been some figures that he wouldn't have done in that literal sense, particularly the Duke of Cornwall who opened the proceedings. Although Roberts made sketches at the event he also had a couple of sittings with the Duke in England before the painting was completed. I would imagine it was much more just a case of using his artist's eye with some of the more important dignitaries. But I gather there are notebooks—I think they are mostly held at the National Library—where he made sketches and recorded some of those details like height and weight, hair colour, eye colour and those sorts of things.

**Question** — Would it be correct to say that before a portrait is commissioned there is a sort of assessment that someone's career is substantially complete?

**Kylie Scroope** — Generally the preference is if possible to have the portrait painted while the subject is still in office so that it closely represents the way they looked while they were in that office. But obviously when you are dealing with people like prime ministers in particular or chief justices, they have pretty busy schedules, so that is not always feasible. Certainly there are a substantial number of portraits that have been painted immediately after someone has left office and in the case of Prime Minister Harold Holt, who left office rather suddenly, obviously that portrait had to be painted posthumously. Some of the earlier ones as well, where they only decided to begin the collection after people had passed away, like Sir Henry Parkes. In those

cases what usually happened was they made an effort to obtain good quality photographic portraits of the people and then those were given to the artists.

**Question** — We have seen a very conservative collection of portraits apart from the Clifton Pugh one of Gough Whitlam. Has that been controversial amongst the selection committee that sometimes an artist may have been regarded as a little bit too avant-garde or a little bit too untraditional?

**Kylie Scroope** — Occasionally. There are rare examples of portraits being submitted and being rejected by the committee. Surprisingly the ones that most often got returned for rework were the earliest ones where I would say they were pretty conservative anyway but obviously the standards they were being judged against were even more conservative than our tastes would be now. So, for instance, Tom Roberts did a portrait of Lord Tennyson which was sent back to him for rework, which I think is a bit presumptuous considering the stature he would have had as an artist at that time. Considering what we now see in the finished portrait it is hard to imagine what they could have been finding fault with. George Lambert, who was probably one of the more avant-garde artists of that early era, painted a portrait of Sir George Reid in 1913, where unlike most of the other early ones he wasn't standing, he was seated. If any of you are familiar with George Reid he was a reasonably large man and had a nice round tummy. Because he is seated that is very much emphasised in the portrait and I think one of the news clippings I showed might have made reference to it. There was a lot of both public consternation and consternation amongst the committee. I'll just read it to you:

the matter of Sir George Reid's portrait now hanging in Queen's Hall was mentioned and it was decided that Mr Longstaff should be approached in order to ascertain the price of his picture of Sir George Reid.

So basically they commissioned or obtained a second portrait because Lambert's was described as being too much of a caricature of the man. There were a couple of other later artists as well whose portraits were rejected. Probably the other best known example was the first portrait of Sir John Kerr by a Queensland artist called Sam Fullbrook—a terrific artist but not necessarily a painter of realist likenesses. So that portrait was rejected without Sir John Kerr ever having any input into the decision and a second portrait was obtained.

**Question** — Were any actually rejected by the subject?

**Kylie Scroope** — There was one, I believe—Malcolm Fraser's first portrait which he expressed considerable concern about. That was painted by Bryan Westwood, one of

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the artists we looked at. It was a standing portrait, highly realist, and I think the view that was expressed was that it made Malcolm Fraser look like a very intimidating character—probably a highly accurate representation of the way he was when he was prime minister. I think that his persona is quite different now. The Visual Arts Board, who by then were playing the role of the Commonwealth Art Advisory Board, had endorsed it as an acceptable portrait and a number of the members of the Historic Memorials Committee had endorsed it. Because of Mr Fraser's concerns the committee was eventually persuaded that a second portrait should be obtained.

**Question** — How do you see the place of the Historic Memorials Collection in the overall conceptual basis of the art program for Parliament House and in the four years that you have been here are you aware of any changes in attitudes towards its relative importance vis-à-vis the rest of the collection or any changes you are aware of since the building opened in 1988?

**Kylie Scroope** — Not significant changes, I would say. Just to go back a step, when this building was being built there were a number of committees that were involved in various decision-making processes relating to this building and the overall role was played by a joint standing committee of parliamentarians who were established to manage the process. They did a lot of the work on briefing the architects and that sort of thing. For those of you who don't know, the art collection in Parliament House is considered to be very much an integral part of the building. It wasn't added as an afterthought, it was developed as a concept right through the whole process of the architecture being developed. The joint standing committee took advice from a body, I think it was called the Presiding Officers' Reference Advisory Group, about a thing that they called the locational listing. There was also an art advisory group, a separate body, to the Parliament House Construction Authority. So all these groups of different people with different backgrounds and perspectives provided input to the joint standing committee. That committee eventually developed what they called the locational listing which included an item-by-item inventory of material from Old Parliament House that they determined should either be left there or brought to this building.

The majority of the Historic Memorials Committee portraits were deemed to be needed for this building because they so much represent the history of the Parliament. Of course at that stage the Museum of Australian Democracy at Old Parliament House hadn't been established and there was a degree of uncertainty about what might happen to that building. But in particular the placement of the portraits around the Members' Hall was something that was decided and committed to very early on and has remained constant. We have made some minor changes. The number of prime ministers' portraits that can be displayed in the public areas of this building is

relatively limited because we are constrained by the number of wall slots. There used to be only 12 of them on display but a couple of years ago there was some concern that the portrait of John Curtin was about to be displaced so that another portrait could hang and in response to the public concern about that we put a proposal to the presiding officers that we could relocate some of the other portraits to provide more space for prime ministers. So we now have 16 portraits of former prime ministers on public display. The parliamentary 'firsts', who used to be in Members' Hall, are now further out the front of the building.

So I would say minor adjustments. But I think generally, particularly for the members of Parliament themselves, those of them with a strong interest and commitment to parliamentary history would always see it as an essential thing that the core of the Historic Memorials Collection is displayed here. But we are lucky of course that we have institutions like the High Court, the Portrait Gallery and Old Parliament House now that can also display the ones that can't be displayed here.

**Question** — You have just mentioned the High Court and the portraits that are there are absolutely stunning, but I have to make the comment that they are so high up the wall that the actual plaques that go with them providing information cannot be read. Is that something that you can address or does it have to be done through the High Court?

**Kylie Scroope** — It is something the High Court would have to address but I can tell you that it is something they are looking into themselves and I think probably within the next few months it should be addressed. It does illustrate the difference with a building where the artworks were added later, almost as an afterthought, compared to this building where the building was very much designed with display of art as part of its purpose.

**Question** — Do you see a time when the portraits will be replaced by digital images?

**Kylie Scroope** — I don't think so. It is really interesting, even back in 1911 when the collection was first established there was talk about acquiring photographic portraits as well and busts in stone. But curiously, while they did acquire photographic images to use as references, particularly where a portrait was being painted of someone who wasn't alive any more, they have never really been retained as part of the core collection. I think there is still something about a painted portrait that provides a degree of distance, perhaps, and also makes it a bit more special. If you go to the National Portrait Gallery you will see that they acquire portraits in a much broader range of media—they have things like textiles, lots of photographic portraits, relief images, that sort of thing. The technical prescription for the HMC portrait

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commissions is still very controlled in that they have to be oil paintings on canvas, they have to be within a certain size range, they have to be framed in a manner that is considered suitable for the collection and that sort of thing. There is certainly no push at this point to change it. I suppose the only thing that might change it is that eventually there might be less people painting portraits but there is no sign of that happening yet, there are plenty of competent portrait artists around still to take these sorts of commissions on.

**Question** — You said that the *Big Picture* was in the Royal Collection and lent back to us. How does it come to pass that such an important picture was in the Royal Collection and not here and how did it come back here?

**Kylie Scroope** — Strangely enough the *Big Picture* was a private commission. So it was a group of Melbourne businessmen, who I think called themselves something like the Australian Art Association, who basically undertook to offer this commission and they were the ones who set out some of the basic requirements like that it had to include accurate likenesses of a large number of the people there. Various historians have suggested that their primary motivation was in fact commercial. There were photogravure reproductions made of the *Big Picture*—mass produced print forms of it—and they sold widely not only in Australia but all around the world. They were produced by a French printing company who specialised in that kind of thing. So it had been suggested that the group of people who commissioned the work weren't really that interested in a major commemorative artwork, they were looking for something to form the basis of a cheaper commercial product that they could then exploit.

But in any case, when the painting was completed that group of businessmen presented it as a gift to the King. King Edward had become monarch just before Parliament opened when Queen Victoria died, but he wasn't at the opening—he sent his second son. And so the portrait was sent off to England to the Royal Collection and from what we can gather it stayed in St James's Palace until the 1950s. There were occasional rumblings about the fact that it was there and not here and that really came to a head in the 1950s when Senator Dorothy Tangney in particular lobbied Prime Minister Robert Menzies very hard to advocate for its return. Menzies eventually engaged the secretary of the Governor-General who undertook to get the Governor-General to write to the Palace saying, 'we think this is a really important part of Australia's history, would there be any scope for returning it to Australia?' The response of the royal household was that because it had been a gift they would offer it on permanent loan. So for the last 53 years it has been here.

The sad thing was that when it finally came back to Australia in 1958 I don't think they anticipated just how big it was and it was actually quite difficult to find anywhere big enough to hang it. It did spend a little bit of time in Old Parliament House on display and it also did a little tour of some of the major state galleries, but it spent quite a lot of time languishing in storage because there was nowhere big enough to show it until the new High Court building opened in 1980 and finally there was a big concrete wall and it was there until this building opened. But as you can see when you look at the place where it is located here, again the architect consciously designed a space for its display. So the area where that little balcony is and the curved wall, architecturally it echoes the visual references.

**Question** — In 1927 the Duchess of York was given a book of sketches by Eirene Mort and they were sketches of Canberra, and in relation to the centenary of the naming of Canberra in 2013, I wondered if we could get them back for an exhibition and any other picture or works they have of Canberra? Have we ever investigated what they have of Canberra?

**Kylie Scroope** — It is not something we have looked into. It is possible some of the other institutions may have. I guess the *Big Picture* is proof that these things won't happen quickly but they are not impossible. In the case of the *Big Picture* it was probably about four or five years of toing and froing and correspondence at various levels but eventually it did happen and there is no push to take it back.



## Introduction

It is my great privilege to talk today about human rights, in our national parliament, and in conjunction with International Human Rights Day. In so doing I want to reinforce the critical importance a commitment to human rights has as the foundation of those core values that characterise our society. I will look at the experience of the operation of the ACT's *Human Rights Act 2004*. And I will suggest there are three paths for us to take to improve human rights of Australians: bold policy ideas, strong political leadership, and more active community engagement.

When I talk about human rights, I mean equality and fairness for everyone. A society that commits to human rights, commits to ensuring that everyone is treated with dignity and respect. In Australia, the values that we regard as core to our national character—values such as freedom, respect, fairness, justice, democracy and equality—each stem from a commitment to human rights.

They are the values we enshrine in our vernacular as 'a fair go for all'.

I believe the protection of human rights is everyone's responsibility. A shared understanding and respect for human rights provides the foundation for peace, harmony, security and freedom in our community and, importantly, the right for the most vulnerable and marginalised members of our community to have their dignity respected and their basic needs fulfilled.

I took, in my decade as chief minister, greatest satisfaction from the way my government implemented social justice, freedom from discrimination, human rights, equality of opportunity, and the rule of law. We introduced a Human Rights Act into ACT law in 2004, the first Bill of Rights in Australia. I believe it has led to better legislation being passed, more accountability to people in the community for the provision of services, and acts as a marker of our values. Its opponents, and indeed continuing opponents to Bills of Rights, raise a stock set of objections to their enactment.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 9 December 2011.



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But the sky didn't fall in.

And it is worth reflecting, now that more than six years has passed since the passage of the Human Rights Act, on its impact.

