Papers on Parliament

Lectures in the Senate Occasional Lecture Series, and other papers

Number 55

February 2011

To order copies of *Papers on Parliament*

On publication, new issues of *Papers on Parliament* are sent free of charge to subscribers on our mailing list. If you wish to be included on that mailing list, please contact the Research Section of the Department of the Senate at:

Telephone: (02) 6277 3074
Email: research.sen@aph.gov.au

Printed copies of previous issues of *Papers on Parliament* may be provided on request if they are available. Past issues are available online at:

http://www.aph.gov.au/Senate/pubs/pops/index.htm

Contents

Contributors

Charles Sampford is Director of the Institute for Ethics, Governance and Law, a joint initiative of the United Nations University, Griffith University, Queensland University of Technology and the Australian National University.

Diana Dwyre is Professor of Political Science at California State University, Chico, USA. She was the 2009–10 Fulbright ANU Distinguished Chair of American Politics.

Kathleen M. Burns is a Washington, DC-based journalist and academic and a former member of the Australian Parliamentary Press Gallery.

John Bannon is an Adjunct Professor in the Adelaide University Law School. He was Premier of South Australia from 1982 to 1992. His biography of Sir John Downer, *Supreme Federalist*, was published in 2009.

Andrew Hutson is an academic in the Faculty of Architecture, Building and Planning, University of Melbourne.

Scott Brenton is a lecturer in politics and public policy at the University of Melbourne and was the 2009 Australian Parliamentary Fellow.

Meg Russell is Reader in British and Comparative Politics and Deputy Director of the Constitution Unit, University College, London. She was specialist adviser to the Select Committee on Reform of the House of Commons which designed the 2010 reforms.

Rosemary Laing is the Clerk of the Senate. She is the editor of *Annotated Standing Orders of the Australian Senate*, published in 2009.

Parliament, Political Ethics and National Integrity Systems*

Charles Sampford

Introduction

Oxymorons and scandals

Discussion of either business ethics or political ethics generally stimulates a range of fairly standard jokes that I have heard over the 20 years I have been researching and discussing these issues.[1] I might as well get in first:

> 'Political ethics is an oxymoron'.
> 'Political ethics! That will be a short speech'.
> 'Harry [Evans], why did you invite someone to talk about this non-existent topic?'
> 'Charles, why did you waste your time coming to talk about it?'

And to the audience: 'why did your bother to come to hear about this?'

Twenty years ago, you might have invited Senator Richardson to speak. He would have given a very short speech on ethics confined to his three-word phrase: 'Whatever it takes'. This might have been seen as the epitome of the 'pragmatism' that was so happily touted.

One of the many deliberately annoying habits of philosophers is to dig down into apparently simplistic and anti-philosophical statements and find more questions than the author realised. 'Whatever it takes' implies a total commitment to ends at the expense of means. But what are those ends? How do you know that the means chosen will deliver them? Will the means chosen so offend others that the ends will not be achieved? Will the means chosen lose the necessary support to achieve the ends designated?

This is related to a similar point about pragmatism, so popular during the 1980s and came to be associated with the idea that government should pursue policies that 'work'.

---

[1] Starting with the establishment of the Centre for Philosophy and Public Issues at Melbourne University where I was Acting, then Deputy Director and Principal Research Fellow.

But how do you know that a policy is 'working' if you do not know what ends you are seeking to achieve?

At the end of that decade, the focus of ethics was not so much on brief descriptions of what corporate and political ethics should be but on the manifest examples of what it should not be—as exposed in the 'WA Inc' and Fitzgerald enquiries. Indeed, the ethical meltdowns in politics, business and the interface between them provided the stimulus for widespread discussion of ethics in the early 1990s. Some were excited at the prospect of fundamental changes in the way we did things as when an excited ABC journalist asked whether they signalled a 'sea change'. I suggested that it 'was more likely a tidal movement which would ebb as soon as the stock market recovered'. This is not to say that real progress cannot be made and that the exposure of ethical scandals in the institutions that dominate our polity and our markets cannot be used to promote and secure important reforms which may reduce the number, duration and severity of ethical and governance scandals. Most meaningful reforms come from public outrage at such scandals and the associated imperative of doing something about it. Those who are concerned about good governance should be ready with our ideas of what should be done when scandals are exposed—as happened in the late 1980s and in the last decade.

Ethics is not the first response to scandals. The initial public reaction is tougher laws and stronger enforcement against the individuals responsible. However, those who think that increasing the penalties and catching the bad apples is, or even can be, the answer remind me of H. L. Mencken's great comment, 'To every complex problem there is always a simple solution: and it is always wrong'.

At first sight tough law enforcement seems deceptively obvious:

> bad things have happened,
> there are plenty of bad people,
> therefore the bad people caused the problem,
> therefore the problem can be fixed by catching the bad people.

If only life were as simple as in American movies.

Prosecutions do have a cathartic effect and may help to mobilise reform. Laws can support other reforms. But they are not the key part of the answer.

Firstly, prosecutions take a long time and are frequently inconclusive. Even if successful they will not bring back the destroyed shareholder wealth, the stolen money, the uncollected revenue or even a significant proportion of it. Even for the few who are brought to justice, most of the wealth that has been destroyed or stolen will be

irrecoverable. This is not just because it cannot be traced but often because it no longer exists.

Secondly, as we all know, laws whose purposes are not internalised are rarely effective. This is why many emphasise the importance of ethics.

Thirdly, they do not address the key institutional questions of why the 'bad apples' got to such positions of power and were tempted to abuse that power for their own ends. If there are a lot more crooked politicians or CEOs, it is not because there are more bad people in a particular country. It is because its corporate, bureaucratic and/or political institutions generate a lot of temptations and opportunities for corruption and tend to promote those who will give in to those temptations.

The point is that many of the problems are essentially institutional rather than individual and you cannot fix institutional problems by punishing individuals.

Much of this is appreciated. In fact, there are almost as many zealous proponents of ethics and institutional reform as single solutions to governance problems. Thus, *pace* Mencken, there is not one simple solution—there are three. After law reform has failed—as it always does if tried in isolation—the other solutions are preached from a range of soapboxes.

Those pressing for essentially ethical solutions emphasise that law is ineffective if not backed up by the values of those they are supposed to govern. This leads to attempts to create codes of conduct and to persuade relevant players to abide by them. Some enthusiasts (not including myself) push for a form of 'bare ethics' as a singular solution involving voluntary codes and 'all regulation short of law'. Yet ethics without the sanction of law to back it up is a 'knaves charter'—a guide for the good and a dead letter for the bad.

Those pressing for institutional solutions are attuned to the institutional nature of many of these problems. They recognise that much of the problem lies in the opportunities and temptations for corrupt and unethical behaviour and the difficulty in detecting it. The solution becomes the creation of new agencies and the reform of existing ones—ticking every box on the list of institutions that have worked in other countries.

Each of these three solutions is inadequate and bound to fail if tried in isolation. What is needed is a combination of the three components—ethical standard-setting, legal regulation and institutional design. None are sufficient by themselves but together they

provide a powerful trinity—what I have called an 'ethics and integrity regime'[2] and what Transparency International calls an 'integrity system'.

Before discussing this 'integrity system' approach, I would like to emphasise a structural issue that creates many of the problems that ethics and governance must address but may not be able to finally 'solve'.

