

# Papers on Parliament

Lectures in the Senate Occasional Lecture  
Series, and other papers

Number 67  
May 2017

Published and printed by the Department of the Senate  
Parliament House, Canberra  
ISSN 1031-976X (online ISSN 2206-3579)

Published by the Department of the Senate, 2017

ISSN 1031–976X (online ISSN 2206–3579)

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

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## **The Australian Prime Ministership: Origins and Evolution\***

*Paul Strangio*

The Australian prime ministership has seldom seemed so confounding as in recent years. We have seen a higher rate of turnover in the office than at any time since the first decade of the Commonwealth. Kevin Rudd, Julia Gillard and Tony Abbott each confidently entered the office only to be broken by it in swift succession and now, in less than 12 months, the buoyant hopes that accompanied the ascension of Malcolm Turnbull have dissipated. Yet despite the tribulations of recent incumbents, there is little question that the prime ministership is still the main prize in Australian politics. It is also the most closely observed office in the land; indeed, relentlessly so. Political scientists use the term ‘personalisation’ to describe the modern phenomenon of leader-centred politics.<sup>1</sup> They postulate that as the hold the established parties exercise over voters has waned leaders are taking their place. Leaders are ‘standing in’ for the party and are increasingly important in providing the cues for the public to interpret and make decisions about politics. Whether this phenomenon is as pronounced in Australia as it is in some other comparable democracies is arguable, but there is little question that in our intensely mediatised age leaders are more prominent than ever before. This is a paradox of the contemporary prime ministership: never has it loomed so omnipotent in the nation’s life and yet been so apparently brittle in the experience of incumbents.

What do we know, however, about the origins of this office that bulks so large in the nation’s collective political psyche? What expectations did the founders of the Commonwealth have for the prime ministership when they designed the Constitution in the final decade of the 19th century? Were those expectations principally grounded in Westminster precedent or were they influenced by their own experiences of executive government in the Australian colonies? And how did the office grow into a position of national leadership from its rudimentary beginnings at Federation in 1901, and which office holders contributed most to that development and how? It is to these questions that we address ourselves today.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 2 September 2016.

<sup>1</sup> See, for example, Ian McAllister, *The Australian Voter: 50 Years of Change*, UNSW Press, Sydney, 2011, pp. 241–6.

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## Pre-history

Answering the first question is easy enough. Australians apparently know little about the genesis and initial development of the prime ministership or its early occupants. One clue to this ignorance is that when polls have been conducted asking members of the public to rate former prime ministers the results have been skewed to contemporary holders with meagre recognition of leaders predating Bob Hawke, especially among younger cohorts.<sup>2</sup> This unfamiliarity with the nation's political origins and founders was emphatically demonstrated by surveys on that subject carried out a decade and a half ago during the centenary of Federation. The results so disconcerted authorities that they commissioned advertisements embarrassing citizens by asking, 'What kind of country would forget the name of its first prime minister?'<sup>3</sup> The surveys showed that Australians were more acquainted with the names of America's founding fathers than those who had forged their own nation.

Arguably, scholars have to accept some responsibility for the impoverished state of public knowledge. While we have many accomplished biographies of prime ministers and excellent accounts of the making of the Commonwealth, we have lacked a study that charts the development of the prime ministership. Filling this lacuna is the objective of the study my colleagues, professors James Walter and Paul 't Hart, and I are undertaking. We are halfway through this epic task with the first volume, which chronicles the office's evolution up to the mid-20th century, published early this year.<sup>4</sup> One of the first questions we needed to resolve in writing that volume was where to begin. Should the account commence in 1901 or should it include some pre-history of the prime ministership? As the historian among us, I was charged with writing the early chapters and I decided an appropriate starting place for my research was the Federal Conventions of the 1890s. Surely, I figured, the delegates to those august gatherings had given consideration to the prime ministership and articulated their expectations of the office.

I was disappointed. Poring through hundreds of pages of proceedings of the conventions, I discovered the delegates barely mentioned the office. What did catch my eye, however, is that among the delegates were several prime ministers! For example, when on St Patrick's Day 1898 the final session of the 1897–98 Federal

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<sup>2</sup> Essential Report, 'Australia's Best Prime Minister', 30 January 2012, <http://www.essentialvision.com.au/tag/john-curtin>.

<sup>3</sup> Kate Krinks, 'Creating the Active Citizen? Recent Developments in Civics Education', *Research Paper no. 15 1988–99*, Parliament of Australia, Canberra, March 1999. See also Anna Clark, *History's Children: History Wars in the Classroom*, University of New South Wales Press, Sydney, 2008, pp. 22–3; and Civics Expert Group, *Whereas the People ... Civics and Citizenship Education: Report of the Civics Expert Group*, Australian Government Publishing Service, Canberra, 1994.

<sup>4</sup> Paul Strangio, Paul 't Hart and James Walter, *Settling the Office: The Australian Prime Ministership from Federation to Reconstruction*, Miegunyah Press, Melbourne, 2016.

Convention concluded in Melbourne one of the last formalities discharged by its president, New South Wales lawyer and politician Edmund Barton, was to move that the convention ‘cordially invites the Prime Minister of each colony’ to supply copies of the draft constitution to the voters of their respective jurisdictions.<sup>5</sup> I was intrigued by this nomenclature since my understanding was that by the late 19th century ‘premier’ had become the standard term for the chief executive of each of the colonies, displacing earlier appellations that had included ‘colonial secretary’ and ‘chief secretary’.<sup>6</sup> Further research revealed that, consistent with its status as the ‘mother colony’, it was in New South Wales, but also and less explicity in South Australia and Tasmania, that it had been most customary to attach the title of prime minister to the head of government.<sup>7</sup> What accounted for the liberal assignment of that term to the leaders of the colonies at the Federal Conventions is not entirely clear, but possibly it was a means to forestall petty jealousies among them and avert the damaging impression of a hierarchy of colonies.

Whatever the reason, the presence of plural ‘prime ministers’ at the Federal Conventions strongly suggested to me that it would not be enough to treat the proclamation of the Commonwealth on 1 January 1901 as a kind of year zero in the practices of executive office. Instead, we would have to delve back further to understand the origins of the Australian prime ministership. That view was reinforced by my investigation of the backgrounds of the 80 or so delegates who comprised those conventions. Not only were these men creatures of colonial politics, but as one historian has put it, ‘their individual careers present a picture of profound government experience’.<sup>8</sup> The numbers speak for themselves. Cumulatively, the delegates boasted in excess of 1,000 years of service in the colonial legislatures and hundreds of years of ministerial office. Twenty-five of them occupied the position of premier by the time of Federation.<sup>9</sup> Their combined total of chief executive office experience

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<sup>5</sup> Australasian Federal Convention 1897–98 (Third Session), Melbourne, 17 March 1898, p. 2466.

<sup>6</sup> For example, in Victoria the head of government formally became known as the premier following an administrative restructure in 1883. See Raymond Wright, *A People’s Counsel: A History of the Parliament of Victoria 1856–1990*, Oxford University Press, Melbourne, 1992, p. 90. For an account of the evolution of the nomenclature of the head of government in colonial Queensland see Denis Murphy, ‘The Premiers of Queensland: The 1978 Clem Lack Oration of the Royal Historical Society of Queensland’, pp. 1–3, [https://espace.library.uq.edu.au/eserv/UQ:205013/s00855804\\_1977\\_78\\_10\\_3\\_87.pdf](https://espace.library.uq.edu.au/eserv/UQ:205013/s00855804_1977_78_10_3_87.pdf).

<sup>7</sup> Solomon Encel, *Cabinet Government in Australia*, Melbourne University Press, Melbourne, 1962, p. 24. See also Colin A. Hughes and B. D. Graham, *A Handbook of Australian Government and Politics 1890–1964*, Australian National University Press, Canberra, 1968, pp. 58–60, 85, 197–200 and 211.

<sup>8</sup> Geoffrey McDonald, ‘The Eighty Founding Fathers’, *Queensland Historical Review*, vol. 1, 1968, p. 50.

<sup>9</sup> This number includes Victoria’s William Shiels, who briefly stood in for Henry Wrixon at the 1891 Convention in Sydney.

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approached nearly 100 years.<sup>10</sup> In short, the constitution-framing forums of the 1890s were brim full of experience of colonial governing practice.

In this light it began to make sense that the prime ministership should have been inconspicuous in the deliberations of the Federal Conventions. Deeply schooled in the workings of responsible government in the colonies, the delegates brought with them highly developed assumptions about the role of head of government. Moreover, when their work was fulfilled and Federation was realised in 1901, assumptions about how executive government would operate were further buttressed by the composition of the early Commonwealth parliaments and governments. Nearly three-quarters of the members of the House of Representatives and senators elected at the inaugural federal ballot of March 1901 were veterans of the colonial legislatures and among the successful candidates were no fewer than 13 former or serving heads of government.<sup>11</sup> There was an impressive concentration of that executive experience in the ministry of Edmund Barton, Australia's first prime minister. More than half of the Barton ministry that met the parliament for the first time in May 1901 were former colonial premiers—William Lyne from New South Wales, George Turner from Victoria, Charles Kingston from South Australia, Philip Fysh from Tasmania and John Forrest from Western Australia. Between them these men had a total of around three decades of experience as head of government, while the remaining members of Barton's team had all held portfolios in colonial administrations. Boasting such an abundance of leadership experience, it was small wonder that it was dubbed the 'cabinet of kings'.

So volume one of our history of the prime ministership necessarily predates 1901. Indeed, it begins by examining the Westminster inheritance, briefly tracing the development of the office from the early 18th century administration of Robert Walpole, who is conventionally identified as the first British prime minister, through to the era of the great political titans, Benjamin Disraeli and William Gladstone, in the second half of the 19th century. Yet, if the model of chief executive was from the outset based on British precedent, what was more interesting to me is how the distinctive features of parliamentary democracy in the Australian colonies conditioned that model during the half-century that preceded Federation.

In the time we have together today I cannot go into significant detail about the patterns of colonial politics. However, in summary, a combination of factors—the small-scale parliaments and geographically fragmented populations, the dilution of ideology (the pragmatic quest for economic development mostly trumped principle) and the relative social and economic homogeneity of the Australian colonies—caused

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<sup>10</sup> These figures are based on data extracted from the various state parliament websites.

<sup>11</sup> Gavin Souter, *Acts of Parliament: A Narrative History of the Senate and House of Representatives, Commonwealth of Australia*, Melbourne University Press, Melbourne, 1988, p. 51.



parliamentary politics to remain primarily based on factions well into the latter decades of the 19th century, whereas in Britain two-party government had already dawned. The dominance of factional rather than party politics and the attendant fluidity of parliamentary alignments accounted for the chronic instability of colonial politics as measured by the high turnover of ministries.

The crucial point for us is that the slow transition to party politics had important consequences for the nature and practice of executive leadership and the authority of office holders. Faction leadership was highly personalised<sup>12</sup>: followers deferred to a leader on the basis of their individual merit-based claims to pre-eminence, not their occupation of a formalised position. Henry Parkes, arguably the pre-eminent faction leader of the colonial era, invoked the notion of leaders ‘as “superior” men’ and insisted that ‘a man should become leader by commanding others’ sympathy by superior acquirements’.<sup>13</sup> Typically, faction leaders relied upon a nucleus of regular followers whose fidelity to a ‘chief’ (as faction leaders were commonly referred to) was built on respect for the leader’s qualities but also affection. To stitch together a government, however, faction leaders almost invariably had to woo supporters outside the orbit of their loyalists. This might require a temporary power-sharing arrangement with another faction and/or harnessing the support of non-aligned members. Preferment and patronage lubricated this process, but the creation of alliances was also facilitated by doctrinal flexibility. Perhaps the paramount attribute required by a faction leader, however, was an expert command of parliamentary proceedings and strategy. Indeed, gaining and staying in office usually hinged on parliamentary performance—oratorical skill was important—tactical manoeuvre and cunning.

What then of the authority of faction as opposed to party leaders? Faction leaders were not bound by the same constraints imposed by parties. As Patrick Weller writes, in factions ‘leaders were not obliged to consult their followers; since there was no formal position of leader, their leadership was undisputed and faction leaders were not subject to re-election’.<sup>14</sup> On the other hand, because of the absence of the formal bonds of solidarity and organisational sanctions associated with party, their authority was less predictable and more contingent than that of a party leader. As Weller further explains: ‘The corporate identity of the party may have created some constraints on the leader, but at the same time he had the advantage of greater security and stability in his following than a faction leader could expect.’<sup>15</sup>

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<sup>12</sup> See here, in particular, Peter Loveday and Allan William Martin, *Parliament, Factions and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856–1889*, Melbourne University Press, Melbourne, 1966, ch. 2.

<sup>13</sup> Quoted in Patrick Weller, ‘From Faction to Party: The Role and Authority of the Leader’, *Political Science*, vol. 26, no. 2, December 1974, p. 42.

<sup>14</sup> *ibid.*, p. 41.

<sup>15</sup> *ibid.*

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Other factors hedged the authority of government leaders in the colonial era. There was ambiguity of title and the role mostly lacked statutory recognition or separate remuneration. Office holders also had little access to supporting resources. Departments dedicated to providing bureaucratic assistance to government heads generally did not come into existence until the 20th century, with leaders previously dependent upon small secretariats based within other departments.<sup>16</sup> This limited their ability to direct and coordinate the work of other ministers, which was already a common difficulty in multi-faction governments where there were competing focal points of power in cabinet. In a broader sense, the absence of disciplined party groupings made for a power balance that favoured the parliament over the executive. Leaders found it difficult to impose a legislative program upon parliament with bills often ending up being enacted in markedly different form to that introduced by the government.<sup>17</sup> Similarly, because of the pervasive localism of elections and the fact that campaigns seldom revolved around clearly defined policy manifestos, office holders rarely were able to wield a mandate to subdue a wilful legislature. Colonial upper houses were yet another powerful constraint on executive authority.<sup>18</sup>

For all this, strong heads of government did emerge in the colonial era. Prominent examples were: Parkes in New South Wales, Graham Berry in Victoria, Samuel Griffith in Queensland and John Forrest in Western Australia. Some of these were beneficiaries of temporary party consolidations, but for the most part leadership predominance was principally made possible by the exceptional qualities of the individual office holders. It is also true that by the time colonial representatives were designing a constitution for a federation in the 1890s, the transition from faction to party politics was underway. The combined forces of the growth of population and electorates, the expansion of parliaments, the diminution of geographic fragmentation and the increased economic and social stratification were eroding the moorings of the faction system and creating the conditions for party development. The emergence of labour parties was, of course, a harbinger and catalyst of party settlement. Nevertheless, that metamorphosis from the old paradigm of faction-based parliamentary politics and person-centred leadership to a party-dominated system was still in train; as Peter Loveday and A. W. Martin have written, the period was ‘an amalgam of the old and the new’.<sup>19</sup> And that transition continued into the first decade

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<sup>16</sup> See, for example, Joanne Scott, Ross Laurie, Bronwyn Stevens and Patrick Weller, *The Engine Room of Government: The Queensland Premier's Department, 1859–2001*, University of Queensland Press, St Lucia, 2001, chs 1–3.

<sup>17</sup> David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003*, The Federation Press, Annandale, 2006, p. 39.

<sup>18</sup> Victoria's Legislative Council earned a reputation for being the most intractable of the upper houses. See Geoffrey Serle, ‘The Victorian Legislative Council, 1856–1950’, *Historical Studies, Australia and New Zealand*, vol. 6, no. 22, May 1954, pp. 186–203.

<sup>19</sup> Loveday and Martin, *op. cit.*, p. 153.

of the Commonwealth and was reflected in the early development of the prime ministership.

### **The Federal Conventions**

I noted earlier that the prime ministership was a largely overlooked subject at the Federal Conventions and suggested that part of the reason for this is that the framers of the Constitution came to those forums with a very well-developed understanding of the role of head of government. Nevertheless, there was debate among delegates about what form the executive ought to take in a federated Australia that could potentially have had important ramifications for the head of government and authority of the office. That debate turned around whether the core principle of responsible government—executive accountability to the lower house—was compatible with a federation in which the upper house in its capacity as a guardian of state rights was to enjoy virtually coequal powers with the lower house.<sup>20</sup> In the end, the delegates decided that this was not an insuperable contradiction.

But what is striking for our story is the assertion by the instigator of, and perhaps most articulate contributor to, this debate, the Queensland premier and future chief justice of the High Court, Samuel Griffith, that the Australian colonists were responding to different imperatives to those that had animated the American founding fathers at the end of the 18th century. Whereas the latter, Griffith observed, had ‘been frightened by the tendency’ of the executive in the United Kingdom to ‘overawe Parliament’, the challenge for the Australian constitution makers was not guarding against an oppressive executive and crown but creating a federation in which the rights of the smaller colonies (states) would be balanced against New South Wales and Victoria, which were expected to carry greatest sway in the lower house of a national parliament.<sup>21</sup> Griffith did not elaborate on why executive power in 19th century Australia should be regarded as comparatively tame, but surely it was a corollary of the slow consolidation of the party system and the record of colonial legislatures successfully constraining governments. Indeed, that history seemed to have imbued the Federal Convention delegates with a general insouciance towards the prospect of a strong executive. There is little evidence of them harbouring the anxiety that had haunted the creators of the American republic that the chief executive might in time morph into a de facto monarch.

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<sup>20</sup> For a useful summary of that debate see Brian Galligan, ‘The Founders’ Design and Intentions Regarding Responsible Government’, *Politics*, vol. 12, no. 2, 1980, pp. 1–10.

<sup>21</sup> National Australasian Convention 1891, Sydney, 4 March 1891, p. 35. See also Samuel Walker Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, Government Printer, Brisbane, 1896.

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To the contrary, the Australian constitution makers seemed to welcome the prospect of a powerful prime minister. As I have said, the convention delegates remained frustratingly clammed up about the position of chief executive. The earliest and most substantial exception came in Sydney in 1891 in the context of them batting away a heterodox proposal from the former governor and premier of New Zealand, Sir George Grey. Parading his credentials as ultra democrat, Grey advocated that the position of governor-general be an elected office, ‘open at all times to that man in Australia who is deemed the greatest, and worthiest, and fittest’.<sup>22</sup> Ignoring the practicality that a rival popular mandate would upset the equilibrium of the political system, he rhapsodised about a statesman equivalent to Abraham Lincoln rising up through the office. Little more than a minor sideshow from the main constitutional debates, for our purposes the interest in Grey’s proposal was that delegates found it so heretical that they were galvanised to articulate their otherwise unspoken assumptions about the pre-eminent place the prime minister or premier (the title was not settled for another decade) ought to occupy in a federated Australia.

Signalling dissent from Grey, the New South Wales delegate, Sir William McMillan, asked:

who in this country wishes to be better than the prime minister of federated Australia? Who cares to be the governor of federated Australia when the prime minister is the first man in power in the country? His position will be the blue ribbon of the highest possible ambition ...<sup>23</sup>

The Victorian, Alfred Deakin, was especially incredulous that Grey should confuse the governor-generalship as ‘the summit of Australian ambition’, whereas in reality it would be ‘little better than a glittering and gaudy toy’. There would be ‘nothing’ in the office ‘to arouse the ambition of those who claim to stand on the liberal side of the community’.<sup>24</sup> And Deakin dismissed as ‘almost grotesque’ the notion of an Antipodean Lincoln being consigned to the role. Such a colossus would occupy only one rightful place in the political firmament of the coming federation:

If we ever possess a man of his rude, rugged, magnificent nature ... What should we do with such a man? I trust that we should make him premier of Australia ... the office for which he was fitted ... and [in which] he could fulfil his own destiny and the destiny of his people.

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<sup>22</sup> National Australasian Convention 1891, Sydney, 1 April 1891, p. 563.

<sup>23</sup> *ibid.*, 12 March 1891, pp. 272–3.

<sup>24</sup> *ibid.*, 1 April 1891, pp. 570–1.

According to Deakin then, no shadow of doubt existed about what would be ‘the highest office in the commonwealth—that is, the premiership’.<sup>25</sup>

### **Fulfilling the office’s promise**

As it turned out, it was Deakin who settled the choice of the title ‘prime minister’ for the chief executive in a federated Australia during the preparations for the inauguration of the Commonwealth. For reasons unrecorded but possibly because of a concern that it would be deemed presumptuous for an Australian national leader to assume the equivalent title of his British counterpart, in late 1900 Barton, the putative head of government, wrote to Deakin flagging reservations about the ‘constitutional propriety’ of appropriating the title prime minister. In reply, Deakin evinced no such qualms and instead argued it would have the benefit of differentiating the federal leader from the chief executives of the states and by implication assert the Commonwealth’s status in relation to the former colonies. He advised Barton: ‘the head of the Federal Government ought to be termed the “Prime Minister”—a good old English title which will have the advantage of distinguishing him from State “Premiers”’.<sup>26</sup> Prime minister it became.

Establishing its title was one thing, but a much greater challenge would be to realise the potential of the office. It is that story to which I wish to devote the remainder of this lecture. How did the major occupants of the office during the first half of the 20th century gradually transform the prime ministership into an institution that was worthy of being described as the ‘blue ribbon of the highest possible ambition’?

This was not a given in the early decades of the federation. There were significant constraints on the office. The Constitution itself circumscribed the Commonwealth government and, consequently, checked prime-ministerial authority, especially in the thorny areas of economic management and industrial relations. Concluding that the office’s limitations were unequal to the challenges of nation building, a majority of incumbents sought greater power by amending the Constitution. That proved mostly futile—only four of 24 referenda initiated during the first half of the 20th century passed. Another fetter on prime ministers was the dearth of administrative infrastructure. Vignettes from the first days of the Commonwealth evoke the primitive nature of the early organisational arrangements: Barton’s private secretary, Atlee Hunt, managing the fledging business of the federation on a desk perched on a balcony of the Treasury Building in Macquarie Street, Sydney, that was exposed to

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<sup>25</sup> *ibid.*

<sup>26</sup> Alfred Deakin to Edmund Barton, 24 October 1900, Papers of Sir Edmund Barton, MS 51, Series 1, Item 718–9, National Library of Australia (emphasis in the original). See also John Andrew La Nauze, *Alfred Deakin*, Oxford University Press, Melbourne, 1962, pp. 261–2.

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the elements;<sup>27</sup> Barton later reminiscing that when he commuted between Sydney and Melbourne he carried the ‘whole federal archives in his Gladstone bag’;<sup>28</sup> Barton and his closest ministerial colleagues cooking chops and making billy tea in the open fireplace of the garret-like living quarters that had been commandeered for the prime minister in the upper level of Melbourne’s Spring Street Parliament.<sup>29</sup>

Administrative support for prime ministers remained limited for many years. A Prime Minister’s Department was created in 1911, but was little more than a small secretariat for decades. Though loyal private secretaries served incumbents, ministerial offices were a distant innovation. The Commonwealth public service, which began with a mere 1,400 staff, most of whom were customs officers, stayed modest in size and weak in policy generation until World War Two. The immature party system was another impediment to executive authority at the outset of the Commonwealth and even when the system settled in 1909 the fractiousness of the parties remained a thorn in prime-ministerial sides. And they frequently had to butt heads against uncooperative state premiers and other rival power centres.

It would be through improvisation and by virtue of their skills, zest and wits that the holders of the office incrementally grew the prime ministership into a platform for national leadership. No grand design guided them and nor was progress linear. The project stalled during the interwar period—a time of mostly thwarted prime-ministerial ambitions. Each major incumbent of the first half of the 20th century, however, made a distinctive contribution to developing the prime-ministerial repertoire. So, to conclude today’s lecture let us turn to those leaders and their contributions.

First is Alfred Deakin, the most beguiling of Australian prime ministers. Three times office holder during the politically topsy-turvy post-Federation decade, we label Deakin the ‘ringmaster’ of the early Commonwealth. In many respects, Deakin was a transitional figure from the colonial to the Commonwealth eras. He practised a person-centred leadership redolent of the ‘chiefs’ of pre-1900 factional politics. Through the cultivation of personal affiliations, parliamentary tactical guile, oratorical virtuosity and clarity of purpose, he achieved much to outfit a nation that, as he had written in 1901, was beginning life as little more than ‘a piece of political carpentry’.<sup>30</sup> It was principally under his leadership that the newly created federation obtained stability and by the end of its first decade the Commonwealth had obtained a status

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<sup>27</sup> Hunt later reminisced about the Commonwealth’s primitive administrative beginnings in a series of articles published in the *Argus* under the title ‘Federal Memories’. See *Argus*, 5 December, 12 December, 19 December and 26 December 1931 and 2 January 1932.

<sup>28</sup> Geoffrey Bolton, *Edmund Barton*, Allen & Unwin, Sydney, 2000, p. 229.

<sup>29</sup> *ibid.*, pp. 238–9.

<sup>30</sup> Quoted in La Nauze, *op. cit.*, p. 235.

and influence few would have anticipated at the time of its inauguration. The nation-building edifice constructed by his governments was all the more remarkable given the fluidity of the party system and the fact his Protectionist grouping was dwindling in parliamentary strength. His deft statecraft is an instructive example for contemporary leaders as we enter an era where minority governments and unstable parliaments may again become the norm.

Also three times prime minister, Andrew Fisher's most significant government was his second of 1910–13. It was a watershed not merely because it was Australia's first majority government and the first majority national labour or social democratic administration anywhere in the world, but because it unambiguously ushered in the party-based prime ministership. This was symbolically underscored when after Labor triumphed at the April 1910 election—a victory inextricably connected to the settlement of the party system occasioned by the 1909 fusion of the non-Labor parties—Fisher refused to accept the offer of a commission to form a ministry until confirmed as leader by the Labor caucus.<sup>31</sup> With that action he signalled emphatically that his prime ministership was based not on individual claim; he would instead occupy the office solely by virtue of his position within the party. In government, Fisher diligently nursed the relationship between caucus and cabinet and faithfully abided by Labor's platform. From Fisher's time party management became the *sine qua non* of effective national leadership: a task fumbled by many of his successors. Fisher was also stylistically different to the colonial political elite that had dominated the first decade of the Commonwealth. He was the first 'everyman' prime minister. He was also pioneering in travelling the country extensively; indeed those wide-ranging expeditions combined with Labor's sweeping Commonwealth-wide victory of 1910 and his government's active promotion of national sentiment arguably qualifies Fisher as Australia's first truly national prime minister.

As Australia's World War One leader, Billy Hughes was unquestionably a colossus. He demonstrated how a crisis could be exploited to extend the reach of the Commonwealth and to stretch the authority of the prime-ministerial office. War also brought an unprecedented focus on the federal government and this, combined with Hughes' outsized personality, compelled attention upon the prime ministership. The office became the most influential and resonant in the land. And yet this proved to be a contingent and transient inflation of authority. Bloated by wartime power and capricious of nature, Hughes had neither the inclination nor patience to systematically and enduringly transform the prime ministership as an institution. What is more, by catalysing a split in the Labor Party in 1916 Hughes destabilised the only recently

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<sup>31</sup> Patrick Weller (ed.), *Caucus Minutes 1901–1949: Minutes of the Meetings of the Federal Parliamentary Labor Party*, Melbourne University Press, Melbourne, 1975, (Minutes 26 April 1910), p. 254.

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settled party system, an upheaval which had baneful consequences for his prime-ministerial successors on both sides of the political aisle. Even on the international stage, Hughes's legacy was mixed. By force of his extraordinary will Hughes demanded and obtained a voice for Australia on the international stage, as reflected most vividly by his rambunctious display at the Paris peace negotiations. But he had little interest in reforming imperial relations in a way that would furnish Australia and the other dominions with greater independence lest it erode the bonds of empire. In the final analysis, Hughes's prime ministership was most of all an early and dramatic lesson in the perils of excessive leadership predominance.

Stanley Bruce marked a break from the office holders of the first two decades of the Commonwealth. He was the first prime minister who had not sat in one of the colonial legislatures—that and the fact he had spent substantial parts of his early life outside of Australia endowed him with a distinctly non-provincial mindset. To a greater extent than any of his predecessors, he enunciated a vision for national development. When he presided over the opening of Parliament House in the new capital of Canberra in May 1927, he implored his fellow legislators to 'think and act nationally'.<sup>32</sup> Intent on restoring order following the erratic Hughes, the methodical Bruce professionalised and modernised the cabinet system. He was an early advocate of evidence-based policy. He began the practice of drawing in expert advisers and establishing commissions of inquiry to supplement the institutional resources available to him. Bruce made progress in resolving the problematic imbalances in Commonwealth-state relations especially in the area of finance, only to be ultimately undone by his impatience with the constraints on the Commonwealth's power. In the end, his period of office and that of his successor, James Scullin, illustrated the constrained authority of the prime minister's office in the circumstances of disorderly political parties, a still meagre administrative apparatus, and the Commonwealth's limited economic clout.

A three-time election winner, Joseph Lyons stands out in the interwar period for leading a government that appeared relatively stable and popular. Both in policy and institutionally his was, however, largely a holding pattern prime ministership. Lyons played a relatively restrained role in his own government. He presided over a divided cabinet and party that had little stomach for strong direction. Lyons practised a conciliatory and cautious leadership that made him the 'honest broker', liked by the public and tolerated by business and media elites as palatable compared to the alternative prime-ministerial candidates. Unlike Bruce, he displayed scant interest in modernising the machinery of executive government. Where Lyons did add a further element to the prime-ministerial repertoire was in the area of public performance. His warm and reassuring persona and skilful exploitation of the revolution in mass media

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<sup>32</sup> Quoted in *Brisbane Courier*, 10 May 1927, p. 13.



in the 1930s, particularly his adroit use of the fledgling medium of radio, helped forge a genuine and enduring bond with the public. He was Australia's most accessible and probably most popular prime minister to that time, and arguably its first 'media' performer.

Licensed by another crisis, World War Two, and heeding the lessons of the previous four decades, it was John Curtin and Ben Chifley who consolidated and built upon the elaborations of their predecessors. They used the exigency of war to successfully bring about a decisive and permanent realignment of financial power between the Commonwealth and the states. Galvanised by the barren Scullin years, they understood their first task was to carry their party with them, and then to persuade the public. They assiduously worked the cabinet, caucus and Labor organisation, pursued a coherent reform program sustained by a cause rather than personal aggrandisement. They also needed the best possible program advice, and adept administrators to implement policy. They called on experts of all stripes. They created new agencies with direct access to the prime minister, to manage the 'total war effort' and advise on post-war reconstruction. This made them the best supported and advised prime ministers of the first 50 years. It also laid the foundation of the modern Australian Public Service, and of a Prime Minister's Department that would eventually become the central co-ordinating agency it is today. In addition, through stirring wartime oratory and conscientious cultivation of the press gallery, Curtin fostered the public connection.<sup>33</sup> Curtin and Chifley also established the efficacy of a leadership tandem. Their nation-building partnership anticipated that of Bob Hawke and Paul Keating in the 1980s—an irony since in a 1990 speech Keating dismissively referred to his Labor predecessors as a 'trier' (Curtin) and a 'plodder' (Chifley).<sup>34</sup> The historical record says otherwise.

The prime ministership as a platform for national influence was not really settled until the 1940s. Its 'levers' thereafter became: the financial muscle to cajole premiers; an effective and properly resourced federal public service; disciplined party organisations; command of communication channels; and an understanding that party discipline and a cabinet operating with due process were essential. It was such developments that led Labor minister John Dedman to observe in 1949 that 'the office

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<sup>33</sup> Since our first volume was published further insight into Curtin's media management practices has been provided in Caryn Coatney, *John Curtin: How He Won Over the Media*, Australian Scholarly Publishing, Melbourne, 2016.

<sup>34</sup> Mark Ryan (ed.), *Advancing Australia: The Speeches of Paul Keating, Prime Minister*, Big Picture Publications, Sydney, 1995, pp. 3–8; Paul Kelly, *The End of Certainty: The Story of the 1980s*, Allen & Unwin, Sydney, 1992, pp. 621–2.

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of the Prime Minister is becoming more and more the pivot around which the whole government machine turns'.<sup>35</sup>

This is not to say that the office's evolution has not continued in the more than half a century since. There have been further accretions of Commonwealth power at the expenses of the states. The bureaucracy has vastly burgeoned. Ministerial staffers arrived on the scene and have grown in number and influence. The international dimension of the role has expanded dramatically. The advent of the 'celebrity' medium of television recast the relationship between leaders and the public. More recently, party bases have dwindled substantially from their mid-20th century peak and electoral volatility has increased. Moreover, intensifying globalisation has altered the locus and freight of decision making, while the digital revolution has further disrupted long-existing patterns of political communication. It is this story we deal with in the second volume of our study. Yet that ongoing development does not diminish the achievements of Curtin, Chifley and their fellow early prime ministers to realise the office's potential by mid last century. Remembering the lessons of their hard-won gains might even help today's leaders find the role less confounding.



**Question** — Thank you very much for a very stimulating presentation. You mentioned the prime minister taking over the role of kingship. He certainly has seemed to do so in the declaration of war. How did that happen and how can we stop it in the future?

**Paul Strangio** — We have had some interest in making that a decision that would have to be endorsed by the parliament. In the period we are talking about here, Australian prime ministers did not have that power because of the constrained foreign policy making capacity. So this is a development of the post-war period effectively. I have not been able to cover the entire story of the development of prime ministerial authority in that first half-century, but part of it is the gradual development of foreign policy and the presence of prime ministers on the world stage. That story you are talking about, that sort of unilateral power, really comes in the second volume and we will be dealing with it there.

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<sup>35</sup> John Dedman to Ben Chifley, 30 March 1949, quoted in Leslie Finlay Crisp, 'Central Co-ordination of Commonwealth Policy-Making and Dilemmas of the Prime Minister's Department', *Australian Journal of Public Administration*, vol. 26, no. 1, 1967, p. 34.

One of the more absorbing things about prime ministers on the international stage in the first half-century is that they used to disappear for so long. It is hard to get our heads around, for example, that when Hughes went off when the war was still on in 1918, he was away for around 18 months. There was a common pattern: when they left the country there was instability. They were constrained in that foreign policy power, but when they did go away it tended to undercut their domestic power. So certainly when we get into the second volume we are talking about dramatically inflated power in terms of foreign policy-making decisions about war and so forth.

**Rosemary Laing** — I think the growth in the scale of the office is an interesting phenomenon, and was probably inevitable. I think many people will be familiar with the stories about Chifley taking phone calls from Canberra housewives because his phone number in Old Parliament House was one digit different from the Kingston butcher's number, and the Prime Minister of Australia at the time would quite happily pass on orders to the local butcher's shop. It is just unimaginable that that sort of thing could have happened even very soon after that time. From the 1950s onwards the scale of the office was much elevated.

**Paul Strangio** — It is reflected in the comparable buildings. All of you I think would be familiar with Old Parliament House and its intimacy. I did refer in the lecture to that beautiful scene of Barton cooking chops and making billy tea in his garret-like living quarters in Spring Street. A lot of what was going on in parliamentary terms occurred in Spring Street, Melbourne. It was not until 1927 that parliament moved to Canberra. So the intimacy of the office and the modesty of the office is striking. For example, when Fisher was prime minister he decided to acquire a prime ministerial vehicle and it caused quite a stir.

Fisher is an interesting figure in many ways because he was a very humble, modest man but, at another level, when he travelled, for instance, he was very prickly about receiving all the honours due an Australian prime minister. It was not for him so much, but because he was a Labor prime minister. He felt acutely that sensitivity that a Labor prime minister should not be treated any differently when he travelled. The modesty of the office is striking, that is right. Compared to the premiers and so forth, there was a real sense that they had to build the authority and the prominence of the office incrementally.

**Question** — I am interested in the prime ministers you omitted to talk about and am intrigued by your comment about the 'hapless' Scullin. My first question is: can you complete the picture there? My second question is: why didn't you mention Menzies and talk a little about that, considering he is our longest serving Prime Minister?

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**Paul Strangio** — That is a very good question. I had to be selective today. In the volume we have not looked at prime ministers individually. We have tended to treat them either in groups or in pairs. For example, we treat the first Commonwealth decade as a decade, but argue that it revolves around Deakin. Then we treat Fisher and Hughes together, in part to underscore their stylistic difference. Fisher is the group leader, then Hughes comes along and he is at the opposite end of the spectrum of prime ministerial types—domineering, authoritarian and so forth—and he blows the party system away. So we wanted to highlight different things. We do look at Scullin, but we group him with Bruce in terms of two prime ministers who felt acutely the constraints of the office and the constraints of the Commonwealth in battling with issues to do with the economy, particularly industrial relations. Industrial relations is a running sore through much of the first half-century of the Commonwealth. The famous aphorism about Scullin’s prime ministership is that his government was in office but not in power. And in large part that’s true. It was an extraordinarily difficult prime ministership because of party disorder and party ill-discipline, the lack of economic powers, the competing power bases of premiers such as Jack Lang in New South Wales, and the lack of an administrative apparatus. So many of the weaknesses of the office almost seem to compound during Scullin’s period and I think it is also in part a reflection of his own rather timid leadership style. His most magnificent moment was when he travelled overseas and asserted the appointment of Sir Isaac Isaacs as governor-general, the first Australian governor-general, but in many ways his was a hapless prime ministership.

We do look at Menzies’ first prime ministership, but only briefly. As much as anything that is about learning. In the second volume we will devote two chapters to Menzies, one on his own and the second one with him and his three immediate successors. So he of course bulks large in that second volume.

**Question** — Your reference to Isaacs stimulates me to ask: are there any examples where the British government, either publically or behind the scenes, expressed any view on the selection of any of our prime ministers in the first 50 years of the Commonwealth?