### **Creation of a human rights culture**

My personal experience and observations, as well as formal surveys, confirm that the Human Rights Act has been successful in fostering the growth of a human rights culture in the ACT.

Cabinet room discussion, cabinet submissions, ministerial briefings and discussion between officers and within departments are all informed by the Human Rights Act. That is my experience, and it is the experience I am sure of every minister in the ACT Government as well as that of ministerial staff and departmental officers.

The existence of the Human Rights Act is a constant presence in the day-to-day business of the ACT Government and that is its great success.

The ACT Human Rights Commission undertook surveys throughout the ACT Public Service in 2009 which illustrate the range of ways in which the Act is used in, or affects the work of, the public service. These range from issues affecting mental health clients, in teaching migrants, designing buildings, prosecution policy, juvenile justice, corrections policy, law reform and the implementation of security and emergency management arrangements.

It is also not unusual for questions of human rights to be raised in correspondence to members of the Legislative Assembly and in submissions to government, and I have noticed increasing reference to human rights in public consultations and public forums.

Additionally, the government is now far more likely to be taken to task by the Opposition, representative organisations and the general public for allegedly ignoring human rights or the Human Rights Act. While the irony of the Opposition, which trenchantly opposed the passage of the Act, taking the government to task over its implementation and observance is not lost on me, it is I think a clear sign of its utility and efficacy that the Opposition now regularly uses the Act as a mechanism for holding the government to account on human rights issues.

As, of course, it should.

## **Development of policy and legislation**

While every piece of legislation introduced by the ACT Government must be accompanied by a human rights compatibility statement signed by the Attorney-General, it is, to date at least, in areas of criminal law reform and corrections where the Human Rights Act most starkly and consistently pervades the policy and legislative process. The highest profile examples of the Act's impact on the ACT Government's attitude to reform of criminal law were the anti-terrorism legislation and proposals mooted for national laws for the control of outlaw motorcycle gangs. The ACT took a markedly different attitude than other jurisdictions to these issues.

## **Human rights audits and reviews**

The Human Rights and Discrimination Commissioner has also, to date, conducted three human rights audits under section 41 of the Human Rights Act. The first audit involved the former ACT youth detention centre, Quamby, in 2005. The second audit related to ACT remand facilities in 2007, and most recently a human rights audit of Bimberi Youth Detention Centre was undertaken this year. In addition, the Health Services Commissioner conducted a services review of the Psychiatric Services Unit at the Canberra Hospital in 2009 in partnership with ACT Health, pursuant to section 48 of the *Human Rights Commission Act 2005*.

The focus on using these powers has been to 'shine a light' on the practices, policies and procedures of closed environments such as youth and adult detention centres and secure mental health facilities, for which government has total responsibility. It is in these closed environments that people can be at their most vulnerable to human rights abuses and violations. The review function has been the most powerful in achieving systemic change at legislative as well as practical levels.

## **Impact in the courts**

Prior to the enactment of the Act, critics predicted that it would be a litigious feast for lawyers, a rogue's charter favouring the rights of criminals over victims, or would have no impact on court decisions at all. The same critics prophesied that the passage of the Human Rights Act would destroy democracy as we know it with the transferral of law-making power from the parliament to the courts.

None of these criticisms have been realised in practice—there has been no avalanche of cases pursued by lawyers, or of criminals escaping justice through human rights loopholes. There has been no instance of a judge or a court off on a law-making frolic. In 2007 the then Director of Public Prosecutions confirmed that the practice of criminal law 'had not been revolutionised,' and that:

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there have been no more acquittals or technical defeats for the prosecution than before the Act, nor an express reliance on the Act in ways that are different from the common law.<sup>1</sup>

Importantly, there is increasing evidence that the Act is being used as an advocacy tool for individuals in their dealings with the ACT Government, similar to the documented use of the UK Human Rights Act and Victorian Charter.

There have been nearly 150 reported cases citing the Human Rights Act since it came into force. The great majority of these cases have been in the ACT Supreme Court and Court of Appeal, with a small number in the Magistrates Court, Children's Court and tribunals. Many of these matters involved issues of criminal procedure, where the Act has given renewed focus to the requirements of a fair trial, and the need to avoid undue delay in prosecution.

The Human Rights Act has also been applied in a wide variety of civil proceedings, including public housing and private tenancy matters, discrimination, adoption, care and protection, personal injury and planning matters. In many cases the Act has been used to support a conclusion which would likely have been reached on other grounds, but it has been a decisive consideration in some significant cases.

The enactment of the ACT Human Rights Act has had a demonstrably positive effect on awareness of human rights and their protection within the ACT. I am proud not just of that, but am also pleased that the Act was subsequently copied and extended by Victoria. And I remain hopeful that in time the reverberations from the passage of that first Bill of Rights will continue across Australia.

I am also proud that in the ACT we removed discrimination against gays and lesbians, created Australia's first fully elected indigenous body, designed the first human rights compliant prison in Australia, and introduced anti-terrorism laws that complied with human rights. The ACT also decriminalised abortion.

As you know, attempts to ensure full functional equality for gay couples were thwarted when the ACT Civil Union Act was overturned by John Howard's federal Liberal government in 2006 and to my enduring regret its reintroduction was opposed by the Rudd Labor government in 2009. But the territories now, at least, have more freedom to legislate as a result of the passage of Senator Bob Brown's bill<sup>2</sup> and as last

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<sup>1</sup> Richard Refshauge, 'Impact on criminal law and procedure', address to the 2007 Protecting Human Rights Conference, Melbourne, 25 September 2007, online at [http://acthra.anu.edu.au/articles/Richard\\_Refshauge%202007.pdf](http://acthra.anu.edu.au/articles/Richard_Refshauge%202007.pdf).

<sup>2</sup> Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.

weekend's National Labor Conference has revealed, my Labor colleagues, or at least a majority of them, have now caught up to where we in the ACT Labor Party were on the issue of gay rights ten years ago.

The steps taken by the ACT Government were bold and were a consequence of bold ideas, and their boldness continues. The ACT is now working, under the leadership of Chief Minister Katy Gallagher and Attorney-General Simon Corbell, and in partnership with the ANU, on an inquiry into the potential and desirability of introducing economic, social and cultural rights into the ACT Human Rights Act.

### **Economic, social and cultural rights in the ACT**

The final report of the Economic, Social and Cultural Rights Research Project, a linkage project between the ANU and the ACT Department of Justice and Community Safety, reflects the research of respected academic experts in human rights law: Professor Hilary Charlesworth, Professor Andrew Byrnes, Renuka Thilagaratnam and Dr Katharine Young. These researchers reviewed the protection of economic, social and cultural rights across a range of comparative jurisdictions.

Their report provides a detailed analysis of the nature and scope of such rights and possible mechanisms for their protection. The report makes a clear case that economic, social and cultural rights could be better protected through inclusion in the ACT Human Rights Act, and provides a draft bill prepared with the assistance of parliamentary counsel, which sets out a considered implementation model.

The report recommends that the following rights be included in the ACT Act—the right to housing; the right to health, including food, water, social security and a healthy environment; the right to education; the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work-related organisations; and the right to take part in cultural life.<sup>3</sup>

The distinction between the rights contained in the International Covenant on Civil and Political Rights—the ICCPR—and the International Covenant on Economic, Social and Cultural Rights—ICESCR—is an artificial one, influenced by historical political divisions when the treaties were drafted during the Cold War. Human rights are universal, inherent, inalienable and indivisible.<sup>4</sup> Rights in the ICCPR should not be seen as more important or more relevant than the rights in the ICESCR. Newer treaties such as the Convention on the Rights of the Child and the Convention on the

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<sup>3</sup> Australian Capital Territory Economic, Social and Cultural Rights Research Project, *Report*, September 2010, ANU College of Law Research paper no. 10-86, p. 17.

<sup>4</sup> See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 14–25 June 1993, A/CONF.157/24 (Part I), Chapter III.

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Elimination of All Forms of Racial Discrimination do not distinguish between categories of rights. Nor should the Human Rights Act, which is an important mechanism for domestic implementation of our international human rights obligations.

Economic, social and cultural rights, including the right to housing, the right to education, the right to work and the right to the highest attainable standard of health, are critical for individuals to lead dignified lives. In practice, individuals and advocates who have invoked the Human Rights Act have often sought indirect redress for breaches of economic, social or cultural rights through arguments based on civil and political rights. This indicates a need for a broader protection of rights in the ACT, and broad protection federally. For example, in the ACT case of *Peters v. ACT Housing*<sup>5</sup>, tenancy advocates relied on the right to equality to indirectly protect the right to housing, arguing that public housing tenants should be compensated to the same extent as private tenants where the property owner had failed to carry out essential maintenance work to ensure that the properties were habitable.

As I earlier noted, in 2009 the ACT Human Rights Commission conducted a community survey. The following question was put as part of the survey:

The ACT Human Rights Act 2004 currently covers civil and political rights. It does not include economic, social and cultural rights such as the right to health, housing and education. Do you think these rights should be included in the ACT Human Rights Act 2004?

Respondents were overwhelmingly in support of including economic, social and cultural rights in the Act with 82.6 per cent favouring inclusion.

Similarly the National Human Rights Consultation chaired by Father Frank Brennan involved the commissioning of research that found economic, social and cultural rights were most important to Australians, with the committee stating:

The research the Committee commissioned demonstrated that economic, social and cultural rights are at the top of the list of rights that are considered most important to the Australian community.<sup>6</sup>

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<sup>5</sup> *Peters v. ACT Housing* [2006] ACTRRTT 6.

<sup>6</sup> National Human Rights Consultation, *Report*, September 2009, online at <http://www.humanrightsconsultation.gov.au/>, p. xv.

The way they are protected and promoted has a major impact on the lives of many Australians. The right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.<sup>7</sup>

The Human Rights Act, with only ICCPR protection, has not, as I said earlier, led to a significant increase in litigation, and the ACT courts and tribunals have adopted a cautious approach to the application of civil and political rights. There is no reason to suggest that the inclusion of economic, social and cultural rights would have more than a modest and appropriate impact in strengthening protections for these fundamental rights in the Territory. There is nothing to fear.

The work of the research project provides a solid and practical foundation for the incorporation of economic, social and cultural rights into the Human Rights Act, and the ACT Government now has an important opportunity to progress the vision and potential of the Act to protect all of the fundamental human rights of people within the ACT.

I look forward to the government's response on this important issue.

### **Bold policy ideas**

The passage of human rights legislation is of itself obviously not enough.

It is also important to move the debate into actual policy initiatives, and to test and act on creative ideas from other jurisdictions.

The UK for example has a new piece of legislation on corporate manslaughter which I believe has merit for consideration in the Australian context. A Corporate Manslaughter and Corporate Homicide Bill was introduced to the House of Commons by the then Home Secretary, John Reid, on 20 July 2006 to create new offences of corporate manslaughter, in England and Wales, and corporate homicide, in Scotland. The bill received royal assent on the 26 July 2007, becoming the *Corporate Manslaughter and Corporate Homicide Act 2007*. The Act came into force in early 2008.

The Act contains a duty of care that certain organisations owe to persons who are held in detention or custody. A company will be guilty of the new offence if the way in which its activities are managed or organised, by its senior management, amount to a

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<sup>7</sup> *ibid.*, p. 96.

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gross breach of the duty of care it owes to its employees, the public or other individuals, and those failings caused the person's death.

Companies, and importantly government bodies, face prosecution if they are found to have caused a person's death due to their corporate health and safety failings.

The Act was then extended in 2011 to cover all deaths in police custody suites, prison cells, mental health detention facilities, young offenders' institutions and immigration suites. It also covers Ministry of Defence institutions.

This is groundbreaking because the previous law linked a company's guilt to the gross negligence of an individual who is said to be the embodiment of the company.

It had proved very difficult to prosecute companies and large organisations, and the only successful prosecutions have been against small companies where the director and company are essentially one and the same.