Public power—dilemmas, temptations, tensions and pressure points

Politicians inhabit a uniquely challenging ethical position, both in Australian public life and in deploying public power within the specific framework of liberal democratic institutions that has evolved—and which continues to evolve—in Australia's political, social and economic system. The core idea of democracy is that the people delegate executive and/or legislative power to politicians whom the electors believe will best use that power to serve electors' interests. Politicians play a key role in that process in formulating alternatives as to how public power should be exercised for the good of the community they serve, present these choices to the electorate in open competition, and deliver on the promises and policies they have represented to the people who have elected them.

However, politicians are faced with many important choices about the manner in which they will exercise public power, to what ends, and, faced with complex choices and competing demands, in what order of ranking those ends ought to be pursued. These choices are quintessentially *ethical* choices. Political life is suffused with ethical choices, and as often as not these choices—especially in the current era—are not (yet) the subject of a settled tradition of clear ethical guidance. These ethical tensions manifest themselves in terms of various 'pressure points'—areas of ethical uncertainty where contemporary political practitioners, of necessity, are faced with multiple difficult ethical choices. These 'pressure points' include issues surrounding the ethics of information, government advertising, political funding, lobbying, privatisation and public–private partnerships (PPPs), zoning decisions, relationships with the media and business, and subsequent employment of MPs, among others.

Ethical pressure points create tensions between (sometimes coincident, sometimes competing) political and other ends, and raise familiar and important dilemmas and temptations for politicians. (I digress here to note that temptations and dilemmas are often confused. A dilemma is found where two principles appear to require different and conflicting actions. A temptation is where the principles point one way but the interests

---

2   For further discussion of this idea see, C. Sampford, 'Institutionalising public sector ethics' in N. Preston (ed.), *Ethics for the Public Sector: Education and Training*, Annandale, NSW, Federation Press, 1994, p. 114. This resembles the Transparency International notion of an 'integrity system' and the OECD's idea of an 'ethics infrastructure'.

point in the other. Many like to dress up temptations as dilemmas; a process that can be ridiculed as a dilemma as to whether one should do one's public duty or feather one's own nest. However, doing favours for party donors is sometimes seen as a duty to the party which is a necessary means to secure reforms that benefit the public. While the ethical answer to temptation is much clearer than to dilemmas, I argue that we should recognise each and deal with them within any 'ethics regime' or 'integrity system'— with greater clarity in ethical codes, sources of clear advice in cases of doubt, and mechanisms to make giving in to temptation not only clearly wrong but too risky to contemplate.)

I would like to comment on two sources of tension. The first is to be found in the interactions between democratic and market institutions. In modern liberal democracies, the majority of citizens value both democracy and the market, and there is popular commitment to the belief that politics should be dominated by democratic principles and the economy should be dominated by market principles. While both democracy and the market are built on the single principle of individual choice, they involve two fundamentally different 'counting' principles for evaluating choices.

The oft-repeated counting principle of democracy is 'one vote one value'; the corresponding counting principle of the market is 'one dollar one value'. The eternal temptation is for those who have accumulated dollars in the market to use those dollars to influence those decisions that are supposed to be governed by democratic principles— through funding political parties and campaigns, to outright bribery. The reverse concern is that those who have accumulated votes may seek to convert it into dollars for themselves or their parties (corruption) or for their constituents (the traditional concern of the wealthy against government welfare provision). Accordingly, defining and policing the boundaries between the market and democracy is a perennial problem in modern liberal societies committed to both democratic and market principles. It gives rise to some of the most difficult and controversial issues in liberal democracies— several of which have been on display in recent times. Recognising these pressure points has at least two important consequences. Unless we want to abandon either the market or democracy, these pressure points will remain and integrity systems must watch out for the interaction. Thus, it will generally be better to structure the interaction in ways that reduce the pressure giving less work for the integrity system to do.[3]

A second source of tension lies at the heart of the profession of politics. Politicians offer alternatives to the electorate as to how power should be exercised and then to exercise

---

[3] It should be emphasised that the interaction need not be toxic but can be highly beneficial (including informed policy making, efficiency and greater knowledge and debate about governmental decisions). Well designed integrity systems—such as that advocated below—help ensure that interactions between market and government institutions promote good governance rather than undermine it.

that power in the way they have promised. This means that politicians are, of necessity, seeking power and it will attract those who want power. There is a good reason for seeking power—to exercise it for the public benefits and according to the values articulated to the electorate. There is an acceptable reason for seeking it—that politicians actually like being in that position (the public accepts this on condition that they wield it for their benefit). There is an unacceptable reason that will tempt some—that power can be exercised for the public good but in ways that the public would not understand and must not be told. And, there is a totally unjustified reason—that the power can be used for the benefit of the individual (something that is corrupt according to the definition of Transparency International).[4]

It is in the interests of governments to use that power in ways that will earn approval and convince a majority that it is the better choice. However, there is always a temptation to use governmental power to secure re-election by avoiding or distorting that choice. The crudest form of avoiding that choice involves a cancellation or postponement of elections. However, there are many other means of avoiding that choice—distorting electorates and electoral boundaries, manipulating electoral practices and electoral machinery, using governmental power to silence opposition or promote government policies.

Dilemmas and temptations also arise for politicians when public justifications and attempts to persuade, diverge or threaten to diverge from private, personal or party political ends, or where there is serious uncertainty about whether and to what extent policies are in fact publicly justifiable in open competition with alternatives, and in cases where the ethical distinction between persuading and misleading the public may be blurred by the concept of a 'noble lie'. Temptations arise in circumstances where governments have the power to make decisions that particularly favour certain interests by increasing the value of their property (using 'property' in its broadest sense). The classic case is building approvals and rezoning, but the principle is identical in all cases of the misuse of public power for private gain.

There is no single 'magic formula' that has been discovered for resolving the often complex and difficult ethical tensions politicians face. Instead, in this lecture I put forward a map of the territory which aims at a more perspicuous view of the source of politicians' ethical obligations, and propose not a comprehensive 'solution', but what experience indicates is a reliable system-wide approach to institutional ethical reform—one that offers a best ethical fit, and which I consider to be the most appropriate method of acknowledging and resolving the ethical tensions inherent in Australia's democratic political practice. Sound ethical choice making is maximised when politicians' decisions

---

[4]   An abuse of entrusted power for private gain (including gains for the abusers family, party or corporation).

are made in an appropriately designed, transparent and well-understood national integrity system. The reform of Australia's existing national integrity system along the lines suggested would constitute an ethical quantum leap, and should be welcomed by those who aspire to exemplary ethical practice in Australian politics.

National integrity systems

Integrity, corruption and politics: the Queensland experience

To those who are unfamiliar with the concept of a 'national integrity system'—and especially to the cynical newcomer—political ethics and integrity might appear oxymoronic, and presenting Queensland's framework of integrity and accountability developed in the 1990s may seem equally implausible. In pre-Fitzgerald Queensland, the existence of corruption was widely known but its extent and modes of operation were not fully evident. The Fitzgerald Report identified the need for reform of the structure, procedures and efficiency in public administration in Queensland.[5] In the post-Fitzgerald Inquiry Queensland reform process, perhaps the most striking element was the development of a new model for combating corruption. Rather than relying upon a single law and a single anti-corruption body, existing institutions were strengthened and new institutions were formed to create a set of mutually-supporting and mutually-scrutinising institutions, agencies and laws that jointly sought to improve governmental standards and combat corruption.

Some of the reforms were versions of those tried elsewhere—involving the creation or strengthening of institutions[6] or the passage of a package of administrative laws following the Commonwealth model. However, many of the reforms were either unique to Queensland or very rare—for instance, the Queensland *Public Sector Ethics Act 1994* and associated regime of ethical standard setting; the Queensland *Legislative Standards Act 1992* which provided a means for the protection of human rights in the legislative process rather than just a judicial backstop; a powerful Scrutiny of Legislation Committee; and an Integrity Commissioner to provide advice on conflict of interest and potentially other ethical issues affecting ministers and their advisors.[7]

---

[5]　G. Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council*. Brisbane, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, 1989.