**Paul Strangio** — There is no evidence of that. There is certainly evidence of extensive correspondence during different periods. One of the most interesting periods was under Munro Ferguson, the Governor-General during Hughes’s prime ministership. Munro Ferguson, although a great supporter actually of Billy Hughes, writes a beautifully observed commentary on Hughes’s excesses as a prime minister. So we get close, intimate observations of the eccentricities of his leadership style—his unwillingness to listen, the way that he would often disappear, that he would always have pet schemes that went nowhere, the way he always thought he was the cleverest man in the room. I am slightly going off on a tangent here, but the more I read about

Billy Hughes, the more another prime minister kept on coming to mind, a more recent prime minister! One of the things we are trying to achieve is to see those recurring patterns. But to go back to your point, no, there was no evidence of that. There was certainly unhappiness in Britain about Scullin and his desire to have Isaac Isaacs as governor-general. There was certainly some frostiness between Menzies and Churchill when Menzies was there during early World War Two, but there is no evidence of the British trying to interfere as such.



## **Party Reform: Where are Australia's Political Parties Headed in the Future?\***

*Anika Gauja*

On 24 September 2016, Jeremy Corbyn was re-elected leader of the UK Labour Party in a vote that attracted the participation of more than half a million people. As a product of reforms to the Labour leadership selection process made back in 2014 to create a one member, one vote system and to expand participation to party affiliates and supporters, Corbyn's election has elicited two very different responses from political commentators and the general public. For some, the process has reinvigorated the Labour Party, substantially increasing membership and enabling hundreds of thousands of individuals to participate in a grassroots democratic movement. For others, these reforms have seen the party hijacked by its supporters—or instant members—who paid a few pounds to vote in the leadership contest to elect a leader with little broader electoral appeal.

The experience of the UK Labour Party highlights two very important questions that I want to explore in my lecture today. First, what motivates political parties to undertake organisational reforms? And, second, what are the consequences—both for parties themselves, and more broadly for representative democracy—when they do it?

Today I will take you through some of the research that I have conducted over the last four years on the democratisation of political parties in established democracies. I will draw on examples from Canada and the UK among other democracies, and share some of the experiences of a variety of different parties. The key motivation for this research is to better understand how political parties are responding to technological, social and institutional change, and the effectiveness of some of the organisational changes they have made in order to increase citizen engagement and ensure their relevance as participatory organisations in modern democracies.

### **Membership decline and party reform**

Perhaps the greatest concern that overshadows studies of party organisation today is the collapse of formal party membership. For parties such as the German Social Democrats, the halving of membership since the 1990s has created what has been described as 'beyond catastrophic circumstances', which mean that 'party reform is

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 30 September 2016.

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today more urgent than ever'.<sup>1</sup> The decline in party membership has been well documented in previous research<sup>2</sup>, but it impacts on how we might think about party organisational change in a number of important ways.

The first is the sheer pervasiveness of membership decline, which has been shown to affect parties both across democracies and across party families. Rather than being a specific 'problem' faced by only some parties, it is now part of a broader fight for institutional survival. This highlights not only the salience of the trend, but also the complexity of the problem as encompassing social changes that transcend states and parties with different ideological standpoints and organisational histories.

Another aspect of this pervasiveness is the extent to which membership decline impacts upon key party functions. Members have traditionally been seen as a committed group of activists that promulgate a party ideology, a source of outreach and policy innovation and as the providers of financial and campaigning resources.<sup>3</sup> Insofar as dwindling party memberships affect the performance of parties' participatory and representative functions, they also raise broader questions about the continued capacity of parties to enhance the quality of democracy.<sup>4</sup> Perhaps the most important role that party members have played is in creating a sense of democratic legitimacy for a political party. Although many are increasingly questioning the 'golden age' of the mass party and now regard it as a historical episode<sup>5</sup>, it still carries significant weight as a normative model of how political parties should be organised—evident in the common legal requirement that political parties must be established as membership organisations.<sup>6</sup>

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<sup>1</sup> Daniel Totz, *Ready for Change? The Party Reforms Planned by the Social Democratic Party of Germany*, Friedrich Ebert Stiftung, Berlin, 2011, p. 3.

<sup>2</sup> Susan Scarrow, *Beyond Party Members: Changing Approaches to Partisan Mobilization*, Oxford University Press, Oxford, 2015; Emilie van Haute and Anika Gauja (eds), *Party Members and Activists*, Routledge, London, 2015; Ingrid van Biezen, Peter Mair and Thomas Poguntke, 'Going, Going...Gone? The Decline of Party Membership in Contemporary Europe', *European Journal of Political Research*, vol. 51, no. 1, January 2012, pp. 24–56; Paul Whiteley, 'Is the Party Over? The Decline of Party Activism and Membership across the Democratic World', *Party Politics*, vol. 17, no. 1, January 2011, pp. 21–44; Susan Scarrow and Burcu Gezgor, 'Declining Membership, Changing Members? European Political Party Members in a New Era', *Party Politics*, vol. 16, no. 6, November 2010, pp. 832–43.

<sup>3</sup> Susan Scarrow, *Parties and their Members: Organizing for Victory in Britain and Germany*, Oxford University Press, Oxford, 1996, pp. 42–6; Alan Ware, *Political Parties and Party Systems*, Oxford University Press, Oxford, 1996, pp. 63–4.

<sup>4</sup> See for example Ingrid van Biezen, 'The End of Party Democracy as We Know It? A Tribute to Peter Mair', *Irish Political Studies*, vol. 29, no. 2, May 2014, p. 178.

<sup>5</sup> See for example Ingrid van Biezen and Thomas Poguntke, 'The decline of membership-based politics', *Party Politics*, vol. 20, no. 2, January 2014, p. 205.

<sup>6</sup> Anika Gauja, 'The Construction of Party Membership', *European Journal of Political Research*, vol. 54, no. 2, May 2015, pp. 232–48.



So where does this leave political parties today? While there is a broad consensus on the pervasiveness and salience of membership decline, scholars disagree as to the consequences of this decline for the future of parties as linkage organisations, and whether membership is actually necessary for parties at all. For example, Katz and Mair's cartel party thesis highlights a changing organisational dynamic within parties where members become marginalised at the expense of an increasing dependence on the state.<sup>7</sup> In this view of what parties have become, sustaining a large membership is more about validating the 'legitimising myth of party democracy rather than remain[ing] true vehicles of linkage between party elites and society at large.'<sup>8</sup>

The alternate view is that members continue to remain important to the party organisation in the contemporary era. While it is certainly not surprising, the vast majority of political parties maintain a commitment to the continued importance and role of party members. But what does membership mean in the modern party organisation?

The UK Labour reform document, *Building a One Nation Labour Party*, provides an excellent illustration of how both the need for, and the strengths of, party reform can be conceptualised in terms of expanding the number of party members, as well as the notion of membership itself. Conducted by House of Lords peer and long-time trade unionist Ray Collins in 2013–14, the review was charged with reforming the party-trade union relationship and the leadership selection process under the auspices of building 'a truly 21st century party'.<sup>9</sup>

The report argued for the importance of party membership, noting that:

Members are the lifeblood of our party. It is essential that the rights that come with membership are recognised and understood. Party members play a crucial role in holding their MP to account, selecting their parliamentary candidate, selecting the Leader and Deputy Leader, picking delegates for annual conference, and much more besides.<sup>10</sup>

At the same time, however, the organisational changes the Collins Review recommended involved opening up the Labour leadership selection process in such a way that members' 'crucial' role in leadership selection was substantially diluted.

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<sup>7</sup> Richard S. Katz and Peter Mair, 'Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party', *Party Politics*, vol. 1, no. 1, January 1995, pp. 5–28; Richard S. Katz and Peter Mair, 'The Cartel Party Thesis: A Restatement'. *Perspectives on Politics*, vol. 7, no. 4, December 2009, pp. 753–66.

<sup>8</sup> van Biezen and Poguntke, op. cit., p. 205.

<sup>9</sup> Ray Collins, *Building a One Nation Party Interim Report*, Labour Party, London, 2013, p. 3.

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

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Under these reforms, the three-way electoral college (comprised of members of the parliamentary party, party members and trade unions) that was originally established in 1981 was replaced by a one member, one vote system where the votes of Labour parliamentarians, party members, affiliated union supporters and registered party supporters were simply aggregated and weighted evenly.

In implementing these reforms the party moved from a closed leadership selection process in which unions had a collective voice to a semi-open one. The inclusiveness of the process was increased through the addition of registered supporters to the eligible voter pool. In advocating for the individualisation of union affiliation and the introduction of registered supporters, *Building a One Nation Labour Party* aimed to grow the party and realise Ed Miliband's 'bold vision to mobilise these individuals and build Labour into a mass party, growing our membership from 200,000 to 500,000, 600,000 or more.'<sup>11</sup>

While Ed Miliband's leadership ended after the party's 2015 general election loss, his vision for the party may have come to fruition. A group of over 552,000 Labour Party supporters signed up to participate to select his successor, Jeremy Corbyn. This contrasts significantly with party membership in 2013, which stood at just 190,000.

This particular instance of Labour Party reform departed from previous recruitment strategies in that it adopted a broader understanding of the concept of membership. By individualising the practice of union affiliation, the party sought to grow the membership by converting previous collective affiliates into individual supporters, effectively achieving an instant injection of members through redefining the notion of affiliation. By expanding the leadership franchise to registered supporters, the Labour Party expanded the notion of membership in a functional sense and created a much larger base of support to legitimise and promote the leadership selection. This vision of growing the party was both foreshadowed and encapsulated nicely by Ed Miliband's 2013 St Bride Foundation speech:

I want to build a better Labour Party...by shaping a Party appropriate for the twenty-first century not the twentieth century in which we were founded. Understanding we live in a world where individuals rightly demand a voice. Where parties need to reach out far beyond their membership.<sup>12</sup>

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<sup>11</sup> *ibid.*, p. 3.

<sup>12</sup> Ed Miliband, 'One Nation Politics', speech delivered at the St Bride Foundation, London, 9 July 2013, <http://archive.labour.org.uk/one-nation-politics-speech>.

## New preferences for political participation

The quote from Ed Miliband's St Bride Foundation speech is also interesting because it acknowledges the reality that citizens' preferences for political participation—the ways in which they do politics—are changing, and that political parties need to respond to this.

One of the most prominent themes associated with contemporary social and political change is that of 'individualisation'. As a form of behaviour, individualisation captures the notion that citizens seek to fulfil their own private desires rather than the common good. Driven by social changes such as increasing pressures on time, money and effort, a decline of working-class communities and trade union membership, it has been asserted that people are less willing to participate in collective forms of political activity. Rather than joining political parties, citizens have instead turned to other political organisations to channel their participation, or to direct forms of political action.

For some, these changing patterns represent the decline of political participation and engagement in society<sup>13</sup>, but for others<sup>14</sup> they signify a diversification in citizenship norms and political participation away from primarily duty-bound norms and actions to more engaged and autonomous forms of political participation, and to expanding political repertoires that are no longer focused on the formal institutions of the state. The practical manifestation of this change can be found in the rise of individualised or micro-political forms of participation, such as donating money, signing a petition, or purchasing particular types of goods 'without the need to interact with other people'.<sup>15</sup> Bennett and Segerberg argue that an individual's tendency to engage in these actions is influenced by their relationship to his or her lifestyle, which means that issues are both constructed and responded to in a personalised way.<sup>16</sup> In contrast to dutiful citizens, who see elections, governments and formal political organisations at the core of democratic participation, self-actualising citizens have weaker allegiances to

<sup>13</sup> John Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: American's Beliefs about How Government Should Work*, Cambridge University Press, Cambridge, 2002; Robert Putnam, *Bowling Alone: The Collapse and Renewal of American Community*, Simon and Schuster, New York, 2000.

<sup>14</sup> Russell J. Dalton, 'Citizenship norms and the expansion of political participation', *Political Studies*, vol. 56, no. 1, March 2008, pp. 76–98; Henrik Bang, 'A new ruler makes a new citizen: Cultural governance and everyday making', in Henrik Bang (ed.), *Governance as Social and Political Communication*, Manchester University Press, Manchester, 2003, pp. 241–267; Pippa Norris, *Democratic Phoenix: Reinventing Political Activism*, Cambridge University Press, Cambridge, 2002; Ronald Inglehart, *Modernization and Postmodernization*, Princeton University Press, Princeton, New Jersey, 1997.

<sup>15</sup> Charles Pattie, Patrick Seyd and Paul Whiteley, *Citizenship in Britain: Values, Participation and Democracy*, Cambridge University Press, Cambridge, 2004, p. 107.

<sup>16</sup> W. Lance Bennett, and Alexandra Segerberg, 'Digital media and the personalization of collective action: Social technology and the organization of protests against the global economic crisis', *Information, Communication and Society*, vol. 15, no. 5, 2011, p. 771.

government, form loose networks for social and political action, and focus on lifestyle and issue politics. By consequence, individual political actions are less likely to involve formal membership but rather a preference for joining selective actions and in citizens ‘displaying their participation in these actions publicly’<sup>17</sup>, increasingly through the use of social media.<sup>18</sup>

**Table 1: Political activity: Australia (percentage of respondents)**

<b>Political Activity</b>	<b>All voters</b>	<b>ALP voters</b>	<b>Lib/Nat voters</b>	<b>Greens voters</b>	<b>Other voters</b>
Currently a member of a political party	2	1	2	1	1
Previously a member of a political party	4	4	5	1	2
Campaigning work for a political party or candidate—eg door knocking, phone canvassing	2	2	1	1	4
Handed out how-to-vote cards on election day	5	5	5	7	8
Been to a candidates meeting	1	2	1	4	–
Attended a rally	4	3	3	11	7
Signed an online petition or taken other online auction	20	24	14	37	21
None of them	60	56	68	37	55
Don’t know	2	3	1	1	1

Source: Essential Media Communications, 2014, N=1,056

The figures contained in Table 1 are a stark reminder of the insignificance of party and partisan forms of participation for Australian citizens. In an online Essential Media poll conducted in April 2014, respondents were asked about their political activity. A very small minority reported participating in parties in some way: whether that be as a member or by campaigning. Respondents were also asked whether they would consider becoming a member of a political party. Only 15 per cent of respondents indicated that they would, and this was the highest (19 per cent) amongst Greens voters. Men were twice as likely as women to consider joining (20 per cent as compared to 10 per cent), and by age, younger voters (under 30) were least likely to

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

<sup>18</sup> W. Lance Bennett and Alexandra Segerberg, *The Logic of Connective Action: Digital Media and the Personalization of Contentious Politics*. Cambridge University Press, New York, 2013; W. Lance Bennett, ‘The Personalization of Politics: Political Identity, Social Media, and Changing Patterns of Participation’, *The Annals of the American Academy of Political and Social Science*, vol. 644, November 2012, pp. 20–39.

consider joining (81 per cent), compared to those aged 31–50 (69 per cent) and voters over 50 years of age (71 per cent).<sup>19</sup>

There are two ways in which participatory patterns such as these might impact upon the nature of party organisations, particularly as participatory arenas. The first is the potential withdrawal of political parties from society.<sup>20</sup> Faced with declining memberships, political parties might look elsewhere for resources, policy input and legitimacy. This is the response which has received a significant degree of academic attention and is characterised by the notion of a ‘hollowed out’ political party—one with a greatly reduced organisational structure in which party leaders communicate directly with the electorate by utilising mass communications technologies, resourced by the state.

The second option is that political parties change their internal structures and processes to better reflect these patterns of participation. If political parties adapt or evolve to new institutional environments, it stands to reason that they must also respond to a new type of politically active citizen. This may require a radical re-thinking of what we mean by the notion of a political party as a mediating institution and where its organisational boundaries lie. At the very least, a more nuanced account of what it means to be active within, or engaged with a political party, is necessary—one that moves beyond the notion of a formal member.

### **The creation of supporters’ networks**

I was the last of a generation of joiners. People don’t join organisations in the way they used to. It’s affecting service clubs, affecting even volunteer sporting organisations, churches ... People just don’t join in the way they used to now. There’s a whole lot of reasons for that, but—to some degree—the phenomenon that I’m talking about with political parties is a reflection of a different society where people don’t join.<sup>21</sup>

An excellent practical illustration of an organisational reform that is designed to respond to external pressures for change, in particular shifting participatory preferences, is the creation of formal supporters’ networks. As at October 2015, supporters’ or friends’ networks have been established by the social democratic parties in Australia, New Zealand, the United Kingdom and Germany, as well as the UK Conservatives and the New Zealand National Party.

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<sup>19</sup> Essential Media Communications, 2014.

<sup>20</sup> Peter Mair, *Democracy Beyond Parties*, Discussion paper, Centre for the Study of Democracy, University of California, Irvine, 2005.

<sup>21</sup> Former Australian Prime Minister John Howard, interview with author.

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These networks allow citizens to ‘join’ the party in a reduced capacity free of charge or with a donation of their choice. Becoming a friend or supporter of a political party can also be seen as an expressive action (for example, supporters may publicise this action on Facebook) and does not require any commitment on the part of the individual, and ‘offer[s] people a means of formalising their support for the party without going so far as becoming full members’.<sup>22</sup> This builds on the perception, as expressed by former Australian Prime Minister John Howard, that it is the notion of membership that is problematic from the individual’s perspective, rather than support for the party and its policies per se.

Although it is defined in opposition to membership, what supportership actually means, and involves, is quite vague. Taking the New Zealand Labour Party as an example, a ‘registered supporter’ is defined as ‘a person who agrees to have their name listed as such.’<sup>23</sup>

As a result of the Collins Review<sup>24</sup> the vote of a registered supporter in a UK Labour leadership contest carried equal weight to that of an ordinary party member. The eventual scale of non-member involvement in the leadership contest also far outweighed what was previously anticipated and approved by the Labour Conference. Back in 2011, the *Refounding Labour* document, approved by Conference, stipulated that if the party could recruit more than 50,000 supporters, this would trigger these supporters being given three per cent of the electoral college in the vote for the party’s leader, which could rise to 10 per cent depending on the number of supporters’ recruited. In 2015, over 100,000 registered supporters participated in the ballot, comprising a 25 per cent share of the total selectorate. In 2016, registered supporters comprised 24 per cent of those voting in the leadership contest.

In Australia, the Labor and National parties have also involved their supporters in candidate selections through the trial of open primaries for the selection of parliamentary candidates in state branches. Marketed as ‘community pre-selections’, voting in these primaries is a one-off event, with supporters pre-registering to vote but with no further obligation to the party.<sup>25</sup> However, these developments suggest that if supporters are also gradually given rights in leadership and candidate selections, then the distinction may not be as clear-cut as previously anticipated. As supporters are

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<sup>22</sup> Peter Hain, *The Future Party*, Catalyst, London, 2004, p. 16.

<sup>23</sup> New Zealand Labour Party, *Labour Constitution and Rules*, 2014, par. 11, p. 5, <https://www.labourparty.org.nz/sites/default/files/2014%20Constitution.pdf>.

<sup>24</sup> Ray Collins, *Building A One Nation Labour Party: The Collins Review Into Labour Party Reform*, Labour Party, London, February 2014, [http://action.labour.org.uk/page/-/Collins\\_Report\\_Party\\_Reform.pdf](http://action.labour.org.uk/page/-/Collins_Report_Party_Reform.pdf).

<sup>25</sup> Anika Gauja, ‘The “Push” for Primaries: What Drives Party Organisational Reform in Australia and the United Kingdom?’, *Australian Journal of Political Science*, vol. 47, no. 4, December 2012, pp. 641–58.

actively encouraged to contribute to policy debates, and as parties move to more consultative forms of policy development, the difference between members and supporters in this area of party activity seems even smaller still.

In Germany, the move to reach out to non-members in the Social Democratic Party proved to be controversial. Originally, party leader Sigmar Gabriel proposed a system of open primaries that would have seen non-member involvement in the party expanded to candidate and leadership selection. However, following harsh criticism within the party that primaries would undervalue the point of ‘proper party membership’ and a mixed reception in the press, this suggestion was retracted.<sup>26</sup> The compromise reached was to focus non-member or supporter participation in policy-related activities rather than include them in candidate, leadership or other types of representational decision-making within the party. In putting the reforms forward to the November 2011 party conference, the executive resolved that ‘structures should be put in place to allow non-members to vote on *specific issues*; supporter membership has been developed to this end which means that in future those interested can become supporters of a *certain working group or topical forum*’.<sup>27</sup>

The Canadian Liberals now present the most extreme example, outside of the United States, of the shift towards supporters’ networks. In May 2016 the party voted at its conference to dispense with the notion of membership entirely. Instead, anyone willing to register with the party (for free) is able to participate in policy development and candidate and leadership selection. The party, currently in government in Canada under the leadership of Justin Trudeau, advertises itself not as a party but as an open movement.

### **Community organising and movement politics**

Political parties are not just using the language of movements, but appropriating some of the organisational and campaigning techniques of movement politics. One of these techniques is community organising.

Originally copied from advocacy and third sector organisations, the basic principles of community organising—asking people what they care about rather than telling them

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<sup>26</sup> Daniel Totz, *Ready for Change? The Party Reforms Planned by the Social Democratic Party of Germany*, Friedrich Ebert Stiftung, Berlin, 2011, p. 6; Amandine Crespy, ‘Germany’, in Jean-Michel De Waele, Fabion Escalova and Mathieu Viera (eds), *The Palgrave Handbook of Social Democracy in the European Union*, Palgrave, London, 2013, p. 164.

<sup>27</sup> Cited in Daniel Totz, op. cit., p. 6, emphasis added; see also SPD [Social Democratic Party of Germany, Sozialdemokratische Partei Deutschlands], *Party on the Move: The SPD’s organizational policy program*, Resolution of the SPD Party Board, 26 September 2011, party document, pp. 7–8.

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what to think<sup>28</sup>—have become fused in the campaign practices of US political parties in the last decade through network building and the ‘creation, cultivation, and maintenance of ties with supporters that staffers could mobilize for collective social and symbolic action’.<sup>29</sup> Community organising, as American political parties have borrowed and applied it, reflects a process of technological adaptation and of learning and diffusion not simply between parties, but between parties and other political organisations that have creatively ‘redefined organizational membership and pioneered more novel fundraising practices’.<sup>30</sup>

In turn, what has been successfully used in American campaigning is seen as a source of inspiration to party organisations in Canada, Australia and the UK. For example, the Canadian Liberal Party pointed to the experience of the US Democratic Party in the foreword to its 2009 Change Commission Report and noted that:

Obama’s community development model has demonstrated the success in turning every supporter into a worker, a policy source and then a donor. They have perfected a model in which a supporter with four hours to contribute can be immediately plugged into four hours of meaningful work.<sup>31</sup>

Adapting the principles of community organising is a way in which political parties in Australia and the United Kingdom have attempted to strike a balance between member and non-member participation. In the United Kingdom, for example, the UK Labour Party had advocated these initiatives as examples of ‘best practice’ amongst its local groups. The Folkestone local branch led one of these local campaigns against parking charges in the town centre. Starting with an online petition, the campaign spread to an offline petition in the high street that collected 2,000 signatures, progressed to a series of community meetings and culminated in a local council referendum. Lauded by the party, the campaign was able to successfully reinvigorate the local branch, as members:

had a focus. Each week we would get ready to give a speech at a meeting, or prepare for a radio interview, or print more posters for the campaign ...

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<sup>28</sup> Aaron Schutz and Marie G. Sandy, *Collective Action for Social Change: An Introduction to Community Organizing*, Palgrave Macmillan, New York, 2011, p. 5.

<sup>29</sup> Daniel Kreiss, *Taking Our Country Back: The Crafting of Networked Politics from Howard Dean to Barack Obama*, Oxford University Press, Oxford, 2012, p. 10.

<sup>30</sup> David Karpf, *The MoveOn Effect: The Unexpected Transformation of American Political Advocacy*, Oxford University Press, Oxford, 2012, p. 3.

<sup>31</sup> Liberal Party, Canada, *Advancing Change Together: A Time to Act*, The Report of the Change Commission of the Liberal Party of Canada, April 2009, p. 1.



We found a new energy in the local party, with new members taking the lead in campaigns and long standing members finding a new lease of life.<sup>32</sup>

Not only was participation within the party renewed at the local level, but the campaign also succeeded in bringing the Labour Party into the public view and integrating supporters as ‘for the first time, we became part of the community and built bridges with other groups that were working for the best interests of the town’.<sup>33</sup>

Translating this model of organising and participation to a national scale, in the context of election campaigning, has proved to be less successful for the UK Labour Party. One of the fundamental tensions inherent in the community organising model of partisan politics is between the decentralisation and autonomy of decision-making practiced by volunteers and local groups and the desire of the party organisation to maintain control of groups, processes and policy agendas. As Schultz and Sandy argue:

Organizing is not about doing *for* others. Instead, organizers are supposed to work *with* people to produce social change. A key tenet of organizing is that those affected by a particular social problem are usually best equipped to figure out what changes are most likely to make a real difference.<sup>34</sup>

However, as Nielsen notes, ‘campaign assemblages are trying to have it both ways: to mobilize the masses associated with membership-based associations while retaining the centralized control characteristic of management dominated advocacy groups’.<sup>35</sup> This tension was clearly evident in the community organising session led by US organiser Arnie Graf at the 2013 UK Labour Party conference. Once questions were solicited from the floor, a number of party members complained of the disjoint between community organising training, strategies at the local level and the priorities of the central party office. Despite instructions to forge community links and campaigns, a party member from the North London CLP spoke of interventions from central office aimed at ‘blocking efforts to organise’. Those canvassing were restricted to asking three questions of electors, and to work from centrally generated lists. Volunteers were directed not to talk to non-Labour voters and could not target constituents aged between 18 and 24. Similarly, a councillor from the local government area of Barking spoke of the mixed messages about the nature of activism within the party. The discussion was promptly shut down by a staffer from campaign

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<sup>32</sup> UK Labour Party, ‘Best practice: Folkstone Labour Party – Parking Changes Campaign’, Material distributed to participants in the 2013 Labour Party Conference ‘Train to Win’ Program.

<sup>33</sup> *ibid.*

<sup>34</sup> Schutz and Sandy, *op. cit.*, p. 22.

<sup>35</sup> Rasmus Kleis Nielsen, *Ground Wars: Personalized Communication in Political Campaigns*, Princeton University Press, Princeton, 2012, p. 187.

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central office who deferred questions to a private meeting at the end of the session. These events (which happened behind closed doors at the party conference) illustrate not only the ongoing coordination issues when staffers and volunteers ‘have divergent ideas of how campaigns should be run and varying commitments and goals’<sup>36</sup> but also the inherent contradictions between the principles of community organising and partisan politics.

### **Moving organisation online**

The transfer of modes of organising from political advocacy organisations to political parties (and vice versa) is, however, not limited to offline activities. Perhaps more important to the way in which political parties structure themselves and engage with their members and supporters than the diffusion of community organising and campaigning practices has been the gradual uptake of social networking sites and online platforms to provide the basis for a different kind of online organisational infrastructure. For example, all three of the major parties in the UK have adopted NationBuilder as an online community organising software platform that enables parties to build campaign sites that incorporate communications, fundraising and volunteer management/profiling functions. It was also used by the ALP in its 2016 federal election campaign. A US company, NationBuilder describes itself as ‘a unique non-partisan community organizing system’ that enables clients to establish campaign sites at a relatively low cost and with a relatively low level of expertise.<sup>37</sup> NationBuilder effectively taps into individuals’ propensities to respond to issue-based politics, rather than ideological cues. Linking a party’s page to a variety of different ‘micro sites’ that showcase different causes and campaigns, enables users to engage with the party on their own terms, whether that be through donating, signing an online petition, posting comments or campaigning offline.

In addition to online platforms such as NationBuilder, social media is playing an increasingly important role in how political parties engage with citizens, and vice versa. The relatively personalised nature of these communications technologies is highlighted by comparing the ratio of parties’ to leaders’ social media followers. I looked at the major parties in Australia, the UK, Canada, New Zealand, France and Germany and found that in two-thirds of the cases the party leaders attracted more followers on Twitter than their respective party organisations. This was particularly apparent amongst conservative party leaders such as David Cameron, Stephen Harper and Malcolm Turnbull, whose Twitter followings outnumbered those of their parties, on average, more than seven times over. Just over half the leaders had a larger base of

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<sup>36</sup> Daniel Kreiss, *Taking Our Country Back: The Crafting of Networked Politics from Howard Dean to Barack Obama*, Oxford University Press, Oxford, 2012, p. 11.

<sup>37</sup> See <http://nationbuilder.com>.

friends on Facebook than their respective parties, with Angela Merkel, Nicolas Sarkozy, David Cameron and Justin Trudeau attracting followings that far exceeded their parties' memberships.

It is interesting to note how rapidly parties' engagement with social media has grown. Susan Scarrow reported that in 2011 only one party, the British Conservatives, had more than 100,000 Facebook likes. She also noted that in each country as a group, the number of traditional members still exceeded Facebook followers.<sup>38</sup> In 2016, of the 15 parties I covered in my research, 11 had more than 100,000 Facebook likes and the Conservatives were up to 565,000. However, the evidence presented here also supports Scarrow's argument that rates of social media engagement relative to traditional party membership are not uniform across all democracies. While it is safe to say that social media audiences are larger than party membership bases in Australia and the United Kingdom, and are roughly on par in Canada and New Zealand, in Germany and France—with the exception of the leaders' followers on Twitter—traditional party membership still exceeds social media followings.

In so far as platforms such as Facebook and Twitter cultivate greater links between party supporters and individual politicians within the party, they suggest that the process of organisational reform may also be dispersing—with individuals, and particularly party leaders, possessing greater autonomy and power (through social media platforms that require relatively little skill or whose operation can be outsourced to the provider) to craft their own online organisational links and structures. As a type of organisational reform, the mobilisation of supporters and the links cultivated through social media are a relatively 'low-cost' activity in that they can be implemented quickly by party staffers, leaders and parliamentarians, without the necessity of membership consultation or approval. Yet in creating a more individualised and direct channel of communication between parties, politicians and the public, the organisational consequences are potentially far greater than the ease of reform would suggest.

### **What is the impact of these changes?**

The picture painted of the modern political participant—and hence a potential partisan—is of someone who is time poor, reluctant to join a political organisation and most likely to engage with political issues that affect his/her lifestyle than respond to ideological and collective identities. Therefore, as Florence Faucher argues, many of the initiatives introduced by parties to respond to membership decline and these changing participatory preferences assume that the problem lies in the cost to benefit ratio for individuals, and 'that the solution lies in lowering barriers to individual

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<sup>38</sup> Scarrow, *op. cit.*, pp. 141–3.

participation’.<sup>39</sup> In evaluating the consequences of these reforms for both parties and representative democracy more generally, two questions arise. First, are these organisational changes an *accurate* response to changing norms of political participation? The second question, which is of a more normative character, is whether these reforms are an *appropriate* response to changing norms of political participation?

In the Australian context, a survey of voters’ attitudes to partisan engagement conducted in 2012 provides some evidence of the relationship between organisational change and community expectations (see Table 2). Fielded to a representative sample of over 1,200 Australian voters, the survey was designed by the author and administered by the market research company Newspoll through an online panel. Designed to reflect the views of the general population on the possibilities provided by party organisational reform, the survey asked respondents to indicate whether or not they might consider engaging in a number of party-related activities in the future.

**Table 2: Australians’ likelihood of engaging in party-related activities in the future (percentage of respondents)**

<b>Participatory Activity</b>	<b>Likely</b>	<b>Unlikely</b>	<b>Can’t say</b>
Join or be a member of a political party	9	81	10
Participate in a community preselection to select a party’s candidate for parliament	17	71	12
Register as a support of a political party	18	70	12
Sign up to receive information from a political party by email or text message	21	69	10
Post an idea or comment on a political party website	29	58	13
Attend a forum on policy issues that mattered to you	33	53	14
Answer a survey or questionnaire from a political party about issues that mattered to you	64	25	10

N=1,230

Because the survey asked participants about their likely, rather than actual, political behaviour, overall rates of participation are likely to be marginally inflated. However, a number of interesting trends emerge amongst the various engagement items. Unsurprisingly, joining a party is the least popular method of engagement among respondents, with only 9 per cent indicating that they would be likely to do so in the future. By contrast, respondents were twice as likely to register as a supporter,

<sup>39</sup> Florence Faucher, ‘New forms of political participation. Changing demands or changing opportunities to participate in political parties?’, *Comparative European Politics*, vol. 13, no. 4, July 2015, p. 421.

although the total percentage was still only 18 per cent. A majority of survey respondents (64 per cent) were likely to engage in only one partisan activity in the future—answering a survey from a political party about issues that mattered to them. General interest in participating in primaries (17 per cent) and receiving information from a party (21 per cent) was also low. Around one-third of survey participants expressed interest in engaging with parties by posting a comment on a party website (29 per cent), and attending a policy forum (33 per cent).

### **The parties of the future?**

The relationship between political parties and their members and supporters, as well as the relationship between the demands for political participation and the opportunities provided, are both symbiotic. In many cases the two cannot be separated, as ‘when parties have focused on recruiting a specific type of member they have actually contributed to transform what party membership meant’.<sup>40</sup> This observation raises the second of the two questions just posed—notwithstanding the accuracy of parties’ organisational reform processes, are they appropriate? And what kind of party will they produce in the future? What do they say of the future of party democracy?

One of the most prominent themes that I have noticed in my time researching parties is the reluctance of political parties, in the way in which they describe and justify their reforms, to depart from the modern party as anything but a membership organisation. At the same time, however, the concept of membership itself has also been evolving in several important ways, which all tend to blur the distinction, *in practice*, of the boundaries of the party organisation—through the introduction of alternate forms of affiliation (such as supporters), granting decision-making rights to non-members, policy consultations with the broader public and the appropriation of issues, rather than ideologically based community politics campaigns. In this way, political parties can still maintain their status as ‘membership organisations’, and benefit from the legitimacy and resource benefits that accrue from a base of supporters, but the nature of the organisational link that members create changes as a result.

As illustrated by the survey evidence just presented, whilst a significant minority of citizens indicate that they will engage with political parties through new channels of participation in the future, there is no guarantee that the party supporter will become a sustained or active follower in the future. Indeed, the very nature of the reforms to decision-making processes around key party functions presume that individuals will ‘dip in’ and ‘dip out’ of engagement as it suits them.

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<sup>40</sup> *ibid.*, p. 413.

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On the one hand, these new individualised links and intermittent participatory practices are not so different from patterns of membership participation that have characterised political parties in the past.<sup>41</sup> Comparative studies have shown that the majority of party members are, for the most part, inactive. This has remained a relatively constant trend even after party members have demanded, and been given, greater participatory opportunities.<sup>42</sup>

On the other hand, however, Faucher warns that ‘when parties focus on issues at the expense of building a collective identity, they may inadvertently contribute to the very problem they seek to solve: demobilisation’.<sup>43</sup> Indeed, the rise of new political parties on the far left and right of the political spectrum and the mass mobilisation of citizens in democracies such as Greece and Spain in response to the global economic crisis and migration flows have demonstrated the continuing importance of class, inequality and economic cleavages. For social democratic parties in particular, the strategy of dismantling collective identities and affiliation to concentrate on individual, issues-based engagement may have underestimated the continuing relevance of these issues, and in the process left a large group of disaffected citizens by the wayside.

To provide some final thoughts on these issues and on the consequences of party reform, it seems appropriate to return to the reforms to the UK Labour Party leadership selection process introduced at the very beginning of this lecture. Two key messages were delivered when the reforms were announced that: ‘parties need to reach out far beyond their membership’ and the ‘need to change the party so that we are in a better position to change the country’. Were these reforms successful in achieving these goals? Were they able to reconcile the demand for new participatory opportunities with existing party structures?

The new process for selecting the party leader was used for the first time following the resignation of Ed Miliband in May 2015, after the party’s general election defeat. Overall, 422,664 voted in the Labour leadership election, comprising 245,520 members, 105,598 registered supporters and 71,546 trade union affiliates. In 2016 this increased to 506,438. Corbyn was elected with around 60 per cent of the overall vote each time. As a measure of attracting support for the party, increasing membership and, by implication, responding to a desire for new opportunities for partisan engagement, the reforms appear to have been highly successful. At the end of December 2013, the party’s membership stood at 190,000. In July 2016, financial membership was over 500,000.

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<sup>41</sup> Scarrow, *op. cit.*, p. 209.

<sup>42</sup> van Haute and Gauja (eds), *op. cit.*, p. 197.

<sup>43</sup> Faucher, *op. cit.*, p. 421.

The leadership contest also provides several insights into the consequences of ‘reaching out beyond the membership’. The 2015 process attracted significant controversy when *Telegraph* readers were encouraged to join the Labour Party as registered supporters to vote for Corbyn, in order to ‘consign Labour to electoral oblivion’.<sup>44</sup> Amongst allegations of ‘entryism’, several high-profile Labour figures, such as Gordon Brown, Tony Blair and David Miliband intervened during the contest to urge voters not to vote for Corbyn.<sup>45</sup> Editorialising in the *Observer*, Tony Blair commented that ‘the Corbyn thing is part of a trend’—‘There is a politics of parallel reality going on, in which reason is an irritation, evidence a distraction, emotional impact is king and the only thing that counts is feeling good about it all’.<sup>46</sup>

In light of the influx of members and supporters to the UK Labour Party, there was significant conjecture during the campaign, and debate has ensued after the contest, as to whether Corbyn actually represents the party’s support base, or is the choice of a vocal minority of activists. Corbyn is regarded by many senior political figures as a radical democratic socialist, holding policy ideas that are dangerous for the party and for Britain as a whole. Others see the election of Corbyn as a breath of fresh air, and a real shift in engaging people in party politics. It has been described as ‘a democratic explosion unprecedented in British politics’, and a ‘spontaneous campaign that erupted out of nowhere, powered by grassroots volunteers across the country’.<sup>47</sup> Ray Collins’ suggestion at the 2013 Labour Party conference—that we need to change the party ‘so that we are in a better position to change the country’—has particular resonance here, though perhaps not in the way that the architects of the reforms intended.