The new Corporate Manslaughter and Corporate Homicide Act seeks to address this difficulty by focusing on the way in which a company's activities are managed or organised, and it is not reliant on one individual being found guilty of gross negligence manslaughter. The courts will now be able to consider the wider corporate picture, looking collectively at the actions, or more appropriately the failings, of the organisation or the company's senior management.

There had likewise been no successful prosecutions of police or prison officers, individually or at a senior management level, for institutional failures that have contributed to a death in custody.<sup>8</sup>

The background to the 2011 amendment was that in the UK, in the ten years between 1999 and 2009, 333 people died in or following police custody, according to the Independent Police Complaints Commission. Ministry of Justice figures show that in 2010 alone there were 58 self-inflicted deaths among prisoners in England and Wales. There were also deaths of people being transported to and from immigration detention centres—such as the prominent case of Jimmy Mubenga who died while being restrained on a British Airways plane to Angola in 2010.<sup>9</sup> (Notably, the private firm hired to transport him cannot be prosecuted under the Act because the law is not retrospective.)

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<sup>8</sup> Crown Prosecution Service (UK), 'Corporate manslaughter', online at [http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_manslaughter/](http://www.cps.gov.uk/legal/a_to_c/corporate_manslaughter/).

<sup>9</sup> Paul Lewis, Matthew Taylor, Alan Travis and Haroon Siddique, 'MPs demand inquiry over flight death', *Guardian*, 15 October 2010, online at <http://www.guardian.co.uk/uk/2010/oct/15/mps-demand-inquiry-flight-death>.

Prosecutions can take place if it can be proved that the way the facilities are managed or organised caused a death and amounted to a breach of the duty of care. The penalty for organisations convicted is a fine with no maximum limit. Crown Prosecution Service guidance says that the fines are likely to be in the many millions of pounds.

Campaigners for the families of those who die in custody believe the new law will provide extra protection for vulnerable individuals and at last inject some accountability into the system, according to reportage last year in the *Guardian* newspaper.<sup>10</sup>

Helen Shaw, the co-director of Inquest, the UK charity that works with families of those who die in custody, said:

While not all deaths in custody are a result of grossly negligent management failings that would lead to consideration of a corporate manslaughter prosecution many of Inquest's cases have revealed a catalogue of failings in the treatment and care of vulnerable people in custody and raised issues of negligence, management failings and failures in the duty of care.

The new provisions provide a new avenue to address these problems and will hopefully have a deterrent effect, preventing future deaths.<sup>11</sup>

Inquest said that until now, there had been no successful prosecutions for deaths in custody, even in the ten cases since 1990 where an inquest jury had returned an unlawful killing verdict.

Implementation of the clause covering custody deaths was delayed in order to give police forces and prisons time to inspect their custody facilities and their management protocols and administrative arrangements and make sure they were up to the highest standards.

John Coppen, the Police Federation representative for custody sergeants, said:

This will mean the people at the top, who actually control the buildings and the budgets, have to think about their responsibilities. In future if someone was to hang themselves from a ligature in a cell, not only would the custody sergeant be questioned, but the authorities would look at the

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<sup>10</sup> Sandra Laville, 'Corporate homicide law extended to prisons and police cells', *Guardian*, 28 August 2011, online at <http://www.guardian.co.uk/uk/2011/aug/28/corporate-homicide-law-prison-police>.

<sup>11</sup> *ibid.*



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way the building was designed, whether there were any obvious ligature points that had not been removed, and the force could be held responsible.<sup>12</sup>

As well as unlimited fines, courts can also impose an order requiring the company or organisation to publicise the fact that it has been convicted of the offence, and give details.

Why would this bill be relevant to Australia?

I argue for three reasons.

First, we have an ongoing problem with deaths in custody, and in particular with Aboriginal deaths in custody. You will all remember the terrible case of indigenous elder Mr Ward dying in 50 degree heat in January 2008 while being transported in a van in WA.<sup>13</sup> April 2011 marked the 20th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody. It recommended governments immediately work to reduce the number of Aboriginal people in prison. Yes, fewer Aboriginal people are dying in lock-ups and prisons, but more are in jail. And the situation for the next generation is dire. In our juvenile detention centres more than half the children are indigenous.

The Northern Territory Criminal Lawyers' Association president John Lawrence says the lessons of the report have not been heeded:

The bottom line is that we've gotten nowhere—slowly, backwards, up a hill blindfolded<sup>14</sup>

Of topical interest to residents of the ACT is the current debate about the right of drug injecting prisoners in the Alexander Maconochie Centre to access clean needles and the consequences and responsibility that would flow if as a result of their non-availability or non-provision a prisoner is, say, infected with a life-threatening disease and subsequently dies. The position put and maintained by the Community and Public Sector Union (CPSU), the union representative of prison officers, is that clean needles will only be made available to prisoners over their dead bodies. It is not clear who the

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<sup>12</sup> *ibid.*

<sup>13</sup> 'Man dies in 50 degree heat during "inhumane" treatment', *WAtoday*, 13 June 2009, online at <http://www.watoday.com.au/wa-news/man-dies-in-50-degree-heat-during-inhumane-treatment-20090613-c6gx.html>.

<sup>14</sup> Eric Tlozek, 'Aboriginal deaths in custody lessons "not heeded"', 105.7 ABC Darwin, 15 April 2011, online at <http://www.abc.net.au/news/2011-04-15/aboriginal-deaths-in-custody-lessons-not-heeded/2614616/?site=darwin>.

CPSU believes should be responsible for dead prisoners. Certainly not the union or its members. Drug-injecting members of the CPSU and indeed all Australians have access to 3500 publicly operating needle exchange facilities throughout Australia.

Second, Australians die in mental health institutions. The *Age*, for example, reported in September 2011 that 36 people died unexpected, unnatural or violent deaths in Victorian mental health facilities alone between 2008 and 2010 according to Coroner's Court files.<sup>15</sup>

And third, there have been 27 deaths in immigration detention since 2000, with five in the last year, and there is a sense of growing concern about the mental health and treatment of detainees in privatised detention centres.

These deaths are currently dealt with in coroners' courts and in an ad hoc manner, state by state or territory, and mostly in a highly reactive way. Compensation has to be fought for, and structural reform to prevent further deaths is not guaranteed.

It is moot to ask if a person dies in the sorts of circumstances I outlined above—in circumstances where the detainee has not been availed of services or care of the sort or standard available to all other members of the community and they die and their death is reasonably foreseeable or a consequence of a reckless or negligent failure to provide that service or an appropriate level of care—should someone or some organisation or entity be held accountable for that death? The government of the United Kingdom thinks so, as do I.

The ACT has now had in operation for a number of years an offence of industrial manslaughter. It provides that an employer or a senior officer of a company commits the offence of industrial manslaughter if the reckless or negligent conduct of that employer or senior officer causes the death of a worker or serious harm that later causes the worker to die.

There have been no prosecutions under the Act but it is nevertheless credited with having generated massive cultural change on construction and industrial sites within the ACT and to have a marked impact on worksite culture and safety. The legislation was passed following vigorous and cogent representation and argument by ACT-based unions, most particularly the Construction, Forestry, Mining and Energy Union (CFMEU) and Unions ACT. I am certain that all unions operating in the ACT and affiliated with Unions ACT and associated with the industrial manslaughter regime

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<sup>15</sup> Richard Baker and Nick McKenzie, 'Deaths in mental health facilities: unexpected, unnatural and violent', *Age*, 3 September 2011, online at <http://www.theage.com.au/victoria/deaths-in-mental-health-facilities-unexpected-unnatural-and-violent-20110902-1jqdg.html>.

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campaign would support it being extended, as I have proposed, to people other than workers who die as a result of similarly reckless or negligent behaviour so as to cover a broader range of organisations and companies, including within the public sector and even the unions themselves.

Australia needs this type of legislation.

All governments in Australia today should consider it as a priority.

### **The need for strong political leadership**

I became a politician as a direct consequence of having been made redundant following the 1996 federal election and the then cuts to the public service. Unemployed and living in a town dominated at the time by two Liberal governments and virtually unemployable as a consequence, in 1998 I stood for the Legislative Assembly.

A classic case of if you can't beat them, join them.

While the ALP was defeated I was elected as an MLA for Ginninderra, and was appointed Leader of the Opposition. I won the next election and have just retired after nearly ten years as chief minister. I always enjoyed attending meetings of the Council of Australian Governments, particularly while John Howard was prime minister, having regard to the primary role he played in my rather accidental entrée into politics and my presence at the COAG table.

It has been an enormous privilege to have been chief minister. It is a great job. The rewards are immense. The ability to control a legislative program. To develop and implement reform. To lead conversations. To direct change. To deliver services that people rely on.

It is also an incredibly tough job. It's stressful and tiring, the hours are long and the workload heavy. It is at times puerile and the constant negativity and the personal attacks, so much a feature of the Australian brand of Westminster, can be debilitating.

The profession of politics attracts those with passion. Yet surprisingly, one of the hardest things about being a politician is to remain true. True to yourself, to your ideals, your values and principles and to those of your party and your government. In politics there is an almost constant pressure to compromise, to rationalise, to remain silent, to do nothing, to pretend that it really isn't your concern, to look away, to go with the flow. And the pressure is more intense in the circumstance of minority government, which is almost the default political circumstance in the ACT.

Most politicians, when they succumb to the pressure, justify it as simply good politics or as being loyal to the party. We characterise it as being pragmatic. We insist that we are simply reflecting the views of our constituents. We justify the breach of basic principle on the grounds of some contrived greater good. We don't implement controversial policies that have stood in our party platforms for decades, and we say it is because of resource constraints or isn't a priority. We coin convenient little slogans like 'politics is the art of the possible' to comfort ourselves.

These are all of course excuses, and I can't pretend that I haven't been guilty of dragging the odd one out myself. But they are excuses. Excuses designed to justify decisions or actions that at their heart can lack integrity and principle and often attempt to disguise a want of courage or leadership.

For myself, and it is difficult to discuss these things without seeming arrogant or self-serving, but I did try very hard to keep the faith.

As chief minister and leader of the party in the ACT I believed it my duty and my responsibility to consistently reflect my values and those of my party. I thought the people of the ACT had a right to expect me to stand up and defend things that I had led them to believe I stood for.

It wasn't always easy. It brought me into major conflict with prime ministers, premiers, other ministers, the media, and sections of the community. I received death threats. I was pilloried and ridiculed. Sticking to principle, particularly if you are going against the tide, can be a very lonely business.

And while it was often difficult to argue these positions in the face of virulent and at times ill-advised opposition I am proud that we did. Because while each of these issues is important alone and each had to be faced and acted upon, the fact that we advocated particular positions on them also subtly drove an important conversation amongst Canberrans about identity. And I believe governments have an obligation to lead those conversations, as much as they have a responsibility to deliver services. I also think that time, history and experience will or already have vindicated the position we took on all these issues.

I instance again the ALP's new national position on gay marriage. A position adopted and advocated by the ACT Government for the whole of the last decade.

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## The need for more robust community engagement

I earlier gave some examples of the sorts of rationale that politicians often advance for not supporting policies or positions on important issues including of fundamental human rights.

But, of course, it is not only politicians that behave like this or explain or try to justify their behaviour in these ways. When I read the papers or listen to radio or observe the community conversation on so many issues of importance I am often disappointed or surprised at both the quality of the debate and the extent of community engagement. I am surprised at how many of us are happy for someone else to speak and act for us and to purport to represent our views and opinions.

I have a strong interest in the human rights of prisoners. I argue strongly on the needle exchange issue but the debate is about much more than the health needs of injecting-drug prisoners. It is really about recognising the humanity of all prisoners and that they have rights as humans. I think we are each seriously diminished if we, by our silence, passively condone the breach of anyone's human rights, including of prisoners irrespective of how heinous their crime. My point is, and I may be wrong, but I am aware of a total of only seven or eight members of the Canberra public who have, to date, publicly supported the right of prisoners to have the same standard of health services as the rest of us. Why is that?