[6]　The Auditor-General, parliamentary committees, the Office of the Parliamentary Counsel, the Public Sector Management Commission (which has evolved into the Public Service Commission), the Ethical Standards Command of the Queensland Police Service, the Office of Government Owned Corporations, the Director of Public Prosecutions, Legal Aid, the Electoral Commission, the Ombudsman.

[7]　N. Preston et al, *Encouraging Ethics and Challenging Corruption: Reforming Governance in Public Institutions*. Annandale, NSW, Federation Press, 2002, p. 156.

From ethics regimes to integrity systems

I found the Queensland reform process fascinating, and in my various papers and seminars sought to describe it. I called it an 'ethics regime'.[8] One of the strengths of this approach was that it avoided creating a single overarching institution to fight corruption, as there are several real dangers associated with a powerful single-institution approach. Later, when 'sleaze' threatened to bring down the Major Government in the UK, the government established a joint Select Committee on Standards in Public Life chaired by Lord Nolan. When I outlined the Queensland approach to Lord Nolan and his committee and committee staffers, they included a version of the model in their own report.[9] Of more lasting impact was his support for this approach at the Organisation for Economic Cooperation and Development (OECD) and its public management (PUMA) group.[10]

These organisations were involved in assisting new entrants to the EU to improve governance standards. The OECD and PUMA called the approach an 'ethics infrastructure', a term that was adopted in several jurisdictions and by the UN.[11] The idea, however, was most effectively proselytised by Transparency International (TI).[12] When their CEO, Jeremy Pope, visited Queensland, he proclaimed that this was the way

[8] See for example, Sampford, 'Institutionalising public sector ethics', op. cit.; C. Sampford, *Opening Address: Queensland Integrity System*. Brisbane, Joint Key Centre/Transparency International Workshop on the Queensland Integrity System, 2000; C. Sampford, 'Australian national integrity system assessment' in *Australian National Integrity Systems Assessment: Queensland Handbook*. Blackburn South, Vic., Key Centre for Ethics, Law, Justice and Governance, Griffith University in cooperation with Transparency International Australia, 2001; C. Sampford, 'Institutionalising ethics' in *Knowledge for Sustainable Development: An Insight into the Encyclopaedia of Life Support Systems*. London, EOLSS, 2002; C. Sampford, 'More and more lawyers but still no judges', *Legal Ethics*, vol. 8, no. 1, pp. 16–22, 2005; C. Sampford and C. Connors (eds), *World Ethics Forum Conference Proceedings*. [Mt Gravatt, Qld], Institute for Ethics, Governance and Law, 2007; C. Sampford et al, 'From Greek temple to bird's nest: towards a theory of coherence and mutual accountability for national integrity systems', *Australian Journal of Public Administration*, vol. 64, no. 2, 2005, pp. 96–108; C. Sampford and D. Wood, 'The future of business ethics: legal regulation, ethical standards setting and institutional design' in C. Sampford and C. Coady (eds), *Business Ethics and the Law*. Leichhardt, NSW, Federation Press, 1993.

[9] *Standards in Public Life: First Report of the Committee on Standards in Public Life*. London, HMSO, 1995. I was the first person consulted by the Nolan Committee in 1994 and Lord Nolan acknowledged the source of the Queensland example and the source of the advice in addresses to the OECD in a workshop on Public Sector Ethics in November 1997, the Ethics in the Public Service Network conference in Leiden in 1998 and in a lecture tour of Australia in 1999.

[10] *Ethics in the Public Sector: Current Issues and Practices*. OECD, 1996; *PUMA Draft Checklist*. Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries, 1997; *Survey of Anti-Corruption Mechanisms in OECD Countries*. Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries, OECD, 1997; *Council Recommendations on Improving Ethical Conduct in the Public Service: Background note*. OECD, 1998.

[11] *Corruption in Government: Report of an Interregional Seminar*. New York, United Nations Department of Technical Co-operation for the Development and Centre for Social Development and Humanitarian Affairs, 1990; *Corruption and Good Governance*. New York, United Nations Development Programme, 1997.

[12] J. Pope, *Confronting Corruption: The Elements of a National Integrity System (The TI Source Book)*, Berlin, Transparency International, 2000.

to fight corruption and coined the term 'national integrity system',[13] typically involving a number of 'pillars'.[14] TI and later the World Bank and other aid agencies adopted this term and approach. The integrity system was neither national nor particularly systematic, but the choice of the term 'integrity system' rather than 'anti-corruption' system was inspired. Jeremy Pope chose the former because, in his view, it sounded more positive. As I pointed out to him, integrity and corruption are conceptually linked terms—with one the obverse of the other. TI defines corruption as the 'misuse of entrusted power for private benefit'. By contrast, integrity is 'the *use* of public power for officially endorsed and publicly justified purposes'.[15] The latter definition is primary because an abuse cannot be identified if correct 'use' is unknown.[16]

A 'national integrity system' encapsulates the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life. Virtually every state has one in that there are always at least some such institutions, laws etc. The strength of the integrity system depends on what elements are present and how well these elements interact in promoting integrity and inhibiting corruption.

In my view, there are several features of the Queensland integrity system that should be adopted by the Commonwealth. The first, and perhaps most important reform, is the institution of an integrity commissioner to provide ethics advice to MPs and senior civil servants, who is appointed by a bipartisan committee with Opposition agreement to ensure the commissioner's credibility. The second Queensland reform which should be adopted by the Commonwealth—and which is a requirement of all effective integrity systems—is the establishment of a general anti-corruption commission to officially investigate corruption.[17] Third, the Public Sector Ethics Act—a general but unenforceable set of stated values and principles—is an especially innovative and subtly important Queensland reform.

---

[13] This story has been told many times by Jeremy Pope and others—most recently in ABC radio, *Background Briefing*, 11 October 2009, available at www.abc.net.au/rn/backgroundbriefing/stories/2009/2702931.htm.

[14] Legislature, executive, judiciary, Auditor-General, Ombudsman, watchdog agencies, public service, media, civil society, private sector and international actors—traditionally shown as pillars of a Greek temple—though I later suggested a different visual metaphor of a 'bird's nest' in discussions and papers for the World Bank and Transparency International. See Sampford et al, 'From Greek temple to bird's nest', op. cit.

[15] Pope, op. cit. Note that the form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature.

[16] See comments below in the section 'Integrity is primary: anti-corruption is a necessary corollary'.

[17] This is not to say that the absence of a generalised anti-corruption commission ensures that there will be widespread corruption and abuse of power—merely that the risk is unacceptably higher.

What is required for the Queensland approach to work on the Commonwealth level is for each agency to create an agency-specific code, tailored to the particular challenges, temptations and dilemmas as they operate in the agency, to provide education about the code and its function, and regularly to revise the code. To ensure that the process is properly implemented—if improperly constructed the approach may be of no worth or worse—each agency requires at least one integrity officer who provides advice, training in ethics, and is a member of a government-wide network of ethics and integrity officers that is supported from a central public sector ethics agency.