In the 2015 contest, support for Corbyn was highest amongst registered supporters (84 per cent), followed by trade union supporters (58 per cent) and finally, party members (50 per cent). In 2016 support amongst members and union affiliates rose to 60 per cent and dropped to 70 per cent amongst registered supporters. Together, what these voting patterns suggest is that the outcome of the contest was influenced in large part by those who joined in the months leading up to the vote (either as members or

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<sup>44</sup> Toby Young, ‘Why Tories should join Labour and back Jeremy Corbyn’, *The Daily Telegraph*, 17 June 2015.

<sup>45</sup> BBC News, ‘Labour leadership: Gordon Brown says party must be credible’, 16 August 2015; Rowena Mason, ‘David Miliband: electing Jeremy Corbyn risks creating one-party Tory state’, *The Guardian*, 17 August 2015, <http://www.bbc.com/news/uk-politics-33950405>.

<sup>46</sup> Tony Blair, ‘Jeremy Corbyn’s politics are fantasy – just like Alice in Wonderland’, *The Guardian*, 30 August 2015, <https://www.theguardian.com/commentisfree/2015/aug/29/tony-blair-labour-leadership-jeremy-corbyn>.

<sup>47</sup> Seumas Milne, ‘Jeremy’s Corbyn’s surge can be at the heart of a winning coalition’, *The Guardian*, 20 August 2015, <https://www.theguardian.com/politics/commentisfree/2015/aug/19/jeremy-corbyn-coalition-labour>; ‘Jeremy Corbyn’s victory has already transformed politics’, *The Guardian*, 17 September 2015, <https://www.theguardian.com/commentisfree/2015/sep/16/jeremy-corbyn-politics-labour-leader-election>.

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supporters), rather than by long-standing party members. However, it does not necessarily follow that activists were disenfranchised as a result, or that the outcome produced an ‘unrepresentative’ or ‘undemocratic’ result. What it does, however, indicate is that even within individualised party structures, groups can still find ways to mobilise collectively to achieve influence but that they must work creatively to reach larger numbers of citizens. If the Labour leadership’s intention was to silence activists in a sea of ‘moderate’ voices by opening up and democratising the party, they may have received more than they bargained for.

To conclude, I pose the question: in a climate of membership decline, are party reforms designed to re-invigorate the normative ideals of the mass party model of representation, or has the breakdown of membership (coupled with social change) created a climate conducive to reforms that might fundamentally alter the way in which parties connect citizens and the state. While the UK Labour leadership example and many others discussed today suggest that parties continue to hedge their bets by appealing to both traditional organisational structures and new participatory processes, once reforms that seek to ‘open up’ the party in various ways have been implemented, it is very hard to turn back. At the same time as party reforms aim to respond to a new breed of political citizen, the high-profile campaigns associated with primaries, policy consultations, supporters’ networks et cetera work to potentially create a new set of normative ideals and change citizens’ expectations of how they might associate with parties. The consequences of party reform therefore extend well beyond rule changes and well beyond the parties themselves.



**Question** — Thank you for that fantastic talk. I would like to know a bit more about the relationship of those movement-type organisations in the United Kingdom, which seem to be underpinning the rise and success of Jeremy Corbyn, with the Labour Party?

**Anika Gauja** — Very briefly, what the Labour leadership selection process has done is enable groups, whether they be within the political party or outside the party, to organise collectively to influence the outcome of the election. I think this is really interesting and ironic in many ways in how it relates to the original intention of the reform. If we look at it literally, it was to open up the political party. If we think about it cynically and strategically, many would argue that these reforms were implemented in order to increase the power of the leadership. Now at that time that was Ed Miliband and his supporters. So really in proposing the reforms and seeing them



through I think the party and the leadership has bitten off a lot more than it can chew. It has centralised the power of the leader—not the leader that it wanted potentially—but it has also created, ironically, a process that, by opening up the boundaries of what constitutes a supporter, gives groups the ability to collectively organise to join the party and influence an outcome. So I think that it has created a certain permeability between the political party and the variety of different movement organisations which have mobilised to support Corbyn.

**Question** — Is it possible that the reduction in membership is because there is very little difference between political parties now? You really need a very serious issue to galvanise people into moving into a party, as is happening in Austria now, for example, where they are moving to the extreme far right.

**Anika Gauja** — The question went to the fact that there is very little difference now between political parties. That has been the established logic of looking at parties and party systems for the last 20 years: because political parties are vote-seeking organisations they tend to target the median voter, which means that their policies inevitably converge. But I think we have seen in the last five or so years since the global financial crisis a reintroduction of many of the old social and economic cleavages that were seen to have been diluted over the last 20 years. So we have these issues that are remobilising and re-engaging citizens, but parties need to work out a way to actively respond to them and incorporate them in their agendas. One way they can do that is through individualising their processes. In some ways I think populist parties present a real challenge to established political parties in this regard as well. They ostensibly champion direct democracy and claim to express the will of the people, and because they focus on the leader and his or her policy wishes, they are much more flexible and able to respond quickly to what they see as citizen demands. So I think that these new parties are posing a challenge to established political parties but they are also presenting an opportunity because they divide society in such a way that it becomes important for people to re-engage in democratic processes.

**Question** — I was interested that you mentioned the German example, but you did not mention the French example. I am particularly interested in that as I am a dual national, French and British, and I shall be able to vote electronically in the forthcoming primary for the French presidential election. This is a completely free vote. In other words, I have never been a member of a political party and all I have to do is pay €2 for each round of the vote and I also have to subscribe to a rather wishy-washy statement to the effect that I support republicanism, republican institutions and so on. I think this is quite an interesting example because, as you undoubtedly know, the former French President is the president of the party, although of course in France

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he doesn't sit in parliament, but it is probably unlikely that he will be chosen as the candidate in the primary.

**Anika Gauja** — I will take most of that as a comment because I think that does provide a really nice example that I did not have time to touch on. The French Socialist Party and its primary is interesting for a couple of reasons. First, I have been looking very carefully at all of the party documents when these initiatives are actually implemented and what is really interesting to see is just how much they defer, quite blindly, to the experiences of the United States. What happened in Obama's campaign is seen as the holy grail; primaries are seen as the holy grail of democratic participation. Now that was all well and good up to this year and what we have seen in terms of the primary race in the Republican Party but also the presidential election more generally. So that is one interesting example in that even France deferred to the US as being the holy grail of democratic participation. The other interesting aspect is that paying € or £ to vote in primary elections actually constitutes a really important source of income for political parties that are floundering in terms of being able to gather resources from the public. The French Socialist Party earned more than €1 million in running its first primary. I suspect the UK Labour Party made a handsome profit as well from billing its supporters to vote in both of Corbyn's leadership elections.

**Question** — Regarding the issue of funding of political parties, I am wondering what the implications are for public funding of political parties. At present, if a political party doesn't have parliamentary representation, one of the conditions is the number of members of that political party. I am wondering whether that could perhaps in the future move to the concept of 'supportership'. If I remember correctly, the issue that resulted in the conviction, and later acquittal, of Pauline Hanson, was that very distinction between members and supporters of the One Nation party.

**Anika Gauja** — Your question raises a very interesting point about formal notions of party membership defined as somebody signing a piece of paper saying that they are a member of that political party. In Australia establishing a political party at the Commonwealth level requires 500 members. Now we might think 500 members is pretty easy to achieve, but these days it is actually not, particularly if you are registering a party as a state organisation in every state. I think that, given the way in which parties are talking about their support bases in terms of 'supporters' rather than 'members', we might see a shift to parties trying to claim resources or claim registration on the basis of signatures of supporters rather than formal party memberships. On the question of public funding of party campaigns, I think that will continue into the foreseeable future and be done in tandem with trying to reinvigorate grassroots funding in crowd-sourced political campaigns.

If we move towards a system of primaries in the future, I think the question of who is going to resource them is really interesting. In the UK, when the Conservative Party and the Liberal Democrats were elected to government, they actually made a pitch to fund 200 all-postal primaries for parliamentary candidate selection contests. That failed, but it was an attempt to get resources from the state to pay for these activities. In other cases it really shifts the responsibility for fundraising from the party to the candidate. Parties can elect to put caps on primary selection contests, but it is also seen, again drawing from US experience, as a very valuable exercise where candidates learn campaigning skills and learn to fundraise. So a lot of the motivation for implementing this comes not simply from opening up engagement but from bringing resources and bringing money in.

**Question** — Early in your talk you referred to the decline of political parties and you referred to people turning to other kinds of organisations. Now one example of that in Australia would be GetUp, which has a large electronic base and seems to be able to raise a lot of support, including financial support, and significantly influence the political debate on a range of issues. I would be interested in your thoughts on the implications for the political process of these kinds of organisations that play a part in the political debate but do not in fact participate in the electoral process. On a second point, you referred to parties opening up to participation, but I think most of your examples referred to parties of the left. Can you comment on why parties on the right are not engaging in the same opening up process?

**Anika Gauja** — On the first question relating to other types of political organisations and the implications for democracy, I think there are a number of perspectives you can take on it. The first is: the more the better, the more the merrier. If organisations like GetUp allow citizens to express their political preferences and to participate in what they think is a meaningful way in politics, then that contributes to the health of the political system. There are different practices, as you said, for how these organisations then contribute to elections and to election campaigning. In New South Wales, for example, a distinction is drawn between these groups and political parties in terms of the funding that is received and the amount they can spend on campaigns where we clearly, in terms of formal electoral politics, have a two-tier system: parties and candidates at the top level and third-party campaigners at the bottom level.

The second divide in the academic literature is between seeing these groups as competitive or cooperative—competing for individuals' political participation. Political parties have not really responded to shifting participatory demands and organisations like GetUp are modelled on those changing demands, which points to the fact that parties may well be losing out in terms of their processes. I have only

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looked at the Greens, but the overlap between Greens membership and GetUp membership suggests that people who are politically inclined are actually members of both of those organisations. So it is not necessarily a case of one or the other; it is a broader social capital issue. If you are more likely to be active in one organisation, you are more likely to join a political party. So the idea that it is a competitive contest might not actually play out in practice.

**Question** — One of the things that you highlighted is the tension between bringing members in and parties retaining control. I was interested in your discussion about how candidates in these processes are becoming more personalised. Are party elites worried that, as their marketing strategies become increasingly personalised, they might actually lose control to their candidates as well?

**Anika Gauja** — You have certainly highlighted a really interesting tension there and I think political parties are still feeling their way through these different processes, as a lot of different advocacy and political organisations are. That issue of control is not necessarily something specific just to party organisations; it also extends into the advocacy and social movement sectors as well. In terms of reconciling it, the example that I raised of community organisation initiatives in the UK Labour Party really highlights that tension, and that is a tension that is going to grow as social media becomes more prominent.

One of the things that I didn't mention but that I think is particularly interesting is that, with platforms like Facebook and NationBuilder, it is relatively easy for candidates to establish and to create an account. By the same token, what you then do is outsource the responsibility for maintaining that account, outsource a lot of the way in which the message is distributed to people on the network to the organisation itself. So in a way you have a commercialisation of a lot of the campaigning functions as well, which not only creates problems of autonomy from the candidate vis-à-vis the party perspective but also problems of autonomy from the candidate vis-à-vis the party and the reliance on the commercial provider in these situations.

**Question** — One of the most striking things about the election of Jeremy Corbyn in the UK has been a kind of de-legitimisation of the parliamentary wing, because the attitude of the parliamentary wing to his candidacy was very well known throughout the UK before the event. I was wondering if you would comment on that.

**Anika Gauja** — I think that is certainly the case and I think the Labour Party in the UK throughout its history has gone through periods where, like many socialist democratic parties, it has struggled with the relationship between the parliamentary wing and the broader party organisation. I think that for the most of the 80s, the 90s

and 2000s, particularly under people like Tony Blair, the parliamentary wing gained increasing importance and separated itself in terms of policy and in terms of strategic direction from the party's base. On one hand Corbyn could be seen as a correction of this particular phenomenon; on the other hand he could be seen as a dangerous precedent where the party membership gains control over some of the functions that the parliamentary party should more properly control. All of the questions today have raised really difficult issues that I don't immediately have answers to. All I can say is that we are seeing that parties everywhere are grappling with these issues. The consequences have been that, yes, organisations are trying to open themselves up—they are getting more members; they are getting more supporters. But that tension between supporters and the traditional party membership is really apparent and parties have to find a way of dealing with it in the future.



## **Conscription, Conscience and Parliament\***

Tom Frame

I have been thinking about the subject of this address for most of my life. I was born during the most turbulent period of the Cold War—the first week of the Cuban missile crisis in October 1962—and the same year the first Australians were deployed to South Vietnam. The Vietnam War was fought until I was a teenager. The day's fighting featured every night on television. I attended anti-war demonstrations and anti-conscription protests with my father. I can also remember Anzac Day parades at which young Vietnam veterans, many of them national servicemen, were jeered by opponents of Australian participation in the conflict.

As we mark the passage of 100 years since the people decided against making overseas military service obligatory, I will begin by examining the recruitment of military manpower, the recognition of conscientious objection and the parliament's role in the 1916 referendum. I then want to look briefly at the other occasions on which these matters achieved national significance—1943, 1968, 1990 and 2003—before contending that the 1916 referendum is really the first instalment of an evolving and expanding case study on the character of government authority and the limits of the state's coercive powers. Let me begin then with conscription.

### **Conscription**

Prior to the 20th century, most European states obliged their citizens to render some form of military service. Prior to Federation, service in the Australian colonial forces was entirely voluntary. Those who participated in the Maori Wars in the 1850s and 1860s, the Sudan War in 1885, the Anglo-South African War in 1899 and the Boxer Rebellion in 1900 chose to enlist and elected to serve overseas. The supply of volunteers usually exceeded demand. In 1901 the newly formed Commonwealth Government assumed sole responsibility for national defence and was empowered by the Constitution to raise and maintain naval and military forces. The *Defence Act 1903* determined that uniformed service would be voluntary, except in times of war, when men could be conscripted for home defence. A bill for universal (meaning compulsory) military training for Australian men aged 18 to 60 was introduced by the Deakin Government in 1909. Lord Kitchener, the most famous soldier in the British

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 28 October 2016.

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Empire, recommended its introduction during his 1910 visit to Australia. The legislation passed into law with bipartisan support shortly afterwards.

When the war that began in August 1914 continued beyond Christmas of that year and showed every sign of being a protracted conflict, when the list of Australians injured or killed in combat exceeded tens of thousands, when enthusiasm for the war waned and recruitment declined, when more men were needed to maintain the existing strength of the First Australian Imperial Force (1<sup>st</sup> AIF) than were volunteering, the Labor Prime Minister, Billy Hughes, decided to act. As an additional 5,500 men per month were required to ensure the AIF remained operationally viable, Hughes resolved to send men undergoing universal military training to the 1<sup>st</sup> AIF for service overseas. But the necessary legislation would not pass the Senate, where Hughes faced strong opposition, particularly from members of his own party. He could, however, introduce a bill to enable a referendum to be held, a bill that would pass with the support of the Commonwealth Liberal Party headed by Joseph Cook. As an indicator of what was to come, the bill was only just passed. It was the first time in the new nation's history that a question was put to the people for their judgment.

The *Military Service Referendum Act 1916* provided for a non-binding plebiscite. It was not strictly a referendum because the Commonwealth already had the necessary power to conscript men for overseas service, but a referendum is what the act provided. But why was the referendum needed? Prime Minister Hughes had two reasons. The first was the need to secure a symbolic popular mandate that would allow him to transcend deep political division. The second acknowledged that in 1916 conscription was a life and death matter. Was this an early instance of 'wedge' politics? Yes, but the wedge was applied to Hughes's own party rather than the opposition.

On 28 October 1916, the people would be asked in tortuous prose:

Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, *outside* the Commonwealth, as it now has in regard to military service *within* the Commonwealth?<sup>1</sup>

The yes case in 1916 was largely pragmatic. It stressed the urgent need for more fighting men, the increased prospects of victory with an enlarged AIF, and the duty Australia owed to the empire. The yes case was popular among conservatives and the middle classes. The no case sought to highlight issues of governance and principles of conscience. The *Australian Worker* summed up the main no argument:

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<sup>1</sup> Emphasis added.



Society may say to the individual, “you must love this; you must hate that.” But unless the individual feels love or hatred springing from his own convictions and his own feelings, Society commands him in vain.

He cannot love to order; he cannot hate to order. These passions MUST find their source within his own soul.<sup>2</sup>

It was wrong to force men to fight against their will, to act in ways that might violate their conscience, to oblige them to risk their lives when those at home were safe and secure. There were also doubts about whether the additional men would make a difference to the war’s outcome and there were protests that Australia had already committed as much as it was able.

Confident that the yes case would easily prevail, three weeks before the plebiscite Hughes directed all eligible men aged between 21 and 35 to report to their local military authorities, where they would be medically examined and enrolled in a unit. Because it was difficult to prove personal identity and there was a lively trade in fraudulent exemption certificates, the men called up in October 1916 were fingerprinted. This highly unpopular measure, when added to resentment at Hughes’s presumption as to the plebiscite’s outcome, worked decisively against the yes vote. It was also a mini poll on the government’s popularity. Hughes’s personal standing as a strong leader heading a unified team was being slowly eroded by the gradual collapse of his cabinet through resignation and defection.

The referendum was defeated with 1,160,033 responding ‘no’ and 1,087,557 answering ‘yes’.<sup>3</sup> The turnout was 82.75 per cent of eligible voters while 97.36 per cent of the votes cast were valid. The referendum was lost in New South Wales, Queensland and South Australia and passed in Western Australia, Victoria, Tasmania and the federal territories. But the result turned on just 72,476 votes. The narrow margin meant that the issue was far from dead. When Australia was asked to provide a sixth division for the Western Front in 1917 and the need could not be met by volunteers, Prime Minister Hughes, now leader of the newly formed National Labor Party, went back to the people on 20 December 1917 with the question: ‘Are you in favour of the proposal of the Commonwealth Government for reinforcing the Commonwealth Forces overseas?’. Hughes’s plan was to have any shortfall in volunteer recruitment met by compulsory reinforcements of single men, widowers, and divorcees without dependents aged between 20 and 44 years who would be called

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<sup>2</sup> Henry Ernest Boote, ‘The Vital Argument’, *Australian Worker*, 7 September 1916, p. 17, emphasis in original.

<sup>3</sup> A breakdown of the vote against conscription was published in *Commonwealth Parliamentary Papers*, 1917–19, vol. IV, p. 1469.

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up by ballot. The referendum was defeated with 1,015,159 in favour and 1,181,747 against. It was a larger defeat than 1916 and left Australia to stand with South Africa and India as the only participating countries not to introduce conscription for the Great War.

In thinking about what was at stake in 1916 and 1917, it is important to separate opposition to conscription with recognition of conscientious objection. Opposition to conscription was (and is) based on political, procedural and practical considerations. For instance, opponents might argue that the case for compelling a section of the population to render military service is poorly conceived or wholly unconvincing. Opponents might take exception to the method by which men are selected (such as a ballot based on date of birth) or the exemption of certain classes of the population from obligatory service (such as the clergy). There might also be opposition to deploying unsuitable or inexperienced amateur soldiers for tasks better undertaken by trained and experienced professionals. Opposition to conscription can take many forms and may not involve any dimension of conscience.

Conscientious objection is focused on the objective of conscription—involuntary or compulsory military service during wartime—and the possibility that someone rendering such service might be required to kill another human being. Then (and now), possessing certain religious convictions and professing particular philosophical beliefs precludes the taking of human life under any circumstances, including armed conflict. Most societies respect these convictions and beliefs, exempting those professing them from compulsory military service in wartime. During the 19th century in Britain, for instance, Quakers were excluded from the operation of the Militia Act of 1803 while Russia allowed Mennonite Christians to pay a special tax in lieu of military service. Objection of this kind usually comes from pacifists (those opposed to all uses of physical force) who usually represent a dissenting opinion held by relatively few people. That pacifists comprise a small minority may explain why many governments have agreed to a compromise with those sincerely holding such convictions. This has generally been the attitude of Australian governments.

The *Defence Act 1903* defined ‘conscientious belief’ as ‘requiring a fundamental conviction of what is morally right and wrong, which is so compelling that the person is duty-bound to follow that belief’.<sup>4</sup> The Act recognised the validity of conscientious belief for ‘those who could prove that the doctrines of their religion forbade them to bear arms or perform military service’.<sup>5</sup> Australia was the first nation to grant

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<sup>4</sup> Moira Coombs and Laura Rayner, ‘Conscientious Objection to Military Service in Australia’, *Research Note*, no. 31, April 2003, Department of the Parliamentary Library, Canberra, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F2E296%22>.

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

exemption on these grounds. Exemption was limited to combatant duties and was restricted to individuals demonstrating membership of an organisation formally professing pacifism. Notably, no specific religious test was required after 1910. But there were no such grounds for exemption from compulsory military training. Conscientious objection was, of course, always available to volunteers during peacetime through the process of administrative discharge.

The 1916 conscription debate highlighted two contentious issues that were to have continuing significance. The first was the difficulty of reconciling the state's authority to compel individuals to render military service with the entitlement of individuals to seek exemption based on conscience. The second concerned the state's willingness to concede that it did not have an independent existence over and above serving the individuals comprising it, the individuals who remained the source of its authority.<sup>6</sup> The referendum also demonstrated that compulsion and conscience are ethical issues with political dimensions. This meant that conscription stood apart from other government activities. Acknowledging the moral gravity of obliging someone to take a human life and accepting that some citizens might be morally constrained from doing so, is the mark of a mature democracy and a tolerant society.

The argument *then*, and the argument that might be mounted against the reintroduction of conscription *now or in the future*, is that the political case for increased military manpower ought to be improved rather than the state's coercive powers exercised more vigorously. It is better to have willing volunteers than resentful conscripts. In 1916, Australian parliamentarians realised the gravity of the issues and resolved to share the burden with the public—directly and personally. They would not stand alone in accepting responsibility for sending men to their deaths. The people could never abrogate their own collective responsibility if they voted yes.

Notably, the vast majority of serving soldiers voted against conscription. They had seen the horrors of war and would not insist that others share the experience. Nor did they want to fight alongside reluctant comrades with whom they might not be able to trust their own lives.

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<sup>6</sup> It is difficult to assess the extent to which Australians have supported conscription because most opinion polls refer to compulsory military training or national service. Other than during the closing stages of the Vietnam War, more than 60 per cent of the adult population of Australia has purportedly supported either the introduction or continuation of national service. See Peter Sekules, 'A comparison of RSL policies on major national issues with prevailing public opinion', Australian War Memorial history conference, 13 February 1985, p. 6. It is noteworthy that Sekules makes no mention of any poll canvassing opinion on the recognition of conscientious objection. For a broader discussion of the politics of conscription see Henry Stephen Albinski, *Politics and Foreign Policy in Australia: The Impact of Vietnam and Conscription*, Duke University Press, Durham, 1970, pp. 193–202.

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The churches, as the chief guardians of the nation's moral conscience, generally accepted the justness of the Great War and the necessity of conscription for overseas service. Although there was no officially endorsed Anglican position on military service or conscientious objection<sup>7</sup>, Francis James noted 'the striking fact that between May 1916 and January 1918, no Anglican voice appears to have been raised against conscription in the Church Press or in any other Synod'.<sup>8</sup> As the largest denomination, leading Anglican churchmen strongly urged a vote in favour of conscription and conducted their own campaigns in support of the yes vote. As Michael McKernan has shown in *The Australian People and the Great War*, clergy who were inclined to pacifism or who were troubled by the community's general enthusiasm for the war were often hounded from their parishes and accused of disloyalty and even cowardice.<sup>9</sup> The most notable public opponent was the Roman Catholic Coadjutor Bishop and, from May 1917, Archbishop of Melbourne, Daniel Mannix, who referred to the fighting in 1914–18 as 'just an ordinary trade war'.<sup>10</sup> He was the only Australian Roman Catholic leader to respond positively to the 1917 peace proposals of Pope Benedict XV, who advocated the complete abolition of obligatory military service.

The failure of the conscription referenda was not lost on politicians during the Second World War. Although compulsory military training was resumed in October 1939 (war with Germany having been declared the previous month)<sup>11</sup>, general conscription did not begin until hostilities commenced against Japan at the end of 1941. By January 1943 and with the Labor Party in power, military manpower again became a pressing issue and one that could have divided the party a second time.<sup>12</sup> Prime Minister John Curtin prevailed and his party's policy platform was changed. In February 1943, legislation was introduced to define Australia in a manner that included the territories of Papua and New Guinea and the islands of Indonesia and British Borneo.<sup>13</sup> All troops, including the Citizen Military Forces (CMF), were liable for service in a special 'South-Western Pacific Zone'.<sup>14</sup> But this policy created two

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<sup>7</sup> Alan D. Gilbert, 'Protestants, Catholics and loyalty: an aspect of the conscription controversies, 1916–17', *Politics*, vol. VI, no. 1, May 1971, pp. 15–25.

<sup>8</sup> Francis James, in Roy Forward and Bob Reece (eds), *Conscription in Australia*, University of Queensland Press, St Lucia, 1966, p. 265.

<sup>9</sup> The experiences of two clergymen, one Methodist (the Reverend B. Linden Webb) and the other Presbyterian (the Reverend James Gibson), are described in detail in Michael McKernan, *Australian Churches at War: Attitudes and Activities of the Major Churches, 1914–18*, Catholic Theological Faculty, Sydney, 1980, pp. 30–1.

<sup>10</sup> *Argus*, 18 September 1916, p. 6; and *Catholic Press* (Sydney), 29 November 1917, p. 20.

<sup>11</sup> A statement by Prime Minister Sir Robert Menzies giving his reasons for introducing conscription for home defence was published in the *Daily Telegraph* (Sydney), 21 October 1939.

<sup>12</sup> Peter Love, 'Curtin, MacArthur and Conscription, 1942–43', *Historical Studies*, vol. 17, October 1977, pp. 505–11.

<sup>13</sup> New Guinea was then a League of Nations protectorate administered by Australia.

<sup>14</sup> See *Defence (Citizen Military Forces) Act 1943*.

armies: a volunteer army that could be sent anywhere and a conscript army that could only be deployed to the Pacific zone. This naturally complicated defence planning because some units were an amalgam of 2<sup>nd</sup> AIF volunteers and CMF conscripts and volunteers.

Complications aside, John Curtin's decision reflected the acute Japanese threat, acknowledged that American conscripts were now defending Australia and embodied a compromise with Australian reluctance to make overseas military service compulsory.<sup>15</sup> Of the two, historians have judged the latter to be the stronger impetus for the policy change.<sup>16</sup> In the post-Second World War period, Australian forces consisting entirely of volunteers deployed to the Korean War (1950–53), the Malayan Emergency (1948–60) and the Indonesian 'Confrontation' (1964–66)<sup>17</sup>, although compulsory military training was re-introduced in 1951 as part of a national service scheme<sup>18</sup> that continued until 1959.<sup>19</sup>

### **Fifty years on: the debate renewed**

Conscription was reintroduced using provisions contained in the *National Service Act 1951* without parliamentary debate (not that it was technically required) on 10 November 1964.<sup>20</sup> It is important to note that national service was reintroduced in anticipation of possible armed conflict with Indonesia rather than as part of an escalating commitment to South Vietnam. The Act exempted conscientious objectors on the grounds of religious and non-religious beliefs from either all military service or from combative military service, the distinction reflecting the beliefs held. Total exemption was granted on the basis of 'deep seated and compelling' conscientious objection. Ministers of Religion and theological students were specifically exempted.<sup>21</sup>

National service had not been a divisive political issue in the 1950s and did not generate immediate controversy when reintroduced in late 1964. In fact, a Gallup poll showed that 71 per cent were in favour of the scheme at that time and 25 per cent

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<sup>15</sup> 'Conscription and Conscience', *Current Affairs Bulletin*, vol. 40, no. 5, July 1967, p. 69.

<sup>16</sup> *CPD* (Reps), 3 February 1943, pp. 265, 269.

<sup>17</sup> Compulsory military training during peacetime was conducted in the period 1911–29 and 1950–60.

<sup>18</sup> *CPD* (Reps), 21 November 1950, pp. 2723–4, 2728.

<sup>19</sup> *CPD* (Reps), 26 November 1959, pp. 3185–86. In 1957, the scheme was reduced with the introduction of a ballot which would restrict the number of young Australian men 'selected' to undergo compulsory training, *CPD* (Reps), 1 May 1957, pp. 950–2.

<sup>20</sup> *CPD* (Reps), 10 November 1964, pp. 2715, 2717–18.

<sup>21</sup> See *National Service Act 1951* s. 29(1)(d) and (e).

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were against.<sup>22</sup> Attitudes changed little after 29 April 1965 when Prime Minister Sir Robert Menzies advised federal parliament that an infantry battalion would be deployed to South Vietnam for combat operations.<sup>23</sup> The 1 RAR deployment was an all-volunteer force. The following month the Defence Act was amended to allow national servicemen to deploy overseas, with the first Holt Government deciding in March 1966 that ‘nashos’ would serve in South Vietnam from mid-1966. Support for national service was now 68 per cent in favour and 26 per cent against.<sup>24</sup> By October 1970, 58 per cent still agreed with national service and 34 per cent were against with 8 per cent curiously undecided.<sup>25</sup> In September 1971, 53 per cent of 16 to 20-year-olds supported the continuation of conscription with the proportion in favour increasing with the age of respondents.<sup>26</sup> The notable difference was in attitudes to *where* national servicemen ought to be sent. In May 1965, 52 per cent were in favour of them being sent to Vietnam and 37 per cent wanted them to remain in Australia. Surprisingly by August of 1967 and after the first national serviceman, Errol Noack, had been killed in mid-1966, the percentage of those polled showed 42 per cent believing they should be sent to Vietnam (up 5 per cent) and 49 per cent for remaining in Australia (down 3 per cent).<sup>27</sup>

Prime Minister Holt explained that the United States was sending its conscripts to Vietnam and Australia was obliged to do likewise. To avoid the accusation that conscripts were carrying a disproportionate burden of the war-fighting effort, later legislation limited deploying units to less than 50 per cent national servicemen. Between 1964 and 1972, nearly 64,000 men were conscripted. Of that number 19,450 national servicemen would serve in Vietnam with around 200 killed. Of the regular army, 21,132 personnel deployed to Vietnam with 242 killed. Notably, early in their training many national servicemen were quietly ‘invited’ to express their interest in serving in South Vietnam or some other destination. Three out of four conscripts fulfilled their obligations within Australia, Malaysia or in PNG. National service could be avoided by enlistment in the CMF, deferment on the basis of particular circumstances, such as education, or exemption through conscientious objection.

Opinion was divided on whether the war in South Vietnam had a direct bearing on Australia’s security and whether it justified the deployment of conscripts. Disagreement on these two points led to calls for the recognition of ‘selective

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<sup>22</sup> Melbourne Draft Resisters’ Union, *Downdraft*, p. 85, cited in Peter Cook (ed), *Australia and Vietnam 1965–1972*, La Trobe University, Melbourne 1991; Australian Gallup Poll, 1789–1803, Oct–Nov 1964.

<sup>23</sup> Australian Gallup Poll 1852–1871, Sep–Oct 1965; Australian Gallup Poll 1900–1915, May–Jul 1966.

<sup>24</sup> Australian Gallup Poll 1916–1931, May–Jul 1966.

<sup>25</sup> Melbourne Draft Resisters’ Union, *op. cit.*

<sup>26</sup> Australian Gallup Poll 2292–2294, Sep–Oct 1971.

<sup>27</sup> Melbourne Draft Resisters’ Union, *op. cit.*

objection' also known as 'objection to particular wars' in 1966. Commentary focused on what were considered two unsubstantiated assertions in the National Service Act: first, that it focused on 'war' rather than 'wars' and assumed that all armed conflicts possessed comparable moral status; and second, that disagreeing with an elected government's decisions could be a matter of conscience. While critics of the Act conceded that a minority submits to the decision of the majority in a democracy, the decision to wage war raises moral issues so serious that compelling someone to render military service may reasonably be regarded as a matter of conscience and, therefore, an exception to the rule.

It was not until late 1968 that the courts clarified the scope of conscientious belief. In a case heard before the High Court<sup>28</sup>, Bruce Thompson claimed that the phrase 'any form of military service' in section 29A(1) of the National Service Act, meant that exemption was possible if an individual objected to 'any form of military service' including a particular war. The court was split. Chief Justice Barwick disagreed. The case was lost. The Department of Labour and National Service used Barwick's judgment to point out that:

it is open to a national service registrant, whose objection to military service is of a selective nature in that he holds a belief against participation in a particular conflict, to opt for part-time service in the Citizen Forces at the time for registration as an alternative to call-up for the full-time National Service.<sup>29</sup>

Furthermore, there were fears that legal recognition of selective objection could open doors to a general theory of selective obedience to law. The distinction between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to the payment of a particular tax, for instance, was apparently rather slight. Such recognition had the potential to erode public authority and destroy the fabric of government. There was also the additional complicating factor of distinguishing between political beliefs and party loyalties. The latter could involve all of the members of a political party seeking exemption from military service on the grounds that their party opposed a war. Those defending a right of selective objection note that it applies in the sole area where the executive government can compel personal service (which is different from paying taxes and obeying the speed limit). Personal service can also be compelled by the judiciary in the form of jury service and by the legislature in the form of compulsory voting. Both of these obligations are, of course, also accompanied by opt-out provisions.

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<sup>28</sup> *R v District Court of Queensland Northern District; ex parte Thompson*, [1968] HCA 48; (1968) 118 CLR 488.

<sup>29</sup> DLNS to Secretary, Prime Minister's Department, 11 December 1968, DLNS file 72/557.

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## Seventy-five years on: a new debate

Disagreements about selective objection continued until the end of Australian involvement in the Vietnam War and the proclamation of the *National Service Termination Act 1973*. Provisions relating to national servicemen were removed from the Defence Act in 1975.<sup>30</sup>

The debate was moribund until Michael Tate, a Labor Senator from Tasmania, proposed legislation to recognise a right to selective conscientious objection.<sup>31</sup> He later introduced a private members' bill into the Senate proposing changes to the *National Service Act 1951*.<sup>32</sup> The matter languished until 1990 when Senator Tate, by now the Justice Minister, circulated the first draft of a Defence Legislation Amendments Bill. It included recognition of selected conscientious objection for conscripts although the last national service trainee had been discharged from the Army in 1973. The service chiefs were mortified by the prospect of selected conscientious objection being offered even to conscripted personnel because they contended that some of the principles that applied to conscript service could (and would) be applied to volunteer service or create unhelpful confusion. These fears soon materialised when Leading Seaman Terrence Jones failed to report to HMAS *Adelaide* before the ship deployed to the Gulf of Oman in August 1990 to enforce United Nations' sanctions against Iraq after its invasion of Kuwait.

Leading Seaman Jones defended his action by saying (while he was absent without leave):

I am not a coward and I would be prepared to fight for my country, but I am taking a *political stand* because this is not our war, we are just following the Americans. I am prepared to die to defend my country but not to protect the United States oil lines.<sup>33</sup>

He inferred that it was moral to be political in this instance. Although the Defence Legislation Amendments Bill was still in draft form when Jones was declared absent without leave, the Greens (WA) Senator for Western Australian, Jo Vallentine, introduced a private senators' bill for 'An Act relating to conscientious objection to

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<sup>30</sup> Conscription could also take place under s. 60 of the *Defence Act 1903* which allows the Governor-General, by means of a proclamation, to call upon certain male persons to serve in the Defence Force at a time when there is a real or apprehended attack on or invasion of Australia. This Act does not recognise any right of conscientious objection.

<sup>31</sup> *CPD* (Senate), 23 August 1978, pp. 330–3, (Senator Tate).

<sup>32</sup> *CPD* (Senate), 28 October 1982, p. 1975, (Senator Tate).

<sup>33</sup> M. Metherell, 'RAN ship jumper attacks Bush', *Age*, 29 August 1990, p. 10, emphasis added.



certain Defence service'.<sup>34</sup> She described Leading Seaman Jones's decision as 'brave, courageous and principled', and believed he had 'very good reasons for not going.'<sup>35</sup> Jones was taking a political stand that Vallentine sought to protect as a matter of conscience. The inference was that a person's political beliefs were part of their moral conscience and therefore worthy of protection.

At his subsequent court martial, Jones was found guilty of being absent from his lawful place of duty without approved leave. He was sentenced to 21 days detention, reduction in rank to able seaman and forfeiture of four days pay. Jones then sought 'discharge at own request'. His court martial prompted an inquiry from the Human Rights and Equal Opportunity Commissioner, Brian Burdekin, who was concerned that the absence of any right of selective conscientious objection offended against the spirit the Human Rights and Equal Opportunity Act and was contrary to the International Covenant on Civil and Political Rights. In reply, the ADF insisted that:

an expectation that all *lawful* orders will be obeyed is fundamental to the maintenance of discipline ... Concomitant with this expectation there must exist a right ... to take disciplinary action where breaches of this fundamental obligation occur. In other words the right to enforce the obligation to serve is reasonable and not discriminatory. Accordingly, so far as volunteers are concerned, there is no scope for allowing for conscientious objection with respect to specified operations, or indeed combat generally, unless the matter is raised as a ground for discharge at own request.<sup>36</sup>

Recognition of conscience became a 'hot issue' again with the planned invasions of Afghanistan in 2001 and Iraq in 2003. Both operations provoked a great deal of discussion about the justification of Australian participation given the absence of any clear, unambiguous, immediate or direct threat to the Australian people and the national interest from either Afghanistan or Iraq. There were laments and complaints about both operations and many previously apolitical servicemen and women felt they and their skills had been used for domestic political advantage and international alliance leverage. This was very far removed from defending Australia and its national interests, some privately contended. Matters of conscience and the nature of obligation (a slight variation to compulsion) were again at the forefront of conversation. Based on my observations then and now, I would contend that the vast majority of ADF members have not actually thought much about the difference

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<sup>34</sup> Defence (Conscientious Objection) Bill 1990.