Politicians should lead these conversations, but if we citizens are to truly engage in our own community, we need to join in.

And lastly if our aspiration is, as I believe we would all claim, for a fair and just society, then we all have a role to play in achieving it. We can't all leave it to someone else. And we shouldn't reach for an easy excuse.



**Question** — The third last bill that the Senate passed before the Parliament rose this year was a pair of bills that had been on the agenda for quite a while and it was a response to the Brennan report on how to implement human rights regimes at the Commonwealth level. The bills establish a new joint statutory parliamentary committee as a watchdog over human rights and its task will be to examine all bills that are introduced and also it will have the capacity to examine existing Acts and to assess their compliance with a set of listed human rights conventions and treaties.

Since 1981 we have had in the Senate a Scrutiny of Bills Committee which has also had a human rights core to its function and I think that it is possible over the years that there has been an effect on the standards of drafting of Commonwealth legislation as a result of the work of the Scrutiny of Bills Committee. Do you think that given there doesn't seem to be sufficient support for a legislated charter of human rights at the Commonwealth level, that such mechanisms as a parliamentary committee can over time have some effect at least?

**Jon Stanhope** — Well, yes, I do. I think for instance that the scrutiny of bills process has always been effective in my time in the public service and as a politician and an enhanced scrutiny regime as has been proposed as a response to the decision not to proceed with a national Bill of Rights is another step but I haven't seen the proposal in detail and am not aware of exactly what the remit of the new committee is. It certainly is a long way from a Bill of Rights for Australia or a national human rights charter reflecting our international obligations. And I think whilst I commend any additional step in meeting human rights it is a long way from what I would think ideal and the great deficiency is it is very much a parliamentary process, it is not a process that engages the people in any way. It is not a process that sets out as a national Bill of Rights or a national human rights charter would. I think an important part of a Bill of Rights is the public reflection of a community's expectations in relation to rights and the willingness of parliaments and governments and public service providers to be measured against that legislation. So it is a step, but a fairly small one I think.

**Question** — You mentioned Father Frank Brennan. He was quoted in the media today as saying that any laws that allow same sex marriages is likely to be challenged in the High Court of Australia. What do you think about that?

**Jon Stanhope** — If it is an expression of an opinion around the fact of a potential appeal then I probably would agree. I wouldn't be surprised if somebody would seek to challenge it from somewhere across the range of Australia. At this stage we are eagerly awaiting to determine whether the Liberal Party will allow a conscience vote and if they do whether there are more progressives in the Liberal Party than there are conservatives in the Labor Party to see who gets across the line. At this stage I don't think it is a lay down misère at all, that even if the bill is introduced that it will pass. It will be a close-run thing assuming a conscience vote on both sides. I of course support the Labor Party's new position of support for gay marriage. I am not across in detail the form that the bill will take or the proposal but I support it and if Father Brennan doesn't then I disagree with him on this particular issue. I can perhaps understand the basis of any objection he may have if he does object.

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**Question** — The ACT Human Rights Act is based explicitly on the international covenant on civil and political rights. In fact there is a very handy schedule which maps each of the provisions in part three of the Act to the relevant provisions in the ICCPR. There is, however, one very significant departure which I would draw your attention to. Section nine of the Act which refers to the right to life adds firstly a provision (subsection two) that the section applies to a person from the time of birth and secondly, and possibly consequently, it also omits the word ‘inherent’ which is a departure from the ICCPR which refers to an inherent right to life. I appreciate you have strong views on the perceived right to abortion. I would ask you to concede perhaps that there are others who would see that there are other views which emanate from a concern for human rights. I would also suggest that it’s critical to allow an adequate debate where there are perceived conflicts between differing rights and I would suggest lastly that it is anomalous for the ACT legislation to exclude the full reference to international documents on human rights in this manner and to mandate a particular view.

**Jon Stanhope** — Yes, I am aware of the departure or the deviation that you refer to in relation to the right to life and the Legislative Assembly, the government and the Labor Party in passing the Human Rights Act were conscious of the decision that was being taken. The position you have just put was argued by those who opposed the bill. I will state quite openly the most vexed provision within the Human Rights Act was the question around the need for a definition of life to take account of other legislation that had previously been passed in relation to the decriminalisation of abortion within the ACT. It was a difficult discussion and the decision that was taken at the end was essentially to remove doubt in the context of this legislative support for the decriminalisation of abortion, so that we do not create a potential ambiguity in the Human Rights Act around an accepted understanding or definition, most particularly under the criminal law, which deems when life has commenced. It is a difficult debate. It is essentially a rerun of the debate on abortion and I think we took a pragmatic position in the wording of the Human Rights Act but sought to avoid a continuing debate about the commencement of life and the decriminalisation of abortion. I respect the range of views on the issue and that was the nature of the decision that the government and the Legislative Assembly took in passing the human rights issue and the explanation for the removal of a potential for continuing litigation based on the different views that exist about life and its commencement.

**Question** — My question deals with the human rights of ordinary people and particularly community groups in the ACT who do events on public land who must seek permission. Basically what these groups are doing is exercising their human rights by peacefully assembling and if they are jogging or running groups they are then moving throughout the ACT. Yet these groups must seek permission,

presumably meaning that a public servant can have their right to refuse. I think that there is a certain inconsistency there between having to seek permission and doing these community activities.

**Jon Stanhope** — I think you are proposing a human right to gather or to meet and I would accept and defend the right of people to do that. But I think in terms of any discussion around human rights the right is not necessarily absolute insofar as it is accepted and it is reasonable that communities, through their government, have the right proportionately to regulate the activities of citizens. In the scenario you paint you are concerned that people might want to gather and people might want to have a run and the government perhaps seeks or requests or requires a form of approval. I would have thought that that was reasonable and a proportionate response to the need to control the way in which the community operates.

We can't operate appropriately if we say, 'well, you can run up the middle of Northbourne Avenue at any time of the day that you wish' in pursuance of some notion around your freedom to be in any place at any particular time. It is a public place. Other people would assert a right to be able to drive down Northbourne Avenue. So it is always important to maintain a sense of proportion and the reasonable operations of a society or community while recognising and defending human rights but recognising we live and work and operate in a complex society that requires rules and regulations. That doesn't mean that there is no recognition of a human right, it just means that perhaps the pursuit of a particular human right is sometimes constrained by rules and regulations and that is reasonable as long as the restraint is reasonable and proportionate.

**Question** — May I get your reaction to some comments from 2008 by Navi Pillay, the UN High Commissioner for Human Rights? She said:

All too often, drug users suffer discrimination, are forced to accept treatment, marginalised and often harmed by approaches that over-emphasise criminalisation and punishment while under-emphasising harm reduction and respect for human rights.

**Jon Stanhope** — I think that's a valid point and I don't disagree with it but it is also a very complex issue: the contest between regulation of what are currently illicit drugs or substances. I guess that is the heart of your question: why do we maintain our stubborn criminalisation of a whole range of drugs that people are accessing and the implications of that? I am aware of a growing shift in mood even from some senior and significant figures within our police forces in crime prevention nationally and internationally in relation to how long do we persist with the criminal response to



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drugs before we begin to seriously consider the costs and the benefits of the current approach? I haven't thought about it enough to say that I support the decriminalisation wholly. As you know we decriminalised to a small degree the personal use of marijuana but we did wind back some of the definitions or prescriptions even in that as a result of later advice, most particularly from the Australian Federal Police, about some of the implications of marijuana use and the extent to which organised crime was preying on the decriminalisation provisions here within the Territory for its own purposes. Whilst we have maintained some right for personal use, in other words there is a degree of decriminalisation of marijuana use and possession in the Territory. I think it is an important debate we need to have and I am more in favour of looking for ways to move away from the old zero tolerance tough crime approach to drugs. My view is that we need to move but I am not quite sure how far.

**Question** — You urged private citizens to become more active and more involved in human rights. For someone like myself who is passionate about these issues but might not know how to get involved, what would you suggest? And a second question: have you considered applying for Ms Gillard's job?

**Jon Stanhope** — Thank you for the compliment, but no, I have done my dash. Something I dwell on a bit, this notion of engagement. Something I have been thinking about a lot over the last year or so. I think there is an issue for us as a community. The CPSU is the largest union in the ACT. It is the largest union affiliated with Unions ACT and the largest union affiliated with the ALP in the ACT. All household surveys on attitudes to drugs and needle exchange reveal that well in excess of 70 per cent of Canberrans support needle exchange. The CPSU opposes them. It has a formal position of opposition despite the fact that it is the largest union in this community and it is the largest union affiliated with the ALP. I would hazard a guess that in excess of 80 per cent of the members of the ACT ALP support a needle exchange. I wouldn't mind betting that 80 per cent of the ACT's public servants, the workforce represented by the CPSU, support access to clean needles. In other words the CPSU wants its members to have access to clean needles if they are injecting drug users for the sake of their own health and for the sake of the community. In other words they are speaking for 80 per cent of us when they say 'No, we are not going to have needles at the Alexander Maconochie Centre'. They won't even countenance a trial of clean needles. I use that as an example because it is current and it is relevant to a very significant human rights issue.

The trouble always with human rights is that the people most affected or impacted by the non-recognition of human rights are people most exposed, most at risk and most on the edge. As I go through the list of people that we as a nation have happily discriminated against over the last century, we have over time arrived at the position

in this country where we can no longer—because of a change in culture and a change in education and a change in understanding—overtly discriminate against the Chinese as we did through the White Australia Policy. You cannot stand up and overtly discriminate, as we used to, against indigenous people or a range of different migrant groups that have come to the nation, whether it be the Italians or the Greeks or the Vietnamese. We are just getting to the point where it is becoming harder for our leaders, those who would drive us into panic or discriminate against Muslims or refugees, although we still do it.

There is one group of Australians on which there continues to be open season and it is prisoners. We are frightened of them, we are panicked by them. They are dangerous people. The one group who no one defends in the ACT—except I think about seven people—is prisoners. I think it is just so unacceptable that we are down to the last group of humans that we can publicly dehumanise without fear of censure. I think that those of us who think about these things have to stick up for them, as nasty and as awful as many of them are. In fact they are our brothers and sisters, they are our children and they are human beings. Some people lead such hard lives. So many of us are privileged, but some people have awful lives and they need good people to try and change things so that their lives may be a bit better. Just think about prisoners with blunt needles injecting themselves with goodness only knows what. The needles are blunt because they are old and they are used by everybody and are shared and they can barely pierce their arms. And yet some of the letters I read in the paper are so totally lacking in any notion of compassion, or empathy or understanding of just how awful it must be for these people. They are all Canberrans. It's us.

We need to get involved, we need to get engaged. There are ways of doing it. You join an organisation like Civil Liberties Australia, you write letters, or you ring up talkback and you just continue to strongly put a position of compassion, empathy, understanding and respect for human rights.



# Curbing the Grand Inquest: Legislature v. Executive in the United States and Australia

Bill Bannear

## Introduction

The ability of the legislature to scrutinise the actions of the executive is of continuing relevance to our system of government. This article contrasts two specific cases in which committees of the legislative branch inquired into possible political malfeasance by the executive branch, here and in the United States. The first case involved congressional inquiry into the allegedly politicised firing of nine United States Attorneys in 2006. The second involved an inquiry by an Australian Senate committee into the ‘children overboard’ case, including allegations that the public had been misled for electoral gain in 2001. In both cases, the committees sought to compel the testimony of political advisers to an executive officer, with varying success.

While the Australian Parliament and the United States Congress are subject to differing constitutional arrangements, a comparison of the two cases reveals similar battles with executive government. While the design and nature of these two systems of government diverge at multiple points, of particular interest is the increased role played by the judiciary in the United States since the Watergate cases resulted in landmark precedents.