Institutional ethics and values-based governance

I have long argued[18] for a values-based approach to governance of institutions—be they corporations,[19] government agencies[20] or professional groups.[21] Such an approach uses a form of 'institutional ethics' to integrate ethical standard setting, legal regulation and institutional design and utilises the insights of the four main governance disciplines in looking for potential norms. This methodology starts with Peter Singer's basic ethical question—how should we live our lives?[22] Answering that question involves asking yourself hard questions about your values, giving honest and public answers, and trying to live by those answers. If you do, you have integrity in the sense you are true to your values, and true to yourself. In fact, if you don't live up to the answers you give, the first person you cheat is yourself.

Institutional ethics applies the same approach to institutions (be they public agencies, political parties, professions, corporations and NGOs). It involves an institution asking hard questions about its value, giving honest and public answers and living by them. Doing so for an institution is more complex than for an individual, but it is both possible and necessary. It requires leadership in posing questions and seeking answers from members. This process starts with the vital questions that must be asked of any institution or organisation: what is it for? Why should it exist? What justifies the organisation to the community in which it operates given that the community provides privileges such as powers, immunities, funding, monopolies (professions), and the privileges of incorporation from the licence to operate to limited liability? Why is the community within which it operates better for the existence of the government/corporation etc?

---

18 Fitzgerald, op. cit.

19 Sampford and Wood, op. cit.

20 Sampford, 'Institutionalising public sector ethics', op. cit.

21 C. Sampford and S. Parker, 'Legal Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design' in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues*. New York, Oxford University Press, 1995.

22 P. Singer, *How Are We to Live? Ethics in an Age of Self-Interest*. Melbourne, Text Publishing, 1993.

Asking those questions involves an institutional and collective effort under its own formal and informal constitutional processes (including getting acceptance from relevant outsiders—including shareholders and/or relevant regulators). This does not make the institution a charity—some of the most effective institutions in the long term are those that find profitable ways in which to serve the public (as opposed to those who find unprofitable ways to serve or profitable ways that do not serve the public interest). This is not an exercise that should be resented. Public bodies are always expected to so justify themselves and the search for new ways in which institutions can serve the community is one of the great dynamics of change (see below). Even corporations should not resent the challenge to justify themselves. Very few believe that they are there, or would long remain, if they were doing harm to the community. Most believe that a system in which people, ideas and resources can be accumulated in joint stock companies operating in more or less free markets is better for the community than other alternatives. Political parties and the profession of politicians who lead them are used to justifying themselves in terms of how they can benefit the community—it lies at the heart of their activity. While political parties in particular and politicians in general should be the ones to set out their values and put them on public display, it is almost certainly going to be on the basis that they coordinate proposals for the use of public power in ways that benefit those who live within the community.[23] The parties propose and package alternative principles and policies about how public power can be deployed for the benefit of the electorate. These proposals will often reflect different values or different versions of the 'public good' that institutions should pursue. These ideas are presented to the electorate to justify choosing one group of politicians over another.

An institution has integrity if it lives by its answers. However, it does so in a different way. It cannot merely be a personal commitment but an institutional commitment that involves creating mechanisms which make it more likely that the organisation keeps to the values it has publicly declared and to which it is publicly committed. These mechanisms are collectively called an 'integrity system'.

Leaders of any organisation under challenge should initiate this process and consider the justification for their existence, for the concentration of resources within them and the privileges accorded them. Why is the community better off for their existence? Is it better off? These are questions that should always be asked. In some cases, there is a demand for answers from outside as well as a need to provide them internally. While others may be seen in more urgent need of this process than politicians (for example, financial institutions, ratings agencies and any economic organisation that has built the

---

[23] Some might limit the justification to citizens rather than members of the community living within the borders of the sovereign entity of which they are a part—with special responsibility for the electors of the constituency they represent. However, most would see a responsibility to those of the wider group for reasons of prudence, humanity or the acceptance of the human rights obligations that all sovereign states have endorsed through international human rights treaties.

assumption of 'efficient markets hypothesis' into the way they do business), there are always good reasons to do so and the public can turn feral on politicians more quickly than on others.

Whose values?

On this account, it is important to note that integrity involves being true to values stated rather than accepting an external set of values—mine, Harry's, the community's or those identified with a particular religion—let alone those deduced by ethics professors from the philosophical theories they find most convincing. I would prefer that individuals and institutions state their values and live by them rather than pretending to conform to a set of values that they do not hold. It makes perfect sense to say that a person who has publicly stated in advance that his fundamental belief system involves the killing of babies and who goes out and kills babies has integrity. In this sense, integrity is a process value rather than a substantive value—more like democracy or the rule of law rather than fundamental human rights. This does not make integrity a defence against breaches of the laws of the land and others acting with integrity according to their own values. It should produce the response from a judge in terms of: 'that is fine, those are your values and you will appreciate that, according to my values, it is my duty to sentence you to life imprisonment'.

Of course, such extreme views are so rare as to be almost entirely confined to extreme cases to stimulate understanding and refinement of philosophical positions. If translated into the real world, if individuals did act with integrity of this kind (and did not acknowledge other personal values such as a respect for law or a dislike of the consequences of breaking important ones) trials would be quicker and cheaper! In reality, the public nature of the justification provides important constraints. Public debate and justification tend to produce either convergence of views or an understanding of differences. There are some views that we know are going to produce public disapproval and should make a career in politics non-optional.

Competing justifications and the dynamic of change

When it comes to institutions, there are going to be different views about how an institution can best serve the community and justify itself to them. An institution will tend to attract those whose values are congenial if not entirely identical—though it will also attract 'entryists' who want the institution to change or develop its values and approaches in new directions. This is part of the dynamic of institutional change. Institutions that follow a principle of original intent will not flourish. Bologna, the Sorbonne and Oxford (the three oldest European Universities) would not have become the universities they did if they had retained their semi-monastic original goals. Indeed, it

was the differential ability to develop their core values and to realise them that distinguishes successful institutions from those which wither and die. Corporations founded to market gas lamps would not survive in doing so but by branching into lighting or other gas appliances. Political parties founded with a central purpose of socialising the means of production and exchange have all had to change. The first parliament in Europe was established by Simon de Montfort in the thirteenth century as a group dominated by barons insisting on a limitation of royal power which left them free to oppress their serfs but developed into a means for the representatives of the descendents of those serfs to decide the kind of society they would live in and the laws by which they would be bound. The House of Lords commenced as a body to protect aristocratic privilege against the democratic tendencies of the Commons. It became a club for hereditary peers, retired politicians and rich magnates before turning into an occasional questioning of policies and legislation. The Australian Senate, intended as a states' house, was briefly a house that sought to determine the composition of government and settled down into one of the more effective houses of review.

Of course, there will generally be continuity—and often a realisation that the original values were subsets of a more important one—education and the pursuit of ideas for universities, finding new products with existing skills for corporations and the pursuit of the interests of those less well-off for left-of-centre parties.

Finding ways to keep open the opportunities for debate over the values that justify the institution, while ensuring that there is sufficient agreement and cohesion to deliver the public goods that are currently used to justify the institution, is a function of good leadership and governance. Where there are fundamental tensions in the role, the qualities of leadership and internal governance are even more in demand. This is hardly news to any Australian politician.

Integrity is primary: anti-corruption is a necessary corollary

The primary goal of integrity systems is not to stop government corruption or other wrong doing altogether. If that were our primary goal it could easily be achieved. As I put it to the 2003 International Anti-Corruption Conference, every one of the 1200 delegates had a proposal or set of proposals for reducing corruption—with the most ambitious hoping to reduce it by 95 per cent or more. If I was right in my prescriptions and you all followed them (with the first as preposterous an assumption as the second), you might reduce corruption by a little more. However, if you really wanted to get rid of government corruption, completely, permanently and overnight, I had just such a 100 per cent solution—abolish government! No government, no government corruption! We

could go on to do the same for corporations the next day.[24] Though anarchists have traditionally argued for that outcome, the majority have wanted government for the benefits it can deliver to the people it claims to serve and have been prepared to take a risk that the powers delivered to government are used for their stated purposes.