<sup>35</sup> *CPD* (Senate), 13 September 1990, p. 2313, (Senator Vallentine).

<sup>36</sup> Naval Support Command (NSC) Letter, Annex C, 'Human Rights Aspects of Conscientious Objection', to Assistant Chief of Defence Force (Personnel), October 1990, NSC file N90/32170, folio 56.

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between moral objections and political dissent, the majority do not know how to differentiate between them, and even fewer have thought about what they would do if confronted by a moral objection within their service.

Objection to military service always implies some degree of conflict in values between the state and the person who objects. But when the objector is not a pacifist, but selectively objects to military service because of the alleged immorality of the purpose or the legality of the methods used in combat, the conflict of values becomes much more acute and the resolution much more problematic. This is particularly so when objectors contend that the state's actions violate international law. No democratic government concerned about public opinion would be prepared to entertain such an admission by recognising such an objection. Yet, the recognition of a right to *selective* conscientious objection is a crucial one because it establishes the principle that wars and conflicts can be just and unjust and that agreement to serve in the armed forces ought to be conditional. This debate needs to continue. In the current absence of conscription, national service and universal military training, it is a favourable time for a new consensus to be sought.

### **The shadows of 1916**

The 1916 conscription referendum highlighted and worsened sectarian tensions within Australia—tensions which have since dissipated. But it has left a positive lasting legacy in the form of respect for conscience. Since joining the Navy 37 years ago, I have noticed a very substantial shift towards respect for the personal convictions of uniformed men and women. This is a welcome development. But conceptual challenges remain. I would contend that the two most pressing challenges are explaining the distinction between objection and opposition, and ensuring that moral conversation is not proscribed as incitement to mutiny within or beyond the ADF. Trying to pursue mission objectives with both effectiveness and efficiency while giving conscience due regard is not easy. I realise there is impatience with suspected or declared conscientious objection among volunteers, impatience reflected in the retort: 'if they don't approve they are free to leave'. But I would respond in two ways. First, what if their objection is valid because a planned action is morally objectionable? The presence of conscientious reflection in a unit may be crucial to preventing immoral and potentially illegal behaviour. Second, should a career be ended because a person thinks that their participation in one activity is incompatible with their moral conscience and seeks an alternative form of military service?

But the pressing issue is the difficulty of differentiating morals from politics to the extent that such a distinction is ever possible. I have met many people claiming to profess a moral objection when their position is no more than political dissent. They think that something is bad (by which they mean a poor option) rather than wrong (by

which they mean defying a principle). The present approach—to deal quietly and confidentially with individual cases of conscientious objection—is workable but unsustainable. It is presently workable because these cases are few in number while those involved usually prefer privacy and anonymity. I am not sure that this approach will be adequate given the evolving weapons, tactics, scenarios and corporate risk aversion associated with current and likely future operations.

Nonetheless I am confident that we can host a mature discussion that will be principled and pragmatic in balancing the nation's military manpower needs with respect for individual conscience. It is a discussion that necessarily involves parliamentarians and their staff, ethicists and uniformed people. I have already involved my academic colleagues and the military staff at the Defence Force Academy and I would welcome the chance to engage with the very able minds that work in this place as well.



**Question** — Thank you very much; it was a most enjoyable and sustaining presentation. There are two things I would like to clarify. First, did Prime Minister Cook's legislation pass? You mentioned it was supported by Kitchener.

**Tom Frame** — Yes it did. There was a statute that provided for universal military training for 18 to 60- or 65-year-olds in the ensuing period. That did get up. Lord Kitchener supported it. It was put up by Deakin and was passed the following year.

**Question** — Did it relate to service?

**Tom Frame** — No, just training, because there was already a provision on service in the Defence Act of 1903.

**Question** — My second question was on the Michael Tate amendment: did that get lost in the wash?

**Tom Frame** — No it didn't. It became part of a cluster of amendments to the Defence Act in 1992 and made Australia the only country in the world that has legislated for a right of selective conscientious objection for conscripts. I think we remain the only country in the world to have so legislated.

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**Question** — I have two questions. Is national service still on the statute books? Does the government have the power to conscript people?

**Tom Frame** — I don't believe it does. The *National Service Termination Act 1973* terminated national service. There is legislation that could be pulled out hurriedly and I presume put to parliament and passed. I believe the force and effect of the 1973 Act is that the Commonwealth would have to, if you like, bring a bill back to parliament. In 1964 the Act was dormant. My understanding is that the government is not empowered to do that now.

**Question** — So if they did bring it back they would not need a referendum as such?

**Tom Frame** — No. They did not need a referendum during the Great War either. There was no constitutional amendment involved in anything that was happening. It was to try to get a mandate for a particular action. In the same way, this parliament could decide matters in relation to the Marriage Act; it doesn't require an amendment to the Constitution. They called it a 'referendum', but 'plebiscite' is a better description of what it is. If it came back tomorrow, it wouldn't need that. The parliament could decide: a bill to reintroduce national service would be put to the parliament, passed, and then presumably the government could decide to act on it or not.

**Question** — My second question relates to the power of the prime minister to declare or involve us in war and the discussion you are initiating. Is that included in your wide view of this?

**Tom Frame** — This is a matter I have discussed with the 25th Prime Minister of Australia, John Howard. I have discussed it at length with him because I was involved in some conversations before the war in Iraq. I had certain understandings which I made plain in the *Australian*. I regretted the things I had said before the war, and I wrote an equally large article in the *Age* saying that I was wrong. That earned me notoriety on Al Jazeera, but nonetheless I thought it was the right thing to do. I hadn't necessarily supported a vote, say, of both houses of parliament sitting together passing a motion to declare that we would involve our people overseas. I hadn't taken that view, but I have moved in that direction since that time because it does seem to me of such gravity, not just to the people we send but to the people they meet on the other end. It does seem to me that this is a matter of gravity that we may formalise or regularise. You might, if I understand your question, suggest that it be beyond, for instance, the national security committee of cabinet and that it might be put to a broader test of support.

I have to say that I am moving in that direction. I know that Mr Howard has not moved at all, but we can have a friendly exchange on that. But I welcome the chance to tell him why I think in relation to Afghanistan and Iraq, for instance, there could have been other ways of doing it and more people from whom to seek a mandate. The question arises though: would you require that to happen if we quickly had to go to another Rwanda or Somalia? Would you want both houses of parliament sitting together to have a resolution to that effect, or would you say: 'No, that is the kind of thing we ought to be doing. We should do it straight away. Let's not delay. Let's go and do that.'? Because we do not declare wars anymore, we have deployments and we have armed conflicts and things like that, putting a fence around that thing that you want a bigger mandate for is a challenge in itself. But I should stop because I have asked you a question!

**Question** — I think it depends on the circumstances obviously and there is no one simple answer. It is certainly a matter for discussion.

**Tom Frame** — On Iraq and Afghanistan, I have to say, I am moving in the direction of saying that it would have been better with a much larger parliamentary mandate and therefore greater political legitimacy.

**Question** — I'd like to ask you about something where the dust has already settled. I was a strong opponent of the American rape of Vietnam. I am wondering if you would like to tell us what the Australian armed forces and the American armed forces achieved for ordinary Americans and for ordinary Australians. What did they achieve for ordinary Vietnamese? I note that Robert McNamara, the main architect of the war against the people of Vietnam, a few years before his death, turned up at the university of Hanoi and said to the staff and students there, among other things: 'We didn't know anything about you. I have now come to the conclusion that our participation in that war against you was wrong.' It is in his book, *The Fog of War*, and the film. So what do you think? What about these phoney theories about the dominoes?

**Tom Frame** — I can only answer one question. I would have to say, together with McNamara and many others, that both the decision to conduct the war in Vietnam and the manner in which it was conducted are low points for Australia and the United States. I think there is a great deal of regret about how it was done and the difficulties of achieving practical outcomes. It was the case that, in South Vietnam at least, there were a number of instances where the people democratically made their mind plain that they did not want to be connected to North Vietnam. That was not a system of government that they wanted and I think that has to be conceded. Having said that, the

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way in which the war was fought does seem to me to be removed from countries like ours. I don't think anyone would say that we had a moral mandate to be there.

I am always sensitive when I talk about Vietnam. I only remember it as a child growing up and being moved to tears in 1969 when Vietnam veterans were booed. I thought the target was wrongly chosen. But I would say that when people did go there they had their own views that it was right, that they thought they were doing something that was positive and productive. I am always anxious not to say that they did something that was inherently evil or wrong, or that there was nothing good in what they did. The war itself was misguided and the conduct of it, as everyone has said, was a low point both in diplomacy and in the conduct of a campaign. We still learn lessons from Vietnam, both diplomatic and political lessons, as we ought, and even in terms of how to do counterinsurgency—not that we do that any better, but at least we are better informed about the bad decisions that we might make.

**Rosemary Laing** — I have a question about the 1916 referendum, so called. It is incredible that, at a time when voting was not compulsory, the turnout was so extraordinary. How did people get their information about the terms of the question or the issue? Clearly the churches played a big role. Was there such a thing as a yes or no case? How did the ordinary voter get to engage with those issues?

**Tom Frame** — I think broadly there were three ways. One of them was that they had personal contact with their member of parliament, if they were in a major urban centre and not where it was difficult for the local member to get out and about. That was principally the way. We have got plenty of records of speeches given by the MP for wherever it may have been in support of or against the referendum question. The second way was of course newspapers. People relied heavily on newspapers. Not having radio or television and the internet a space-age thought, they would just acquire newspapers. It is one of the great sadnesses: I think good thought produces good writing and one of the reasons a lot of public conversations are impoverished is because people do not write; it is just grabs and words. When you write you have to put words on a page that don't have all the trickery of oratory. So papers were important. Things like the *Australian Worker* saying, 'This paper supports this view', or the *Bulletin* presenting an argument, were important. In terms of interaction with other people, where would you have a discussion? It was the case, if you look at the census, you are looking at say 96 per cent of the population belonging to four major denominations. Regular churchgoers were probably only about 35 per cent in that period. But people would hear a sermon, have a discussion or whatever else it might be, bring that home and that would continue because there were no other ways—that was a form of entertainment. So I would say those are the three main ways.

There is more than I have written, but not what I have read, concerning the churches because they were so influential in shaping votes. It is not possible for us to say that all Anglicans voted this way or Catholics voted that way, but if the oratory and the vehemence of it had any effect, and it was said to be sectarian, then you would think people would line up according to what their priests, pastors or ministers were urging. It is true too that people who had served or were thinking about serving had a lot of skin in this game, so to speak. So it was a matter of lively conversation. There were not so much attempts to stop those who were coming back who had been wounded from speaking, but they were powerful advocates when they did speak against the yes case. Therefore I think the fact that 82 per cent of people turned out is highly significant.

We first of all went to having compulsory registration for voting and later to compulsory voting and, if I could put in a small plug, our university is having a one-day conference looking back on the 1996 election and the first year of the Howard Government on 16 November. That is relevant to this conversation because Albert Langer advocated a way of voting in the 1996 election which was then made invalid immediately afterwards by the parliament here. But it seems to me to be in one sense illiberal if you say on the one hand, 'I don't think people should be compelled to vote', then say over here, 'People should be compelled to vote but only within these narrow parameters.' My colleague, Andrew Blyth, who is the centre manager where I work, is working on this. I think they are important issues. When it came to the referendum, you had yes or no options, people didn't need to be compelled and 82 per cent were there. The interesting thing is that when Senator Herbert Payne moved a motion for compulsory voting he said, 'The people can't be allowed to not be interested!' His view was that having compulsory voting would lead to a happy outcome where people would be knowledgeable about their nation's affairs. Making them vote would mean they could not ignore politics. There had already been a notable decline in voting for the nine elections where it was not compulsory. I am a strong believer in compelling the people to vote because it does not have that factor that I observed when I was in the UK. I was the local vicar at Anne Boleyn's Church in Kent and a man came up to me and said, 'Oh Vicar, you must pray on Thursday for rain.' I said, 'Why should I do that?' He said, 'Because the socialists won't vote!' We are talking here about 1997 and the view still held that the rain would have a democratic effect and I did not want that to be the case. So that is why I hold—you may disagree with me, and please do—that we take out a whole range of extraneous factors. But making the people decide in 1916 I think was important. It was an ancillary thing to say, 'If you are going to do this, you put your hand to it as well', but I think it was an important thing.





## **Parliament, the Executive and Vice-Regal Reserve Powers: Heading Off Crises in a Closely Tied Parliament \***

*Anne Twomey*

### **Harry Evans and 1975**

One of the most striking aspects of the 1975 dismissal controversy is the enormous risk that was involved. The crux of the crisis was the failure to secure the passage of supply and the risk to the economy and public sector workers when the government ran out of money. If the parliament had been dissolved without supply having been passed, it would have caused the very financial crisis that Kerr was seeking to avoid by the dismissal of the Whitlam Government. It was therefore essential that supply be secured before the parliament was dissolved, on the day of the dismissal.

Knowing this, Harry Evans, as a young officer of the Senate, took the view that the governor-general would not dismiss the prime minister, because the risk of failing to secure the passage of supply was too high.<sup>1</sup> There were procedural tactics that could have been used by the Labor Party to delay the passage of supply in the Senate, as the Coalition had already done, so that the House of Representatives could continue to operate and force the governor-general to respond to its vote of no confidence in the Fraser Government. Harry therefore bet a colleague that Kerr would not dismiss Whitlam. He lost.

The question remains, however, how did Kerr anticipate that Fraser would be able to secure supply once it was known that the Whitlam Government was dismissed? How could Kerr possibly have guessed that upon being dismissed, Whitlam would go back to the Lodge for lunch rather than go to parliament and tell his Senate colleagues? The likelihood of that happening must have been infinitely small, even though it did in fact happen. Perhaps Kerr had read Whitlam better than generally believed—that despite weeks of speculation about the possibility of the dismissal of the Whitlam Government, speculation that had even led Senate officers to bet on it occurring, Whitlam's overwhelming hubris had caused him to give no serious contemplation to this prospect or how tactically to deal with it or thwart it. Further, Kerr must have reasoned that Whitlam's contempt for the Senate and belief in the supremacy of the

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\* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 4 November 2016. The Harry Evans Lecture commemorates the service to the Senate of the longest serving Clerk of the Senate, the late Harry Evans.

<sup>1</sup> Harry Evans, '1975 Revisited – Lost Causes and Lost Remedies', in Michael Coper and George Williams (eds), *Power, Parliament and the People*, Federation Press, Sydney, 1997, pp. 157–8.

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House of Representatives would cause him to focus solely on the House and not realise the crucial role of the Senate. If that was Kerr's reasoning, he was surprisingly prescient but nonetheless engaged in a high-risk enterprise. It could have so easily failed and ended up with Whitlam being reinstated to office and Kerr either being forced to resign or dismissed.

Harry Evans concluded<sup>2</sup>, and I agree, that it was most likely that neither Kerr nor Whitlam had fully thought through how the parliamentary aspects would work in conjunction with the reserve powers. That is why, in this Harry Evans lecture, I thought it was timely to explore the interaction between parliament and the reserve powers, particularly in the context of a government with an extremely slim majority in the House of Representatives. By doing the anticipatory war-gaming, it may avert circumstances arising where the exercise of the reserve powers might be contemplated.

The other important observation to make is that back in 1975 we had a rather unsophisticated view of the reserve powers—some powers were put in a 'reserve powers box', others were not, and the only guidance as to when a reserve power could be used was derived from irregular and unsatisfactory precedents. After thinking about this a lot over the past few years, I would argue that we should avoid boxes and focus instead upon the constitutional principles at play and how conflicts between them ought to be resolved. The power to summon or prorogue parliament might therefore be regarded as a reserve power, but only in circumstances where its exercise supports or reinforces constitutional principles such as responsible and representative government.

### **Accidental vote of no confidence**

Given the tight numbers in the current House of Representatives, what are the constitutional ramifications if a vote of no confidence in the Turnbull Government is passed by the House of Representatives simply due to the absence of government members, be it because they left early for home, or the pairing system has broken down, or government members are otherwise absent due to illness or other reasons? Would the government have to resign? Could it advise a dissolution? How should the Governor-General respond?

The general principle of responsible government is that a government defeated in the lower house must either resign or advise a dissolution, and that if it proceeds to govern without the confidence of the lower house, then the governor-general is entitled to exercise the reserve power to dismiss it. There is an exception, however,

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<sup>2</sup> *ibid.*

where a loss of confidence appears to be temporary only. In such a case the governor-general should give the government a reasonable amount of time to establish the restoration of confidence on the floor of the House, by way of a vote of confidence in the government.

This view was put by Sir John Madden when he was Chief Justice and Lieutenant-Governor of Victoria. He said:

The Governor does not, of course, use his authority to dismiss his Ministers except in a case where they have really and permanently lost the confidence of the House, but persist notwithstanding in retaining their offices. In a case where they have only technically and temporarily lost their majority the Governor would, I venture to think, always await the Premier's resignation, if he saw fit to tender it, or would treat the vote carried against him as something unreal and accidental.<sup>3</sup>

The same principle is reflected in laws for fixed-term parliaments in some of the Australian states. After a vote of no confidence in the government and before the governor takes any action with respect to dissolving parliament, there is a period of eight days during which the government has the opportunity to restore confidence.<sup>4</sup>

There have been occasions, however, where an accidental loss of confidence has brought down a government. The classic case is the King-Byng affair in Canada in 1926. In 1925, Mackenzie King's Liberal Government lost its majority at the election, but continued to govern as a minority government with the support of the Progressives. After a scandal in the customs department, with a censure motion against him pending, King sought a dissolution from the Governor-General, Lord Byng. Byng refused it as the previous election had only been held eight months ago. King then resigned and the Governor-General appointed the Conservative leader, Arthur Meighen, as Prime Minister. At that time, Meighen held the support of the Progressives. Meighen's government survived several votes on confidence issues, but fell by one vote when a pairing arrangement was broken. The member who breached the arrangement claimed that he had dozed off in the chamber and voted by accident before realising that he had been paired.<sup>5</sup>

While Meighen could have argued that this was no more than a technical defeat and sought to carry on, he instead requested a dissolution. This was because he actually

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<sup>3</sup> Memorandum by Sir John Madden, Lieutenant-Governor, to Mr George Elmslie, Premier, 19 December 1913: Public Records Office of Victoria VPRS 7571/P001/18.

<sup>4</sup> See, for example: *Constitution Act 1902* (NSW), s. 24B; *Constitution Act 1975* (Vic), s. 8A.

<sup>5</sup> Roger Graham, *Arthur Meighen – A Biography*, vol. II, Clarke Irwin, Toronto, 1963, p. 445.

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wanted a dissolution, as it would have been difficult to carry on governing in minority with the precarious support of the Progressives.<sup>6</sup> The Governor-General, with no one left who could form a government, granted the dissolution to Meighen, causing a significant controversy.

If an accidental defeat on confidence occurred in relation to the Turnbull Government, just four months after the double dissolution election on 2 July 2016, and the Prime Minister requested the Governor-General to dissolve the parliament, should the Governor-General do so? While for the most part vice-regal representatives tend to grant dissolutions as and when requested by their responsible advisers, they do have a well-recognised reserve power to refuse to do so. It is commonly accepted that one ground upon which a governor-general may refuse a request for a dissolution is that it is too soon after the previous election. Here, the principle of representative government applies. The vote of the people should be respected and the elected parliament given a reasonable opportunity to function. It is also recognised that frequent elections are costly, cause disruption for the community and will not necessarily give rise to a different result. The voters should not be required to keep going back to the polls until they ‘get it right’ according to the view of the prime minister.

So how long after an election is a sufficient period before a new election can justifiably be called? The Canadian Governor-General, Adrienne Clarkson, when faced with a minority federal government in 2004, took the view that it would be irresponsible to agree to the holding of an election within six months of the previous one, but that after that she would probably grant a request.<sup>7</sup> Looking across the various precedents, the first six to nine months is the period in which a dissolution is most likely to be refused.

If, however, there is no one else who can form a government, then the prime minister has the governor-general over a barrel. If, as in the case of the King-Byng affair, the Turnbull Government were to be refused a dissolution upon suffering an accidental defeat on confidence and it resigned, then it would be unlikely in the present parliament that the opposition could form a government, particularly once the Coalition’s numbers were restored to full strength after whatever accident that had caused its defeat had ended. To appoint the opposition leader as prime minister and then grant him an election would be inappropriate, as Lord Byng discovered in 1926, with the better course being the restoration of the former government and the grant of a dissolution to it.

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<sup>6</sup> The Progressives had also strongly objected to the tactic of appointing temporary ministers in order to avoid the requirement that they resign and seek election once appointed as ministers. Hence there may also have been a substantial loss of confidence in the Government.

<sup>7</sup> Adrienne Clarkson, *Heart Matters*, Viking Canada, Toronto, 2006, p. 192.

On this basis, in the face of an accidental defeat in the parliament, even though a request by the Prime Minister for a fresh election would be unconscionably early, the Governor-General would most likely grant it (unless he could persuade the Prime Minister to withdraw the request and continue governing), given that it would be unlikely that any other government could be formed that would maintain the confidence of the House in its current composition.

### **Temporary loss of confidence pending by-elections**

Another possible scenario is that the current government could lose its majority in the lower house due to the death or resignation of two or more of its members. What can be done in those circumstances to fend off defeat in the House pending by-elections which the government may have a good chance of winning? The common course here is for the prime minister to advise the governor-general to prorogue the parliament until after the by-elections, so that any confidence motion can be dealt with by a full complement of members in the House.

Does the governor-general have a reserve power to reject advice to prorogue parliament? Prorogation has not traditionally been placed in a 'reserve power box', but in recent years there has been growing acceptance, especially after the Canadian controversy of 2008, that in some circumstances the governor-general may refuse advice to prorogue parliament. This includes cases where a government has lost confidence and is trying to avoid accountability to parliament. In form, therefore, a request by the prime minister to the governor-general to prorogue parliament to avoid a vote of no confidence pending the holding of by-elections, would fall into the category where prorogation could be denied. However, here the key is again the temporary nature any loss of confidence. It would be absurdly costly and disruptive to change government at the point that members die or resign and then restore the previous government once the by-elections are held and safe seats have been filled by candidates from the same party. Moreover, the principle of representative government would also support the argument that all places in the House should be filled before it decides on such a critical issue as confidence in the House.

This is so, as long as the by-election is held as soon as reasonably practicable and the resignation is not simply a tactic used to avoid or delay a pending vote of no confidence. Such manipulation occurred in Tuvalu in 2012–13, where first there was a six-month delay in holding a by-election to fill a seat when the government had lost majority support. Following that, the government simply did not reconvene parliament, so that there could not be a vote of no confidence in it. The Governor-General eventually broke the impasse by exercising a controversial reserve power to summon parliament to sit, against the wishes of the Prime Minister. The Minister of

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Health then resigned his seat and the Speaker announced that there could be no vote on the issue of confidence while a constituency lacked representation.<sup>8</sup>

The controversy escalated, with the prime minister advising the Queen to dismiss the Governor-General because of his exercise of a reserve power and the Governor-General then dismissing the Prime Minister. This ‘race to the palace’ showed, incidentally, that the governor-general always wins, because his or her action has immediate effect in sacking the prime minister, while the palace instead engages in ‘masterly inactivity’ and then discards any advice of a prime minister who has since been dismissed. The Tuvalu Parliament was again summoned by the Governor-General, in a further exercise of the reserve powers, the house voted no confidence in the dismissed government and a new government was formed.

A somewhat less tumultuous example occurred in Western Australia in 1971. The Tonkin Labor Government lost its majority when the Speaker died. It sought the prorogation of the house until the by-election was held. Here, unlike in Tuvalu, there were no unconscionable delays in holding the by-election and no strategic resignations. The Governor granted the prorogation in the circumstances (especially because it was a safe seat), but considered that he had a reserve power to refuse to do so.<sup>9</sup>

The British Foreign Secretary, when asked for his views, observed that the decision of whether or not to prorogue was a matter within the Governor’s ‘personal discretion’.<sup>10</sup> The Governor’s official secretary also told the press that the Governor was not bound to act on advice in such matters.<sup>11</sup> In exercising his discretion to support the Premier’s request for the prorogation of parliament, the Governor took into account that the last general election had been very recently held, so a fresh one was not warranted and that any loss of confidence was likely to be of a temporary nature.<sup>12</sup>

A third example of interest concerns the McGowan-Holman Labor Government in New South Wales in 1911. Labor had a slim majority which was lost when two of its country Labor members resigned their seats in protest at a decision concerning rural

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<sup>8</sup> Affidavit of Eselealofa Apinelu, Attorney-General of Tuvalu, ‘Statement of Facts’, 1 August 2013, *In the matter of the Constitution of Tuvalu*.

<sup>9</sup> See further: Gerard Horgan, ‘Prorogation as a Partisan Tool: The Western Australia Experience’, 28 September 2012: [http://www.academia.edu/4721026/Prorogation\\_as\\_Partisan\\_Political\\_Tool\\_The\\_Western\\_Australia\\_Experience](http://www.academia.edu/4721026/Prorogation_as_Partisan_Political_Tool_The_Western_Australia_Experience).

<sup>10</sup> Letter by Sir A Douglas Home, Foreign Secretary, to Sir D Kendrew, WA Governor, 13 December 1971: TNA: FCO 24/1037.

<sup>11</sup> *The Weekend News*, 8 October 1971, quoted in: Peter Johnston, ‘*Tonkin v Brand*: Triumph for the Rule of Law’ in George Winterton (ed), *State Constitutional Landmarks*, Federation Press, Annandale, 2006, p. 232.

<sup>12</sup> Athol Thomas, ‘Has Mr Tonkin been a cad?’, *Canberra Times*, 16 October 1971, p 9.

leaseholds. Holman survived an initial vote of censure thanks to another sleeping member who was counted as voting on the side of the chamber on which he happened to be slumbering. Unable to secure an adjournment, he advised the Lieutenant-Governor to prorogue parliament until after the by-elections. The Lieutenant-Governor, Sir William Cullen, who was also the Chief Justice, refused.<sup>13</sup>

Holman then calculated that a tactical resignation of the government would be better than a defeat on the floor of the house. He concluded, correctly, that the opposition leader would struggle to govern, as he would have to rely upon the independents, and that the Lieutenant-Governor would not grant the opposition leader a dissolution while there was an undefeated alternative government waiting in the wings, especially as the last general election had only been held eight months ago. Holman's plan succeeded. The opposition leader was unable to form a new government and the Lieutenant-Governor was therefore forced to reinstate Holman and grant him his prorogation until the by-elections were over.

Holman faced all sorts of woes in maintaining his majority. He next managed to lose it when his majority of one toppled over the balustrade of a staircase in Parliament House while attempting to avoid a Hansard reporter, and ended up in hospital.<sup>14</sup> On this occasion, his government survived by pairing the fallen member with the opposition's aptly named Mr Fell. When the pairing system was later threatened by the opposition, Holman publicly claimed that they would wheel the injured member into the house on his bed from the hospital next door so that he could vote. The opposition immediately backed down as the photo opportunity would be too powerful. Hence the pairing system survived.<sup>15</sup>

Holman's pairing experience suggests that undermining the conventional courtesies of the parliament may not be a wise course for an opposition. It can lead to a public backlash and the impression that the opposition is not fit to govern. Moreover, Holman's prorogation experience suggests that if the Turnbull Government lost its majority through the death or resignation of two or more members, it could reasonably seek the prorogation of the House until the by-elections were held, assuming this was done without undue delay. While the Governor-General would have a reserve power to reject such advice, it would be wise for him to accept it if there were no real prospects of the opposition forming a government that held the confidence of the House and the government was likely to win the by-elections.

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<sup>13</sup> See further: Anne Twomey, 'How to Succeed in a Hung Parliament', *Quadrant*, vol. 54, no. 11, November 2010, p. 39.

<sup>14</sup> 'Accident at Parliament House', *Sydney Morning Herald*, 25 August 1911, p. 7; 'Accident to Mr Meehan, Sydney', *The Brisbane Courier*, 25 August 1911, p. 5.

<sup>15</sup> W. Holman, 'My Political Life', reprinted in: M Hogan (ed), *The First New South Wales Labor Government 1910–1916*, UNSW Press, Sydney, 2005, p. 53.

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## **Imposition of an early election against the wishes of the cabinet**

If a prime minister is facing imminent defeat within his or her party, can he or she call an early election, against the wishes of ministers and the parliamentary party, as a means of imposing discipline on the parliamentary party and galvanising support for his or her leadership position? Jack Lang tried this when Premier of New South Wales in 1927. He asked the Governor for a 'dissolution in secret'.<sup>16</sup> What he meant was that he wanted to pressure his cabinet colleagues by showing them that he had in his pocket the governor's agreement to a dissolution. The Governor said he would only act publicly, not in secret. He consulted the Chief Justice (as was standard practice, pre-1975). The Chief Justice noted that while the prerogative of dissolving parliament belonged to the Governor, he doubted whether it would be wise to exercise it, other than in exceptional circumstances, against the wishes of a majority of the Executive Council.<sup>17</sup>

The Governor therefore insisted that the matter be put before the full Executive Council. Only Lang, and possibly one other minister,<sup>18</sup> voted in favour of a dissolution, with all the rest opposing it. The Governor accepted the view of the majority and did not grant a dissolution at that stage. Instead, he encouraged Lang to resign as Premier so that he could be reappointed and form a new ministry. This was done on the condition that Lang would advise a dissolution as soon as new electoral rolls were prepared.<sup>19</sup>

This was an unusual approach and it is unlikely that a vice-regal officer would call a full meeting of the executive council today to ask its members to state whether or not they agreed to an election. These days it is regarded as being up to the prime minister, rather than the cabinet, to determine the election date (in the absence of fixed-term elections).

If, however, it was clear that the prime minister no longer held the support of a majority of his parliamentary party, and was therefore likely no longer to command the confidence of a majority of the house, then the governor-general might well hesitate before acting upon advice from the prime minister to dissolve parliament, as the prime minister's responsibility to parliament would be in doubt.

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<sup>16</sup> Sir Dudley de Chair, *Memoirs*, Vol VI, Imperial War Museum ('IWM'), 98.

<sup>17</sup> Letter by Sir Philip Street to Sir Dudley de Chair, 25 May 1927: IWM DEC/5.

<sup>18</sup> De Chair, in his memoirs, stated that only Lang wanted a dissolution: Sir Dudley de Chair, *Memoirs*, Vol VI, IWM, 98–9. In Lang's account, he was supported by one other minister: J T Lang, *I Remember*, McNamara's Books reprint, Sydney, 1980, p. 325.

<sup>19</sup> See further: Anne Twomey, 'Sir Dudley Rawson Stratford de Chair' in David Clune and Ken Turner (eds), *The Governors of New South Wales 1988–2010*, Federation Press, Annandale, 2009, pp. 468–9.



When Sir Joh Bjelke-Petersen lost the support of his parliamentary party in November 1987, the Governor warned him that if he sought to resign and be reappointed, as Lang had done 50 years before, the Governor might decline to reappoint him. While the Governor was not prepared to dismiss Sir Joh from office, in the absence of a vote of no confidence in him upon the floor of the house, he might well have hesitated to grant Sir Joh a dissolution if he had advised it. Indeed, the Governor had been given a legal opinion, prepared at the request of the National Party in October 1987, in anticipation that Sir Joh would seek a dissolution against the wishes of his party and ministry. The opinion contended that the Governor should refuse advice to dissolve parliament if it was given by the Premier contrary to the wishes of the Executive Council and a majority of the house.<sup>20</sup> If the issue had arisen, however, delay in dealing with it, rather than outright refusal, would have been all that was needed as the existing political pressures would soon have resolved the issue without the need for any exercise of the reserve powers.

### **Royal assent to a bill passed against the government's wishes**

Another scenario, this time raised by my students, is what would happen if a private members' bill to implement same-sex marriage passed in the House of Representatives, due to one or more Liberals crossing the floor, passed the Senate and was presented to the Governor-General for assent? Imagine that the National Party members of the Coalition demanded that the Prime Minister advise the Governor-General to refuse assent to the bill, or face the termination of the Coalition agreement, sending the Liberal Party into minority government. Could the Prime Minister rightly tell the National Party members that it would be unconstitutional to advise the Governor-General to refuse assent? What would the Governor-General do if he received advice to refuse assent to the bill?

This scenario raises the as yet unresolved question of whether the grant of royal assent is a legislative act or an executive act. Is the governor-general, in giving assent to bills, acting upon ministerial advice, as part of the executive, or the advice of the two houses, as part of the parliament? In practice, it is the clerks on behalf of the presiding officers of parliament who present bills to the governor-general for assent. Apart from a certificate from the attorney-general that there is no legal impediment to giving assent to the bill, there is no ministerial advice to the governor-general to assent. Assent does not occur in executive council and there is no counter-signature indicating ministerial responsibility for the decision, as is otherwise the case in relation to formal acts by the governor-general.

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<sup>20</sup> Opinion by G L Davies and C D Gilbert, 'Ex Parte: National Party of Australia Queensland – Joint Opinion', 12 October 1987.

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Judicial authority on the issue is inconclusive. While some reference is made in cases to the Governor-General acting as part of the ‘Crown in Parliament’ when granting royal assent,<sup>21</sup> much of the commentary is unfocused or contradictory. For example, in a 2015 Canadian case,<sup>22</sup> Rennie J stated that royal assent is ‘the final stage in the legislative process’ and that it is given on behalf of the Queen in Parliament.<sup>23</sup> He then observed:

In granting assent, the Governor General does not exercise an independent discretion. He acts on the advice of the Prime Minister. Assent must be given to a bill that has passed both Houses of Parliament; to withhold assent would be inconsistent with the principle of responsible government.<sup>24</sup>

These statements are potentially contradictory. If assent cannot be withheld to a bill that has passed both houses, then presumably the governor-general is not bound to act upon the advice of the prime minister in relation to assent if, for example, the prime minister advises the governor-general to refuse assent to a bill that has been passed by both houses.

At a more fundamental level, this issue raises a clash between the principles of representative government and responsible government. Under representative government, the people elect their representatives, and it is the votes of these representatives in the parliament that must prevail. Under responsible government, the governor-general acts upon the advice of his or her ministers who are responsible to parliament for their actions.

Where ministers advise the deferral or refusal of assent because a serious error in a bill has been identified after its passage but before assent<sup>25</sup>, then these principles can be reconciled because it is likely that a majority of the parliament, or at least the lower house when there is a majority government, would also support such a deferral or refusal of assent in order to allow the error to be corrected rather than immediately come into force.

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<sup>21</sup> See, eg: *Re Scully* (1937) 32 Tas Law R 3, 30 (Clark J); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 193 (Kirby J); and *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 455 (Dawson J).

<sup>22</sup> *Galati v Governor-General of Canada* [2015] FC 91 (Federal Court, Canada).

<sup>23</sup> *Galati v Governor-General of Canada* [2015] FC 91, [43]–[45] (Rennie J).

<sup>24</sup> *Galati v Governor-General of Canada* [2015] FC 91, [46] (Rennie J).

<sup>25</sup> Note that if commencement of the Act or the relevant provision can be deferred, then this is the appropriate course to take. But if the Act commences upon the grant of assent, and the effects of the error are both deleterious and unable to be adequately compensated for, then deferral of assent until corrective legislation can be passed, might be appropriate.

For example, in 1898 the Lieutenant-Governor of Ontario refused assent to a bill that contained an error and the Journals of the Legislative Assembly recorded that this was done on ministerial advice, ‘it being understood that the Legislative Assembly also desires such withholding of assent thereto’.<sup>26</sup>

However, where the reason for ministers advising the refusal of assent to a bill is that the government was defeated in the lower house on the bill, this brings into question their responsibility and suggests that the principle of representative government should prevail, given that ministers cannot claim to command the confidence of the lower house, at least with respect to this particular bill.

The principle of responsible government is a two-way street—while the head of state must act upon the advice of responsible ministers, ministers must maintain their status as responsible to parliament in order to be entitled to give that advice. The whole *raison d’être* of responsible government is to give primacy to parliament by ensuring executive accountability to it. It would seem illogical, therefore, for the principles of responsible government to be relied upon to override the will of parliament.

This point has also been made by Nick Barber in the United Kingdom. He argued that:

The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law. But just as it would be undemocratic to allow one person – the Monarch – to veto legislation, so too it would be undemocratic to give this power to the Prime Minister. In short, when presented with a bill that has passed through Parliament in a proper manner, the duty of the Monarch is to give assent – irrespective of the advice of her Ministers. There is no room for discretion. On its best interpretation, this is what the convention requires: if the Monarch were to accept the advice of her Prime Minister on this issue, she would be acting unconstitutionally.<sup>27</sup>

An example of a government advising the refusal of assent to a bill passed without its support arose in New Zealand in 1877. The Prime Minister, Sir George Grey, advised the Governor to refuse royal assent to a land bill. The bill had been introduced by the previous government, but continued in its progress under Grey’s government and had been amended in a manner contrary to the government’s wishes. Grey advised the Governor, Lord Normanby, to refuse assent.

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<sup>26</sup> Ontario, *Journals of the Legislative Assembly of the Province of Ontario*, vol. 31, 17 January 1898, p. 188.

<sup>27</sup> Nick W. Barber, ‘Can Royal Assent be Refused on the Advice of the Prime Minister?’, UK Constitutional Law Blog, 25 September 2013, <http://ukconstitutionallaw.org>.