In order to provide context to the two cases, the article begins with an overview of the constitutional arrangements, followed by a brief history of public interest immunity claims (or executive privilege) in both countries.

## Constitutional arrangements in the United States and Australia

The American and Australian systems of government share a number of features, including the separation of government powers amongst three bodies: the legislature, the executive and the judicature.<sup>1</sup>

The framers of the United States Constitution were influenced by the ideas of leading European philosophers such as John Locke and Baron de Montesquieu, who argued for the division of governmental powers as a check against tyranny.<sup>2</sup> The framers

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<sup>1</sup> The Australian Constitution refers to the Judicature, the American to the Judicial Branch.

<sup>2</sup> Mark Rozell, *Executive Privilege: the Dilemma of Secrecy and Democratic Accountability*, John Hopkins University Press, Baltimore, 1994, p. 22.

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therefore set out at the constitutional convention to devise a government system of limited powers.<sup>3</sup> Thus the legislative power was vested in Congress, the executive power in the President and the judicial power in the Supreme Court.<sup>4</sup>

There is some argument as to whether the branches were intended to be truly equal. Raoul Berger argues that the legislative branch was intended to be supreme over the executive branch, citing (amongst many other things) the precedent of the English Parliament and a statement by the chief constitutional architect, James Madison, that ‘in republican government, the legislative authority necessarily predominates’.<sup>5</sup> However, Mark Rozell argues that Berger overstates his case, and that the framers saw a strong executive as necessary to the protection of liberty.<sup>6</sup>

In any event, it is clear that a primary concern in the construction of the United States Constitution was to implement a system of checks and balances that would prevent the accumulation of power in one branch. Government functions were divided amongst the branches, forcing cooperation and negotiation. For example:

- treaties could be made by the President but with the advice and consent of two thirds of the Senate;<sup>7</sup>
- Congress was granted the power to raise armies and declare war, but the President was appointed Commander-in-Chief of the armed forces;<sup>8</sup> and
- the House of Representatives has the power to impeach the President, but the trial is the preserve of the Senate, with the Chief Justice presiding.<sup>9</sup>

The deliberate division of functions resulted in a system suited to negotiation and compromise.

The Australian Constitution, influenced by the American example, adopted a similar tripartite division of powers. Thus, the legislative power is vested in the Parliament, and the ultimate judicial power in a federal supreme court (the High Court of Australia). However, the executive power is vested in the Queen, a point at which the systems begin to diverge.

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<sup>3</sup> *ibid.*, p. 12.

<sup>4</sup> Congress was able to establish inferior courts, however the ultimate judicial power lay in the Supreme Court.

<sup>5</sup> Raoul Berger, *Executive Privilege: a Constitutional Myth*, Harvard University Press, Cambridge, Mass., 1974, p. 13.

<sup>6</sup> Rozell, *op. cit.*, pp. 22–5.

<sup>7</sup> United States Constitution, art. 2, s. 2.

<sup>8</sup> United States Constitution, art. 1, s. 8; art. 2, s. 2.

<sup>9</sup> United States Constitution, art. 1, ss. 2, 3.

In addition to an American-style separation of powers, the Australian Constitution also appropriated the traditions of Westminster. This included provisions prescribing a system of responsible government.<sup>10</sup>

Where the American version of the separation of powers arguably presumes coequal branches of government, the Westminster system of responsible government traditionally presumes the supremacy of parliament. Where the American President is directly elected, the Australian Parliament extends confidence to a ministry who advises the Crown. The executive government is thus responsible to the Australian Parliament. Specifically, the ministry is required to hold the confidence of a majority of the lower house.

It seems logical therefore to expect that there exists a greater claim to oversight of the executive by the parliament in the Australian system than the American. For instance, in *Lange v. Australian Broadcasting Corporation*, the High Court referred to the chain of accountability to the electorate as implying ‘a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament’.<sup>11</sup>

Parliament is directly accountable to the people through regular elections, but the executive government is accountable to the Parliament. This is the fundamental chain that is meant to ensure the democratic accountability of government to the people. By contrast, the American people are able to vote for both their representative and President.

One might expect that, as a result, the Australian Parliament would have greater power relative to the executive government than its American counterpart. In reality, however, the ability of the legislature to successfully investigate the executive has been a vexed issue in both jurisdictions, and is explored in the following section.

### **Legislative inquiry and public interest immunity claims in the United States and Australia**

The term ‘public interest immunity claim’ refers to a claim by the executive branch of government that the disclosure of certain information would be against the public interest. In Australia, it has also been known as ‘Crown privilege’. In America, it is commonly known as executive privilege, although this has come to refer specifically to the confidentiality of presidential deliberation and communication.

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<sup>10</sup> The specific provisions that give rise to responsible government were identified in *Lange v. Australian Broadcasting Corporation* (see note 11).

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While public interest immunity claims may be made on a number of grounds, this paper focuses on the claimed immunity pertaining to executive branch deliberation and communication. The principle behind such a claim is that confidentiality is necessary to ensure that governments can receive candid advice and deliberate effectively. It is argued that transparency would result in self-censorship and inhibit internal discussion and therefore the efficient operation of government. In Australia, these principles are represented by the confidentiality of cabinet deliberations. A similar argument is applied to the need for confidentiality in the public service, particularly in the provision of advice to ministers. In the United States, the focus is on the President and his advisers, but also communications with and within government departments.

The following sections briefly outline the development of public interest immunity claims generally, and the protection of government communications specifically in each jurisdiction. As might be expected in two systems with a shared ancestor, in the form of the Westminster Parliament, the basic principles are very similar. A marked difference, however, has been the increasing use of judicial intervention in the United States, particularly since the 1970s.

### **Executive privilege in the United States**

The United States Congress has a long history of committee inquiry into executive branch conduct. This power of inquiry has been confirmed as an implicit adjunct of the legislative power. In 1927, the Supreme Court found that ‘the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function’.<sup>12</sup> A further case, arising from the activities of the House Un-American Activities Committee, established that the power was broad, but not unlimited:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.<sup>13</sup>

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<sup>11</sup> *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

<sup>12</sup> *McGrain v. Daugherty* (1927) 273 U.S. 135, 174.

<sup>13</sup> *Watkins v. United States* (1957) 354 U.S. 178, 187.

The court noted that no inquiry was an end in itself, but needed to be related to, and in furtherance of, a legitimate task of Congress.<sup>14</sup>

The executive response to congressional inquiry has changed over time. The earliest precedents were set by presidents that had direct involvement with the drafting of the Constitution. When faced with a congressional request for information in connection with the St Clair inquiry, President Washington convened a meeting to discuss how to respond. Thomas Jefferson recorded that there was general agreement at the meeting that ‘the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion’.<sup>15</sup>

The earliest precedent therefore suggests that the balancing of competing public interests was inherent in resolving such cases. Congress too recognised the concept. For example, an 1807 request by the House of Representatives for information relating to the Burr conspiracy included the caveat ‘except such as [Jefferson] may deem the public welfare to require not to be disclosed’.<sup>16</sup>

However, the grounds for presidential refusals to provide information expanded to include arguments based on constitutional arrangements. In 1833, President Jackson stated that Congress could not ‘require of [him] an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council’. President Jackson, in 1835, refused information on a subject ‘exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the executive’.<sup>17</sup>

Claims to immunity from congressional inquiry were made on a variety of grounds throughout the 19th century and early 20th century. However the aggressive use of the Senate’s investigatory powers by Senator McCarthy and the House Un-American Activities Committee in the 1950s caused both the Truman and Eisenhower administrations to make a significant number of claims of immunity. The Eisenhower administration was the first to describe such claims as ‘executive privilege’ referring specifically to the claimed protection of communications between the President, White House aides and other officials.<sup>18</sup>

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<sup>14</sup> *ibid.*

<sup>15</sup> Paul Ford, *The Writings of Thomas Jefferson*, Putnam, New York, 1892, pp. 189–90.

<sup>16</sup> Berger, *op. cit.*, p. 179.

<sup>17</sup> Rozell, *op. cit.*, p. 39.

<sup>18</sup> Berger, *op. cit.*, p. 170.



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In the 1970s the pendulum swung in the other direction. President Nixon's extreme statement of the unlimited nature of executive privilege in connection with investigation of the Watergate controversy led to a series of landmark court cases. Most importantly, in *United States v. Nixon*, the Supreme Court found a constitutional basis for executive privilege, in the 'supremacy of each branch within its own assigned area of constitutional duties' and the separation powers.<sup>19</sup> The privilege found and examined by the court specifically related to the confidentiality of presidential communications only. The court noted that a claim for immunity based on military, national security or foreign affairs may have higher protection.<sup>20</sup> The term 'executive privilege' is therefore commonly used to refer specifically to the protection of presidential communications.

However, the court also rejected Nixon's assertion that this privilege was absolute. Rather, it was presumptive and could be overcome by an appropriate showing of public need by the branch seeking access to the communications.<sup>21</sup> This test, essentially one of public interest, was applied to a congressional committee in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.<sup>22</sup>

A number of cases in subsequent decades have further refined the operation of executive privilege.

Firstly, the judicial branch still prefers not get involved in disputes between the other two branches. Only after a political solution has been attempted and failed will the courts intervene.<sup>23</sup>

Secondly, courts have sought to define executive privilege narrowly. This was emphasised in *Nixon v. Administrator of General Services*, where the court repeated statements from *United States v. Nixon* that the privilege was limited to communications in the performance of the President's constitutional functions.<sup>24</sup>

Similarly, the cases *In re: Sealed Case (Espy)* and *Judicial Watch, Inc. v. Department of Justice* further defined the privilege. Key points from the cases include:

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<sup>19</sup> Morton Rosenberg, 'Presidential claims of executive privilege: history, law, practice and recent developments', *CRS Report for Congress*, Congressional Research Service, updated July 5, 2007, p. 6, citing *United States v. Nixon*, 705 (see note 20).

<sup>20</sup> *United States v. Nixon* (1974) 418 U.S. 683, 710.

<sup>21</sup> Rosenberg, 'Presidential claims of executive privilege', op. cit., p. 6, citing *Nixon v. Sirica* (D.C. Cir. 1973) 487 F.2d 750.

<sup>22</sup> *Senate Select Committee on Presidential Campaign Activities v. Nixon* (D.C. Cir. 1974) 498 F.2d 725.

<sup>23</sup> See *United States v. AT&T* (D.C. Cir. 1977) 567 F.2d 121; *United States v. House of Representatives* (D.D.C. 1983) 556 F.Supp. 150.

<sup>24</sup> Rosenberg, 'Presidential claims of executive privilege', op. cit., p. 7.

- a distinction between presidential communications and general executive branch communications (deliberative process). The latter is a weaker form of executive privilege and disappears altogether when there is any reason to believe government misconduct has occurred;<sup>25</sup>
- the presidential communications privilege is limited to communications made, or solicited and received by a presidential adviser or their staff in order to inform the President's decision-making. The advisers or staff members in question were limited to White House staff with operational proximity to direct presidential decision-making.<sup>26</sup>
- The decision-making in question was limited to that relating to the President's core Article II functions, involving 'quintessential and non-delegable Presidential power'.<sup>27</sup>

These precedents have formed the 'ground rules' in battles between the executive and Congress and were relied on extensively in the US case study below.

### **Public interest immunity in Australia**

As in the United States, the Australian Constitution does not explicitly grant the Parliament the power of inquiry, nor the executive the power to withhold information from Parliament.

However, it does grant both houses of Parliament the powers of the House of Commons in 1901, as well as the right to establish their own powers, privileges and immunities.<sup>28</sup> Given the inquiry powers of the House of Commons at that time, there is a general acceptance of similar inquiry powers of the Australian Parliament.

In marked contrast with the development of the principles of executive privilege in the United States, Australia does not share the American history of judicial intervention that commenced with the Nixon cases. As a result, there are very few legal precedents that directly relate to the relationship between the parliament and the executive.