Integrity systems are not just about stopping corruption and bad behaviour. Their primary function is to promote integrity and good behaviour. In addition to prevention, we need to look at ways to 'identify, reward and promote integrity'. Integrity guidelines should be first and foremost about the values underlying public agencies, the public interests that they serve, and how the agencies fulfil those values and serve those public interests. It is easier to communicate values than detailed rules. If the detailed rules are consistent with, and supportive of, the agency's values, it is easier for agency members to understand and interpret the detailed rules.

For similar reasons, integrity systems should look to identify and reward integrity as well as identifying and punishing corruption. Those who are acting with integrity (that is, furthering the values underlying their agency to serve the public) should be encouraged, acknowledged and be the ones who receive the rewards most valued by public officials. This means that we should examine the positive incentives available to us—from public honours, to promotion, to commendation—with the highest rewards only available to those with the highest integrity. As one person at a Gold Coast integrity forum put it: 'We need big carrots and small sticks'. We must also ensure that we do not create perverse incentives for our politicians that will create temptations to abuse their power.

Institutions created by government have a key role in the integrity system but are not the only critical pillars of political integrity. The Fitzgerald process was crucially dependent on journalists as well as watchdog groups and lawyers. Some of the problems uncovered would not have been as serious if there had been better standards of corporate governance and business ethics. Thus, some integrity measures might be more effective with greater media involvement. For example, if a parliamentarian is under scrutiny for acting in a grey area (or what he or she claims is a grey area), the media might ask if they had consulted the Integrity Commissioner. This action will leave those acting dubiously with little recourse, and encourage more to seek and follow advice. In national integrity systems, it is common to emphasise four sources of non-government support for and involvement in national integrity systems, including the press, NGO and activist groups, the professions and business.

---

[24] Although the abolition of government would involve an abolition of its laws—presumably including those making joint stock companies possible.

Understanding how the integrity system operates

If the existing national integrity system is effective (and it largely is), it is not just because of a number of separate initiatives but because of the way they interact with each other. This question was addressed in the Australian National Integrity Systems Assessment involving the Key Centre for Ethics, Law, Justice and Governance in conjunction with Transparency International which I had the honour to lead.[25] This leads to another important question: how can the elements of the framework/system become mutually supportive? This point is important, because sometimes reform involves improving the links between integrity agencies and integrity initiatives.

Maintaining and strengthening the national integrity system

Integrity systems tend to develop over time and need constant maintenance and strengthening. 'Eternal vigilance' is required because of the tendency of integrity systems to degrade because of temptations inherent in the political process.[26] That vigilance is built in to integrity institutions but it is well to regularly review such systems. Fitzgerald proposed that the Electoral and Administrative Review Commission (EARC) be permanent and many would like it revived.[27] However, it is important to review the various elements of the integrity system and their interaction (that is, are they mutually supportive when integrity agencies are doing their job and mutually checking if not?). This review process should consider the balance between education, prevention and enforcement. It should also consider the impact of major proposed public sector reforms on the integrity system to ensure that potentially perverse effects are understood and minimised, and consider potential sources of corruption risk and make suggestions for addressing them.

To perform any or all of these functions, a body would need to share some features with Queensland's EARC, for example, independence of the body and the commissioners/board members; the respect of both sides of politics; the ability to engage in high quality research into the current institutions, current problems and alternative models; involve public consultations; and see its role as making proposals to be considered by parliament, not deciding itself. (It is supremely important that parliament,

---

[25] *Australian National Integrity Systems Assessment: Queensland Handbook*. Blackburn South, Vic., Brisbane, Key Centre for Ethics, Law, Justice and Governance, Griffith University in cooperation with Transparency International Australia, 2001; *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*. Blackburn South, Vic., Brisbane, Griffith University/Transparency International Australia, 2005.

[26] It is not uncommon for politicians to be in a position to enhance their chances of retaining power by abusing their power and limiting the effectiveness of elements of the integrity system that are designed to stop such abuses. Whenever a politician gives in to that temptation, the integrity system is weakened.

[27] Fitzgerald, op. cit.

as the oldest and most critical part of integrity systems such as ours, is the ultimate forum for debate and decision on governance.) The subject matters of the body's enquiries would be set by references given to it by the prime minister (and premier at state level).

Integrity systems as a risk management strategy

Integrity systems can be seen as a form of risk management. One of the most important drivers of integrity system reform should be the identification of integrity risks. Importantly, it is not necessary to prove that the risk has materialised (though this will provide conclusive evidence of the existence of the risk) for us to take action. Like all forms of insurance, there will be costs. Integrity measures utilise money and talent. While almost always ensuring better decisions and avoiding corrupt decisions, they may make decisions slow or timid or even stall decision making completely in ways that prevent public agencies providing the benefits they claim to deliver as surely as if they were acting corruptly.

Some important insights flow from a 'risk management' analysis of integrity systems. First, the purpose of integrity measures is to ensure that our institutions (from corporations to cabinets) do what they claim to do and live up to the values for which they claim to stand. Like all risk management, the probability of the risk being realised and the seriousness of the risk—as well as the costs of insurance—must be assessed. Also, like insurance, the cost of integrity measures is real but is generally a small proportion of the total. I am not sure what the cost of parliament, courts and the various integrity agencies is but, assuming (arbitrarily) that it may be around five per cent of the federal budget, the purpose of the five per cent investment in integrity measures is to ensure that the other 95 per cent is guaranteed. Obviously, if extra integrity measures eat into the 95 per cent without significantly reducing risk, such measures are either not worth pursuing or the integrity measures have been poorly designed. Similarly, if the extra integrity measures mean that a lot less is realised for that 95 per cent, the measures are either not worthwhile or have been poorly designed. Again, even if the risk has materialised, it does not necessarily require action if the risk is proven to be very rare or that it has been dealt with effectively. However, confidence in integrity measures is important, to the extent that sometimes we may engage in integrity measures to ensure confidence.[28]

There are three immediately identifiable ways of reducing the risk that power will be abused. The first is to reduce temptation. For example, there exists a permanent

---

[28] This is related to another point—that risk can never be fully quantified and, in human systems, a risk that is not addressed may encourage behaviour to exploit that risk. For these reasons, it is rational to err on the side of over-insurance rather than under-insurance.

temptation where governments have the power to make decisions that particularly favour individuals by increasing the value of their property in the broadest sense. The classic case is building approvals and rezoning. If, for example, there is a betterment tax or a charge for service provision, there is less temptation. The second is to reduce opportunity, by ensuring that those who benefit cannot be involved in the decision. Formal rules must be enforced where those who are interested do not decide—via conflict of interest rules—and do not have input, via strict lobbying rules. The third risk management technique in this area is to increase the likelihood of being discovered, via a guarantee of transparency in decision making, so that the public can easily find out what is being decided, who benefits, and who has spoken to whom about what, via an officially established public right to know, and a requirement to give reasons and defend them under administrative law.

Ethics guidance

I have no time for 'bare' ethics—ethical pronouncements that are not embedded within, and supported by, national integrity systems. Ethical guidance needs to be backed up by effective legal regulation and institutional reforms that make unethical behaviour difficult to perform and easy to detect. However, the process does have to start with ethical guidance for elected and appointed officials so that they know how they should behave and for those who are designing integrity systems to deal with the risks that some may not know how to behave.