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The Governor rejected this advice. He noted that ministers were entitled to oppose the bill in parliament, but he could not see why they should be able to defeat it at the assent stage if they could not do so in the parliament. Grey then refused to provide the governor with the legal advice authorising him to assent to the bill. The Governor escalated the crisis by declining to give assent to an appropriation bill. Grey capitulated and signed the document and the Governor gave assent to both bills.<sup>28</sup>

Grey complained to the British Secretary of State, arguing that the Governor was constitutionally obliged to act on his advice and had failed to do so. The Secretary of State for the Colonies supported the Governor in declining to act upon advice to refuse his assent.<sup>29</sup>

This is, of course, a very old example. It is very difficult, however, to find a more recent example<sup>30</sup> because in practice governments that are defeated in parliament do not advise the refusal of assent to the relevant bill. This may be because the government's defeat on the bill is regarded as a vote of no confidence, causing the government to fall, or because advising the governor-general to refuse assent to a bill passed by both houses may be so politically provocative that it would cause a vote of no confidence in the government. A third reason might be because of the uncertainty about whether or not the governor-general would accept such advice and concern that giving such advice may be regarded as 'unconstitutional', escalating a sense of political crisis. As the Canadian scholar Andrew Heard has noted, 'Cabinet ought not to advise a normative refusal of assent in the first place'<sup>31</sup> and that, because it is breaching convention in doing so, its advice ought to be rejected. Finally, if a government's advice is rejected by the governor-general, there is also a line of argument that the government is then obliged to resign, meaning that the giving of such advice would be a high-risk manoeuvre.

If, therefore, a bill was passed against the wishes of the government, be it a same-sex marriage bill or any other, it would be most unwise to advise the governor-general to refuse assent to it. Allegations would be made that the government was disrespecting the parliament and acting in breach of constitutional principle, which would build a sense of crisis. Moreover, the governor-general may well take the view that he is

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<sup>28</sup> John E. Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review*, vol. 41, no. 1, 2010, p. 72.

<sup>29</sup> Alpheus Todd, *Parliamentary Government in the British Colonies*, Longmans, Green & Co., 2nd ed, 1894, p. 664, referring to a despatch dated 15 February 1878.

<sup>30</sup> There are more recent examples where a bill has been passed by one government, but a new government has been sworn in before assent has been given—see the *Bills Annulment Act 1935* (NSW). This, however, is a different situation.

<sup>31</sup> Andrew Heard, *Canadian Constitutional Conventions – The Marriage of Law & Politics*, 2nd ed., OUP Canada, Toronto, 2014, p. 72.

required to act upon the advice of the houses, rather than a defeated government, in such circumstances. The rejection of the government's advice would lead to calls for the government to resign or at least for an election to be held. The reason why there are so few examples of such advice being given is, therefore, that in most cases it would have potentially dire consequences for the government.

An exception may occur, however, where a bill breaches the Constitution. This might arise in circumstances where, for example, the bill includes or increases an appropriation and it was introduced in the Senate, contrary to the requirements of section 53 of the Constitution, or failed to be supported by a message from the governor-general, recommending the purpose of the appropriation, contrary to section 56 of the Constitution. Here, two further constitutional principles arise—the rule of law and the separation of powers.

On the one hand, the rule of law requires the executive and the parliament to obey the Constitution. On the other hand, the separation of powers requires that the courts, rather than the executive, adjudicate upon constitutional validity. On that basis, if the matter was justiciable, assent should be given and constitutional validity left to the courts to determine.

But if, as in the case of sections 53 and 56 of the Constitution, the breached constitutional provisions were regarded by the courts as non-justiciable, because they concern internal parliamentary matters with which the courts should not interfere, then an interesting question arises as to whether the governor-general, as the guardian of the Constitution and the last standing point of authority that could prevent an unconstitutional bill from becoming law, should refuse assent on this ground, either with or without the advice of the government. There is no authoritative answer to this question, and any answer would be likely to depend upon the circumstances—such as the potential harm that may be caused by the bill and the likely consequences of its passage. In this case, if the governor-general refused assent to such a bill, not only would this be consistent with the rule of law, but it would also, arguably, support another aspect of the principle of responsible government, that the financial initiative rests in the hands of the government that is responsible to the parliament.

A controversy arose in relation to such a bill in 2011<sup>32</sup>, during the Gillard Government's hung parliament. The bill would have changed the eligibility provisions for rural students to access the youth allowance, which would have had the effect of increasing expenditure on the allowance under an existing standing appropriation. The bill was initiated in the Senate and was not the subject of a message by the Governor-General. While there may well be arguments between the houses about whether a bill

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<sup>32</sup> Social Security Amendment (Income Support for Regional Students) Bill 2011 (Cth).

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of this nature triggers the application of sections 53 and 56, what is interesting for present purposes is that the House of Representatives chose not to vote upon the bill, due to its concerns about whether it met the constitutional requirements.<sup>33</sup> This was so even though the government did not hold a majority in the House of Representatives and the cross-bench members had rural students in their electorates who would have benefited from the bill. This is the way that such disputes ought to be resolved—within the parliament, not in the courts or at Government House. However, this does not mean that the system will always work in this way, so the governor-general’s role and powers may well become crucial in the future.

### **The doctrine of necessity**

A final challenging scenario, raised by another of my students, concerns the role of the governor-general in restoring constitutional governance when for some reason government slips outside the Constitution and cannot otherwise be restored by orthodox legal routes. This sounds like the type of thing that only arises in countries subject to coups, such as Grenada or Fiji, where the doctrine of necessity has been used to support actions by the governor-general to restore representative government. Nonetheless, a scenario in which it could have happened occurred in Australia immediately before the last federal election.

There was a constitutional challenge to the validity of provisions in the Commonwealth Electoral Act which provide for the electoral rolls to close a week after the issue of the election writs. It was contended in the *Murphy* case<sup>34</sup> that the closure of the rolls breached a requirement in the Constitution that the houses of parliament be ‘directly chosen by the people’, as it excluded significant numbers of people from voting. A similar issue had arisen in the *Rowe* case before the 2010 election.<sup>35</sup> There the complaint was that in 2006, the law had been amended to remove a seven-day grace period to enrol after the issue of the writs. The court, in *Rowe*, struck down the validity of the 2006 amending law, leaving in existence the prior provisions of the Commonwealth Electoral Act, that closed the rolls seven days after the issue of the writs. As this was a perfectly workable alternative, there was no problem.

However, in the 2016 *Murphy* case, there was no amending law to strike down. The argument was that the Constitution required the rolls to stay open all the time until

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<sup>33</sup> Note the assertion by Coalition members that the government could choose not to present the bill to the Governor-General for assent: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, p. 602 (Mr Pyne). This is incorrect, as it is parliamentary officers who present the bill to the Governor-General.

<sup>34</sup> *Murphy v Electoral Commissioner* [2016] HCA 36.

<sup>35</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

polling day, so that people could enrol on the actual day of the election. The Commonwealth Electoral Act had never provided for this. The problem was therefore one of severance and workability. Could the provisions in the Commonwealth Electoral Act, if held invalid, be severed from it, leaving a workable electoral law, or would it have been necessary for the High Court to hold the entire Act invalid? The Commonwealth initially argued that severance was not legally possible, so that the entire Commonwealth Electoral Act would have to be struck down as invalid if the court accepted that the Constitution required the rolls to remain open until polling day.

The Commonwealth later backed down from this position. Why? Because it has drastic consequences. The *Murphy* case was heard by the High Court after parliament had been dissolved. In the ordinary course, if the High Court struck down the whole of the Commonwealth Electoral Act as invalid, then parliament could quickly re-enact it with altered provisions that permitted the rolls to stay open. But if parliament is dissolved and cannot enact a new electoral law, and if there is no law under which to hold an election, then there is a major problem. There can be no new parliament until there is an election, and there can be no election unless the parliament enacts a new electoral law. How could such an impasse be broken?

In such a case, the doctrine of necessity would come into play. It confers on the governor-general such powers as are necessary to restore constitutional governance and representative government. There would have been at least two possible options. One would have been for the governor-general to have exercised a reserve power to summon the previous parliament, allowing it to sit for the purpose of passing a revised electoral law, in order to allow the election to take place.

If that was not regarded as advisable or practicable for timing reasons, the second option would have been for the governor-general, with the agreement of both the government and the opposition, to instruct the electoral commissioner and all relevant public servants to proceed with the election according to the previous electoral law, as adjusted by agreed changes that comply with the Constitution's requirements as set out in the High Court's judgment, regarding keeping the rolls open. This would be based upon a firm commitment by the government and the opposition that, regardless of who won the election, such a law would be enacted in the next term of parliament with retrospective effect to apply to the election period and that the governor-general's actions would be validated. The Commonwealth Parliament has power to make laws with retrospective effect, as long as it does not alter the application of the Constitution.<sup>36</sup>

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<sup>36</sup> *R v Kidman* (1915) 20 CLR 475; *University of Wollongong v Metwally* (1984) 158 CLR 447.

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As it happened, the High Court did not accept that the Constitution requires the electoral rolls to remain open until polling day, so the question of whether the provisions could be severed, and the effect upon the election did not arise. It would also be most unlikely that a prudent High Court would throw the country into such a constitutional crisis in the middle of an election campaign when the parliament was dissolved. However, it is useful at least to consider the plan B, if such events do arise, so that there is general acceptance of the role the governor-general can take in such circumstances and that the reserve powers can be used in a positive way to create a path back to constitutionality.

## **Conclusion**

While it is always the best policy for governments to avoid the circumstances in which the application of reserve power may arise, it is also a useful exercise to think through the possibilities of what might occur and how the powers of the governor-general and the parliament might interact. In the end, it is the responsibility of all constitutional players—parliamentarians, ministers, judges and the governor-general—to uphold the same constitutional principles. If everyone is working to the same end, with the same understanding of these principles and how they apply, then crises should be able to be avoided. The better the understanding we have of these constitutional principles, and the powers and roles of each of the institutions of government, the less likely we will be to face constitutional upheavals such as the 1975 dismissal.



**Rosemary Laing** — Thank you very much Anne. That was fabulous and I think Harry would have enjoyed that immensely. The thought at the end that having the numbers may not be enough sometimes is well worth thinking about. Very sobering.

**Question** — I was thinking about what I could put to you that is in the tradition of Harry Evans. My question relates to what discretion the governor-general has if the prime minister puts to him or her that he wants a dissolution because the government has become unworkable because of the role of the Senate. Now I have a vague recollection that some years ago Malcolm Fraser sought a dissolution on those grounds. I think Sir Ninian Stephen initially declined and there was a second letter—I think I probably drafted the second letter—which was more strongly worded and used the terms that government had become unworkable because of the role of the Senate. What is the discretion of the governor-general in those circumstances and how well does it relate to the formal requirements for a dissolution?



**Anne Twomey** — That is a fantastic question because yesterday I spent my time in the National Archives and the file I was actually reading was precisely that one! I was looking at the 1983 double dissolution election and the advices and controversy between Malcolm Fraser and Sir Ninian Stephen. So I was actually reading that letter or that series of letters yesterday! The first thing to note is that section 57 of the Constitution, which is the one that deals with double dissolution elections, is slightly different because it is all set out in detail in the Constitution and the High Court has held that the detail of it is justiciable. So it is something where a governor-general when deciding to grant a double dissolution does have to be satisfied that the various requirements that trigger the double dissolution have been met. So that is different from your ordinary dissolution. This is much more statute based and specific.

What was interesting was that Sir Ninian took a tentative view, although not a final view, that he also had to be satisfied that, not only was there a trigger for a double dissolution, but that he should be satisfied that the parliament had become unworkable. So that is the advice he sent Malcolm Fraser back to consider and give him. Sir Ninian actually said that he was satisfied with that advice. But in a wonderful file note I was reading yesterday, where he explained his thinking on all this, he said there are two strains of thought on this particular issue. You could either take the view of Sir Samuel Griffith when he was Chief Justice back in the early days of federation saying that you did have to be satisfied that parliament was unworkable. Or you could take the view of H.V. Evatt that, so long as the conditions were satisfied, that was enough and you had no discretion in relation to this. In explaining his view, Sir Ninian said: 'I didn't have to make a final decision as to whether to choose Griffith or Evatt because in the circumstances I was satisfied that the Senate had made the parliament unworkable. Therefore I did not have to make that invidious choice.' So Sir Ninian left open that question and that is a question that remains as to whether or not you have to satisfy the governor-general of that unworkability point. We do not have any further decision on that but I think it is quite interesting that if you look at Sir Ninian's own record of his views on that he gave equal weight to both sides of the argument and decided, as a good judge does, that, if I don't have to decide, that is probably a good thing.

**Question** — That was an inspiring address and a great tribute to Harry. My question is a simple one. You referred to justiciability in relation to the courts not interfering with the internal workings of parliament. If the two senators who are currently in dispute have their roles terminated here, would any legislation they passed be justiciable? Is it possible there was a flawed vote and the courts would interfere?

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**Anne Twomey** — Again, another really interesting question. I was talking to Rosemary about this a bit earlier. To the extent that we have any authority on the proposition—there is only one case and it is only what lawyers call ‘dicta’: it is not something that decided the case; it is just an observation in the case—the court took the view that you were a senator until such time as your seat was vacated and therefore any voting you did in the meantime would not be held to be invalid. So the courts would not go back and look at the votes and say, ‘You have to take that person out because they were disqualified.’ That is also consistent with the English approach—that is, you cannot go behind the parliamentary roll. As far as they are concerned, you cannot go behind the list of votes and, so long as parliament itself says that the vote has been passed, the courts there won’t look behind it either. If somebody challenged that, the court could change its mind. That is always a possibility, but I think a fairly remote one because courts would also appreciate that you could cause absolute chaos by going and doing that. If you found that someone who had been voting in the parliament for two years was there invalidly, you would have to invalidate everything prior to that. Given the catastrophic nature of that kind of decision, my suspicion is that, if you did try to overturn it, the courts would not be interested in taking that path. I am reasonably confident that the courts will not go back and look at laws passed with the vote of someone later held to be disqualified.

**Question** — I was interested in your survey of situations where, perhaps in days gone by, state governors have conferred with chief justices because they hold the position of lieutenant-governor when the governor is not able to act, in a sense being a deputy governor for practical purposes. It just raised with me the question that there is no such similar arrangements at the federal level. The chief justice is not the lieutenant governor and obviously the administrators come in when the governor-general is away. I wonder if it would be your view that because of that arrangement a governor conferring with a chief justice at the state level would have a legitimacy that just does not arise at federal level?

**Anne Twomey** — Rosemary, you have a very informed audience! Fabulous questions! You are right that at the state level it is different because the lieutenant-governor is a judicial officer. Since the trauma of 1975 and the many attacks on Sir Garfield Barwick because of the advice, and later in relation to Sir Anthony Mason as well, most judges now take the view that they just won’t be involved in advising on that, either at the state level or at the Commonwealth level, simply because of concerns about how that would now fit in with the separation of powers. That is now more justified than it was in 1975 because now we have changes in our legal system in relation to the separation of powers. To get technical, we have a whole lot of cases about judges acting as *persona designata* and what they can and what they can’t do and whether it is incompatible with being a judge and all the rest of it. We have a

huge amount of jurisprudence that has happened since 1975 that potentially makes it more dangerous for a judge to advise because the issue may be regarded as justiciable in a way that wasn't the case in 1975.

So in answer to your question, although you are right that as lieutenant-governor they do have a closer connection with governors, and they do talk informally I understand just as a matter of general principle about these sorts of things, they also disappear very quickly when a crisis is in play and try not to advise in relation to those, simply because of the issues about the separation of powers and the like. Regardless of the federal or state level, judges in Australia are reluctant to be involved. Interestingly, however, if you contrast this with Canada, judges still are involved there in advising on those sorts of things. At the federal level in Canada it is the chief justice and judges of the Supreme Court who do fill that role, unlike in Australia. They are much more relaxed about it in Canada and other jurisdictions, but because of our 1975 trauma we are much more reluctant to have judges involved these days.

**Question** — I want to follow up on the scenario advanced by your student about the passage of private members' legislation against the wishes of a government. Surely that would be prima facie evidence of loss of confidence by parliament in that government and the government should then resign. Has there been an example in recent times of private members' legislation on a significant issue being passed against the wishes of the government?

**Anne Twomey** — I think there have been. I think you would probably find some examples in the United Kingdom during their minority government where legislation was passed against the wishes of the government. Often it is the case in a hung parliament that amendments and the like can be passed that the government is not terribly thrilled about. Among votes you lose in the parliament there is a distinction between votes on matters of confidence and votes that aren't on matters of confidence. Now, in the case of my student's scenario about the same-sex marriage bill, it may well be the case that some members of the government might take the view that it is a matter of conscience, that there should have been a free vote, and cross the floor, but it isn't a permanent loss of confidence. It falls into that temporary category because for the rest of the time they are going to keep voting with the government—'It is just that we crossed the floor once; it doesn't mean the end of the government because the next time and the time after that and the time after that we will be voting for the government.' It becomes critical, however, if the government says, 'This is a bill that is an issue of confidence and if we get defeated on this then we will have to resign.' Sometimes that is done as a threat. I think Tony Blair said that if he had lost the vote on the Gulf War he would have resigned. When David Cameron lost the Brexit campaign, although that was a referendum not a parliamentary vote, he

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did resign. So there can be occasions where there are issues of confidence and the government will fall, but there can be other occasions where the government itself still has support and can continue to govern even though the particular circumstances of a private members' bill are such that it could be passed.

## **Populism and Discontent: Comparing the United States and Australia\***

*Simon Jackman*

It is really a great honour to be asked to come and speak in this building. I was here before the election and our friends from the Parliamentary Library will remember that I tipped Hillary Clinton to win the election—she won the popular vote! What I will do today is try to keep my remarks rather short. My experience with talks like this, both before the election and afterwards, is that you will have a lot of questions and I will do my best to try to answer them.

The tempo of politics in the United States and its implications for Australia were front of mind for me as I was on my way up this morning and thinking about the talk. I will say a few words about whether we are living through a populist moment. I will talk a little bit about the US election and challenge some of the conventional interpretations of it. I will do some Australian comparisons. There will not be a lot there, but I hope you find them provocative. I am going to conclude with a comparison between American and Australian political institutions that both enable and inhibit populism. At that point I would like to stop and maybe we can get into some back and forth about any of the above. As I said, when I have given talks lately, audiences are very engaged with the state of American politics and what that implies for our relationship with the United States and perhaps for the planet.

What is populism? I think if you are going to come out and put that in the title of your talk it might be on you to define the term. I am going to use a relatively standard definition. Like many things in political science, there is no one definition that the profession hews to. Populism is a political appeal based on a world view of a contest between masses and elites that transcends ordinary political competition. Often the populist party or the populist candidate claims to be the authentic expression of national spirit, of the true preferences of the people—feel free to insert ‘the Volk’ there. I think this is part of the trouble in the political science profession, as that little aside of mine just revealed: people very quickly want to start sliding words like ‘authoritarianism’ and ‘fascism’ in. I think it is important to be as precise as one can about these things. So I am not going to engage in that as best I can and keep this fairly firmly focused on populism as an electoral phenomenon.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 17 February 2017.

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Populism is also distinguished by the claim that politics as usual is unable to solve pressing national problems. The decision-making apparatus of the state, be it electoral institutions, legislative institutions or the bureaucracy, has been captured by some inauthentic interest—insert what you will: big business; a world view; a neoliberal economic orthodoxy; a communist economic orthodoxy; international financiers, whoever they may be; technocrats; or bureaucrats. There is something gumming up the works and getting in the way of the true authentic expression of national will and policy and it requires things to be shaken up. It finds real expression in the idea that it doesn't matter who you elect because you get the same sorts of policy outcomes. A charismatic leader is often involved. I wouldn't make that a necessary condition for a party to be populist, although the two do seem to go together. The ability to make this claim successfully often turns on the ability of a person to head the movement and to be the bearer of a breakthrough that will unjam the works.

Why is it fair to call Trump a populist? Because, in particular, of his repudiation of the liberal internationalist orthodoxy. Presidential candidates from both sides of American politics for decades have talked about the virtues of free trade and about the virtue of American leadership in the world. Trump's nomination speech was the first time, certainly in my living memory, that I have heard a nominee of a major party say: 'That is not what I am about. Indeed, that is a sellout of the working class. And, by the way, those of you thinking of voting for Hillary Clinton, she is going to keep going down that road that has led to bad outcomes for you and your family. I intend to do something different.' That was a real break. Mitt Romney was not saying things like that. John McCain was not saying things like that. It was a McCain-Biden coalition essentially across the aisle that passed NAFTA, that saw the expansion of NATO, that admitted the Czech Republic to NATO, for instance. When the American Congress has acted in an internationalist direction it has often been on the back of a bipartisan coalition that has seen the extremes of both parties voting no and the yes coalition being brokered by statespeople. Biden and McCain in the 1990s were really leading a bipartisan coalition to get those things done. Trump is not about that, nor is the contemporary US Congress for that matter.

In the Australian context I think there are plenty of examples. I will refer to the Democrats appeal based on 'keeping the bastards honest'. There is a lot wrapped up in that statement. 'They' are bastards—not a good thing; that's a pejorative. It is not about a policy per se. It is about process and about being defined in opposition to 'them'. I won't do it today, but I invite you to think about how some of the appeals of contemporary Australian minor parties are of a similar ilk. We will turn to that later perhaps.

Trump is populist and I would say some of the people currently in the Australian Senate in particular pick up on similar themes—that the major parties are not giving authentic voice to what the people want, whatever that might be; that policy outputs have been captured by other interests that neither party is able to transcend. That is a theme to be sure in contemporary Australian politics as well.

Having set the stage, I am going to change gears a little bit with a retrospective on the American election. The US election is often hailed as a populist triumph—the rust belt working class rose up and embraced Trump’s message. Yes, but no. I think it is very easy to overread the result given how vivid and how huge a presence Trump is in national media. It is very much in Trump’s interests that people continue to think that. His outsize media presence is part of the magic, if you will, but let us turn to the data.

The thing I do take some comfort from, wearing my pollster hat, is that Clinton did win the popular vote by 2.87 million votes. That is a 2.1 per cent margin. Indeed, from that perspective the national polls, although wrong, certainly got the outcome correct in terms of the magnitude. In two-party terms, Clinton beat Trump 51.1 to 48.9. Australian politics occasionally throws up mismatches between the national two-party preferred vote and the seat outcome. The two most vivid recent examples being 1998, when Labor outpolled the Coalition in two-party preferred terms but John Howard won it in the right places, and 1990, when Labor did it to the Coalition. There are earlier examples, although the two-party preferred figures are a little rubbery once you go back to the 1950s in Australia. When it has happened in Australia they have been real nail biters—50.1 or 51 at most—but 51.1 is really quite stupendous to then go on and not win the electoral college. Clinton’s margin is bigger than the margin of Al Gore, who suffered a similar fate—won the vote but lost the electoral college—Richard Nixon and John Kennedy, who squeaked over the line in 1960. It is important to keep that in perspective.

The electoral college went 304 to 227, with seven so-called faithless electors who voted for others. Clinton won 20 states of 50 plus the District of Columbia and one electoral vote in Maine. Maine of course does not use the winner-takes-all formulation; it is winner takes all in each of its congressional seats. With the exception of Maine and Nebraska, the rest of the United States has a winner-takes-all system. It is very brutal in that way. It is a harshly majoritarian electoral mechanism and it is capable, as we have seen, of producing results like the one we got in 2016 and 2000.

How did that outcome come about? It came about because of the fact that the Democrats ran up the score in some big states (see Table 1). Hillary Clinton beat Trump by 30 points in California; it was a 65-35 election in California. In fact,

Clinton’s margin there exceeded both of Obama’s wins there. California went the other way, a really remarkable result. Clinton won that state by 4.27 million votes, which were effectively wasted. If she had won California by one vote, she would have got 55 of its electoral college votes. It would have been great if some of those 4.3 million Californians had taken up residence in other states, from her perspective. A similar story holds for New York, where there was a huge margin, Illinois and Massachusetts. These are big Democratic states. Texas is Trump’s only big-state lopsided win, where the ‘wasted votes’, if you will, amount to only 800,000 votes. Interestingly, thinking about the future of American politics, the margin there was less than 10 points, which a lot of people took notice of as perhaps a harbinger that demographic shifts may be slowly dragging Texas in a less Republican and more Democratic direction. But that is another story. The tale of the tape here is the way that Democratic vote is literally overpowering in some states. When you overlay that on top of this harshly majoritarian electoral mechanism, this is a key building block as to how we got the mismatch between the popular vote and the electoral college vote.

**Table 1: Democratic ‘vote packing’**

State	Electoral Votes	Clinton	Trump	Clinton margin	Margin (%)
California	55	8,753,788	4,483,810	4,269,978	30.0
New York	29	4,556,124	2,819,534	1,736,590	22.5
Illinois	20	3,090,729	2,146,015	944,714	16.9
Massachusetts	11	1,995,196	1,090,893	904,303	27.2
Texas	36	3,877,868	4,685,047	-807,179	9.0

Trump won the election very efficiently. That is perhaps the other way to think about this. Trump won three states in particular—Pennsylvania, Wisconsin and Michigan—by razor-thin margins (see Table 2). Had 77,000 voters stayed home, or half of that number changed their minds and gone the other way, we would be talking about President Hillary Clinton and about how the genius of her analytical team threaded the needle and so on. I am basing this on 2000 as well. When an election is this close, everything becomes relevant—the FBI did it; Hillary Clinton made bad campaign decisions; she should never have used the word ‘deplorables’. We can keep going. When we are talking about changing half of 77,000 votes, or 77,000 people staying home, I think we are at the limits of anything we might reasonably call political science at that point. Our resolution with our theories of voting, data, the whole apparatus, is going to really struggle to explain 0.06 per cent of the vote. When you are in that world, everything mattered and hence perhaps nothing mattered, or at the very least it is just very hard to say.



**Table 2: Trump’s ‘efficient’ victory**

State	Electoral Votes	Clinton	Trump	Margin	Margin (%)
Pennsylvania	20	2,926,441	2,970,733	-44,292	0.7
Wisconsin	10	1,382,536	1,405,284	-22,748	0.8
Michigan	16	2,268,839	2,279,543	-10,704	0.2

That said, you should not take too much away from Trump (see Table 3). It is important to recognise the win in Ohio, which is typically the bellwether state in American elections. It has gone with the winner in every election now since 1964. John Kennedy was the last person to win the White House without winning Ohio. That is a solid win by any stretch of the imagination for Trump in Ohio. That Iowa, a state that Obama carried twice, is now on a 9.4 per cent margin for Trump is an electoral catastrophe for Clinton and her campaign. Florida was lineball. It was the last state over the line for Obama in 2012 and again that was only 1.2 per cent the other way. You should not take anything away from Donald Trump on those wins in Ohio and Iowa. Indeed, Minnesota came perilously close to flipping. Minnesota is often thought to be a Democratic stronghold and is the state that gave us Hubert Humphrey and Walter Mondale. The idea that Trump got as close as he did in Minnesota, and New Hampshire for that matter, is pretty impressive. I look at these data and say, ‘Yes, big swings in many of these states, but don’t overread it.’ Indeed, I think this speaks to Trump’s challenge in 2020: rebuilding this coalition and hoping that the people who stayed home stay home again, as well as the people that came out for him come out again. Pulling this trick off twice would be quite a feat.

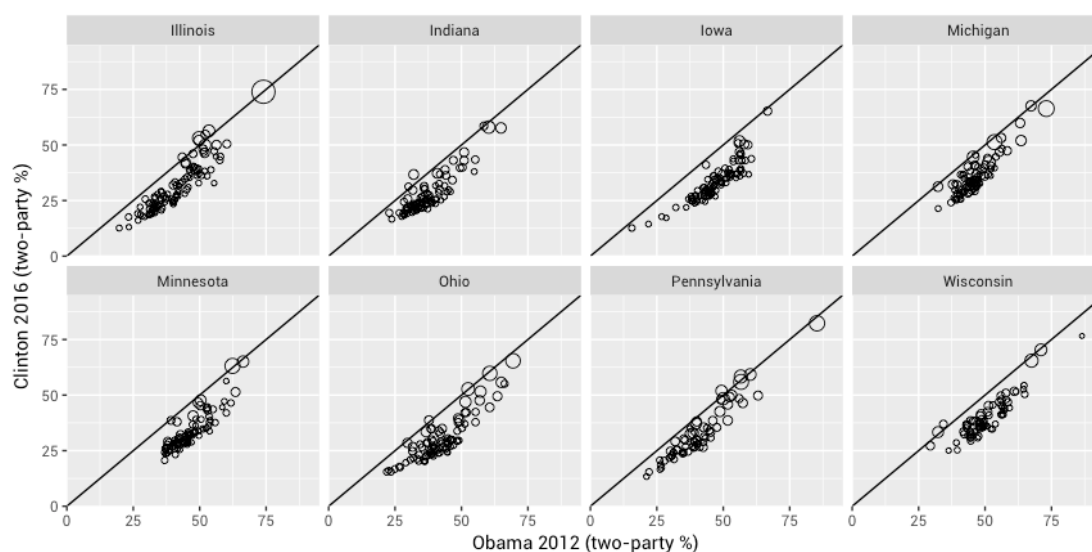
**Table 3: Other significant state results**

State	Electoral Votes	Clinton	Trump	Margin	Margin (%)
<b>Ohio</b>	18	2,394,164	2,841,005	-446,841	8.1
<b>Iowa</b>	6	653,669	800,983	-147,314	9.4
<b>Florida</b>	29	4,504,975	4,617,886	-112,911	1.2
<b>New Hampshire</b>	4	348,526	345,790	2,736	0.4
<b>Minnesota</b>	10	1,367,825	1,323,232	44,593	1.5

The story in those states is largely about what happened in the countryside. There is a lot of information here (see Figure 1). I have got eight states and what I have done on the horizontal axis is plot Obama’s share of the vote from 2012 by county against Clinton’s share of the vote from 2016. If the 2016 election were a rerun of 2012, any engineers in the room should know those data should lie on a 45 degree line, which is represented by the black line. You see all the dots have come down below the line.

That reflects the extent to which Clinton underperformed Obama. The other piece of information is the size of the circle. That reflects the population of each of these counties. The little ones are the small rural counties and the bigger ones are cities like Chicago, Detroit, Philadelphia, Milwaukee, Madison, Minneapolis and Cleveland. You can see in a lot of these places, like Michigan, all the dots slid down a bit. But boy oh boy that turnout not coming back in Detroit really hurt. Detroit is a city with a huge African American population. The real story here is the way the countryside swung hard. Generally speaking, the smaller dots, the rural counties, swung harder than the cities and the vote for Clinton did not hold up enough. Again, those three states, Michigan, Pennsylvania and Wisconsin, would have been enough to tilt the election.

**Figure 1: Obama 2012 and Clinton 2016 vote share comparison**



The real story of this election though is what happened out in the rural counties. Figure 2 gives you a sense of what the current configuration of American politics looks like. Indeed, not just the current configuration. If I had made this graph with the 2012 or 2008 data, it would not look substantially different. Figure 2 plots Clinton's vote share in every county in the US against the population density of each county. It is trying to measure how urban or how rural it is. Counties with big populations and high density are located in the upper right of the graph—Queens County in New York, San Francisco County, the Bronx, Kings County, Yonkers, which is part of greater New York, and New York County. These counties have big populations and high density, over 25,000 people per square kilometre in the case of New York. Those data slant up, meaning the cities voted overwhelmingly for Clinton. For example, Clinton won the Bronx County 90-10. This emphasises that pattern we saw before. Clinton did very badly in small rural counties, which are grouped toward the lower left of the graph. There are a few odd ones. For example, Clinton lost in outer suburban New York, where it is richer people but there is still a reasonably dense

population. This is the big story of American politics at the moment. It is cities versus the hinterland and that maps onto the populist description I provided earlier—out in the countryside resides the authentic nature of America and the cities are cosmopolitan, multiracial, integrated into the world economy and full of people who were not born in the United States. The one thing that is different about the chart in Figure 2 from earlier years is that the pattern has become more pronounced. Over the last couple of cycles, this correlation between population density and how Democratic a place is has become tighter and tighter and tighter. That is a big part of the story.

**Figure 2: Clinton vote share and county population density**

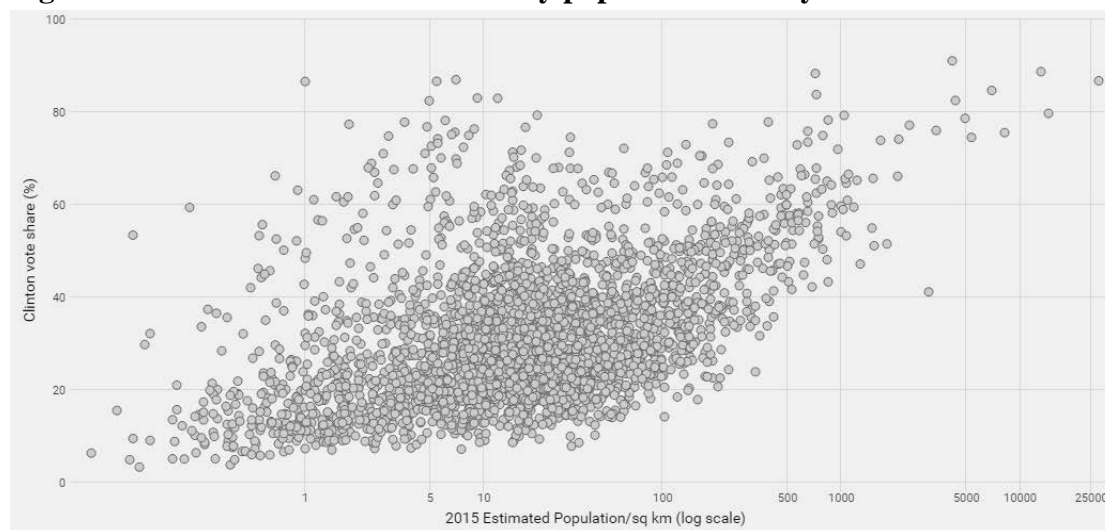
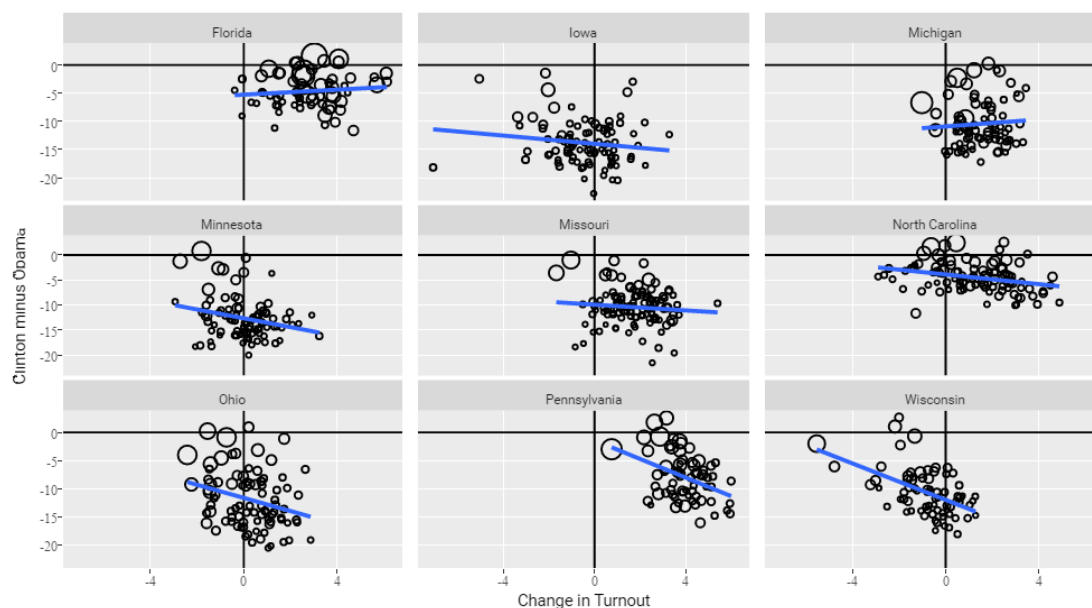


Figure 3, which plots for key swing states the change in turnout between 2012 and 2016 against the change in the Democratic vote between 2012 and 2016, repeats the story too. The changing size of the plotting symbol again indicates whether we are talking about a rural or an urban place. Most of these lines slope down. The point there is that as turnout went up support for Clinton went down. The essential story here is that Trump brought out voters. I would tell you that probably two-thirds to three-quarters of the story is a mobilisation story. Trump spoke to a set of voters who for the most part sat out the last couple of presidential elections. He got people who typically are not the most reliable of voters and who probably sat out the last two elections, in particular in rural counties. There are a few exceptions to the pattern, but generally that is the story: increasing turnout typically associated with declining vote share, or the swing towards Trump being larger and more pronounced in those rural counties.

**Figure 3: Change in turnout and change in Democratic vote**



What happened in Congress? Clinton won a majority of the popular vote and so did House Democrats, or put it this way: Republicans did not win a majority. That is a more accurate statement. Republicans did not win a majority of the House vote, but nonetheless have a thumping majority in the House, which again is one of these things. We are going to end this talk with the primacy of political institutions here, institutions that govern the mapping of preferences into who sits in Congress or the White House and makes policy. How can it be that with 49 per cent of the vote they end up with 67 per cent of the seats? The answer is the Democratic vote is packed. It is a small-scale version of that story I told you about the states. California is a blue state. It has a surplus, in a political sense, of Democratic voters, but so too do many House districts. It is very tempting to draw a district, particularly if you are a Republican, that sits neatly over the Bronx. You have created a 90-10 Democratic district. By the way, the Democratic member of Congress there does not mind that. It is not a bad outcome for them. But for the Democratic Party more generally, that is not a good outcome. It is a little bit cheeky frankly—‘But we are sending African Americans and Hispanics to Congress, which is a good thing, right?’ You Republicans are such warm-hearted people! Your commitment to racial equality is just fantastic! There is a little bit of that going on.