However, the issue of public interest immunity and the inquiry powers of parliament have, to a degree, been tested in court with respect to the New South Wales Parliament. There are major differences in the mechanism by which the parliament is empowered in NSW and federally. However, both jurisdictions operate a similar version of both responsible and representative government.

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<sup>25</sup> *ibid.*, p. 17, citing *In re: Sealed Case* (D.C. Cir. 1997) 121 F.3d 729 (*Espy*).

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> Australian Constitution, s. 49.

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Two specific findings stand out. First, the New South Wales Court of Appeal found that the Legislative Council's power extended to the production of documents to which claims of legal professional privilege and public interest immunity could be made, but that the Council could not compel the production of cabinet documents.<sup>29</sup>

Secondly, statements by the High Court in *Egan v. Willis* confirmed previous views in *Lange v. Australian Broadcasting Corporation* regarding responsible government. In addition to identifying the key parliamentary functions of both law-making and the review of executive conduct, the High Court noted that the principles of responsible government were a resource that could be used by the courts in interpreting the Constitution, but that the concepts were flexible over time and were responsive to modern administrative arrangements.<sup>30</sup>

At the federal level, a number of court decisions relating to the ability of the judicature to compel evidence from the executive in the face of public interest immunity claims are also relevant, although do not directly apply to the Parliament. The last fifty years have seen a change in the treatment of the issue by the courts; from a historical view that a certificate (invoking what was then called Crown privilege) from a minister was conclusive to a focus on a public interest test.<sup>31</sup>

Two cases relating to the immunity of cabinet documents from disclosure in a trial set important precedents for the protection of such high level documents. *Sankey v. Whitlam* established that the immunity attaching to cabinet documents was not absolute and that even they could be disclosed in pursuit of the public's interest in justice. Indeed, *Sankey* cited *United States v. Nixon*, and the two cases bore striking resemblance in terms of the principles argued.<sup>32</sup>

The principle was further refined in *Commonwealth v. Northern Land Council*. The court held that the very high public interest in confidentiality of cabinet documents could only be outweighed in exceptional circumstances where a significant likelihood

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<sup>29</sup> Christos Mantziaris, 'Egan v. Willis and Egan v. Chadwick: responsible government and parliamentary privilege', Research paper no. 12, 1999–2000, Australian Parliamentary Library, December 1999, p. 8; Cabinet documents, in essence a recording of cabinet deliberation, are presumably analogous to the presidential communications identified above.

<sup>30</sup> *ibid.*, pp. 11–12.

<sup>31</sup> Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p. 470; Principles of public interest were first outlined in *Duncan v. Cammell, Laird and Co.*, although the issuing of a certificate was still accepted as conclusive at that stage. This changed in 1968, in *Conway v. Rimmer*—The House of Lords held that a minister's certificate was not conclusive in all cases and that court was the final arbiter of a claim of public interest immunity.

<sup>32</sup> *Sankey v. Whitlam and Others* (1978) 142 CLR 1.

existed that the public interest would be better served through the disclosure of the documents allowing the proper administration of justice.<sup>33</sup>

*Alister v. the Queen* dealt with public interest immunity on the grounds of national security. The court ordered the production of ASIO documents for inspection, noting that this issue too was subject to a public interest immunity test.<sup>34</sup> A number of other cases have similarly enforced the view that no document is completely immune from judicial scrutiny, subject to a public interest test.<sup>35</sup>

However, these matters involved disputes between the executive and the judicature. In terms of parliamentary scrutiny, the upper and lower houses have differed in character. Of the two, only the Senate has typically been outside the control of the executive, whereas party discipline has tended to ensure the effective dominance of the House of Representatives by the executive. As the case studied below relates to a Senate committee, the remainder of this section deals with that chamber.

As with judicature, the last half century has seen a change in the treatment of what was then called ‘Crown privilege’ and is now called public interest immunity claims in the Senate. This has broadly reflected the change in judicial treatment of public interest immunity, with the modern practice involving a test of competing public interests.

The issue came to a head in 1975 over the Khemlani Loans Affair. An inability to compel key evidence from a group of public servants led to a landmark resolution. In it, the Senate recognised that while it has the power to summons witnesses and documents, it may determine that a valid claim of public interest immunity does exist.<sup>36</sup> However, the Senate also held that the right to determine the validity of such claims lay with it, not the executive.

This order, which can be considered as the Senate’s formal position on the matter, was supplemented in 2009 by an order of continuing effect that included a formal procedure to be adopted by the executive upon making a public interest immunity claim:

- the claim should be made by a minister;
- the harm to public interest must be explained; and

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<sup>33</sup> *Commonwealth v. Northern Land Council* (1993) 176 CLR 604.

<sup>34</sup> *Alister v. the Queen* (1984) 154 CLR 404.

<sup>35</sup> Evans, op. cit., p. 472.

<sup>36</sup> *Journals of the Senate*, 16 July 1975, p. 831.

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- the minister should notify the Senate whether the harm could be avoided through supplying the information in camera.<sup>37</sup>

In the event that the Senate and the executive disagree over the validity of a claim, the practice has been for the Senate to adopt political rather than legal remedies. The outcome of a conflict is thus generally resolved with respect to the political damage to the executive of disclosure versus non-disclosure.<sup>38</sup>

### **Case studies**

The following case studies involve situations where committees of the legislature sought to investigate possible political misfeasance on behalf of the executive government. The testimony of advisers was sought in both cases, with an attempt made to refuse access to these individuals. As will be shown, the American committee was eventually able to secure evidence from presidential advisers after protracted debate involving legal precedents and eventual judicial involvement. The Australian committee was unable to secure the attendance of key ministerial advisers, and was unwilling to proceed to summons, which may have resulted in unprecedented judicial involvement.

### **Congressional investigation into the firing of nine United States Attorneys**

In December 2006, the Department of Justice (DoJ) fired seven United States Attorneys (US Attorneys), prompting a major political controversy that eventually led to the resignation of a number of senior DoJ officials.<sup>39</sup> Two other US Attorneys had been told to resign earlier in 2006. These firings became the subject of two separate congressional committee inquiries.

The ostensible reason given for the firings was underperformance, although this was only clearly enunciated in the months following.<sup>40</sup> However, subsequent speculation suggested that the firings had in fact been influenced by the partisan interests of the White House. Speculated motivations included political retribution for conduct in voter-fraud and other cases and giving politically favoured candidates the opportunity to serve as a US Attorney.<sup>41</sup>

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<sup>37</sup> *Journals of the Senate*, 13 May 2009, pp. 1941–2.

<sup>38</sup> Evans, *op. cit.*, p. 469.

<sup>39</sup> Seven US Attorneys were contacted on that date and asked to resign, although the actual date of resignation occurred later in each case.

<sup>40</sup> Alberto Gonzales, 'They lost my confidence', *USA Today*, 7 March 2007.

<sup>41</sup> Dan Eggen and Amy Goldstein, 'Voter-fraud complaints by GOP drove dismissals', *Washington Post*, 14 May 2007.

An investigation conducted by the Department of Justice's Office of the Inspector General and Office of Professional Responsibility would later find that the process used to remove the US Attorneys was fundamentally flawed and that there was significant evidence that political partisan considerations were an important factor in the removal of several of the US Attorneys.<sup>42</sup>

Congressional investigation into the firing of the attorneys occurred in both chambers. The Senate Committee on the Judiciary (SJC) commenced a series of hearings into the matter in February 2007, under the title 'Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?'

Similarly, the House Committee on the Judiciary (HJC), initially through the Subcommittee on Commercial and Administrative Law, commenced an investigation into the firings on 6 March 2007.<sup>43</sup>

Both committees heard from a number of senior Department of Justice officials, including the Attorney General and his deputy. Following this testimony, the committees began to turn their attention to the involvement of White House staff in the matter.

Subpoenas were issued by both committees demanding the testimony of a number of White House staff, including Karl Rove, Deputy Chief of Staff; Harriet Miers, White House Counsel during the firings; and Sara Taylor, former Director of the Political Affairs section. Additionally, a subpoena for documents held by the Chief of Staff, Josh Bolten, was issued.<sup>44</sup>

In response, the Bush administration advised the committees that both the document subpoenas and those demanding the testimony of White House officials were subject to executive privilege, which was argued on three grounds.

The first related to 'internal White House communications' which, according to the White House Counsel, fell squarely within the scope of executive privilege as 'internal deliberations amongst White House officials' citing the precedent in *United States v. Nixon* that notes the need for frank and candid discussion in decision-

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<sup>42</sup> US Department of Justice Office of the Inspector General and US Department of Justice Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, US Department of Justice, Washington DC, 2008, pp. 325–6.

<sup>43</sup> *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, Memorandum Opinion, Civil Action no. 08-0409 (JDB), US District Court (District of Columbia), 31 July 2008, p. 6.

<sup>44</sup> Jonathan Geldert, 'Presidential advisors and their most unpresidential activities: why executive privilege cannot shield White House information in the U.S. Attorney firings controversy', *Boston College Law Review*, vol. 49, no. 3, May 2008, p. 825.

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making.<sup>45</sup> Further, this was argued to be a particularly strong claim as it involved the President's constitutional appointment and removal power, a 'quintessential and non-delegable Presidential power' as per the precedent set by *Espy*.<sup>46</sup> The question posed by the White House was therefore whether the public benefit of the committee's access to the evidence (in this case, oversight) was strong enough to overcome, as per *Senate Select Committee v. Nixon*.<sup>47</sup>

The second related to communications between White House officials and individuals outside the executive branch, including judicial officials. It was argued that the interest in confidentiality extended to a case where the President or his advisers had to go outside the executive branch in order to inform themselves.<sup>48</sup>

The final category related to communications between the White House and the Department of Justice. It was stated that these communications were deliberative and hence fell within the scope of executive privilege.

Additionally, the memorandum cast doubt on whether Congress had a legislative authority over the nomination or replacement of US Attorneys.<sup>49</sup> This was despite the Senate's traditional role in the confirmation process, although may have been more applicable in the case of the HJC. A final argument referred to *Senate Select Committee*, opining that the number of documents already provided to committees was sufficient, and that further evidence was merely cumulative and unnecessary.<sup>50</sup>

The committee chairmen responded by labelling it an 'unprecedented blanket claim' and requested a detailed privilege log for documents including the specific basis for the assertion of privilege in each case. They also noted the precedent arising from *Espy* and *Judicial Watch*, that executive privilege was limited to communications that, in the case of advisers, were solicited and received for the purpose of informing the President. This was relevant as initial comments by executive officials suggested that the President had no involvement in the decision to fire the US Attorneys.<sup>51</sup>

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<sup>45</sup> Rosenberg, 'Presidential Claims of Executive Privilege', op. cit., p. 24.

<sup>46</sup> *ibid.*

<sup>47</sup> As described previously, this was a case where the precedent in *United States v. Nixon* (the requirement for a strong showing of need) was applied to the demands of a Senate committee. See note 22.

<sup>48</sup> Rosenberg, 'Presidential Claims of Executive Privilege', op. cit., p. 25.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*; In that case, the court had ruled against the select committee, partly on the grounds that a House committee already had access to the tapes in question and were conducting an investigation. As a result, the benefit of the Senate committee's investigation was merely cumulative, as it was in addition to an existing investigation of similar aim.

<sup>51</sup> Senator the Hon. Patrick Leahy in US Senate Committee on the Judiciary, *Preserving Prosecutorial Independence: Is the Department of Justice Politicising the Hiring and Firing of US Attorneys?*, Committee hearing transcript, 11 July 2007, p. 388.