Ethics guidance: creating, revising and interpreting codes

We now have in Australia a range of important codes for elected and appointed officials. I would argue, however, that codes should be reviewed every five years with the involvement of an external facilitator from a central agency (Public Service Commission or a central ethics office if established) with an annual check of issues that arose in the past year that need to be clarified. The quinquennial process would be staggered so that central office assistance was spread out over the five-year time frame. Our study nine years ago suggested that experience was mixed but that agency staff involvement was limited.[29] In fact, the involvement of staff at all levels is critical. Issues look different in the CEO's office and front desk. It is critical that both perspectives are taken into account to ensure that agency specific codes address the dilemmas, temptations and uncertainties that confront agency staff.

There should also be stakeholder and community input into developing agency codes—in particular, those whom a public agency is supposed to serve should be involved. The 'clients' should not dictate how the agency operates. However, their views should be

---

[29] *Australian National Integrity Systems Assessment: Queensland Handbook*, op. cit.

fully taken into account because their view of their needs, how those needs are interpreted, and how agency staff deals with them is a critical input without which public servants are only guessing at whether their agency is living up to the values they claim and delivering the benefits to society that justify their existence.

Ethics investigations

Breaches of ethics that are not 'official misconduct' are best not investigated in the first instance by a body such as the Queensland Crime and Misconduct Commission (CMC). For public servants, internal disciplinary mechanisms should be utilised. For parliamentarians, it should *not* be the Integrity Commissioner. You give advice or you investigate—doing both compromises each. The original Canadian approach suggested an Ethics Counsel to advise politicians and an Ethics Commissioner to investigate breaches. This first attempt came awry when they appointed the first and asked him to do the latter. The Integrity Commissioner must confine him or herself to advice.

Given parliamentary privilege and the likelihood that complaints about ethics breaches will include what is said in parliament, decisions over sanctions involve parliament and its ethics committee (censure), party (disendorsement) and the electorate (rejection at the next election). However, to avoid the temptation to make political use of ethics committee hearings, it is highly desirable if there were an independent statutory officer to give the Ethics and Privileges Committee public advice on complaints that are referred to it.

Key ethical 'pressure points'

I now turn to an interconnected set of central ethical issues currently facing Australian governments, and seek to offer proposals for ethical clarification and integrity measures that can support the suggested conclusions. These are based on the foundational democratic principle, discussed earlier, that politicians have a publically justified role in democratic societies that entails formulating choices for the electorate as to how public power should be exercised for the good of the community they serve. These will concentrate on the ethical pressure points discussed earlier in this lecture.

Lying/misleading/persuading

Let us start with the one universally recognised 'hanging offence' for ministers (though one for which some may claim too few swing). Misleading parliament is the one misdeed for which ministers are supposed to resign or be sacked—a misdeed that

various ministerial codes rightly extend to misleading the public[30] who are, after all, the target for persuasion.

If the role of politicians is to develop, package and implement alternative policies and approaches to government so that the electors can choose, then it is easy to see why misleading electors and their representatives is so universally condemned. If there are real alternatives in policy/principle/values, then there should be real differences of opinion about which is preferable and it is the role of the politician to persuade the electorate of the superiority of their ideas.

In their enthusiasm to persuade the public that their policies/principles/values are superior, they may slip into misleading or even lying. Indeed, a perennial complaint about politicians is that they habitually do so.

Some may insist that they never lie but may seem to regularly mislead. The distinction is important, but not exculpatory. Lying involves making a false statement in order to induce a false belief. Misleading involves making a true statement in order to induce a false belief. However, if electors find out they have been mislead rather than lied to, they are unlikely to be satisfied with the excuse: 'I didn't lie to you. I just mislead you'. The effect is the same—the intentional creation of a false belief in the minds of the electors. Indeed, misleading must of necessity be premeditated and by being more calculated is, in some ways, more heinous than a lie told on the spur of the moment.

Either action strikes at the heart of the profession of politics.

The difference, of course, is whether you really believe it. This is a question of being true to your own values and asking yourself again, coming back to that thing that is really, really important and central to the profession of politics. It is at the centre of our integrity system. Ethics for politicians are at the centre of their activities. And the question is: Do you really believe it? Is it something that you can sleep with at night and tell your grandchildren about in 20 years time?

If you believe that their policies and general philosophy underlying it are correct, and if you believe that their public values and public policies deserve to be chosen on their merit by your fellow citizens, you should not have to either lie or mislead. The art is to convey to the public the reasons why you really believe it is good for them—not to mislead them into choosing policies, parties and parliamentarians that are not good for them. To be seen to win by other means, discredits those values and policies and dishonours the profession.

---

[30]   See, for example, John Howard's first ministerial code of conduct in 1996.

Transparency and right to know

There have been very significant recent developments for transparency and the 'right to know' in Australia.[31] However, I would add a strong property argument to the rights argument. Information produced by the government for the purposes of making and recording decisions is the property of the people. One, therefore, needs a good argument to deny access by the people to their property. There are some good arguments but it is important that they are applicable in the case at hand. On the other hand, there are some very bad arguments for withholding information to prevent public discovery that a minister or senior public servant was wrong, foolish, or unethical. The worst case of all is where information is withheld because it would prove that a minister misled parliament or electorate (deliberately or otherwise), or failed to correct a statement.[32]

To use a power to withhold information for such purposes seems to be a very clear abuse of power for personal or party political ends and seems to fall within Transparency International's definition of corruption. Whether or not it is formally included within anti-corruption legislation, our procedures should ensure that information will not be withheld on that basis. In the case of a properly functioning national integrity system, ministers in any doubt should seek advice from the Integrity Commissioner or the Information Commissioner and the latter should always have the right to release such information.

I would strongly suggest that Australia should move towards a system of publishing as a rule and withholding as an exception (the reverse of the traditional approach). There is no doubt that the current system does take time and resources for both the seeker and the provider of information. With the digital and web revolutions, this need not be a major problem for the majority of documents and the majority of organised stakeholders (though individual citizens have differential access to the web with those most

---

[31] Especially, D. Solomon, *The Right to Information: Reviewing Queensland's Freedom of Information Act*. Brisbane, Queensland Department of Justice and Attorney-General, 2008, available at www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf.

[32] Discussion of the Ponting case revolves around the rights and wrongs of prosecuting a civil servant who provided documentary evidence to a member of parliament that the then prime minister had lied to parliament. However, for me, the problem begins with those who treated the information as secret in the first place. This information belongs to the people. Withholding it, so that the prime minister will be saved from exposure as having lied to parliament and therefore being unfit for office according to one of the strongest conventions of the Westminster parliament, is a grave abuse of power—and clearly corrupt on the definition offered here. Prosecuting Ponting was another serious abuse of power but would never have been an issue if the information had been declassified in the first place. I am sure that it would be said that any official declassifying that information would be persecuted. If so, that is a very grave accusation against senior officials of the then government. This is where the UK does need an anti-corruption commission as well as whistleblower protection to ensure that the real risks are those who would abuse power by preventing the release of such information rather than on those who provide it to the public. But, before that, it is important to ensure some clear thinking by civil servants about the exercise of their power.

disadvantaged and most in need of government services also lacking web access). Most final documents can be put on the parts of public websites that are accessible to citizens and civil servants alike. This will be done as a matter of routine record keeping—it is just that this part of the file is open to everyone. There will still be some documents that are not uploaded and these will follow the rules and rulings established by past practice, court decisions and any changes that result from this review.