It is an interesting political tension inside the Democratic Party because two things are being put in opposition—a commitment to getting faces of colour into the US Congress, a laudable goal and an important one, but it is coming at the cost of packing votes, meaning that the Democratic vote is spread very inefficiently, which creates outcomes like this where Republicans can win a huge chunk of the seats even though they get significantly below a corresponding proportion of the vote. Now, there is

nothing that says we ought to have proportional representation. The theoretical merits of PR is a topic for another day perhaps. If you have a district system, small changes in vote will produce big changes in seat share, but mismatches like this are perhaps not what you would want to see, at least not too often.

Right now this is hardwired into American politics and the mechanism of redistricting—we call it redistribution here—is largely a partisan affair. There are some exceptions. California switched to a citizens commission for redistricting. But the default, until a state legislature hands that power away or the citizens take it away through a referendum and an amendment to the state constitution, is that power vests in the state legislature. Imagine for a moment the New South Wales parliament has responsibility for drawing the lines for New South Wales House of Representatives seats in this place, or that the Queensland parliament gets to draw the lines for Queensland's House of Representatives seats here. The temptation to get partisan with that is overwhelming and has been irresistible in contemporary American politics. The fact of the matter is you do it in two steps. First, you gerrymander the state legislature to protect yourself. Once you have got control of that, you then gerrymander the House of Representatives seats and hardwire in results like this for at least a decade. In the United States the census comes in years ending in zero, and the districts are redrawn in time for the next two elections in a decade-long cycle. We are midway through that right now. This is a big part of the story. Why am I bringing this up in this talk about populism? Because it gives Republicans in Congress, indeed certain more populist elements of the Republican Party, more power to make policy than would correspond to their electoral strength in raw national numerical terms. That is another thing I think it is important for Australian audiences, indeed American audiences for that matter, to keep in mind.

North Carolina is a state I am doing some research on at the moment. In 2016 Democrats won three out of 13 seats. They won 48 per cent of the vote state-wide. In each of the three seats they won, they won by more than 67-33. Again, the incumbents there say, 'Nice!', but there are only three of them. The euphemism for this is 'packing and cracking'. You pack your opponents votes and then you crack them as well, disperse the remainders. This creates moderately safe seats for yourself and a small number of whoppingly safe seats for your opponents and locks up their vote. So that is part of the story with Congress.

I have a few quick observations on the American Senate. It is a very interesting place at the moment, if you have been following news accounts coming out of the United States. There is a 52-48 split there. The filibuster is a rule in the American Senate that you need 60 votes to call debate to a close. So 41 senators can dig their heels in and say, procedurally, 'We are not ready to vote.' Right now, Republicans are eight short.

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There are eight to nine Democratic senators who are incredibly powerful. There is a short-circuit for the majority and that is to lump a lot of legislation into the budget reconciliation process, which is one thing that has been carved out as filibuster proof. But that is really slow and I think it is going to create some real tension inside the American political system.

I will finish with a few observations about Australia. A couple of things about Australia: compulsory voting pushes turnout above 90 per cent here. We used to think it was well above 90 per cent until the Electoral Commission started computing the denominator the right way and we figured out there are a lot of people out there who ought to be enrolled and are now enrolled but do not vote. I used to go around the world saying Australia has voter turnout above 95 per cent. Somewhere between 90 and 95 per cent is perhaps a more credible number. What that means is that the alienated must vote in Australia, or not. I am thinking of my dad up in Queensland—very unscientific of me. What is the old saying? The plural of anecdote is data! My dad is now 81 years old and is fed up. The only reason he votes is because they are going to fine him and, to hell with it, he is going to vote ‘non-conventionally’ shall we say—a bit of him getting back at the system. I haven’t talked to him for a while about this, but that was certainly his state of mind a couple of election cycles ago. What that does in Australia is produce a steady supply for none of the above. In the American system, if you are alienated and upset, you do not have to vote. Indeed, it is a Tuesday and you might have other things to do that day than vote for these people you do not really like. It is a very different sort of system for that reason. The other thing to note is that the voting system we have for the Senate, the transferrable vote, and perhaps especially at double dissolution elections, provides a pathway—what, if I were an economist, I would call low entry costs—for political entrepreneurs seeking to exploit the fact that compulsory voting is generating this supply of voters, or if you turn it around, a demand for them.

It is interesting thinking about preferential voting, what we sometimes call the alternative vote, in House of Representatives elections in Australia. The preferences of alienated voters going to a minor party, or to a none-of-the-above, mad-as-hell type of candidate, can come back. The deal making that sometimes has to go on to try to secure a flow of those preferences coming back is a little unseemly, as we are currently seeing with respect to Western Australia. But that is probably better, if you are a politician, than having to bring those people back altogether if it were first preference or nothing—‘Let them give second preferences and we will do this deal and maybe they will forget about it by election day or they will not look at how-to-vote cards too seriously.’ It is a little more palatable and allows the easier management of candidates chasing these votes, in the House at least. But the Senate is a different story.

Figure 4 is inspired by some analysis I saw the very clever and hardworking people at the Grattan Institute in Melbourne doing. I thought I would do this for myself. You have got to love the AEC. You can go onto their website and you can download all this data. Not only that, they geo-code polling places for you. Thank you AEC for making research into Australian elections so easy! Doing this for the United States requires half a million dollars of National Science Foundation money to round up the data from all the counties and states in the first place. Whereas you just click a mouse here and you can do it.

**Figure 4: 2016 Senate vote for non-major parties and distance from GPO**

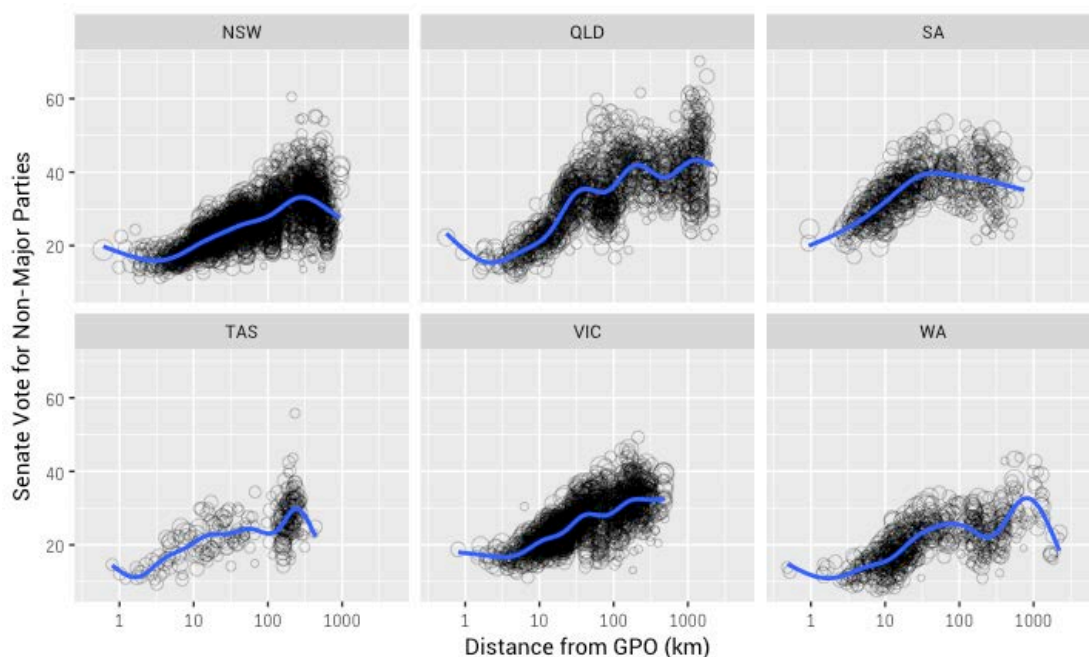


Figure 4 shows the non-major-party vote in the July 2016 Senate election by polling place plotted against distance from the GPO in each state. So there is a lot of data there; each circle is a polling place. I have coded how much of the vote cast for the Senate at a given polling place went to someone other than the Coalition, Labor or the Greens. I am calling the Greens a major party here. We might quibble with that, but just go with it for the time being. You know who we are measuring: it is all the others. What I have plotted on the horizontal axis is how far that polling place is from the GPO in that state. The first time I saw this analysis I was sitting in Melbourne at the Grattan Institute and it is pretty interesting.

The Greens are largely concentrated in urban areas. In fact the Green vote almost goes to zero once you get more than 10 kilometres away from a GPO in most places—Nimbin being an exception, but never mind! I showed you a bunch of data from the United States of the countryside, the hinterland, being on fire. This is the closest quick

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thing I could come up with to a demonstration of this dissatisfaction with what is being offered up by the major parties and a willingness to entertain voting for someone else. I want to draw attention to how high these numbers are getting—over 40 per cent in some places, a lot of this data is above a third in New South Wales once we get out 100 to 500 kilometres away from Sydney. Queensland is not perhaps the best way to do this because it is the most decentralised state in Australia. Nonetheless there are quite a few polling places in Queensland where ‘others’ are getting 50 per cent of the vote. This is in 2016. We will see what this looks like the next time around. There is a similar pattern elsewhere but perhaps a little less pronounced than in Queensland, where we are picking up on the return of Pauline Hanson to Australian politics.

There has been a bit of polling data talked about in the last couple of weeks, but I thought I would go back and present data from the last election on this. Moreover, the version of this I saw done at Grattan repeats this analysis for the 2016, 2013, 2010, 2007, 2004 sequence of Australian elections and it is just going up and up. The pattern is there, but it just keeps ratcheting up in each cycle. I do not know how far away you people live from the ACT GPO! It may not be people in this room necessarily who live these distances away from a major urban area. Out in the countryside the willingness to entertain unconventional candidates has always been stronger than in the city, at least for the last couple of decades, but it is increasing and moreover we have a set of electoral mechanisms in Australia that allow the people capturing this vote to find their way into the national parliament.

The Australian Election Study, a survey run out of the Australian National University by Ian McAllister, asks people if they favour compulsory voting or not. These numbers are starting to trickle down (see Table 4). I looked at these numbers from about 20 years ago and they were much stronger. Support for compulsory voting is starting to fade a little bit. Only 49 per cent strongly favour compulsory voting. I guess if you put the two weakest categories together you are up to 28 per cent. If you ask people, ‘Would you have voted if it had not been compulsory?’ only 64 per cent, less than two-thirds, are saying they definitely would have voted (see Table 5). I would tell you that is an upper bound because these are people who are taking a long survey in the mail about politics. They are sort of into politics. They are so into politics they are willing to take this long survey and only 64 per cent of them say they definitely would have voted. They did not get any incentive to take this survey. This big booklet arrives in the mail with a nice letter from Ian McAllister saying, ‘Would you take my survey? It’s for science’, and a lot of people do it. The other thing is that to say you would not have voted is a little subversive in Australia, even privately on a survey. We have a norm of civic participation that has found voice in the



Commonwealth Electoral Act and to go against that is a little unusual. So I would tell you that out there in the wild this number is even smaller than 64 per cent.

**Table 4: Do you think that voting at Federal elections should be compulsory, or do you think that people should only have to vote if they want to?**

<b>Response</b>	<b>Per cent</b>
Strongly favour compulsory voting	49
Favour compulsory voting	23
Favour people voting only if they want to	17
Strongly favour people voting only if they want to	11

**Table 5: Would you have voted in the election if voting had not been compulsory?**

<b>Response</b>	<b>Per cent</b>
Definitely would have voted	64
Probably would have voted	17
Might/might not have voted	8
Probably not have voted	6
Definitely not have voted	5

In tables 6 and 7 I have done two things. I have tabulated who they said they voted for in the election by how they answered that question about voting. Then I did a breakdown of the vote in the same way I did in Figure 4, combining major parties and Greens in one category and combing the remainder under ‘others’. These tables buttress my claim about where that vote is coming from. For the House of Representatives, the ‘definitely would have voted’ category splits 92-8 for major parties plus Greens versus others. By the time you get down to ‘definitely not have voted’, that vote for other candidates is up now to 30 per cent. The story from the Senate is even more stark. Among that subset of people who say ‘I definitely would not have voted’, it is basically 50-50 voting for these other, non-conventional candidates and parties.

**Table 6: Voluntary turnout by House of Representatives vote**

<b>Response</b>	<b>Major Parties (incl. Greens)</b>	<b>Others</b>
Definitely would have voted	92	8
Probably would have voted	88	12
Might/might not have voted	77	23
Probably not have voted	76	24
Definitely not have voted	70	30

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**Table 7: Voluntary turnout by Senate vote**

Response	Major Parties, including Greens	Others
Definitely would have voted	85	15
Probably would have voted	81	19
Might/might not have voted	64	36
Probably not have voted	66	34
Definitely not have voted	54	46

So, on balance, I am a fan of compulsory voting. I think it keeps a lot of money out of Australian politics for one thing, which having lived in a America for a long time I tend to think on balance is a good thing. But, as we think about the current configuration of Australian politics and maybe frustration at the inability of governments to get policy through, maybe this gives us some reason to contemplate the flip side of compulsory voting—that demand it generates, that supply it generates, of voters willing to vote for non-conventional candidates. It is something to think about and something that we often do not think about. I think we rightly hold up compulsory voting as one of the stronger facets of Australian electoral democracy, but there may be some sting in the tail.

What is the takeaway? Institutions matter. I presume you believed that before you came in today, but they matter in different ways. In the US there are different institutions. The winner-takes-all system in the Republican primary process, something we did not talk much about, helped Trump get the nomination, and then the winner-takes-all system in the electoral college helped generate that mismatch between the popular vote and the election outcome. In Australia we have got some institutions too. We have got a whole bunch of them—compulsory voting, different electoral systems for House and Senate—and I think we need to think through what role they are playing in the translation of alienation and people being upset with the system and how that finds political voice in the national parliament.



**Question** — Thank you very much for those comments. I am an American who has been living in Australia for a long time. I am an old political science major as well, so I have had a keen interest in what is going on and, like everyone else, I have been trying to understand it. You talked about the urban-rural split and I think I saw some stats that came out that also talked about the educational split. To what extent do you think the urban-rural split was a proxy for education? I think tertiary educated people

were more likely to vote for Clinton, for example. Also, thinking about the actual voters, how they voted and why, I am wondering whether there was any pre- or post-election opinion polling that says whether, like Brexit, people were actually voting for Trump largely to send a message without actually expecting or wanting him to win.

**Simon Jackman** — On the first question about education, yes, it is a fact that you will find more college-educated people in cities, but it is important for Australian audiences to remember that getting a college degree is way more common in the United States than it is here. You will find plenty of college-educated people in rural areas who voted for Trump. It goes down, but it is not a hard, deterministic rule: college degree equals democrat, or urban dweller equals democrat. You can slice up the college-educated population. I think a majority of white males with college educations voted for Trump. It does moderate the tendency, but among that demographic with college degrees you would still see Trump winning. The other thing to say is that kids are not going back home after they get their degree, and it is a similar phenomenon in Australia. They are not going back to a small town or to a farming community but staying in a larger place, typically where they got their degree. That is a source of resentment back in those communities but also of depopulation, frankly. It emphasises a skills gap that I think the urban-rural divide is in large measure about, but not entirely.

On your second question—What decided the election? What was in people’s heads? Were they voting for Trump?—I still have not looked at this yet. I do not know anybody that has done a good job of looking at this. I still can’t help but think part of the story in some of those states was that people were lulled into a false sense of security by the polls. A bunch of Sanders people woke up on Tuesday morning and said: ‘I don’t like her. I didn’t vote for her in the primary, but she has got this so it’s okay because the polls are saying she is up by three points in Wisconsin or Pennsylvania.’ I wonder if there was some demobilisation that came from that. Note what the preconditions are there: ‘I don’t like her’ and ‘I voted for Sanders in the primary’. The polls are the third thing in that chain of reasoning. I think the first two have to be confronted in any serious post mortem of the election.

One of the glibbest takeaways I have heard from the election is that you have got to have a verb in your slogan—‘Make America great again’ versus ‘Stronger together’. I can’t fault the Clinton campaign. After that hot mic Billy Bush video dropped, you would think it was over. Of course, as we say in rugby, you are going to play the man not the ball at that point. You are going to go after Trump and his fitness for office. You have got to be very careful not to get engaged in too much Monday morning quarterbacking, to use an American expression. I tend to think they probably played the right campaign.

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Was it a positive agenda that Trump had? Yes, he talked about bringing jobs back to those places in a way that Clinton was not credible on. He talked about how free trade has disrupted those communities in a way that no serious candidate had talked about before. So I think there are a bunch of people who knew exactly what Trump was saying and were down with the program and got up and voted for the first time in 10, 12 or 16 years. Indeed some of them might have even voted for Obama. That leads to one last thing that I will say. I saw some polling out of Iowa the other day—this is based on a tiny bit of data but more on intuition than anything—and for all the turmoil of the opening month of his administration I am not sure it has hurt him that much in some of those rural, small town places in the upper Midwest and into the farm states. I think he is shaking things up. So those are some thoughts. I wish I had a better answer on what they were thinking in voting for Trump, but that is my best stab at it.

**Question** — I would like to ask you a question about the seemingly inherent instability of the populist parties in Australia. I am thinking of One Nation, Katter's Australia Party and the Palmer United Party. At the 1998 Queensland election One Nation did very well indeed and then split into two parties almost immediately. You see the same thing. They are there and then they split apart and the vote seems to go either to some other populist party or back to the main parties. Could you comment on that general issue of instability please?

**Simon Jackman** — I think this is the flip side of the Westminster system. Ministerial leather exerts a tremendous discipline on politicians. When you take that out of the equation for the minor parties, whose leverage comes from being on the crossbench, essentially the temptation is to be a free agent in that environment rather than sticking together as a group. It is easy to be picked off or to get divided. One of the things about Hanson mark 2 versus Hanson mark 1 is an understanding of the discipline that a serious political organisation entails. That was not there, maybe because it all happened so quickly and took them by surprise. They have not been doing this for a century like the Labor Party or conservative parties under different names over the course of Australian political history. Understanding that you might be the government of the day imposes a discipline on a political organisation that being on the crossbench does not.

The other thing is a commitment to a program, having an ideology about the way the state ought to be run and about public policy. Keeping the bastards honest only gets you so far. For Hanson, I think this will be a test. If those Queensland numbers are even halfway true, it will be very interesting to see what positions Hanson's party holds in the next Queensland parliament. If they are pivotal then it is game on and I

wonder if that will impose some of this discipline ex post, if not ex ante. I think that is part of the story, another institutional story.

**Question** — Thank you for that excellent analysis of voting patterns in 2016. I just wanted to take you back to your definitions of populism because you associated populism with the belief that political leaders and the political establishment are captured by big business and international financiers and so on and so forth. Of course, this was not true at all of the kind of populism that emerged in Australia in the 1990s, which did not include big business in the elites. This was the kind of anti-elite discourse that was promoted by News Corp publications, talkback radio hosts and John Howard. It was the battlers versus the elites who wanted to redistribute taxpayers' dollars and spend them on special interests like welfare beneficiaries, protection of the environment, Indigenous Australians and all those things. So Pauline Hanson in the 1990s was quite unusual insofar as she was an economic nationalist. The mainstream of populism in the 1990s, the market populists, were against the UN but not against globalisation. Pauline Hanson, of course, did espouse economic nationalist, anti-globalisation beliefs and has again today. So there is a complexity there in Australian populism which perhaps was not captured in your definitions.

**Simon Jackman** — That is fair enough. I was holding those out as examples of the 'them' that populists seek to make political targets. But you are right about the version of it that we had in the 1990s, at least here in Australia. I guess she took aim at welfare recipients of whatever skin colour, but she also referred to an Aboriginal industry and there was that sort of talk about a technocratic or bureaucratic conspiracy against the masses that perpetuates that. But it's a fair cop; I take your point.

**Question** — Moderate success outside politics and not a professional politician: you have got Bob Hawke, Andrew Leigh in Canberra, Malcolm Turnbull, and Barnaby Joyce; in America you have got President Reagan, President Trump and even, in his first election, President Obama. Is there a swing in both countries, at the leadership level or even the local member level, towards people wanting a non-professional politician but someone who has got a bit of competence and credible experience outside politics?

**Simon Jackman** — I couldn't speak authoritatively. I don't have a dataset on that, but certainly those are very vivid examples of late. The charismatic, breakthrough leader is going to carry more authenticity if they have that career path and have runs on the board, if you will, in another domain. Turnbull had been in politics for a long time before he became prime minister, although not as long as John Howard. It is funny though. Schwarzenegger didn't go on to 40 years in the US Senate or anything like that. There was Berlusconi in Italy and we will see about Donald Trump.



## **The Concept of ‘The Same in Substance’: What Does the *Perrett* Judgment Mean for Parliamentary Scrutiny?\***

Ivan Powell

In 2015 an action was brought in the Federal Court to challenge the validity of a legislative instrument—the *Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015* (Cth), which set the rate of certain Family Court fees (*Perrett v Attorney General of the Commonwealth of Australia*<sup>1</sup> (*Perrett*)).

The validity of the instrument was challenged on the basis that it was ‘the same in substance’ as a previously disallowed instrument and had been re-made within six months of that disallowance, contrary to s. 48 of the *Legislative Instruments Act 2003* (Cth) (LIA).<sup>2</sup> However, the application was dismissed on the basis that s. 48 ‘should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure’.<sup>3</sup> A subsequent appeal of the decision was discontinued on 5 February 2016.<sup>4</sup>

In a number of material respects, the Federal Court’s interpretation of the concept of ‘the same in substance’ may be regarded as in conflict with the earlier and authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)*.<sup>5</sup> *Perrett* therefore raises issues central to the Senate Standing Committee on Regulations and Ordinances’ (the R&O committee) scrutiny of delegated legislation raising ‘same in substance’ questions, as well as to the broader concepts of parliamentary sovereignty and accountability which inform the work of Senate committees.

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\* This paper was originally prepared for presentation by the then Deputy Chair of the Senate Standing Committee on Regulations and Ordinances, Senator Gavin Marshall, at the 2016 Australia-New Zealand Scrutiny of Legislation Conference. However, due to the timing of the 2016 election, it was instead presented by Ivan Powell, who was at that time secretary to the committee.

<sup>1</sup> [2015] FCA 834.

<sup>2</sup> On 5 March 2016, the *Legislative Instruments Act 2003* (LIA) became the *Legislation Act 2003* (LA) due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. References in this paper are to the LIA, which was the relevant Act for the purposes of this paper. Section 48 of the LA retained the same in substance prohibition under discussion in this paper.

<sup>3</sup> *Perrett v Attorney General of the Commonwealth of Australia* [2015] FCA 834, 29.

<sup>4</sup> *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).

<sup>5</sup> [1943] HCA 21; (1943) 67 CLR 347.

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This paper explores the parliamentary and legislative history of the ‘same in substance’ concept, the tensions between *Perrett* and existing High Court authority, and the way in which the Senate and the R&O committee could seek to respond to the implications of the *Perrett* decision in examining ‘same in substance’ issues in future. More generally, the paper demonstrates the persistent tension between parliamentary oversight of the exercise of legislative power by executive governments, and the way in which parliamentary scrutiny principles interact with legal standards and requirements.

### **Nature of executive law-making**

An understanding of the implications of *Perrett* must necessarily be underpinned by an appreciation of both the nature of executive law-making via delegated legislation and the way in which the Commonwealth Parliament maintains a level of control over the exercise of its legislative power by the executive.

The justifications for the use of delegated legislation are well rehearsed and include that its use reduces pressure on the parliament’s time, and allows for technical and unforeseen matters to be dealt with appropriately and expeditiously.<sup>6</sup> Accordingly, Acts of the Commonwealth routinely delegate the parliament’s legislative power to ministers and other office holders, who may make instruments of delegated legislation that become enforceable as the law of Australia without needing the approval of the parliament. The delegation of legislative power may be expressed broadly—as in the case of general regulation and rule-making powers—or relatively constrained—as in the case of Acts which allow for specific matters to be determined (an example would be, as in the case of the *Perrett* instrument, an Act providing that the executive may set fees for the provision of particular services).

According to *Odgers’ Australian Senate Practice* (*Odgers’*), up to half of the body of Commonwealth law comprises delegated legislation,<sup>7</sup> and this ubiquity underscores the fact that its use is both well accepted and largely unremarked as a feature of modern legislative practice. However, from a parliamentary perspective, it is important to maintain an appreciation that executive-made law is, in a fundamental sense, inherently undemocratic. As *Odgers’* states:

[The use of delegated legislation] ... has the appearance of a considerable violation of the principle of the separation of powers, the principle that

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<sup>6</sup> See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, LexisNexis Butterworths, 4th ed., 2012, pp. 6–9.

<sup>7</sup> Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice*, 13<sup>th</sup> ed., Department of the Senate, Canberra, 2012, p. 416.



laws should be made by the elected representatives of the people in Parliament and not by the executive government.<sup>8</sup>

*Odgers'* goes on to note, however, that the parliament's primacy as the legislature is effectively preserved via a system of control based on the power of either house of parliament to disallow (that is, to veto) instruments of executive-made law.<sup>9</sup>

### **Parliamentary control of executive law-making**

#### *Historical context*

At the Commonwealth level, the establishment and development of an effective system of parliamentary control of executive law-making occurred early in the life of the new Commonwealth Parliament. In contrast to the present-day unconcern with the delegation of the parliament's legislative power to the executive, the broader context of the era was one in which significant debates occurred about the consequences of delegated legislation for parliamentary supremacy and democratic accountability. As noted by Dennis Pearce and Stephen Argument, the exercise of legislative power by the executive (that is, the Crown) in fact 'underlay much of the disputation between the English Parliament and the Crown in the seventeenth century' and, with the ascendancy of the parliament, led to a 'quiescent period of legislative activity on the part of the executive that lasted until the nineteenth century'.<sup>10</sup>

However, by the early years of the Commonwealth Parliament, and in the decade preceding the establishment of the R&O committee in 1932, the greater use of delegated legislation had seen 'public and parliamentary concern' leading to consideration of 'parliamentary procedures to ensure that the exercise of regulation-making power became an active subject of parliamentary scrutiny and liable to a measure of control'.<sup>11</sup> This was underlined by parallel developments in the UK during that period, which included the publication by the Lord Chief Justice of England, Lord Hewart, of a work on the dangers of delegated legislation entitled *The New Despotism*—a title which unsubtly conveys the undemocratic character of executive-made law; and the resulting inquiry into ministers' powers by the Donoughmore Committee on the Powers of Ministers, whose report provided both a significant technical exposition of the nature and justification for the use of delegated legislation and recommendations intended to provide a framework for its use and oversight by the UK Parliament.

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<sup>8</sup> *ibid.*, p. 413.

<sup>9</sup> *ibid.*, p. 416.

<sup>10</sup> Pearce and Argument, *op. cit.*, p. 5.

<sup>11</sup> Evans and Laing, *op. cit.*, p. 416.

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As recounted in *Odgers*’, at this time in Australia the Senate, coincidentally, had established a select committee to inquire into the matter of establishing standing committees of the Senate on ‘statutory rules and ordinances’.<sup>12</sup> The report of the select committee recommended the establishment of the R&O committee, which was duly established in accordance with a resolution of the Senate following the election of 1931.<sup>13</sup>

*Prohibition on making regulations the ‘same in substance’ as disallowed regulations*

The establishment of the R&O committee complemented an earlier innovation of the Senate that had also reflected the general appreciation of the problems of delegated legislation and the concomitant need for direct parliamentary control of such legislation. This was the inclusion in the *Acts Interpretation Act 1904* (Cth) (AIA) of the requirements for the gazettal and tabling of instruments of delegated legislation and, critically, the provisions providing for their disallowance by the parliament.<sup>14</sup> The ability to disallow instruments of delegated legislation has since been, and remains, the key controlling feature of the Commonwealth Parliament’s oversight of executive-made law.

For the R&O committee, the ability to recommend that the parliament disallow any instruments of delegated legislation that offend its scrutiny principles has been and remains a well-established practice that has ensured that its expressions of concern about delegated legislation have a persuasive character. Indeed, in the roughly 85 years of the R&O committee’s existence, the Senate has not failed to act on a recommendation of the R&O committee to disallow an instrument of delegated legislation.<sup>15</sup>

However, at the time of, and in the background to, the Senate select committee’s consideration of the need for a committee specifically to oversee delegated legislation, a significant controversy unfolded that threatened the efficacy of the parliament’s disallowance power. As recounted by *Odgers*’, the Senate’s disallowance of regulations made by the Scullin Government under the *Transport Workers Act 1928* (Cth) was frustrated by the prompt remaking of the regulations and the refusal of the Senate’s petition to the Governor-General not to approve the re-made regulations on the basis that they were the same in substance as the disallowed regulations.<sup>16</sup> This

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<sup>12</sup> *ibid.*, p. 417.

<sup>13</sup> *ibid.*, p. 417.

<sup>14</sup> *ibid.*, p. 416.

<sup>15</sup> *ibid.*, p. 424.

<sup>16</sup> *ibid.*, p. 417. See also Pearce and Argument, *op. cit.*, p. 205.

petition was no doubt necessary given the absence of a statutory prohibition at that time.

Clearly, the ability of the executive to avoid disallowance by simply remaking disallowed regulations represented a significant hollowing out of the disallowance power and, in 1932, the parliament acted promptly to restore the efficacy of the disallowance provisions of the AIA. The amendment prohibited remaking of disallowed regulations within six months of disallowance or the making of new regulations 'substantially similar', unless their introduction was preceded by a motion rescinding the earlier disallowance.<sup>17</sup> These provisions and the related provisions for parliamentary control were retained in the LIA, which was enacted in 2005 to effectively consolidate and reform the legal framework governing the making and operation of Commonwealth delegated legislation.

A refinement that, similarly, sought to preserve the efficacy of the disallowance provisions was introduced in 1937, following observations by a member of the House of Representatives that a motion for disallowance could be effectively circumvented if it was simply left unresolved at the conclusion of the disallowance period.<sup>18</sup> To avoid this, a provision was inserted in the AIA to provide that, in the event of any such unresolved notice, the regulations would be deemed to have been disallowed.<sup>19</sup> *Odgers*' notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.<sup>20</sup>

The introduction of the same in substance prohibition, and other provisions to preserve the efficacy of the disallowance power, thus must be recognised as critical elements of the parliament's control and oversight of executive-made law via disallowance. More generally, the evolution of the procedural and legal architecture of committee scrutiny coupled with the disallowance power reveals the inherent tension of the delegation of the parliament's legislative power to the executive and the potential for the diminution of the parliament's democratic and sovereign nature where the executive is able to effectively circumvent the parliament's control of delegated legislation.

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<sup>17</sup> Evans and Laing, op. cit., p. 418.

<sup>18</sup> *ibid.*, p. 418.

<sup>19</sup> *ibid.*, p. 418.

<sup>20</sup> *ibid.*, p. 421.

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## Judicial consideration of the ‘same in substance’ concept

### *The Women’s Employment Case*

As the preceding account shows, the same in substance prohibition has existed on a statutory footing since its inclusion in the AIA in 1904. As described in Pearce and Argument, the principal judicial consideration of the ‘same in substance’ concept since that time occurred in the High Court’s judgment in the *Women’s Employment Case*.<sup>21</sup> In this case, a declaration from the court was sought that regulations made under the *Women’s Employment Act 1942* (Cth) were invalid because they were the same in substance as previously disallowed regulations, in contravention of s. 49 of the AIA (in which the same in substance prohibition was then contained).

The court heard two views as to the correct interpretation of the same in substance provisions. First, it was argued that it prevented only the re-making of regulations that, while having a different legal form or expression, were *identical* in substance or legal effect to a disallowed regulation. Second, it was argued that it prevented the re-making of regulations that, regardless of form, had a substantially the same, although *not identical*, legal effect as a disallowed regulation.

In the most extensive consideration of the interpretation of the provision, by Latham CJ, his Honour clearly preferred the second view in finding that:

in order to give any practical effect to the section, it should be construed ... [as meaning that it] prevents the re-enactment by action of the Governor-General, within six months of disallowance, of any regulation which is *substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*.<sup>22</sup>

Similarly, McTiernan J stated:

a new regulation would be the ‘same in substance’ as a disallowed regulation if, *irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation* that it could be fairly said to be the same law as the disallowed regulation.<sup>23</sup>

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<sup>21</sup> [1943] HCA 21; (1943) 67 CLR 347

<sup>22</sup> *ibid.*, p. 364 (emphasis added).

<sup>23</sup> *ibid.*, p. 389 (emphasis added).

The brief consideration of the question by Rich J stated that 'in making the necessary comparison [to determine whether a regulation was the same in substance as a previous one] *form should be disregarded*'.<sup>24</sup>

Williams J stated that the provision required 'the court to *go behind the mere form of the regulations and ascertain their real purpose and effect*'.<sup>25</sup>

These statements regarding the interpretation of the provision appeared consistent with one another, as well as with Latham CJ's identification of the principle of the same in substance prohibition as being to ensure that 'no Government can exercise a legislative power against an objection of either House'. The focus on the substantive or general legal operation was therefore necessary to ensure that the prohibition could not, in practice, be circumvented by the making of minor changes to the legal effect of a disallowed regulation:

The adoption of this view prevents the result that a variation in the new regulation which is real, *but quite immaterial in relation to the substantial object of the legislation*, would exclude the application of s 49.<sup>26</sup>

For the same reason, Latham CJ stated that, where a new set of regulations covered the same issues as were included in a disallowed set of regulations but also included new material, the new regulations would still offend the same in substance prohibition and therefore be of no effect.<sup>27</sup>

Further, Latham CJ noted that the court 'should not hesitate to give the fullest operation and effect' to s. 49. While the question of whether a new regulation was the same in substance as a disallowed regulation would often be a 'question of degree, upon which opinions may reasonably differ', in the event of a court finding a regulation to be invalid, the parliament retained the power to rescind the earlier disallowance resolution to allow the making of the later regulation. His Honour stated:

No decision of the court that one regulation is the same in substance as another regulation can prevent the disallowing House from giving effect to a contrary opinion if it wishes to do so.<sup>28</sup>

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<sup>24</sup> *ibid.*, p. 377 (emphasis added).

<sup>25</sup> *ibid.*, pp. 405–6 (emphasis added).

<sup>26</sup> *ibid.*, p. 364 (emphasis added).

<sup>27</sup> Pearce and Argument, *op. cit.*, p. 206.

<sup>28</sup> *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.

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Chief Justice Latham’s focus on the substance or legal effect of the remade regulation, and willingness to give the same in substance provision its ‘fullest operation and effect’, was particularly apparent in relation to his finding that a regulation which provided that, notwithstanding the disallowance of one of the previous regulations by the parliament, ‘decisions preserved by or given under that previous regulation should continue to have full force and effect’.<sup>29</sup> Latham CJ held:

So far as this [later regulation] ... operated in relation to these decisions, it operated in defiance of the disallowance, because it preserved in full future operation everything that had been preserved by or done by virtue of the disallowed regulation. Thus it was in the whole of its operation the same in substance, that is, in legal operation, as the disallowed rule.<sup>30</sup>

### *The Perrett case*

A straightforward reading of the judgments in the *Women’s Employment Case* suggests that a majority of the court interpreted the same in substance provision as rendering invalid a regulation that produces substantially the same result as a disallowed regulation, even though its legal effect might include immaterial differences (or possibly even new matters) in comparison to the disallowed regulation. By interpreting the operation of the provision in this way, the court ensured that its practical effect was congruent with its animating principle of ensuring that the executive cannot exercise its delegated legislative power against the express objection of the parliament.

This understanding of the judgements in the *Women’s Employment Case* was apparent in the R&O committee’s inquiries in relation to the instrument the subject of the challenge in the recent Federal Court judgement of Dowsett J in *Perrett*.<sup>31</sup> In this case, the government had sought to increase by regulation (the first regulation) a number of family law fees from 1 July 2015. The regulation would:<sup>32</sup>

- increase the full divorce fee in the Federal Circuit Court from \$845 to \$1,195 (a \$350 increase);
- increase the fee for consent orders from \$155 to \$235 (an \$80 increase);
- increase the fee for issuing subpoenas from \$55 to \$120 (a \$65 increase);

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<sup>29</sup> *ibid.*, p. 374.

<sup>30</sup> *ibid.*, p. 374.

<sup>31</sup> [2015] FCA 834.

<sup>32</sup> The full title of the instrument was the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (Cth).

- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 10 per cent; and
- introduce a new fee of \$120 for the filing of amended applications.

Following the disallowance of the first regulation by the Senate on 25 June 2015, on 9 July 2015 the Attorney-General made the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 (the second regulation) to:

- increase the full divorce fee in the Federal Circuit Court from \$845 to \$1,200 (a \$355 increase) and in the Family Court from \$1,195 to \$1,200 (a \$5 increase);
- increase the fee for consent orders from \$155 to \$240 (an \$85 increase);
- increase the fee for issuing subpoenas from \$55 to \$125 (a \$70 increase);
- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 11 per cent; and
- introduce a new fee of \$125 for the filing of amended applications.

The explanatory statement for the second instrument, noting the disallowance of the first instrument, stated that the 'Government will reintroduce those family law fee increases under the [second] Regulation with an additional \$5 increase'.<sup>33</sup>

In September 2015, the R&O committee's report on the second regulation drew attention to the comparative quantum of the increases introduced by the two regulations (with the reintroduced fees being increased by \$5 relative to the earlier increases); the characterisation of the fees as having been reintroduced following the earlier disallowance; and the remarks, of Latham CJ<sup>34</sup> in the *Women's Employment Case*, referred to above.<sup>35</sup> The R&O committee thus cited the significant similarity in the effect of the instruments as the relevant context for seeking the view of the Attorney-General as to whether the second instrument was, for the purposes of s. 48 of the LIA, the same in substance as the first regulation and therefore of no effect.