Sara Taylor, who had since left the White House, agreed to appear before the Senate committee under oath on 11 July 2007, but stated that she would uphold a presidential direction to not testify concerning:

White House consideration, deliberations, communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys, including consideration of possible responses to congressional and media inquiries on the United States Attorneys matters.<sup>52</sup>

The committee accepted that Ms Taylor was in a difficult position, in the ‘middle of a constitutional struggle between two branches of Government’ and did not press the issue.<sup>53</sup>

On the same day, the committees were informed that neither Ms Miers, Mr Rove nor Mr Bolten would be responding to the subpoenas. An opinion by the Office of Legal Counsel argued that the President, as the head of an independent branch of government, could not be forced to appear before a congressional committee, as this would threaten ‘fundamental separation of powers principles—including the President’s independence and autonomy from Congress’.<sup>54</sup> As an extension of the President, this immunity flowed to his advisers. The fact that Ms Miers was a former adviser by this stage did not alter the principle—post-service immunity was required to fully insulate advisers during the period of their service.<sup>55</sup> The arguments were based on principle and previous executive opinions and did not directly cite any case law.

In response, both the Senate and House committees voted to cite certain advisers for contempt for their refusal to respond to subpoena. The House Judicial Committee’s contempt resolution was adopted and passed by the House of Representatives itself, in February 2008.<sup>56</sup>

As Rosenberg notes, Congress has three kinds of contempt proceedings at its disposal. It can choose to cite a witness under the inherent contempt power, under a statutory criminal contempt procedure, or in some cases, enforce orders through a civil

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<sup>52</sup> Sara M. Taylor in Senate Committee on the Judiciary, Committee transcript, op. cit., p. 394.

<sup>53</sup> Senator the Hon. Charles Grassley in Senate Committee on the Judiciary, Committee transcript, op. cit., p. 393.

<sup>54</sup> ‘Immunity of former counsel to the President from compelled congressional testimony’, Memorandum Opinion for the Counsel to the President, 10 July 2007, *Opinions of the Office of Legal Counsel*, vol. 31, p. 2.

<sup>55</sup> *ibid.*

<sup>56</sup> 110th Congress, House Resolution 982, 14 February 2008.



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contempt procedure.<sup>57</sup> In this case however, the committee resorted to a new type of action.

Rather than conducting a contempt trial itself, the House requested the judiciary to handle the matter (following the statutory criminal contempt procedure). The House Speaker referred the citations to the DoJ, requesting a grand jury investigation. However the Attorney General declared that this would not occur as in his opinion, the officials had not committed a crime.<sup>58</sup>

The HJC therefore commenced a civil suit against Ms Miers and Mr Bolten in the US District Court (District of Columbia), challenging the executive's claimed immunity of presidential advisers from congressional subpoena. In *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et. al.*, the court found that Ms Miers' failure to respond to the subpoena was without any legal basis, and that in fact the Supreme Court had made it 'abundantly clear that compliance with a congressional subpoena is a legal requirement'.<sup>59</sup> Quoting the Supreme Court case *United States v. Bryan*, the court noted:

A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.<sup>60</sup>

However, the District Court emphasised the narrow scope of its decision, stating:

The Court holds only that Ms. Miers (and other senior presidential advisers) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisers, but this is not one of them. For instance, where national security or foreign affairs form the basis for the Executive's assertion of privilege, it may be that absolute immunity is appropriate. Similarly, this decision applies only to advisers, not to the President.<sup>61</sup>

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<sup>57</sup> Morton Rosenberg, 'When Congress comes calling', The Constitution Project, Washington DC, 2009, p. 14.

<sup>58</sup> Geldert, op. cit., p. 826.

<sup>59</sup> *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, op. cit., p. 78.

<sup>60</sup> *ibid.*, p. 79. Underline added by D.C. Court.

<sup>61</sup> *ibid.*, p. 89.

The court also noted that Ms Miers remained free to make claims of executive privilege in answering the committee's questions.<sup>62</sup> The case did not deal with the question of the validity of such claims, only that they did not confer an immunity from subpoena.

The Bush Administration appealed the decision; however the case was later withdrawn as a result of an accommodation reached with the White House.<sup>63</sup> The terms of the accommodation were essentially as follows:

- the HJC would be restricted to interviewing Miers and Rove, with an option to interview William Kelley (another former official) if necessary;
- the committee reserved its right to seek public testimony from Rove and Miers;
- transcripts of the interviews would be created (they were later released publicly);
- the scope of the interviews was limited to facts relating to the decision to replace the US Attorneys and testimony provided to the committee by DoJ officials;
- for questions within the scope of the interviews, official privileges were limited to questions relating to communications to or from the President; and
- counsel for all parties concerned were permitted to attend the interview.<sup>64</sup>

Similar agreement was reached over a number of documents that had been requested by the committee. In return, the parties agreed to a stay in the litigation, which was later withdrawn. It was also noted that:

The Committee will not argue that this accommodation operates as a bar or waiver of the current or former Administration's existing rights, including but not limited to the right to argue jurisdictional objections, claims of immunity, or claims of executive privilege.<sup>65</sup>

In mid-2009, the committee finally received evidence from both Rove and Miers. Upon release of the testimony and associated exhibits in August 2009, the chair of the committee, John Conyers stated:

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<sup>62</sup> *ibid.*, p. 90.

<sup>63</sup> Court of Appeals Docket 08-5357, U.S Court of Appeals for D.C. Circuit. 14 October 2009.

<sup>64</sup> Gregory Craig, 'Agreement concerning accommodation', 4 March 2009, online at <http://judiciary.house.gov/hearings/pdf/RExhibits.pdf>.

<sup>65</sup> *ibid.*, p. 3.

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I am especially grateful to the Speaker of the House, Nancy Pelosi, and the House Democratic leadership for their strong and unwavering support of this investigation, including the citations for contempt of Congress issued by the House in 2008. I also thank all members who voted in support of those citations and authorized the historic litigation that was instrumental in bringing us to this point. Today's release marks a powerful victory for the rule of law, and should be celebrated by all who cherish our constitutional system of separation of powers and open, transparent government.<sup>66</sup>

While both the committee and an internal DoJ investigation found evidence of partisan influence in the replacement of the US Attorneys, a special attorney appointed as a result of the DoJ inquiry found that no criminal charges could be laid.<sup>67</sup>

### **Senate Select Committee on a Certain Maritime Incident**

On 6 October 2001, the HMAS Adelaide intercepted SIEV (Suspected Illegal Entry Vehicle) 4, a boat carrying asylum seekers destined for Australia. An erroneous account that some of the asylum seekers had thrown children overboard was reported to the Australian public the following day.

Photos from a separate incident on 7 October showed children in the water and were released as though they depicted the interception of SIEV 4.

The allegations were made in the context of an upcoming election where illegal migration had become a major issue. The claims made about the actions of a group of asylum seekers were therefore perceived to be politically beneficial to the government of the day. Then Minister for Defence, Peter Reith, did not correct the public statement until following the November election, leading some to conclude that the public had deliberately been misled for political gain.

In 2002, the Senate established the Select Committee on a Certain Maritime Incident to investigate the matter, in addition to broader issues relating to asylum seeker policy. The committee took evidence from a number of public servants and desired to investigate the chain of communications involving the minister's office and the minister. The committee's preferred course of action was to call as witnesses Mr Reith (who had retired prior to the inquiry), several of his former advisers (Mike

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<sup>66</sup> Congressman John Conyers, Jr., Chairman, US House Judiciary Committee, media release, 11 August 2009, online at <http://judiciary.house.gov/news/090811.html>.

<sup>67</sup> Ronald Weich, Assistant Attorney General, correspondence to the Hon. John Conyers, Jr, Chairman, House Judiciary Committee, 21 July 2010, online at <http://www.talkleft.com/media/weichletter.pdf>.

Scrafton, Ross Hampton and Peter Hendy) and the Prime Minister's international adviser, Miles Jordana.<sup>68</sup>

However, a cabinet decision was taken to refuse access to ministerial staff, including public servants who had served in the minister's office at that time. The cabinet decision ordered all individuals in those categories not to appear before the Senate committee.<sup>69</sup> As a result, none of the advisers did.

Mr Reith also decline to appear, despite three requests to do so.<sup>70</sup> He used advice from the Clerk of the House of Representatives (House Clerk) to justify his stance, which is examined more closely below.

The committee's requests for the ex-minister and his staffers to appear and provide evidence were thus met with concerted resistance by the executive of the day. The committee noted that it was unwilling to proceed with formal summons for the witnesses on the grounds that it 'would be contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue was settled'.<sup>71</sup> Additionally, the chair of the committee noted that he had no wish to expose the advisers to the risk of being found in contempt of the Senate and subject to a jail term or fine as a result of a ministerial direction. This harked back to a similar decision of the Senate during the investigation of the 1975 Loans Affair. For these reasons, the committee never did issue summons.

In the absence of legal precedent, the case was argued on principle and past practice. The two sides of the argument were represented in a series of advices from both the Clerk of the Senate (Senate Clerk) and the House Clerk, together with a number of legal opinions solicited in connection with those advices.<sup>72</sup>

At issue were three distinct questions:

- what was the nature of the immunity of a minister who is a sitting member of one house of parliament from an inquiry of the other;
- did that immunity continue once the minister retired from parliament; and

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<sup>68</sup> Senate Select Committee on a Certain Maritime Incident, *Report*, pp. xiv–xv, online at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=maritime\\_incident\\_ctte/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=maritime_incident_ctte/report/index.htm).

<sup>69</sup> *ibid.*, p. xiv.

<sup>70</sup> *ibid.*, p. xv.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*, pp. 345–445. The arguments raised were complex and have been distilled here for the purposes of the paper. The actual correspondence is commended to the reader.

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- did that (or any other) immunity extend to the staff of the minister's office.<sup>73</sup>

The first question was the most important as it informed the answer to the other two. It was the source of a significant difference of opinion.

The Senate Clerk argued that the immunity was based on the principle of comity between the Senate and the House of Representatives. The immunity had nothing to do with the identity of the individual as a minister, but resulted from the fact that the individual was a sitting member of the House of Representatives.<sup>74</sup> The Senate Clerk noted that the only immunity from compulsion to appear recognised by the Senate was that of current members of the lower house, and current state office holders.<sup>75</sup>

In contrast, the House Clerk described the immunity as being 'something more akin to a legal immunity'.<sup>76</sup> The House Clerk held that rather than the immunity deriving from a 'loose concept of comity' it was in fact derived from the 'complete autonomy of the Houses from each other ... primarily based on section 49 of the Constitution, and section 50 providing for each to determine its rules and orders'.<sup>77</sup>

In a legal opinion by Professor Geoffrey Lindell solicited by the House Clerk, he noted that his own view was that the immunity was more properly viewed as a legal restriction on the powers of both houses deriving from section 49:

The same immunity is acknowledged to exist in relation to the Houses of the British Parliament. The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view as well as *from an analytical perspective since it may flow directly from the terms of section 49 of the Constitution* if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth.<sup>78</sup>

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<sup>73</sup> For simplicity, the question ignores complications arising from either the minister or the staff remained employed in that capacity at the time of the inquiry.

<sup>74</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Harry Evans, Clerk of the Senate and Senator the Hon. John Faulkner, 19 February 2002.

<sup>75</sup> *ibid.*

<sup>76</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Ian Harris, Clerk of the House of Representatives and Committee Secretary Brenton Holmes, 3 April 2002.

<sup>77</sup> *ibid.*

<sup>78</sup> Geoffrey Lindell, 'Comments provided by Professor G.J. Lindell on advice given by the Clerks of both houses of the Commonwealth Parliament', Senate Select Committee on a Certain Maritime Incident, *op. cit.* appendix (emphasis added).

On the other hand, an opinion by Bret Walker, QC, solicited by the Senate Clerk, supported the view that no such extended immunity applied. In essence, Mr Walker argued that the rationale behind the immunity from compulsion of a current member was to ensure they could attend to their business in the chamber.<sup>79</sup> Thus it was a protection against an impediment to the ability of the house to meet, debate and legislate.

The rationale behind the accepted immunity of ministers, as current members of the lower house, was crucial, because it would assist in determining whether such an immunity extended to former ministers and their staff.