The documents that are not uploaded under this suggested reform would fall into four categories. While it may be appropriate for some drafts to be made public, the ability to freely explore and debate alternatives would be hampered if all drafts had to be released as a matter of routine. Authors of documents would also take longer producing drafts if they were to be available for all to see. Their superiors would probably feel they had to exercise more control of what was written in such drafts. This does not mean that the freedom of information (FOI) rules would not require the posting of drafts—especially in cases where existing rulings require it. However, the balance of convenience would be to allow departments to release drafts and for citizens to make application (and a case) for seeing drafts. Documents whose existence is disclosed but which are not made available constitute the second category of exceptions. The documents that fall into this category would be determined by existing rulings and any relevant changes to those rulings. Citizens doing relevant searches would be alerted to the relevant document and could make application for their publication. Of course, a title may not disclose its substance and some might be encouraged to develop obscurantist naming systems. However, clear naming will be useful for civil servants. There are a number of approaches that could be taken. One would be the inclusion of keywords that can be searched. Another would be to allow full-text searching that identifies the documents containing relevant passages without disclosing their contents. Such requirements would be introduced in consultation with government to determine which methods are likely to cost less, be useful to the bureaucracy anyway and which pose extra risks to the security of confidential contents of documents.

The third category of exception would include documents whose existence is not disclosed. There may not be many such documents but allowance should be made for such cases—especially for security, investigative or privacy reasons. The fourth category would include documents which are made available but with certain information blocked out. Because of the work that would have to be done to determine what information needs to be withheld and altering the document, there is no point in doing this for a large number of documents which may never be sought under FOI. Accordingly, such documents will fall into the second or third categories. However, technology may be available or capable of development that would automatically detect certain kinds of information and black it out. The rules for determining what documents fall into the relevant categories would be public. Individual citizens, NGOs and corporations could

make application to the FOI commissioner for the rules to be altered. If the FOI commissioner approves a change but either government or applicant disagrees with the decision, it can be taken to the Supreme Court. Citizens and others with standing could seek the release of particular documents.

This approach to web publication of most final documents would not only respect the public's 'right to know' but increase knowledge of what government is doing with two important effects. The public would have a better understanding of what government is trying to do and either accept what it is trying to do or focus views as to how it might change what it is doing, and, if elected or appointed officials are doing the wrong thing, it is much more likely to be identified. Also, watchdogs outside the media will be able to be more effective and, crucially, the citizenry will not be as limited to the existing media as a source of knowledge about the activities of their elected officials.

Gifts, donations and fundraising

There are good reasons that ethics guidelines for receiving gifts be the same for all, on the basis of simplicity, ease of reference for both prospective recipients and givers, and transparency—the public will not get unnecessarily concerned with gifts within the standard permissible gift but will be in a better position to be able to report suspicions that someone has received too much. Any deviation from a single rule would need to be justified and, indeed, there is much to be said for uniformity across Australian jurisdictions.

Political donation and fundraising is one of those areas where the best approach is to reduce the pressures generated by the need to seek funds rather than to rely on integrity measures to prevent abuses. While one should always look to improving the latter, it is best if they are not required to do too much work and to hold back a tide generated by political competition at the heart of democracy. Most of the ideas for doing so have been around a long time (including, for example, providing time for political parties at election as a condition of the broadcasting licence, on condition that other political advertising should be either banned or funded by the government).

Attempts at restricting political donations are likely to attract the same avoidance techniques that greet any new taxation measure. The solution is to ensure that the means by which funds can be provided to political parties should be defined by inclusion rather than exception—there are specific ways of supporting a political party and all others are void (leading to forfeiture of money provided other than in an approved way).

A solution that reduces the reliance on outside funding for election campaigns avoids putting temptations in the way of politicians in carrying out their critical role in

presenting, packaging and implementing their policies and approaches to government. This can be done solely on the basis of what will appeal to electors without the distraction of considering what donors think. It would also free up time for frontbenchers. A minister's time is one of the scarcest resources in government. Access to it must never be bought. Ministers should decide whom they want to consult and whom they should see in exercising their public office. This may well be much the same group of people whom the minister would have seen anyway at fund-raisers. However, the decision is for the minister and staff—not for the party and those from whom the party seeks to raise money.[33]

Because parties are federal, it is much better for solutions to be federal as well.

Government advertising

In 2000, 2005 and 2010, I was invited to make submissions to Senate enquiries on government advertising. I argued that the problem of government advertising campaigns had been building for at least 30 years. The first government advertisement which caused me concern was one for the Australian Assistance Plan in 1975 in which a great Australian character actor had been thrown out of his house because he had a dog. The advertisement seemed to suggest that the AAP would provide a solution. If others were to see it now and compare it to campaigns over the last 20 years, they might accuse me of an overly sensitive ethical nose (and I would enter no defence to that charge). However, by 2005 the risk was universally recognised.

As I put it in 2005:

> Government advertising, by contrast, need not be false or misleading to be problematic. It has a legitimate function in providing information on government policies to those who may be affected by them. However, it is capable of abuse if the main effect is to paint the government in a good light. Given that this is public money that is not available to the Opposition this could constitute a particularly unfair advantage and provides a great temptation to any government. It may enable a governing party to entrench itself in power—using the fruits of past electoral victory (i.e., control over government resources) to perpetuate future electoral victories it would not have earned had the playing field been level.

In 2005 I argued that

---

[33] Note that none of this precludes charging for the cost of the meal or the overheads of organising an event. However, it would be much better if the event were not organised by the party but by the department or by some third party.

the parliament should treat the potential abuse of political advertising in the same way as corporations identify and deal with risk. Once a board has established a risk, its magnitude and its likelihood, then it is bound to consider what it can do to limit the likelihood of the most probable and serious risks materializing and the damage that would be done. While I am not going to say that governments and parliaments should always act like corporate boards, it is always worth considering how they would approach such problems.

I also noted that

there is a very important side effect of having an independent highly credible body certifying the accuracy and non-partisan nature of the advertising. This will give the advertising campaign greater credibility and increase the likelihood that it will be accepted. It will also make it far less likely that the campaigns will be attacked as false—and if it is so attacked, the government can brandish the independent arbiter's decision. This will save time and money and increase the efficiency and effectiveness of the government advertising. [34]

After 20 to 30 years of increasing expenditure on often questionable campaigns, I would be churlish not to acknowledge the significance of the 2008 reforms. I had argued strongly in favour of formal guidelines and an independent arbiter—but suggested a committee rather than the auditor-general who was frequently recommended for the latter role. Guidelines need to be developed with experience (that is why they are guidelines) and the guidelines seemed to be a very good, first iteration.[35]

The 2010 variations to process have been much criticised for removing the auditor-general and substituting a committee appointed by the government. While it seems to me that the Australian National Audit Office did a very good job for almost two years, my preference for an independent committee remains for the original reasons given and new ones.

The rise of corporate and union campaigns also has to be addressed. The previous and ongoing concern is to ensure that a more or less level playing field is not tipped on its

---

[34] C. Sampford, Additional submission to the Australian Senate Finance and Public Administration Committee Inquiry into Government Advertising, August 2005, www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/2004-07/govtadvertising/ submissions/sub04a.pdf, pp. 2–3.

[35] Having worked with a colleague (Dr Round) to suggest guidelines, I can recognise the difficulties of designing these *ab initio*. I am happy to acknowledge that the 2008 version covered the advertising of cabinet policy decisions that did not require further legislation in a way that ours did not.

end by the use of government funds to assist one party in a party political debate. However, playing fields can be tipped by a range of different forces—including the application of corporate, union or even NGO resources. (While the last two have resources of a different degree of magnitude and often come in as counterbalances to other resources, they should never be ignored in considering whether the playing field is more or less level.)