However, the R&O committee's report also noted the substance of the *Perrett* judgment in the Federal Court, which had been handed down on 13 August 2015. The case involved an application to declare the second regulation as being in breach of s. 48 of the LIA on the basis that it was the same in substance as the first regulation. However, Dowsett J had dismissed the application on the basis that s. 48 'should be

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<sup>33</sup> Explanatory Statement, *Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015* (Cth), p. 1.

<sup>34</sup> [1943] HCA 21; (1943) 67 CLR 347, 364.

<sup>35</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 10 of 2015, 10 September 2015, pp. 2–5.

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construed as requiring that, *in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure*'.<sup>36</sup>

The R&O committee expressed the view that Dowsett J's interpretation of the same in substance prohibition, by requiring the second regulation to have been identical to the first regulation, appeared to differ in 'material respects' from the higher authority of the High Court's *Women's Employment Case*, insofar as the R&O committee had understood the judgments in that case to have collectively held that the provision prevented the remaking of an instrument producing 'substantially the same, though not in all respects', legal effect as a previously disallowed instrument.

However, and perhaps unsurprisingly, the Attorney-General's response to the R&O committee's inquiries in relation to the second regulation did not seek to address the apparent contradictions of the two judgments, but instead focused on *Perrett* as the 'current binding judicial authority' on the interpretation of the same in substance prohibition:

The current binding judicial authority on this issue is the decision of the Federal Court of Australia in *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834. In that matter, the Federal Court held that the second instrument was not the 'same in substance' as the first instrument. As indicated by the committee, in making this finding his Honour Justice Dowsett concluded that section 48 of the *Legislative Instruments Act 2003* should be construed as requiring that, for a legislative instrument to be invalid it must be, in substance or legal effect, identical to the previously disallowed measure (at [29]).<sup>37</sup>

In addition, the Attorney-General referred to aspects of Dowsett J's reasoning in support of the conclusion that the second instrument was not made in breach of the same in substance prohibition:

In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison' (at [29]). In *Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations)* [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail – between essential characteristics and immaterial features'. In applying this principle, Justice

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<sup>36</sup> *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, 29 (emphasis added).

<sup>37</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 2 of 2016, 24 February 2016, pp. 43–4.



Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure (at [22]).<sup>38</sup>

The Attorney-General also noted that the *Perrett* judgment was at that time the subject of an appeal; however, the appeal did not proceed and was ultimately withdrawn.<sup>39</sup>

### **The reasoning in *Perrett***

#### *Substance, form and immaterial differences*

While it is not the purpose of this paper to provide a very detailed analysis of the reasoning in *Perrett*, some analysis of Dowsett J's judgment is necessary to highlight the difficulty in understanding it as correctly applying the authoritative principles enunciated in the *Women's Employment Case*.

The first element of Dowsett J's substantive reasoning on the question of the same in substance issue proceeded on the basis of a consideration of the judgments in the *Women's Employment Case* and, specifically, the respective statements of Latham CJ and McTiernan, Williams and Rich JJ, reproduced above. It was suggested that those judgments were consistent in rejecting an approach that required an instrument to be identical in substance to a disallowed instrument and preferring an approach which eschewed form as a relevant consideration in favour of assessing whether its general legal effect was substantially the same as that of a disallowed instrument (though not identical in terms of immaterial respects or perhaps even the inclusion of additional material).

However, Dowsett J regarded three members of the court (Rich, McTiernan and Williams JJ) as in fact preferring the first approach—that is, as understanding s. 49 of the AIA as essentially distinguishing between substance (legal effect) and form (legal expression) and requiring that an offending instrument be 'identical in substance with a disallowed regulation'.<sup>40</sup> Justice Dowsett's reasoning in reaching this conclusion was somewhat elusive but appeared to turn on the characterisation of statements rejecting the relevance of form as amounting to conclusions that identical legal effect was required for the purposes of the same in substance prohibition. For example, noting Rich J's comment that 'in making the necessary comparison form should be

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<sup>38</sup> *ibid.*, p. 44.

<sup>39</sup> The Attorney-General's response is reproduced in full in Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 10 of 2015, 10 September 2015, Appendix 1 (Correspondence).

<sup>40</sup> *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [18].

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disregarded’, Dowsett J concluded that ‘his Honour adopted the first of the [approaches suggested]’ (that is, the requirement for identical legal effect).<sup>41</sup>

Similarly, Dowsett J considered McTiernan J’s statement that a new regulation ‘would be the same in substance if, irrespective of form or expression, it were *so much like* the disallowed regulation in its general legal operation that it *could be fairly said* to be the same law as the disallowed regulation’.<sup>42</sup> Notwithstanding that McTiernan J’s language, which is emphasised in the quote above, appeared to fall well short of a requirement for identical legal effect, Dowsett J summarily concluded:

Superficially, this statement might appear to be somewhat equivocal. However, in my view, it is closer to the position adopted by Rich J [that an offending instrument must be identical in its legal effect] ...<sup>43</sup>

Justice Dowsett also cited Williams J’s statements that the provision required a contextual analysis of the two instruments in question, in which the court should ‘go behind the mere form of the regulations and ascertain their *real purpose and effect*’.<sup>44</sup> However, rather than considering the extent to which questions of ‘real purpose and effect’ might allow for some differences in legal effect, Dowsett J concluded that, simply because Williams J’s judgment had in places distinguished between the substance and form of the new regulation (disregarding form as relevant), his Honour had also found in favour of the first approach (requiring identical legal effect).

Justice Dowsett’s reasoning thus led to the characterisation of Latham CJ’s judgment as a minority view on the question of the correct interpretation of the same in substance prohibition. However, even in this regard, and as highlighted by the Attorney-General’s response to the R&O committee, Dowsett J rejected that Latham CJ’s emphasis on distinguishing between substance and detail—between essential characteristics and immaterial features—was substantively different from a distinction between form and substance, at least in cases where the legal effect of the instruments was to impose fees. Justice Dowsett stated:

[Latham CJ’s distinction between] essential characteristics and immaterial features ... [may go] beyond that between form and substance, but if so, not by much, at least for present purposes. I find it difficult, in considering the First and Second Regulations, both of which impose fees, to accept that

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<sup>41</sup> *ibid.*, [19].

<sup>42</sup> *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 389.

<sup>43</sup> *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, at 20.

<sup>44</sup> *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 405–6 (emphasis added).

any increase in a fee ... can be described as 'detail' or an 'immaterial feature' of the measure in question. The amount of the fee ... is at the heart of each measure.<sup>45</sup>

*Definition of 'the same in substance'*

The second element of Dowsett J's judgment was a definitional analysis of the term 'the same in substance', which, as the term was not defined in the LIA, centred on the common meaning of the phrase as rendered in dictionary definitions, including the *Oxford English Dictionary* (2nd ed.) and the *Macquarie Dictionary* (5th ed.). As Dowsett J characterised the applicants (and Latham CJ) as 'tacitly' treating the term 'the same in substance' as meaning 'substantially similar', the thrust of this exercise was to determine whether there was a difference in the meaning of the two terms (that is, 'same' and 'similar'). If any such difference were to exist, the meaning of the actual phrase in the legislation would necessarily prevail.<sup>46</sup>

This starting point appears problematic as, first, it unnecessarily changed Latham CJ's formulation (that is, 'substantially the *same*', though not in 'immaterial' respects) to the phrase 'substantially *similar*', which reduced the concept of 'same-ness' to 'similar-ness' and removed from all consideration the question of the materiality or nature and quality of any differences in the legal effect of an impugned instrument. Therefore, Dowsett J's finding that the term 'substantially similar' was not co-extensive with the term 'the same in substance', while correct, did not appear to squarely address the substance of Latham CJ's approach.

In addition to this problematic paraphrasing, Dowsett J's survey of the dictionary definitions of the component words making up the phrase 'the same in substance' was, unfortunately, incomplete. Justice Dowsett's analysis commenced with a survey of possible definitions for a number of isolated terms, including 'in substance', 'substantial', 'substance' and the 'same'. However, while his Honour reasonably and clearly concluded that the term 'same' means 'identical', he did not clearly identify which of a number of possible definitions of the terms 'in substance' and 'substance' was correct for the interpretation of s. 48 of the LIA. While one can infer from Dowsett J's ultimate conclusion that he preferred a restrictive definition of 'in substance'—perhaps best understood as meaning the 'actual' or 'real' 'matter of a thing'<sup>47</sup>—it is not clear why this meaning was preferred over definitions suggesting that, for example, 'substance' means the 'essential' character of a thing 'that is such *in the main*; real or true *for the most part*'. As definitions of this flavour clearly reflect a

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<sup>45</sup> *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [22].

<sup>46</sup> *ibid.*, [23].

<sup>47</sup> *ibid.*, [23].

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common usage that accommodates Latham CJ's formulation (that is, 'substantially the same', though not in 'immaterial' respects), Dowsett J's definitional analysis may in fact be taken as drawing into question his own conclusion that the same in substance prohibition requires that, in order to be invalid, a legislative instrument must be *identical* in its legal operation to a previously disallowed instrument.

*Full operation and effect*

The third and final substantive element of Dowsett J's judgment regarding the same in substance prohibition involved his consideration of the need for the court, as Latham CJ suggested, to give the provision its 'fullest operation and effect' because any finding by the court could not, in effect, bind the parliament if it wished to 'give effect to a contrary opinion'.<sup>48</sup> Dowsett J noted:

The task conferred upon the Court by s 48 concerns the intersection of the legislative, executive and judicial functions. Whilst it may be true, as Latham CJ said, that the Court should not hesitate to give the fullest operation and effect to legislation of this kind, the courts generally seek to avoid involvement in matters of political judgment. Disputes about whether a \$5 increase in a fee is an essential characteristic or an immaterial feature, or as to whether the result of such increase is substantial or otherwise, may lead to such involvement.<sup>49</sup>

While Dowsett J's concern for the court avoiding involvement in political questions is understandable, the brevity of his reasoning is again problematic. This is particularly because it does not address the key element of ultimate parliamentary control that was emphasised by Latham CJ, the presence of which ensures that any factual finding by a court that an instrument is the same in substance as a disallowed instrument is unlikely to have the character of a political judgment.

Justice Dowsett's caution over the potential for involvement in political judgments also sits uncomfortably with his own statement that it was difficult for any increase in a fee to be described as an 'immaterial feature' of an instrument because 'the proposed increase is at the heart of each measure'.<sup>50</sup> To the extent that this finding amounted to a determination of fact regarding the materiality of the additional increases in the second regulation, it appears less as a political judgment than as one

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<sup>48</sup> *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347], 364.

<sup>49</sup> *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [29].

<sup>50</sup> *ibid.*, [22].

concerning, in the words of Latham CJ, a 'question of degree, upon which opinions may reasonably differ'.<sup>51</sup>

### **Implications of *Perrett* for the work of the R&O committee**

#### *Effectiveness of the same in substance provisions*

The tensions between the judgments in the *Women's Employment Case* and *Perrett* have significant implications for the work of the R&O committee in examining same in substance issues into the future. While matters raising the same in substance questions have come before the R&O committee relatively infrequently, its longstanding approach, in accordance with the *Women's Employment Case*, has consistently focused on the general substance or legal effect of a remade instrument, notwithstanding that the instrument is not identical to a previously disallowed instrument.

For example, in August 2015, prior to its consideration of the instrument the subject of *Perrett*, the R&O committee examined the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), which introduced a new visa criterion for protection visas (subclass 866) to provide that such visas could not be granted to unauthorised maritime arrivals. This regulation followed the disallowance of an earlier regulation that had reintroduced temporary protection visas, which included conditions that an unauthorised maritime arrival could only be granted a temporary protection visa and could not access the protection visa (subclass 866). Drawing attention to the same general legal effect of the two regulations, the R&O committee sought the view of the then Minister for Immigration and Border Protection as to whether the later instrument was the same in substance as the disallowed regulation.<sup>52</sup>

Following *Perrett*, however, the R&O committee may find it more difficult to pursue same in substance matters in cases such as this and *Perrett*, where the legal operation of an instrument is not identical to a previously disallowed instrument. Indeed, the Attorney-General's response to the R&O committee regarding the second regulation demonstrates that the requirement for identical legal effect curtails any substantive

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<sup>51</sup> *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347], 363.

<sup>52</sup> The minister's response to the R&O committee, while stating that the instrument was made in 'full cognisance' of s. 48 of the LIA, and that legal advice had been received in connection with the making of the instrument, did not in fact state that the instrument was regarded as not being the same in substance as the disallowed regulation. The minister declined the R&O committee's request to receive a copy of the legal advice received. Following the disallowance of the second regulation, the R&O committee concluded its examination of the issue without it or the minister having expressed a view as to whether the regulation should be regarded as being the same in substance as the previously disallowed regulation. See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 9 of 2015, 19 August 2015, pp. 15–16.

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consideration of whether the legal effect of an instrument circumvents the disallowance of an earlier instrument, thereby potentially allowing the government to exercise its delegated legislative power, in the words of Latham CJ, ‘against an objection of either House’.<sup>53</sup> As noted above, Latham CJ’s judgment in the *Women’s Employment Case* directly contemplated the consequences of the requirement of identical legal operation for the efficacy of the same in substance prohibition, in particular noting that the inclusion of immaterial differences in a new instrument would be sufficient to avoid being in breach. Similarly, Latham CJ noted that the inclusion of additional matters in a previously disallowed instrument would also be sufficient to escape the same in substance prohibition, and to render the provision, in practical terms, ‘a complete futility’.<sup>54</sup>

*Future approach of the R&O committee?*

The very real risk that the requirement for identical legal effect in the application of the same in substance prohibition could undermine the intent and purpose of s. 48 of the LIA is one that the R&O committee will need to carefully consider in any future cases in which such matters arise, particularly if the executive is inclined to adopt the more restrictive interpretation of Dowsett J in any future dialogue with the R&O committee. In this regard, the R&O committee’s concluding remarks on the second regulation appear to indicate that, while it will remain cognisant of legal interpretations of the same in substance prohibition, it will also continue to bring a broader range of factors to its assessments:

The committee’s examination of any ‘same in substance’ issues in the future will continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the R&O committee’s scrutiny principles.<sup>55</sup>

The R&O committee’s reference to ‘the broader concepts of parliamentary sovereignty and accountability’ which inform its scrutiny principles would suggest that it retains its appreciation of the critical role that the same in substance prohibition has in ensuring the effectiveness of the disallowance power and thus in preserving the parliament’s oversight and control of the exercise of its delegated legislative powers by the executive. In this regard, it is useful to consider how the present legislative regime for delegated legislation has been informed by the work of the R&O

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<sup>53</sup> *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347], 364.

<sup>54</sup> *ibid.*, 361.

<sup>55</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 2 of 2016, 24 February 2016, p. 46.

committee in the past, and particularly the way in which it interacts with the R&O committee's scrutiny principles (as contained in Senate standing order 23).<sup>56</sup>

*Interaction of the R&O committee's scrutiny principles with legal standards*

With the enactment of the LIA in 2005, the provisions governing disallowance and related provisions such as the same in substance prohibition were moved from the AIA and included in the LIA as part of a comprehensive regime for the making and oversight of delegated legislation. The legislative codification of the architecture for the making and disallowance of legislative instruments in the LIA was a significant innovation, particularly because it also placed many of the informal or conventional standards and requirements previously enforced by the R&O committee onto a legislative basis for the first time. This included, for example, the requirements for the provision of explanatory statements with legislative instruments, and the need to provide specific information regarding the conduct of consultation in relation to the making of an instrument.<sup>57</sup>

The practical effect of this was to transform what were previously the R&O committee's conventional expectations around the making of legislative instruments into legal requirements, now falling within the scope of the R&O committee's first scrutiny principle, which requires that instruments of delegated legislation are made 'in accordance with statute'. The R&O committee has since assessed instruments for conformity with these legal requirements of the LIA, rather than as its expectations per se. The accommodation of the legal requirements of the LIA within the R&O committee's scrutiny principles reflects a practical concern for ensuring that, as far as possible, legislation proponents are presented with a consistent and well understood set of scrutiny standards in negotiating the passage of instruments through the scrutiny process. However, notwithstanding the practical benefits and outcomes of the codification of so many of the R&O committee's requirements and standards via the LIA (now the *Legislation Act 2003* (Cth)), it is important to note that its mandate ultimately derives not from statute but from the principles outlined under Senate standing order 23. In accordance with the separation of powers, the R&O committee's duty is not merely to ensure that instruments are in conformity with relevant legal

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<sup>56</sup> Under Senate standing order 23, the R&O committee is required to scrutinise disallowable legislative instruments to ensure that: (a) they are in accordance with statute; (b) they do not trespass unduly on personal rights and liberties; (c) they do not unduly make the rights and liberties of citizens dependent upon administrative decisions not subject to review of their merits by a judicial or other independent tribunal; and (d) they do not contain matters more appropriate for parliamentary enactment.

<sup>57</sup> See, for example, Pearce and Argument, op. cit., p. 96 (at 4.6), which notes that 'early steps in relation to the preparation of ... [explanatory] material, in the Commonwealth jurisdiction, were largely to address the requirements of the ... committee'.

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requirements but also to ensure that its scrutiny principles are not breached by instruments of delegated legislation.

A critical and sometimes overlooked consequence of this application of the separation of powers doctrine to understanding the R&O committee's work is that, while the concept of legality is strongly relevant to the R&O committee's scrutiny principles (that of ensuring that instruments are 'in accordance with statute'), mere conformity with applicable legal requirements may not, of itself, ensure that an instrument does not breach one or more of the R&O committee's scrutiny principles under the Senate standing orders. The R&O committee has therefore occasionally found the need to remind legislation proponents that the standards derived from its scrutiny principles are essentially distinct from the legal requirements or standards arising from such statutes as the LIA and the AIA.<sup>58</sup>

### *Legal authority versus scrutiny principles*

The essential distinction that the R&O committee makes, between conformity with legal requirements and the primary consideration of ensuring that instruments of delegated legislation do not offend its scrutiny principles, may suggest that the R&O committee's approach to same in substance matters in future will be guided by the types of purposive considerations that were apparent in the judgments of the *Women's Employment Case*. In this respect, Latham CJ's exposition of the manner in which a requirement for identical legal effect hollows or renders ineffective the same in substance provisions appears to speak directly to the R&O committee's past application of its scrutiny principles to ensure effective parliamentary control of the exercise of its delegated legislative power. Similarly, this concern for parliamentary control echoes the historical development of the disallowance power and related measures to ensure its effectiveness, in which procedural innovations were introduced to prevent the actual or potential circumvention of disallowance by a willing executive.

In contrast, the judgment in *Perrett*—the difficulties of reconciling its reasoning with the authoritative High Court *Women's Employment Case* judgment aside—did not address the consequences of its conclusion that the same in substance prohibition requires identical legal effect. Given that these consequences could include that the

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<sup>58</sup> See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 1 of 2016, 3 February 2016, Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665], pp. 57–60. The R&O committee stated that its requirements are separate from the legal standards of the LIA and noted that, 'while the committee generally seeks to conduct its scrutiny of delegated legislation to accord with, or augment, the provisions of the LIA, the fundamental principle underpinning the committee's expectations is that of ensuring that it is able to effectively scrutinise instruments with reference to the four matters outlined in Senate Standing Order 23' (at p. 59).



same in substance prohibition may be avoided through the introduction of minor, immaterial differences to a new instrument having the same legal effect as a disallowed instrument, it is suggested that the R&O committee will have limited scope to adopt this restrictive approach in service of its fundamental scrutiny principles.

In the event that the executive henceforth prefers *Perrett* as the correct application of the *Women's Employment Case*, there may be a need for the R&O committee to pursue future dialogue on same in substance matters in the context of its scrutiny principles rather than in a legal context in which the provision is, in practical terms, 'a complete futility'. Applying such an approach, for example, to the circumstances of *Perrett* could see the R&O committee undertaking a factual assessment of whether a \$5 increase, on top of large fee increases previously introduced and disallowed, was immaterial taking into account such things as the relative difference between the amounts and the expected difference in revenue gained over defined periods. If the R&O committee were to regard it as immaterial, the fact of the earlier disallowance would enable it to conclude that the second regulation contained matter 'more appropriate for parliamentary enactment', in breach of its fourth scrutiny principle, and to make its recommendations accordingly.

## **Conclusion**

In the fourth edition to their seminal work on delegated legislation in Australia, Pearce and Argument state that, as at the time of publication, only the Commonwealth, the Australian Capital Territory, the Northern Territory and Tasmania include provisions preventing the making of an instrument the same in substance as a previously disallowed instrument.<sup>59</sup>

However, the relevance of the implications of *Perrett* flow beyond just those jurisdictions which have enacted same in substance prohibitions. As the historical tensions around the delegation of the parliament's powers to the executive demonstrate, such delegation involves an inherent and persistent tension between the need for parliaments to retain effective control of their legislative power and the desire of executive governments to exercise such powers to the fullest possible extent in implementing their policies and legislative programs. *Perrett* is a demonstration that, notwithstanding the widespread use and acceptance of the delegation of parliaments' legislative powers to the executive, there is a continued need for parliaments to oversee the exercise of legislative power by executive governments, and to ensure that the necessary legal and procedural bulwarks are in place to ensure that such oversight is and remains effective.

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<sup>59</sup> Pearce and Argument, *op. cit.*, p. 204.

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*Perrett* is also instructive of the character of technical legislative scrutiny undertaken by parliamentary scrutiny committees, and the interplay of legal standards with scrutiny principles. All such committees include the consideration of legal standards and requirements in their assessments of whether instruments of delegated legislation are validly and properly made, and such standards often provide a consistent and accessible benchmark that is easily referable to the scrutiny principles which are the foundation of the work of scrutiny committees. For example, human rights and administrative law standards may act as ready proxies for scrutiny principles, and also provide substantial bodies of jurisprudence that can be drawn upon in service of scrutiny principles. However, *Perrett* is a reminder that, where legal standards or principles are unable to serve those deeper principles of parliamentary sovereignty and accountability, scrutiny committees must ultimately draw upon their scrutiny principles in a way that ensures and maintains effective oversight of the exercise of delegated legislative power by the executive.

In this light, while the *Perrett* judgment has cast significant doubt on the correct interpretation of the same in substance provisions, a legal resolution in the form of a further, definitive judgment of a court is not necessary for the R&O committee to be able to continue to adequately consider any same in substance matters that arise in future. This is because it is open to the R&O committee to draw upon the lessons of history and its own scrutiny principles to interpret the same in substance prohibition in a way that preserves the effectiveness of the disallowance power, which is so critical an element of the parliament's oversight of delegated legislation.

**Scrutiny Committees: A Vehicle for  
Safeguarding Federalism and the  
Constitutional Rights of Parliament\***

*Glenn Ryall and Jessica  
Strout*

Most parliamentary legislative scrutiny committees have broadly framed terms of reference which include a requirement to examine whether legislation is within power and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament. By considering the relevance of provisions of the Commonwealth Constitution to these terms of reference, the Australian Senate's Scrutiny of Bills Committee and Regulations and Ordinances Committee have demonstrated that they can play a part in safeguarding federalism and the constitutional rights of the Senate. This paper explores three examples of the committees' recent work in this area.

First, the paper considers the scrutiny committees' work with respect to the Senate's constitutional right to amend proposed appropriations (i.e. budget bills) that do not involve the ordinary annual services of the government.

Second, the paper outlines the work of the Regulations and Ordinances Committee post-*Williams*<sup>1</sup> in scrutinising Commonwealth spending initiatives that may not be supported by a constitutional head of legislative power and are therefore not within the legislative competence of the Commonwealth Parliament.

Finally, the paper reviews grants to the states under section 96 of the Constitution and the recent requests of the Scrutiny of Bills Committee that further information about these grants be made available on a routine basis in order to assist senators in scrutinising these payments, noting the role of senators in representing the people of their state.

Before considering how the Senate's legislative scrutiny committees have played a part in safeguarding federalism and the constitutional rights of the Senate, it is helpful to consider the importance of federalism and the role of the Senate in Australia's federal system more generally.

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\* A version of this paper was originally presented at the 2016 Australia-New Zealand Scrutiny of Legislation Conference, Perth, 11–14 July 2016.

<sup>1</sup> *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

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## Federalism

Federalism is important as a way of persuading separate self-governing states to unite on the basis of retaining their separate identities and sovereignty within their own sphere.<sup>2</sup> The division of powers between regional and national governments can also be seen as an additional safeguard of the rights of the people and against governments misusing their powers.<sup>3</sup> Thus federalism, combined with the separation of governmental power between the legislative, judicial and executive arms of government and the division of legislative power among two differently-constituted houses, are important safeguards against arbitrary government. This concept of federalism was articulated by the framers of the United States Constitution:

[In a federation] the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>4</sup>

Other advantages attributed to federalism, include:

- the adaption of local policies to local circumstances;
- the ability of states to conduct experiments and innovations in policy without involving the whole country;
- a healthy competition between states for the best policies;
- greater scrutiny of national policies as a result of the need to achieve cooperation; and

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<sup>2</sup> In the Australian context, it is clear that a key theme at the 1890s Convention Debates was a desire to ensure that the Commonwealth and the states would each be sovereign within their respective fields—each would be free to perform its functions and exercise its powers without interference, burden or hindrance from the other government. The Constitution was to be ‘an agreement among sovereign powers to give up some of their power to a new central body, but preserving their sovereignty over what they retained. The State was not subordinate to the Commonwealth, nor the Commonwealth to a State’: Leslie Zines, *The High Court and the Constitution*, 5th ed., Federation Press, Annandale, 2008, p. 1.

<sup>3</sup> ‘If a bad government possesses all powers, all powers may be abused, but a national or regional government can use its powers, and the people can use their separate votes in electing those governments, to correct, to some extent, any misuse of the powers of either one’: Rosemary Laing (ed), *Odgers’ Australian Senate Practice: As Revised by Harry Evans*, 14<sup>th</sup> ed., Department of the Senate, Canberra, 2016, pp. 8–9.

<sup>4</sup> Alexander Hamilton or James Madison, Federalist No. 51: ‘The structure of the government must furnish the proper checks and balances between the different departments’, *New York Packet*, New York, 8 February 1788.

- more opportunities for citizens to participate in decision-making, to gain experience in government and to hold public office.<sup>5</sup>

In Australia the division of powers between the Commonwealth government and state and territory governments is the basis of Australian federalism. This division of power is reflected in the terms of the Commonwealth Constitution. Relevant to the issues considered in this paper:

- section 51 lists the areas in which the Commonwealth Parliament may legislate or exercise jurisdiction, but does so without necessarily depriving the states of authority to legislate in those areas;
- section 61 provides a broad executive power to the Commonwealth; and
- section 96 allows the Commonwealth Parliament to provide ‘financial assistance’, tied or otherwise, to the states.

Of course, decisions of the High Court are important in determining the meaning of these provisions and therefore the balance between Commonwealth and state powers.

### **The role of the Senate in representing the people of the states**

The importance of states’ rights was a key issue at the 1890s Convention Debates. The constitutional framers regarded the Senate as essential to the federal system. As Sir Richard Baker, later the first President of the Senate, noted:

I venture to think that no one will dispute the fact that in a federation, properly so called, the federal senate must be a powerful house ... The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power.<sup>6</sup>

However, this does not mean that the constitutional framers intended that senators would vote in state blocs, instead it was intended that every law must have the support of a geographically distributed majority.<sup>7</sup> The purpose of the Senate and the bicameral structure of the Commonwealth Parliament was to require a double majority for the passage of laws. That is, a proposed law requires:

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<sup>5</sup> Laing (ed), op. cit., p. 9; Senate Select Committee on the Reform of the Australian Federation, *Australia’s Federation: an agenda for reform*, June 2011, pp. 6–12; Federal-State Relations Committee (Parliament of Victoria), *Australian federalism: the role of the States*, October 1998, pp. 5–9.

<sup>6</sup> *Australasian Federal Convention 1897–98* (Second Session), Sydney, 17 September 1897, p. 784, (Richard Baker, South Australia).

<sup>7</sup> Harry Evans, ‘The role of the Senate’, *Papers on Parliament*, no. 52, December 2009, pp. 93–4.

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- a majority of the representatives of the people as a whole [the House of Representatives]; and
  - a majority of the representatives of the people of a majority of states [the Senate].

This double majority requirement means that it is impossible for a majority to be formed from the representatives of only one or two states.<sup>8</sup> Without this requirement, the legislative majority could consist of the representatives of only two states and this could lead to neglect and alienation of the outlying parts of the country.<sup>9</sup> Most importantly in this regard, equal state representation in the Senate means that no political party can afford to neglect any state.<sup>10</sup> As Deakin noted in relation to parties in the Senate:

There will not be any question of large or small states, but a question of liberal or conservative. Then, as to the Senate, how does the question of equal representation affect parties? It affects them to this extent: that, as in the American Union, the leaders of those parties will take care to rally their forces, and push their campaigns with as much care in the smaller states as in the larger states.<sup>11</sup>

Similarly, the rationale for equal representation of the states in the Senate was explained by John Cockburn, as follows:

We must dispose of the terms ‘large’ and ‘small’, and think of the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the States.<sup>12</sup>

This rationale explains why the Senate was given powers in relation to proposed laws virtually equal to those of the House of Representatives. The Senate must agree to every law to ensure that it has the support of a geographically distributed majority.

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<sup>8</sup> Harry Evans, ‘Federalism: an idea whose time has come?’, paper presented at the Samuel Griffith Society Conference, Canberra, 7–9 March 1997.

<sup>9</sup> Evans, ‘The role of the Senate’, *op. cit.*, p. 93.

<sup>10</sup> *ibid.*, pp. 94–5.

<sup>11</sup> *Debates of the Australasian Federal Convention 1897–98* (Second Session), Sydney, 10 September 1897, p. 335 (Alfred Deakin, Victoria).

<sup>12</sup> *Debates of the Australasian Federal Convention 1897–98* (First Session), Adelaide, 30 March 1897, p. 340 (John Cockburn, South Australia).

## How the Senate represents state interests

In addition to this fundamental purpose of ensuring that all Commonwealth laws have the support of a geographically distributed majority, the equal representation of the states in the Senate also ensures that state interests are taken into account in other ways. As Barwick CJ recognised:

[the constitutional framers] intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.<sup>13</sup>

An important part of this examination from a different standpoint derives from the equal representation of the states in the Senate. This equal representation means that the perspectives of smaller states are more likely to be considered in the Senate. While much (and seemingly, most) Commonwealth activity does not have a significantly different impact on different states, where there is a differential impact the equal representation of the states allows the Senate to bring a different point of view which takes into account the interests of the smaller states to a much greater extent than in the House of Representatives.<sup>14</sup> In this way, the Senate's structure influences the way in which the Senate discharges many of its functions because the state basis of Senate representation sensitises its operation to state concerns.<sup>15</sup> In this regard, it is important to note that, despite the importance of party in the Senate, few senators dismiss the relevance of state-based representation altogether.<sup>16</sup>

### *The Senate's scrutiny function*

While it is often acknowledged that the modern Senate has a strong role as a house of scrutiny or review<sup>17</sup>, the fact that this role is complementary to the Senate's role as a states' house is often overlooked. The procedures available to senators relating to the

<sup>13</sup> *Victoria v Commonwealth* (1975) 134 CLR 81, 122 ('PMA Case').

<sup>14</sup> A recent example of this relates to consideration of the distribution of GST revenues to the states. While Western Australia has strongly supported changes to the distribution formula, other states such as Tasmania strongly support the existing system. This debate has been reflected in the Senate, while the issue has received comparatively little attention in the House of Representatives.

<sup>15</sup> Campbell Sharman, 'The Australian Senate as a States House', *Australian Journal of Political Science*, vol. 12, no. 2, 1977, pp. 73–4.

<sup>16</sup> Scott Brenton, 'State-Based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation', *Journal of Legislative Studies*, vol. 21, no. 2, 2015, p. 274.

<sup>17</sup> See, for example, Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*, Hart Publishing, Oxford, 2011, p. 120.

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Senate's role as a house of scrutiny provide many opportunities to pursue state interests.<sup>18</sup> These processes and procedures include:

- amendments to government bills<sup>19</sup>;
- Senate committee inquiries<sup>20</sup>;
- Senate estimates hearings<sup>21</sup>;
- the introduction of private senators' bills<sup>22</sup>;
- disallowance of Commonwealth delegated legislation that impacts a particular state<sup>23</sup>;
- orders for the production of documents<sup>24</sup>; and
- questions to ministers in question time.<sup>25</sup>

Importantly, other than questions to ministers in question time, these procedures are, in practice, not realistic options in the House of Representatives. In this way, it can be said that the procedures that the Senate has developed as a house of scrutiny are complementary to its work in representing state interests.

#### *Party rooms and the ministry*

In addition to bringing the perspectives of smaller states to debate in the Senate and its committees, equal representation of the states in the Senate also allows for increased representation of the smaller states in party rooms.<sup>26</sup> Relatedly, it is usually desired to

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<sup>18</sup> Paula Waring, 'The Pursuit of State Interests in the Senate', *Papers on Parliament*, no. 66, October 2016, pp. 139–59.

<sup>19</sup> For example, an amendment to the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), co-sponsored by Senator Eric Abetz (Liberal) and Senator Bob Brown (Greens), was passed by the Senate on 27 October 2009 to ensure that the government's plan to close down the Federal Court registry services in Hobart could not proceed.

<sup>20</sup> Recent examples of Senate inquiries relating to state matters include inquiries into the Perth Freight Link project (May 2016), Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016 (May 2016), Regulation of the fin-fish aquaculture industry in Tasmania (August 2015), Privatisation of State and Territory assets and new infrastructure (March 2015), and the Select Committee on the Reform of the Australian Federation (June 2011).

<sup>21</sup> For example, recently Tasmanian senators examined the take-up and efficacy of a Commonwealth wage subsidy scheme offered to Tasmanian employers and the Defence Materiel Organisation has been questioned extensively about the proposed construction of submarines in South Australia.

<sup>22</sup> For example, the Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015.

<sup>23</sup> Recent examples include disallowance motions which sought to stop a 'super trawler' operating off the Tasmanian coastline, and to stop the declaration of the Coral Sea Conservation Zone because of its potential impact on Queensland fisheries.

<sup>24</sup> For example, the Senate will often order ministers to table documents in the Senate relating to state issues, such as Commonwealth funding for state infrastructure projects.

<sup>25</sup> Questions relating to the distribution of GST revenue to the states have been common in recent years.

<sup>26</sup> J. R. Odgers, *Australian Senate Practice*, 6th ed., Royal Australian Institute of Public Administration, Canberra, 1991, p. 11; Sharman, op. cit., p. 68; Waring, op. cit., p. 158.



have all states fairly represented in the federal ministry. Without the Senate this would be much more difficult, or impossible in situations where a governing party lacks any representation in the House of Representatives from a particular state.

*Minor parties and independent senators*

The proportional representation electoral system for the Senate allows independents and minor parties to more easily secure representation in the Senate than in the House of Representatives. These minor party and independent senators often have distinctive regional constituencies and use the Senate to bring national attention to particular state-based concerns.<sup>27</sup> For example, Independent Tasmanian Senator Brian Harradine secured increased subsidies for Bass Strait shipping as part of the budget negotiations in 1993 and \$353 million for environmental, technical and other programs in Tasmania as part of the negotiations in relation to the sale of Telstra in 1996 and 1999. In 2009, Independent South Australian Senator Nick Xenophon was able to negotiate \$900 million in fast-tracked funds for water buy-backs for the Murray-Darling Basin.<sup>28</sup>

**The role of the legislative scrutiny committees in safeguarding federalism and the constitutional rights of the Senate**

The scrutiny role undertaken by the Senate also allows it to play a role in representing the constitutional interests of the states. This work is most often done through the Senate's legislative scrutiny committees. As former Chief Justice French has noted, the scrutiny of legislation by the Senate's legislative scrutiny committees is:

a special process which stands apart from the mainstream of parliamentary debate about legislation based upon contested policy ... It aspires to bipartisanship in ensuring that legislation is subjected to a degree of parliamentary quality control according to agreed parliamentary criteria.<sup>29</sup>

The 'parliamentary quality control' undertaken by these committees includes examining whether legislation is within power and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament. By considering the relevance of various constitutional provisions to these functions, in

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<sup>27</sup> Campbell Sharman, 'The representation of small parties and independents in the Senate', *Australian Journal of Political Science*, vol. 34, no. 3, 1999, p. 360.

<sup>28</sup> Waring, *op. cit.* p. 144.

<sup>29</sup> Chief Justice Robert French, 'Adding Value to Law Making', speech delivered at the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Canberra, 6 July 2009, p. 1.

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recent years the Scrutiny of Bills Committee and the Regulations and Ordinances Committee has sought to represent state interests through:

- highlighting the Senate's constitutional right to amend proposed appropriations (i.e. budget bills) that do not involve the ordinary annual services of the government;
- highlighting instances where it appears that Commonwealth executive spending programs may be intruding into areas of state responsibility; and
- increasing the availability of information in relation to section 96 grants to the states.

***The Senate's constitutional right to amend proposed appropriations not involving the ordinary annual services of the government***

The extent of the financial powers of the Senate was one of the most contentious issues at the 1890s Convention Debates and one in which the possibility of federation itself was at stake. In 1897 Sir John Forrest stated that if strict adherence to the Westminster form of responsible government (in relation to the powers of the houses over 'money bills') were 'the only terms upon which [the larger colonies] want Federation, they must federate for themselves, and leave the other colonies to stand out of the compact'.<sup>30</sup>

In the debates about 'money bills', delegates from the larger colonies demanded that the 'majority must rule' and that the Senate should not have the power to reject or amend financial legislation.<sup>31</sup> On the other hand, delegates from the smaller colonies argued that if the traditional Westminster conception of responsible government was not altered to provide the Senate with adequate financial powers 'we may as well hand ourselves over, body and soul, to those colonies with the larger populations'.<sup>32</sup>

In the end, the smaller colonies largely achieved their aims with the Senate having nearly the same legislative powers as the House of Representatives, including the power to reject all bills. As Frederick Holder succinctly put it, in the context of the Senate being integral to the federal structure of the Constitution: 'To set up a Senate which will have no power of the purse will be to set up an absolutely worthless body.'<sup>33</sup>

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<sup>30</sup> *Debates of the Australasian Federal Convention 1897–98* (First Session), Adelaide, 13 April 1897, p. 490 (John Forrest, Western Australia).