The House Clerk, having determined that the immunity was derived from a constitutional necessity for the independence of each house, believed that the immunity therefore applied to former members and ministers of the House. This was due to a consideration that ‘to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity’.<sup>80</sup>

Having disagreed with the source of a current House minister’s immunity, the Senate Clerk rejected this proposition, noting that former ministers of the House had appeared before a committee under summons in 1994.<sup>81</sup> Mr Walker also noted that the rationale he had identified did not apply to former members nor to their advisers, and as such no immunity existed.<sup>82</sup>

In terms of advisers, a number of arguments were made to justify a possible immunity:

- public servants working in the minister’s office were bound by a clause in the Public Service Act to maintain appropriate confidentiality about dealings as an employee with any minister or minister’s staff. As the Public Service Act was more recent than the *Parliamentary Privileges Act 1987*, it could possibly overrule the older Act’s position on parliamentary committees;<sup>83</sup> and

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<sup>79</sup> Bret Walker, ‘Australian Senate witnesses—former ministers and ministerial staff’, Opinion, 16 May 2002 in Senate Select Committee on a Certain Maritime Incident, *op. cit.*, appendix.

<sup>80</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Harris and Holmes, 3 April 2002.

<sup>81</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Evans and Faulkner, 19 February 2002.

<sup>82</sup> Walker, *op. cit.*

<sup>83</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Harris and Holmes, 3 April 2002.

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- advisers employed under the *Members of Parliament (Staff) Act 1984* were essential in assisting the minister to perform his role and as such should be considered a part of the minister.<sup>84</sup>

Inherent in the argument was an understanding that ministerial staff were accountable to the minister, and the minister to the Parliament—presumably in the form of their particular house. However, as the Senate Clerk noted, there was evidence that ministerial staff had come to exercise a number of functions of increasing independence from their minister, creating a need for greater oversight.<sup>85</sup>

The difference of opinion between the two Clerks, and the stance of the Senate committee and the executive, remained unresolved. The committee declined to issue summons and the matter was not tested by a court. As a result key testimony was not provided to the select committee.

However, in 2004 one of the advisers in question, Mike Scafton, wrote a letter to the editor of the *Australian* providing his version of the events, which appeared to contradict statements of the Prime Minister back in 2002. The Senate established a second committee, the Senate Select Committee on the Scafton Evidence in order to revisit the issue in light of the new evidence.

### **Comparison of cases**

In any comparison of the two cases, it needs to be recognised that while the American and Australian systems of government share a number of features, both are also subject to very different sets of circumstances. As a result, it is not possible to draw concrete conclusions without considering all of these different circumstances.

Nevertheless, both cases provide an interesting insight into the contemporary challenges to legislative inquiry posed by the growth in importance of executive office advisers. Of particular interest to this author, however, is the role played by the courts in the American case, and the use of legal precedents to inform the debate between the two players. By contrast, the Australian debate occurred more at the level of principle, rather than precedent.

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<sup>84</sup> *ibid.*

<sup>85</sup> Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Harry Evans, Clerk of the Senate and Senator the Hon. Peter Cook, Chair of Select Committee, 22 March 2002. Note that as a result of this case, the issue was examined by the Senate Finance and Public Administration References Committee. That committee recommended a number of changes that would ensure advisers would appear before committees under certain circumstances, ensuring that their conduct could be suitably examined. These recommendations were not adopted by the government.

### **The power to compel attendance**

The HJC was far more successful in penetrating executive barriers in its investigation, but it must be recognised that even in the US case, the committee entered into a compromise with the White House. Where it could have pressed for the attendance of Ms Miers and Mr Rove at a public hearing, they were instead interviewed in private in accordance with a negotiated agreement. The agreement limited the scope of questioning, but also constrained the executive's ability to make claims of executive privilege.

It would appear that the catalyst for reaching this agreement was the committee's willingness to challenge the claimed immunity of advisers and the subsequent favourable finding by the DC Court. Though the case was appealed by the executive, the possibility that it would be upheld likely gave the committee a strong position in negotiation.

By contrast, the Australian committee decided against summoning Peter Reith on the basis that it would likely be subject to legal challenge. The ministerial advisers were also not summonsed on the basis that it would be unfair to create the possibility of their being charged with contempt, given they were caught in a battle between the executive and the parliament. As noted above, members of the US SJC made similar comments during the negotiated testimony of Sara Taylor.

Given the Australian committee's preference for political negotiation over judicial intervention in the case of Mr Reith, it is also likely that the committee had a similar view with regard to the summoning of advisers.

The variety and complexity of issues raised in the debate between the two Clerks and various academics demonstrates the confusion arising from the vaguely defined concepts of responsible government. This is further compounded by statements such as that of the High Court in *Egan v. Willis* that the concepts of responsible government are flexible over time, suggesting that any future findings may pit historical convention against modern administrative arrangements.

The sheer complexity and number of variables that exist in a system that pits responsible government against a separation of powers regime makes predicting a finding by the High Court difficult. This surely acts as a significant impediment to either the parliament or the executive resorting to judicial intervention, in the absence of confidence of a positive outcome.

To a certain extent, this impediment no longer exists in the United States. It was 'broken' by *United States v. Nixon* and related cases when the Supreme Court



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established both the constitutional standing of executive privilege and a mechanism by which it may be overcome. From that point onwards, the risk associated with legal action was lessened as the major yardstick had already been placed.

It is tempting to conclude that, being mindful of precedent, congressional committees are more likely to challenge and overcome claims of executive privilege, as occurred to a limited extent in this case. Interviews conducted by the author in Washington DC in March 2011 suggest that such a conclusion is not accurate and the reality is far less clear-cut.<sup>86</sup>

Interviews with key personnel suggest that the existence of legal precedent in the area of committee powers and executive privilege did not necessarily give the committee confidence that a court would find in their favour. It would appear that the committee proceeded with litigation without being certain of a favourable outcome.

Indeed, the extent to which the House Judiciary Committee pushed the matter, including to the extent of appealing to the judiciary for assistance in enforcing the subpoena, was apparently unusual. Individuals associated with the case noted the degree of frustration with the Bush administration's assertions of immunity from congressional processes that had built up over seven years. One individual described the 'empty chair' moment, when the subpoenaed individuals failed to attend a committee hearing as directed, as a galvanising moment that increased the resolve of the committee to take unique steps against the executive. These factors appear to be key to the course of action taken by the committee and its eventual success.

### **Complications arising from the fusion of responsible government and the separation of powers**

In addition to the key difference of legal action, a comparison of the two cases also demonstrates the confusion arising in the Australian system due to the dual identity of a minister as both a member of the executive and of the parliament. As demonstrated in the Australian case above, confusion over the extent of this immunity has also been used to prevent access to both former ministers and ministerial advisers.

Even to accept the immunity at its minimum (that espoused by the Senate Clerk), the fact that current House ministers are usually only questioned by the House itself highlights a major flaw in ministerial responsibility. As the House is almost always

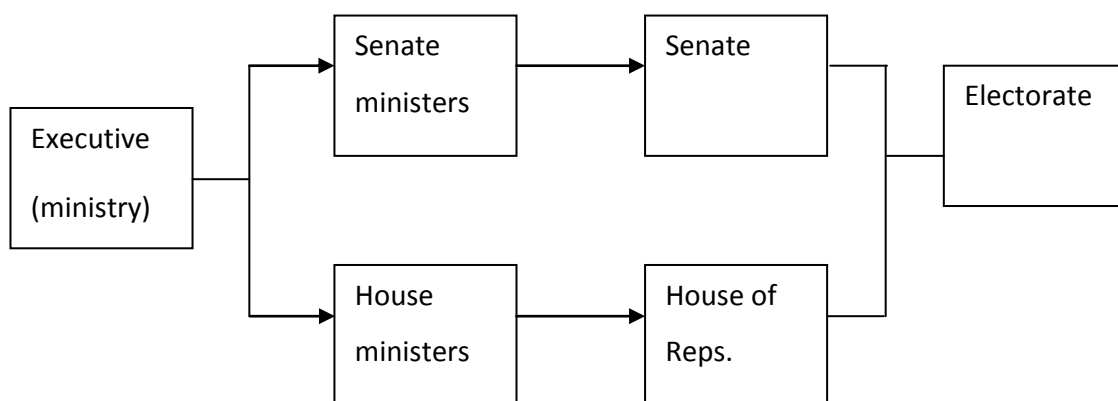
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<sup>86</sup> Interviews were conducted with staff of House Judiciary Committee, Congressional Research Service and other individuals who were involved with the case.

dominated by the party of the executive,<sup>87</sup> and party discipline is demonstrably strong, the possibility of critical oversight of those ministers is significantly weakened.

Theoretically speaking, if it is accepted that serving (or indeed former) ministers are only answerable to their own chamber, then the line of accountability identified by the High Court (connecting the executive and the people via the parliament) is split into two tracks. Ministers selected from the Senate are accountable to the Senate and ministers selected from the House are accountable to the House. If one house is dominated by the executive, a flaw in the overall chain is evident.

**Figure 1: A two-track chain of accountability**



In practice, there are a number of mitigating factors. These include the likelihood that general elections serve as a referendum on the executive, rather than merely the selection of local representatives. This would tend to make executives directly accountable, if by indirect means. However, it is also true that competent investigation can better inform the electorate, thus informing their electoral decision.

The American system of government avoids the complications inherent in the Australian system by fully separating the legislature and executive. The clean separation of powers in the American system, even with a supposed equality of the branches, appears to have enabled far greater penetration of the executive branch's activities, at least in the case examined. In the absence of a broader study, it is inconclusive as to whether this finding can be generalised.

It is also important to note that other factors not addressed above may have played a key role. This paper makes no attempt to measure the relative strength of public or media pressure in each case, other than to merely assert that both cases had a high profile and received widespread media attention. It is also likely that the change to a

<sup>87</sup> The current Parliament notwithstanding.

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Democratic administration midway through the US inquiry was important. The agreement was negotiated in March 2009, two months after the inauguration of Barack Obama as President, with both houses of Congress controlled by the Democrats. By contrast, Prime Minister Howard maintained control of the executive branch and the House of Representatives until well after the inquiry, and its successor, concluded.

### **Concluding observations**

Confusion resulting from the inclusion of both separation of powers considerations and provisions relating to responsible government have clouded understanding of the relationship between the parliament and the executive in Australia. Differing interpretations of these constitutional arrangements in the *Certain Maritime Incident* case prevented any resolution of arguments about whether a former minister who was also a member of the House of Representatives, and their advisers, could be compelled to give an account of their actions to a Senate committee.

This situation points to a hole in ministerial responsibility, where ministers who are also a member of the lower house are able to avoid scrutiny by the Senate, but also their own house by reason of executive dominance of that chamber.<sup>88</sup> The assertion that this protection extends to former ministers and to advisers will likely be repeated again where it suits the executive of the day.

By contrast, the somewhat greater tendency in the United States to seek judicial intervention to resolve issues relating to the congressional–presidential relationship has provided significant clarification of their respective powers, for better or for worse. This tendency towards legal arbitration is perhaps particularly suited to the American understanding of the separation of powers, with its deliberate and enunciated system of checks and balances.

The HJC was able to threaten the executive with potential and actual litigation in wielding its inquisitorial powers of both subpoena and the ability to overcome executive privilege. As a result, it reached an accommodation with the White House and secured the testimony it required.

While it is tempting to compare the outcomes of the two cases, it is important to note that a direct comparison between the two jurisdictions cannot be made. Specifically, the operation and understanding of what is meant by the separation of powers in each constitution differs significantly. History and convention suggest that the Australian

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<sup>88</sup> The current situation of minority government may or may not result in a change in this regard, particularly if it proves to be a one-off or rare occurrence.

courts are unlikely to involve themselves in the relationship between the parliament and the executive. In the absence of a catalysing event such as the Watergate scandal in the United States, this is unlikely to change in the foreseeable future.