<sup>31</sup> *ibid.*, pp. 499–500 (Richard O'Connor, New South Wales).

<sup>32</sup> *ibid.*, p. 490 (John Forrest, Western Australia).

<sup>33</sup> *ibid.*, p. 148 (Frederick Holder, South Australia).

*Sections 53 and 54 of the Constitution*

Section 53 of the Constitution (and related provisions) reflects the federal compromise between the delegates for the smaller and larger colonies. Relevantly, the second paragraph of section 53 of the Constitution provides that:

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The rationale for these provisions is to reserve to the executive government the initiative in proposing appropriations and impositions of taxation, without affecting the substantive powers of the Senate.<sup>34</sup> Section 53 therefore provides that the two houses of parliament have equal powers in relation to all proposed laws, except certain proposed laws imposing taxation or appropriating revenue or moneys.<sup>35</sup>

The Constitution contains two sections which are designed to ensure that the Senate is not unduly inhibited in its consideration of financial legislation by the conditions imposed on it by section 53. Of particular relevance is section 54, which provides that a proposed law that appropriates money for the ordinary annual services of the government must deal only with such appropriation:

This means that appropriations for purposes other than the ordinary annual services of the government ... may not be combined in one bill with provisions which the Senate may not amend. This ensures that the Senate is not prevented from amending provisions which do not appropriate money for the annual services of the government because of such provisions being linked with such appropriations in a single bill. Such a linkage of provisions is usually referred to as 'tacking', and section 54 seeks to prevent 'tacking'.<sup>36</sup>

At the 1890s Convention Debates delegates were aware of the problem of 'tacking' in the United States and section 54 was designed to remedy the issue.<sup>37</sup> In part, delegates

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<sup>34</sup> Laing (ed), op. cit., p. 359.

<sup>35</sup> *ibid.*, pp. 359–60. As noted above, the Senate retains the power to reject all bills.

<sup>36</sup> *ibid.*, p. 362.

<sup>37</sup> Bernhard Wise noted that the importance of section 54 is 'rendered obvious when one notices that in more than half of the constitutions of the states of America this clause has been inserted as a constitutional amendment, owing to the grave and increasing difficulties arising from the practice of tacking to appropriation bills measures not appropriate to such bills ... the States have generally provided a remedy for the evil by enacting that no law shall contain more than one subject, which shall be plainly expressed in its title': *Debates of the Australasian Federal Convention 1897–98* (Second Session), Sydney, 15 September 1897, pp. 539–540 (Bernhard Wise, New South Wales).

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wanted to ensure that the government was not able to ‘expand a whole department, and practically make an alteration of policy, on which the House representing the people of the States would have no opportunity of expressing their views’.<sup>38</sup>

*‘The ordinary annual services of the government’*

The framers of the Constitution had a fairly clear conception of the meaning of the phrase ‘the ordinary annual services of the government’: the expression referred to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government.<sup>39</sup> For example, it was clear that expenditure on extraordinary matters, such as bushfires, would not be part of the ‘ordinary annual services of the government’:

Mr McMillan— ... Calamities, such as the bush fires which have recently occurred in Tasmania and Victoria, take place, and the expenditure which they necessitate is of an extraordinary character ...

Mr Isaacs—I should hope that the expenditure caused by a bush fire would not be part of an annual service .... expenditure incurred for bush fires...would not be ordinary, it would not be annual, and it would not be a service.<sup>40</sup>

Despite this clear intention of the constitutional framers there have been many examples where expenditure for extraordinary matters has been included in the bill for the ordinary annual services of the government. This matter has been of great concern to the Senate as it undermines the Senate’s constitutional rights in relation to appropriation bills. Therefore in 1965 an agreement between the Senate and the government was reached in relation to the interpretation of what should be regarded as ‘ordinary annual services of the government’.<sup>41</sup>

However, in recent times concerns in relation to the inappropriate classification of appropriations as ordinary annual services have again become apparent. This was evident in March 2005 when two appropriation bills were presented to replenish money spent by departments and agencies on relief for the victims of the 2004 tsunami. One of the bills purported to be for ordinary annual services but, as the

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<sup>38</sup> *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 8 March 1898, p. 2081 (John Cockburn, South Australia).

<sup>39</sup> Laing (ed), op. cit., p. 386.

<sup>40</sup> *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 8 March 1898, p. 2076 (William McMillan, New South Wales; Isaac Isaacs, Victoria).

<sup>41</sup> Laing (ed), op. cit., p. 386.

expenditure could not possibly be ordinary annual services expenditure, both bills were treated as amendable bills by the Senate.<sup>42</sup>

These instances indicated that the government appeared to be taking a position that ordinary annual services include anything it regarded as falling within vaguely-expressed outcomes of departments, including expenditure in relation to extraordinary events and new policy proposals.<sup>43</sup> It therefore appeared that virtually all new policies would be classified by the executive as ordinary annual services of the government and the appropriation of money for such policies would be included in a bill that is not amendable by the Senate.

On 22 June 2010, as a result of continuing concerns relating to the misallocation of some items in appropriation bills, the Senate resolved ‘to reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government’ and that ‘appropriations for expenditure on ... *new policies not previously authorised by special legislation* ... are not appropriations for the ordinary annual services of the Government’.<sup>44</sup>

#### *Consideration of ordinary annual services by the Scrutiny of Bills Committee*

The Scrutiny of Bills Committee regularly identifies spending items in appropriation bills that may have been inappropriately classified as ordinary annual services when they in fact relate to new programs or projects.<sup>45</sup> Specifically, the committee has noted that this inappropriate classification undermines the Senate’s constitutional rights and impacts on the Senate’s ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

Recently, for example, the committee alerted the Senate to the fact that it appeared that the initial expenditure in relation to the establishment of a new ‘Cities and the Built Environment Taskforce’ may have been inappropriately classified as ordinary

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<sup>42</sup> The Northern Territory Emergency Response package of bills repeated this anomaly, as did bills to cover expenditure on an equine influenza outbreak.

<sup>43</sup> Laing (ed), op. cit., p. 388. For example, any new policy in the education and training portfolio that relates to either (a) ‘improving early learning, schooling, student educational outcomes and transitions to and from school through access to quality child care, support, parent engagement, quality teaching and learning environments’ (outcome 1), or (b) ‘promoting growth in economic productivity and social wellbeing through access to quality higher education, international education, and international quality research, skills and training’ (outcome 2) would be regarded as ‘ordinary annual services of the government’.

<sup>44</sup> *Journals of the Senate*, 22 June 2010, pp. 3642–3 [emphasis added].

<sup>45</sup> In accordance with Senate standing order 24(1)(a)(v), the committee is required to report on bills that insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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annual services and therefore included in Appropriation Bill (No. 3) 2015–2016, which was not amendable by the Senate. The committee considered that the case for suggesting that the Cities Taskforce was a new policy, the appropriation for which should be subject to amendment by the Senate, was particularly strong because:

- the expenditure related to the *establishment* of a Cities Taskforce to develop and implement the Government’s *new* Cities Agenda;
- an entirely new program was created within the Environment Portfolio to support the new cities and the built environment policy; and
- it appeared that responsibility for a ‘national policy on cities’ was included in the Administrative Arrangements Order for the first time on 18 February 2016.<sup>46</sup>

The committee’s comments on this matter also informed debate in the Senate in relation to the bill.<sup>47</sup>

The ability of the Senate, as the chamber representing the people of the states, to amend proposed appropriations where the government seeks to implement a new policy is essential to safeguarding federalism and the constitutional rights of the Senate. Recognising this, the Scrutiny of Bills Committee has noted that it will ‘continue to draw this important matter to the attention of Senators where appropriate in the future’.<sup>48</sup>

#### *Consideration of ordinary annual services by the Regulations and Ordinances Committee*

The Regulations and Ordinances Committee identifies items in regulations that authorise expenditure that may have been inappropriately classified as the ordinary annual services of the government.<sup>49</sup> In light of concerns regarding the potential erosion of the Senate’s constitutional rights with respect to the authorisation of such

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<sup>46</sup> Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, p. 255.

<sup>47</sup> *Journals of the Senate*, 17–18 March 2016, p. 4074; Commonwealth, *Parliamentary Debates*, Senate, 17–18 March 2016, p. 2709.

<sup>48</sup> Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2016*, 24 February 2016, pp. 4–8; Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, pp. 253–5.

<sup>49</sup> In accordance with Senate standing order 23(3)(d), the committee is required to ensure that a disallowable legislative instrument does not contain matter more appropriate for parliamentary enactment.

expenditure post-*Williams*<sup>50</sup>, the committee has taken the approach of drawing any such instances to the attention of the Senate and the relevant standing committee.<sup>51</sup>

The *Williams* cases brought into question the validity of direct Commonwealth government payments to persons, other than a state or territory. In 2012, the High Court delivered its judgment in *Williams v Commonwealth (Williams No. 1)*<sup>52</sup>, holding that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services to a Queensland government school under the National School Chaplaincy Program. The decision emphasised the limited scope of the executive power to enter into contracts with private parties and spend public monies without statutory authority, and had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.<sup>53</sup>

In response to *Williams No. 1* the government enacted the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) (the FFLA Act), which purported to retrospectively provide legislative support for over 400 non-statutory funding schemes whose validity was thrown into doubt. This Act also inserted a provision (section 32B) into the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act) to provide legislative authority for the government to spend monies on programs listed in regulations.<sup>54</sup> Consequently, the executive can purport to authorise expenditure on programs via the making of regulations by adding the particulars of those programs to a list in the relevant regulations.<sup>55</sup> As such, it is possible for items

<sup>50</sup> *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

<sup>51</sup> See for example Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2015, 12 May 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370], pp. 10–11 and Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2015*, 25 March 2015, pp. 267–71, which commented that it seemed the initial expenditure in relation to the items provided for in the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370] in the Health portfolio may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2014-15, which is not amendable by the Senate). See also Patrick Hodder, ‘The Williams decisions and the Implications for the Senate and its Scrutiny Committees’, *Papers on Parliament*, no. 64, January 2016, pp. 143–59.

<sup>52</sup> (2012) 248 CLR 156.

<sup>53</sup> For a fuller account of the decision, see Glenn Ryall, ‘*Williams v. Commonwealth*—A Turning Point for Parliamentary Accountability and Federalism in Australia?’, *Papers on Parliament*, no. 60, March 2014, pp. 131–48.

<sup>54</sup> The FFLA Act inserted section 32B of the FMA Act (now *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act)) to provide legislative authority for the government to spend monies on programs listed in Schedule 1AA (now Schedule 1AB) to Financial Management and Accountability Regulations 1997 (now Financial Framework (Supplementary Powers) Regulations 1997 ((FF(SP) regulations)).

<sup>55</sup> Schedule 1AB of the now FF(SP) regulations. On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added

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inappropriately classified as ordinary annual services of the government to be included in regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.

In March 2014, the then Senate Standing Committee on Appropriations and Staffing requested that the Regulations and Ordinances Committee monitor executive expenditure authorised by regulation under the now *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), and report on such expenditure to the Senate.<sup>56</sup>

The request noted the fundamental role of parliament to approve appropriations and authorise revenue and expenditure proposals and, in the context of the Commonwealth Constitution, identified a deficiency in the Senate's scrutiny of executive expenditure authorised via the making of regulations to add programs to Schedule 1AB of the now Financial Framework (Supplementary Powers) Regulations (FF(SP) regulations), specifically in relation to items of expenditure inappropriately classified as the ordinary annual services of the government. The request noted that previously such items were drawn to the attention of the Senate Standing Committee on Appropriations and Staffing and Senate legislation committees examining estimates of expenditure; and a list of such items was also drawn to the attention of the Minister for Finance. However, post the government's response to *Williams*, such items would not be examined as part of the estimates process.

In looking at disallowable legislative instruments that authorise expenditure of government funds, the Regulations and Ordinances Committee plays an important role in safeguarding the Senate's constitutional ability to amend executive expenditure proposals.<sup>57</sup>

For example, the Senate Regulations and Ordinances Committee drew to the attention of the Senate and the relevant portfolio committee a regulation which established

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Schedule 1AB to the FMA regulations. After this date arrangements, grants and programs have been specified under Schedule 1AB rather than Schedule 1AA. This was a technical change to avoid the need to group items under the administering department (as required under Schedule 1AA). See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp. 1–2.

<sup>56</sup> Correspondence from Senator the Hon. John Hogg, Chair of the then Senate Standing Committee on Appropriations and Staffing, to the Senate Regulations and Ordinances Committee, 17 March 2014. See Senate Standing Committee of Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2014, 14 May 2014, appendix 3.

<sup>57</sup> Noting the Scrutiny of Bills Committee's responsibility to consider whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (See Senate standing order 24(1)(a)(v)) and discussion of the Scrutiny of Bills Committee's consideration of ordinary annual services above), which is supported by the scrutiny mandate of the Regulations and Ordinances committee to report on whether the exercise of delegated legislative power is more appropriate for parliamentary enactment (See Senate standing order 23(3)(d)).



legislative authority for a spending activity administered by the Department of Health, which allocated \$15 million over two years to support the construction of a replacement training and administration base for the Gold Coast Suns Australian Football League (AFL) team at Metricon Stadium, so as to enable the site of the team's existing training and administration base to be used in connection with the 2018 Commonwealth Games. In their comments, the committee noted that prior to the enactment of section 32B of the FMA Act (now the FF(SP) Act) this item should properly have been contained within an appropriation bill not for the ordinary annual services of government.<sup>58</sup>

### ***The constitutionality of Commonwealth spending initiatives***

#### *Background*

The fact that the Commonwealth raises much more revenue than it needs for its own purposes has:

encouraged the Commonwealth over the years to engage in direct expenditure on a wide range of matters beyond the scope of its legislative power, generally in areas of State responsibility, relying on the executive power in section 61.<sup>59</sup>

However, the *Williams* decisions<sup>60</sup> have 'put a brake on this option'.<sup>61</sup> In these cases, the court drew on the federal structure of the Constitution and the system of

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<sup>58</sup> See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2015, 12 May 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370], pp. 10–11. See also Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2015*, 25 March 2015, pp. 267–71. Relatedly, the Scrutiny of Bills Committee drew to the attention of the Senate Appropriation Bill (No. 3) 2014–2015, and commented that it seemed the initial expenditure in relation to the 'Gold Coast Suns AFL Club – upgrade of Metricon Stadium facilities' in the Health portfolio may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2014–2015, which is not amendable by the Senate).

<sup>59</sup> Cheryl Saunders, 'Australian Federal Democracy', speech delivered for the Law Oration 2015, Victoria Law Foundation, Melbourne, 14 October 2015, [http://www.victorialawfoundation.org.au/sites/default/files/attachments/vlf\\_law\\_oration\\_2015.pdf](http://www.victorialawfoundation.org.au/sites/default/files/attachments/vlf_law_oration_2015.pdf).

<sup>60</sup> *Williams v Commonwealth (No. 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416 (Williams No. 2).

<sup>61</sup> Saunders, 'Australian Federal Democracy'. In addition, in *Williams No. 2* the High Court clarified the meaning of the term 'benefits to students' in paragraph 51(xxiiiA) (the social welfare power) of the Constitution. Specifically, the Court held that the concept of 'benefits' to students was more precise than '(any and every kind of) advantage or good'. *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 458 [43]. For something to come within the meaning of 'benefits to students' relief should amount to 'material aid provided against the human wants which the student has by reason of being a student'. *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 460 [46]. This is relevant to the consideration of the constitutionality of Commonwealth expenditure on the Prime Minister's Prizes initiative discussed below.

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representative and responsible government that it establishes to hold that the Commonwealth executive does not (except in limited circumstances) have the power to spend public money without legislative authority. It is now clear that almost all Commonwealth spending programs must be authorised by legislation and therefore be supported by a head of legislative power.<sup>62</sup> As a result, post-*Williams* the Commonwealth executive cannot intrude into areas of state responsibility by using its executive power to expend public money in areas that fall outside the scope of Commonwealth legislative power.

*Consideration by the Regulations and Ordinances Committee*

As Lynch notes, the insistence of the High Court in the *Williams* cases:

that, exceptional circumstances aside, statutory approval is required for Commonwealth spending has obviously created an opportunity for Parliament to take on an oversight role'.<sup>63</sup>

This oversight role has largely been undertaken by the Senate Regulations and Ordinances Committee because the purported legislative authority for new Commonwealth spending programs is provided by specifying the relevant program in regulations.<sup>64</sup> In the context of key provisions of the Constitution, the work of the Regulations and Ordinances Committee in the aftermath of *Williams* demonstrates the role the committee plays in parliamentary accountability and federalism where the executive authorises expenditure in areas that are historically the responsibility of the states.

The Regulations and Ordinances Committee's terms of reference require the committee to ensure that an instrument is made in accordance with statute.<sup>65</sup> This requires the committee to ensure that disallowable legislative instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements. With reference to this, the Regulations and Ordinances Committee has drawn on the reasoning in *Williams No. 2* to request that the explanatory statement accompanying each regulation authorising Commonwealth expenditure on new

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<sup>62</sup> Anne Twomey, 'Post-*Williams* Expenditure—When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?', *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 9–10.

<sup>63</sup> Andrew Lynch, 'Commonwealth Spending After *Williams* (No 2): Has the New Dawn Risen?', *Public Law Review*, vol. 26, no. 2, June 2015, p. 86.

<sup>64</sup> Financial Framework (Supplementary Powers) Regulations 1997.

<sup>65</sup> See Senate standing order 23(3)(a).

programs explicitly state the constitutional head of power that supports the expenditure.<sup>66</sup>

In considering the wide scope of Commonwealth executive spending, Saunders and Crommelin note:

The outcome in the *Williams* cases has reined in the practice to the extent that each program is now supported at least by subordinate legislation, in which some attempt is made to identify a plausible head of Commonwealth constitutional power. Old habits die hard, however. Executive action with limited parliamentary involvement has many attractions for incumbent governments. The legislation is written in very general terms; its subordinate status preserves executive control; and at least some of the claims for supporting power are fanciful.<sup>67</sup>

The Regulations and Ordinances committee now routinely turns its mind to questions of the constitutionality of executive spending programs and despite initial resistance by the government, the work of the committee has successfully established a practice whereby the government points to which of its constitutional powers it is relying on to support each new spending program.<sup>68</sup>

As a result of the committee's continuing consideration of these constitutional issues, it appears that there have recently been improvements in the quality of responses to the committee's requests for advice regarding the purported constitutionality of

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<sup>66</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 15 of 2014, 19 November 2014, p. 6.

<sup>67</sup> Cheryl Saunders and Michael Crommelin, 'Reforming Australian Federal Democracy', *Meanjin Quarterly*, vol. 74, no. 3, 2015, p. 8.

<sup>68</sup> For example, in 2015 the committee questioned the Minister for Finance as to whether the constitutional heads of power identified by the minister (in this case the external affairs power and/or the executive nationhood power coupled with the express incidental power) actually supported the following new spending programs: Mathematics by Inquiry program (to create and improve mathematics curriculum resources for primary and secondary school students); and Coding Across the Curriculum program (to encourage the introduction of computer coding and programming across different year levels in Australian schools). In this instance, the committee continued to seek further information from the minister where it had received successive unsatisfactory responses. When the minister's third response also failed to directly address the committee's concerns the committee sought the minister's explicit and positive assurance that, in exercising the powers delegated by the parliament in the making of the regulation, he was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee ultimately concluded its examination of the matter after receiving a fourth response in which the minister assured the committee that the government's legal advice confirmed that that the Mathematics by Inquiry and the Coding Across the Curriculum programs were supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power). See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 12 of 2015, 12 October 2015, pp. 10–13, and Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 13 of 2015, 13 October 2015, p. 3.

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executive spending schemes. For example, in 2016 the committee questioned the Minister for Finance as to whether each of the constitutional heads of power identified by the minister (including the ‘benefits to students’ limb of the social welfare power) actually supported new spending on the Prime Minister’s Prizes initiative (to provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation). In this instance, the minister’s response advised that the Prime Minister’s Prizes initiative had been revised and that it no longer included any expenditure that would rely on the students’ benefits power.<sup>69</sup>

Relatedly, the committee has recently sought further information from the Minister for Finance to clarify the constitutional foundation for expenditure on new programs where numerous constitutional heads of power are identified in a regulation as supporting a new program.<sup>70</sup> In such cases, where the relevant explanatory statement does not include a clear and explicit statement of the relevance of each constitutional head of power relied on to support the operation of the program, the committee has sought, and received, detailed responses from the minister as to the relevance of each constitutional power that the regulation seeks to rely on to support the new program.

Lynch and Meyrick suggest that in instances where contentious constitutional issues arise ‘the Parliament may proceed with enactment and leave validity to be determined by the High Court’ but only after parliamentary committees have played their part ‘by

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<sup>69</sup> In detail, the committee questioned the Minister for Finance, amongst other things, as to whether the constitutional heads of power identified by the minister (in this case the social welfare power; the external affairs power; and the executive nationhood power coupled with the express incidental power) actually supported the following new spending program: Prime Minister’s Prizes (to provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation). As it was unclear how the funding of the ‘Prime Minister’s Prizes’ initiative may be regarded as providing ‘benefits to students’ within the scope of the social welfare power; or an activity peculiarly adapted to the government of a nation’; and as not able to be otherwise ‘carried out for the benefit of the nation’; the committee requested the advice of the Minister for Finance in relation to the legislative authority for this initiative. The minister’s response advised that the Prime Minister’s Prizes initiative had been revised and that it no longer included any expenditure that would rely on the students’ benefits power. The response argued that the revised initiative was supported by the executive nationhood power coupled with the express incidental power as it ‘provides national-level prizes and awards to recognise the nation’s most outstanding scientists and science teachers’ and ‘has national significance as part of the Commonwealth’s science strategy’. See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 7 of 2016, 12 October 2016, p. 73.

<sup>70</sup> See for example: Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 4 of 2017, 29 March 2017, Financial Framework (Supplementary Powers) Amendment (Attorney-General’s Portfolio Measures No. 4) Regulation 2016 [F2016L01924] pp. 37–40; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751] pp. 41–53; Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921] and Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925] pp. 54–62.

engaging in conscious consideration of the Constitution'.<sup>71</sup> As demonstrated above, it is clear that the Regulations and Ordinances Committee is undertaking this 'conscious consideration' in relation to the constitutionality of executive spending schemes. The Regulations and Ordinances Committee's work in this area has required the Commonwealth executive to directly turn its mind to the question of whether a proposed spending program is supported by a constitutional head of power. Thus, it may be the case, that some proposed Commonwealth spending programs have not gone ahead because the Commonwealth has received advice that the proposed program does not fall within a constitutional head of legislative power. The Regulations and Ordinances Committee's requirement that the purported constitutional authority for a spending program be made explicit on the face of the relevant instrument is apt to focus the minds of the government and its legal advisers in this regard.

The recent work of the committee demonstrates that the parliament plays a critical role in ensuring Commonwealth spending initiatives (i.e. executive actions authorised by delegated legislation) are within the scope of Commonwealth power and are therefore constitutionally valid.<sup>72</sup> By raising the profile of potential Commonwealth incursions into areas of traditional state responsibility, the committee plays a role in protecting the constitutional interests of the states.

### ***Section 96 grants to the States***

#### *Background*

Consistent with the vertical division of power between the Commonwealth and the states, the Commonwealth administers its own legislation and spends money for its own purposes. However, as is the case in other federations such as Canada and the United States, a more difficult issue concerns the Commonwealth's capacity to spend for other purposes—that is, in areas that are traditionally the responsibility of the states. In Australia this issue is particularly significant as a result of the 'vast fiscal imbalance in favour of the Commonwealth, while major expenditure responsibilities remain with the States'.<sup>73</sup>

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<sup>71</sup> Andrew Lynch and Tessa Meyrick, 'The Constitution and Legislative Responsibility', *Public Law Review*, vol. 18, 2007, pp. 163–4.

<sup>72</sup> See for example: Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 6 of 2015, 17 June 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572] and Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 13 of 2015, 13 October 2015.

<sup>73</sup> Saunders, *The Constitution of Australia*, p. 241.

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Unlike Canada and the United States, the Australian Constitution includes an express power for the Commonwealth to spend through grants to the states. Under section 96, the ‘Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’. This grant power has been interpreted very broadly by the High Court.<sup>74</sup> As Saunders notes:

grants can be made on condition that a State exercises its powers in a particular way or that it refrains from exercising a power. A State is not compelled to accept a grant, although given the fiscal imbalance, refusal is rare ... through the mechanism of conditional grants, the Commonwealth exercises extensive de facto control over most areas of State responsibility that involve significant levels of expenditure.<sup>75</sup>

It is interesting to note the High Court’s broad interpretation of the grants power in section 96 in light of the genesis of this provision. At the 1890s Constitutional Conventions a clause similar to current section 96 was proposed; however, the clause was only supported by a few delegates. The proposed clause was objected to as being ‘too indefinite, as making the Commonwealth a “rich uncle” for the States and casting a slur on their solvency, as opening the door to continual applications for “better terms”, and as being a disastrous commentary on the efficiency of the financial clauses’.<sup>76</sup>

In the end, current section 96 was inserted at the last minute at the 1899 Premiers’ Conference. The only official explanation of the views of the premiers was that the section was intended to give effect to the opinion that power should be granted to the parliament to deal with any exceptional circumstances which may from time to time arise in the financial position of any state. It was noted that the power ought not to be used except in cases of emergency and that the section is ‘intended as the medicine, not the daily food, of the Constitution’.<sup>77</sup>

Importantly, and perhaps despite the text and constitutional history of section 96, based on High Court authority to date, it appears settled that the terms and conditions

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<sup>74</sup> *Victoria v Commonwealth* (1926) 38 CLR 399 (‘Federal Aid Roads case’); *South Australia v Commonwealth* (1941) 65 CLR 373 (‘Uniform Tax case (No. 1)’); *Victoria v Commonwealth* (1957) 99 CLR 575 (‘Uniform Tax case (No. 2)’); *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 (‘DOGS case’).

<sup>75</sup> Saunders, *The Constitution of Australia*, p. 242.

<sup>76</sup> John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 869. For example, Dr Cockburn noted that if the clause were to be accepted ‘it would certainly sap the independence of the States by placing the Federal Parliament as a sort of Lord Bountiful over the States’: *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 17 February 1898, p. 1119 (John Cockburn, South Australia).

<sup>77</sup> *ibid.*, pp. 870–1.

attaching to ‘financial assistance’ provided to the states need not be fixed by the parliament itself as the power may be delegated to the executive.<sup>78</sup>

*Contemporary use*

In 2016–17 the Commonwealth proposed to make grants of \$116.5 billion to the states and territories. This included \$61.3 billion in ‘general revenue assistance’ (grants without conditions) and \$55.3 billion in ‘payments for specific purposes’ (grants provided with conditions). The main form of general revenue assistance is the GST entitlement. Payments for specific purposes cover health, education, skills and workforce development, community services, affordable housing, infrastructure, environment, and other ‘national partnership’ payments.<sup>79</sup> The conditions attached to these payments for specific purposes govern the purpose and manner of the expenditure and often stipulate required outcomes. Thus, it can be said that these grants ‘structure the way in which most State constitutional responsibilities are carried out’.<sup>80</sup> Despite the obvious importance of these conditions, the conditions themselves ‘are not necessarily accessible in the public domain’.<sup>81</sup>

The vast majority of grants to the states and territories are provided for by special (standing) appropriations, but some money for grants is also appropriated in the annual appropriation bills.<sup>82</sup>

It has been suggested that despite the wording of section 96, which emphasises that it is the parliament that may ‘grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’, the conditions attaching to section 96 grants ‘are rarely determined or even scrutinised by the Commonwealth Parliament’.<sup>83</sup> The aim of this section of the paper is to demonstrate how, in recent years, the Senate has taken some steps towards subjecting section 96 grants and the conditions attaching to them to some level of scrutiny.

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<sup>78</sup> Cheryl Saunders, ‘Towards a theory for section 96: Part 1’, *Melbourne University Law Review*, vol. 16, no. 1, 1987, p. 18.

<sup>79</sup> Commonwealth of Australia, *Federal Financial Relations*, 2016–17 Budget Paper No. 3.

<sup>80</sup> Saunders, ‘Australian Federal Democracy’, p. 10.

<sup>81</sup> *ibid.*

<sup>82</sup> Daniel Weight, ‘Parliamentary scrutiny of payments to the states and territories’, *Budget Review 2015–16*, Commonwealth Parliamentary Library, May 2015, p. 23, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4036352/upload\\_binary/4036352.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4036352/upload_binary/4036352.pdf;fileType=application/pdf).

<sup>83</sup> Saunders, ‘Australian Federal Democracy’, p. 10. See also Saunders and Crommelin, *op. cit.* The *Australian Education Act 2013* (Cth) is one example where the Commonwealth Parliament outlined some conditions attaching to financial assistance to the states in primary legislation (see especially Part 2 of that Act).

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### *Consideration by Senate committees generally*

One of the most obvious mechanisms for the scrutiny of section 96 grants is through questioning of ministers and officials at Senate estimates hearings. For example, at recent estimates hearings questions have been asked by Tasmanian senators in relation to funding provided to Tasmania under the \$43.1 million Tourism Demand-Driver Infrastructure program.<sup>84</sup> Other questions have been asked in relation to the impact of a new condition placed on Commonwealth funding for the National Partnership Agreement on Homelessness. This new condition required states and territories to prioritise homelessness services directed at youth and the victims of domestic violence. Senators were interested in whether this new condition had resulted in other homelessness services in their state (such as those directed to the elderly or people suffering mental illness) being defunded as a result of the new condition.<sup>85</sup>

On occasion Senate committees will also inquire into issues relating to section 96 grants to the states. For example, in March 2015 the Senate Economics References Committee completed an inquiry into the Commonwealth's 'Asset Recycling Initiative', which was designed to encourage states to sell off public assets in return for a 15 per cent 'incentive payment' in the form of a grant from the Commonwealth if certain conditions were met.<sup>86</sup>

### *Consideration by the Scrutiny of Bills Committee*

In recent years significant work in relation to section 96 grants has been undertaken by the Scrutiny of Bills Committee.<sup>87</sup> Specifically, the committee has commented on a standard provision in appropriation bills which deals with the parliament's power under section 96 to provide financial assistance to the states.<sup>88</sup> As noted above, section 96 states that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' However, a standard provision in Commonwealth appropriation bills delegates this power to the minister. Under this provision the minister may determine:

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<sup>84</sup> Senate Foreign Affairs, Defence and Trade Legislation Committee, *Official Committee Hansard*, 26 February 2015, pp. 181–7 (Senator Singh); Senate Foreign Affairs, Defence and Trade Legislation Committee, *Official Committee Hansard*, 6 May 2016, pp. 165–7 (Senator Brown).

<sup>85</sup> Senate Community Affairs Legislation Committee, *Official Committee Hansard*, 22 October 2015, pp. 124–6 (Senator McLucas).

<sup>86</sup> Senate Economics References Committee, *Privatisation of state and territory assets and new infrastructure*, March 2015, pp. 24–5.

<sup>87</sup> In accordance with Senate standing orders 24(1)(a)(iv) and (v), the committee is required to report on bills that inappropriately delegate legislative powers and insufficiently subject the exercise of legislative power to parliamentary scrutiny.

<sup>88</sup> Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, pp. 511–6; *Ninth Report of 2015*, 9 September 2015, pp. 611–4; *Fifth Report of 2016*, 3 May 2016, pp. 352–7.



- conditions under which payments to the states may be made; and
- the amount and timing of the payments.<sup>89</sup>

Importantly, the relevant provision also provides that the above ministerial determinations are not legislative instruments and are therefore not subject to the tabling and disallowance provisions of the *Legislation Act 2003* (Cth).

In undertaking this work the committee has explicitly emphasised the terms of section 96 and the role of senators in representing the people of their state. Specifically, the committee has:

- highlighted that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the parliament by section 96 of the Constitution;
- noted that while the parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory;
- noted that some information in relation to grants to the states is publicly available; however, effective parliamentary scrutiny is difficult because the information (where it is available) is only available in disparate sources; and
- stated that it is appropriate that at least a minimum level of information is readily and easily available as a matter of course in order to enable senators and others to determine whether further inquiries are warranted (for example, through questioning in Senate estimates, other committees or the chamber).<sup>90</sup>

As a result of this work some further information has been provided to the committee or included in the relevant explanatory materials accompanying appropriation bills.<sup>91</sup> For example, the only information available on the face of the relevant bill in relation to a proposed \$23 million grant in the 2015–16 financial year was that it related to outcome 3 of the Department of Infrastructure and Regional Development.<sup>92</sup> However, following the committee’s inquiries further information was provided

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<sup>89</sup> See, for example, Appropriation Bill (No. 4) 2015-2016 (Cth) cl 14.

<sup>90</sup> Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, pp. 511–6; *Ninth Report of 2015*, 9 September 2015, pp. 611–4; *Fifth Report of 2016*, 3 May 2016, pp. 352–7.

<sup>91</sup> Commonwealth, *Parliamentary Debates*, Senate, 12 October 2016, p. 85 (Senator Polley).

<sup>92</sup> Outcome 3 relates to ‘strengthening the sustainability, capacity and diversity of regional economies including through facilitating local partnerships between all levels of government and local communities; and providing grants and financial assistance’.

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which indicated that the \$23 million grant related to the Latrobe Valley Economic Diversification Program.<sup>93</sup>

To date, the committee has welcomed the provision of such additional information, although it has considered that further information should be provided in future and has sought the finance minister's advice as to:

- whether future budget documentation could include general information about:
  - the statutory provisions across the Commonwealth statute book which delegate to the executive the power to determine terms and conditions attaching to grants to the states; and
  - the general nature of terms and conditions attached to these payments; and
- whether the Department of Finance is able to issue guidance advising departments and agencies to include the certain specific information in their portfolio budget statements where they are seeking appropriations for payments to the states, territories and local government.<sup>94</sup>

In response to this request, the finance minister advised the committee that he would ask his department, in consultation with the Treasury, to review the current suite of budget documentation to give consideration to including additional information on payments to the states, territories and local government in time for the next budget.<sup>95</sup> The committee noted that it 'looks forward to considering the outcome of this review' which should be reflected in the 2017–18 budget papers.<sup>96</sup>

The committee's comments in relation to this matter have also informed debate in the Senate.<sup>97</sup>

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<sup>93</sup> Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, 3 May 2016, pp. 352–7.

<sup>94</sup> The specific information requested by the committee included: (a) the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory); (b) the specific statutory or other provisions which detail how the terms and conditions to be attached to the particular payments will be determined; and (c) the nature of the terms and conditions attached to these payments. See Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, p. 459.

<sup>95</sup> Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, p. 460.

<sup>96</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 3 of 2017*, 22 March 2017, p. 54.

<sup>97</sup> Commonwealth, *Parliamentary Debates*, Senate, 23 June 2015, pp. 4265–7 (Senator Leyonhjelm). Senator Leyonhjelm moved an amendment to Appropriation Bill (No. 2) 2015–2016 to lower the debit limit for national partnership payments (one type of tied grants to the States) from \$25 billion to \$11 billion: *Journals of the Senate*, 23 June 2015, pp. 2774–5. See also an amendment moved by Senator Leyonhjelm (described by the senator as 'symbolic') to Appropriation Bill (No. 4) 2014–2015. The amendment sought to remove authorisation to appropriate money for a \$250,000 tied grant to the states in the infrastructure and regional development portfolio: *Journals of the Senate*, 17 March 2015, pp. 2308–10.

In addition, in specific instances the committee has also requested that a statutory requirement be inserted into bills to ensure that agreements with the states in relation to grants of financial assistance are tabled in the parliament and published on the internet.<sup>98</sup>

The ability of the Senate, as the chamber representing the people of states, to effectively scrutinise proposed grants to the states and territories is essential to safeguarding federalism and the constitutional rights of the parliament. This matter appears to be of ongoing interest to the Scrutiny of Bills Committee as its Chair recently noted that the committee ‘will continue to take an interest in the parliamentary scrutiny of section 96 grants’ into the future.<sup>99</sup>

## **Conclusion**

The Australian federal structure aims to disperse power between the Commonwealth and the states and territories. Even though the array of financial and legislative powers utilised by the Commonwealth has evolved since Federation, the constitutional framework continues to protect states’ interests in a number of ways. This paper demonstrates how the Scrutiny of Bills Committee and the Regulations and Ordinances Committee play a crucial part in the broader role of the Senate in safeguarding states’ interests.

In particular, the committees play a vital role in the scrutiny of proposed appropriations, Commonwealth executive expenditure, and section 96 grants to the states. Through their continued dialogue with the government in these areas, the committees’ have been successful in raising the profile of potential Commonwealth incursions into areas of traditional state responsibility, as well as increasing the level of information available to the public in relation to these matters. This work of the scrutiny committees in examining whether relevant legislation is within power, and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament, shows the real capacity of the committees to safeguard federalism and the constitutional rights of the Senate.

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<sup>98</sup> Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, pp. 462–4 (grants relating to dental services); Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, 23 November 2016, pp. 575–6 (grants relating to industry, innovation, science and research programs).

<sup>99</sup> Commonwealth, *Parliamentary Debates*, Senate, 12 October 2016, p. 85 (Senator Polley).