The answer is not to weaken the accountability regime for governments but to

      recognise the issue in the government accountability regime; and,
      ensure that corporations and others are also subject to the same or different
      but relevant accountability regimes.

Lobbying and other meetings with interested parties

There are many justifications for lobbyists—including assisting interested parties and groups understand government decision making and ensuring that they are consulted. The better government explains the decision-making process and the better it organises its own consultations, the less need there is for lobbyists and the more that the information that lobbyists sell to the few is provided to all. If this process were perfected, demand for lobbyists might evaporate. Of course, no process in any institution is perfect, and demand for lobbyists is likely to remain. Governments could abolish them but they will then be brought 'in-house'; so, for this reason alone, it is better to regulate than prohibit lobbying.

One important integrity measure would be to require that all meetings involving those who might have an interest in the minister or department's decision should be minuted by a public servant (and/or recorded). Such records could be confidential, but would be available to integrity agencies if a later investigation is held. This measure constitutes a protection for the minister and the party concerned, in addition to its benefits for political integrity. This provision does not include social occasions, but the guideline must be that business is not discussed at social occasions, and ethics codes may need to address issues of social contact (as do those for lawyers and judges when a case involving the former is, or is likely to come, before the latter).

Post-separation employment

The United States has long had restrictions on employment for government officials in areas relative to their official role. This approach recognises one of the most obvious pressure points between democracy and the market and a temptation when making decisions about potential employers while in office and use of information and contacts

after office. There is one issue that should be acknowledged: MPs lose office because of the performance of their party, and not necessarily themselves. Those who stay for two or three terms are significantly affected. Their careers have been disrupted and they will find it difficult to go back to where they were let alone where they would (may) have risen; their political experience will not necessarily have prepared them for other work; their superannuation is not as generous as formerly was the case; but their political experience will have increased their capacity for advocacy and lobbying.

These special features identify some of the reasons why it is rational for ex-politicians to engage in lobbying, and why their best employment prospects might be in areas where they worked as a minister. This should not support an argument for lobbying. However, it does indicate that we need to review how the legitimate interests of especially medium-term parliamentarians transferring out of public life are ethically addressed. This is a better approach than compromising the integrity of the system or leaving dedicated hard-working politicians out in the cold merely because the political tide has turned.

Conclusion

In this lecture, I have argued that politicians should see themselves as a profession at the heart of politics. Like any profession they should seek to identify the public good that should define and justify their profession. I have suggested that this lies in the critical function they perform in any functioning democracy of developing, packaging and implementing alternative policies and approaches to government. Like any profession, indeed, like any institution, they should ask themselves hard questions about their values, give honest and public answers, and live by them. Living by them involves development of integrity systems that makes compliance easy and rewarding and abuse of power difficult, easy to detect and not a risk that is worthwhile taking.

Question — My question is about the Integrity Commissioner. I feel like, as an individual or the head of a commission, we are actually giving an individual quite a large remit to decide how correct behaviour should be defined. I agree with you that we should not be working towards creating saints, because to me I believe it is important that ethics, especially in politics, reflect the population and so perhaps it is more important to have an elected integrity commissioner in that scenario than it would be to have elected politicians, because you need the commissioner to represent the ethics of the population, so that he can ensure that our parliamentarians are behaving in a way that reflects the ethics of the population.

I am wondering what your view is, when it's really gone full circle and you might be saying all our government institutions need to have institutional ethics, which are built up from the hard questions within them. In terms of our actual Parliament it comes down to them asking one individual, whose integrity is respected, how they should behave? There are two questions there: how does the Integrity Commissioner know what that behaviour is, and isn't it more important that that person is elected than the person he is giving advice to?

Charles Sampford — A very good question. Obviously there is more to this idea than a couple of lines. The first thing is that of course, they are not just sort of thinking off the top of their head. They are working with existing codes, and as I pointed out, of course, that if in fact they do start producing this letter afterwards, if in fact it's seen to be generally pretty rum advice ('I think that's a pretty stupid thing to say' or 'Why are you consistently coming out with things that exonerate the government?'). A friend of mine had a similar role in Canada, although the problem there was that they seemed to have somebody to do advice and somebody to do investigations, and the person who was appointed to give advice was told to do investigations. Any lawyer would say that's a stupid thing to do, and it really came unstuck. Of course, there is a publicity issue. And so if the person keeps on coming out with things that are contrary to what others think, firstly of course, the code of ethics could be changed, because the code of ethics itself should be developed on cross-party lines as far as possible. In fact, I think it is very hard to actually have codes of ethics that don't have cross-party support. Although I don't think that's necessarily that difficult, and it might be better to actually have people who have recently retired from politics as opposed to those who are currently in the fray.

Firstly there is the code, so they are interpreting a code. Secondly, there is the issue of adverse publicity and, in fact, if people don't like it, the code can be changed and I suppose you can always impeach somebody if they were seen to be utterly corrupt or utterly foolish in their decisions. The final thing is that there is some debate in Queensland, it happens for the head of the CMC but it doesn't happen for the Integrity Commissioner, and that is that they have to be appointed by a parliamentary committee, in which there is at least one member of the Opposition voting in favour of the appointment. It is a bit like the way that the republicans wanted to elect a Governor-General, to have both parties want to have somebody who is on their side, but in fact it is designed so you can't, you have got to choose the person with integrity.

The other thing you asked is of course: having somebody elected. If somebody is going to be elected there's going to be a political process. You are going to have to organise candidates, all those candidates are provided by the party and therefore the thing is the Integrity Commissioner is going to end up representing one party or

another. So I prefer to have a structure which makes it impossible for them to do it, but not to have them starting that. It is a very good question and I can show you the article if you want to see how it is dealt with.

Question — I would just like to ask you to tease out this issue of whether accountability institutions have some sort of undemocratic effect. I am just doing some work related to this in the Solomon Islands and one of the questions we were asked was 'what's the use of the Ombudsman, he hasn't got any teeth to bite'. I answered 'well no, he hasn't got any teeth to bite, but he has got teeth to peel back the banana skin and reveal whether the banana is rotten or not'. It seems to be that the answer is that 'yes, these institutions don't function anti-democratically' because all they really do is reveal aspects of the apparatus of the state that is not necessary immediately apparent to the citizens. But that may not be true of some institutions, I do not know, perhaps some do go a little further than simply peeling back the banana skin, and I'm very interested in the idea of an Integrity Commissioner because, of course, the Solomon Islands has a Leadership Code Commission, with perhaps a rather similar role, but he has the role of prior advice but also the role of doing something about it in investigation.

Charles Sampford — Well I think that basically if you are going to go along for advice from your solicitor you don't want the solicitor to be your judge, or vice versa, so I think that is the fundamental rule of law issue, about why you should separate the roles.

I think the thing is, that these fourth arms of government should be seen and justify themselves, they have to justify themselves too, as making the other institutions work better rather than doing the job themselves. I do think it is possible to become over mighty. One of the arguments against the Hong Kong model is that you create an extraordinary powerful single institution. Of course Hong Kong was different because you didn't have a democratically elected legislature or not one with significant power, so in the end you actually end up having ICAC more powerful because it's taking on some of the roles that democratically elected bodies might do, because the one thing you couldn't have was a democratically elected body because the troops would march over the border the minute that you thought about it, even before you announced it.

I think there is a problem, and one of the arguments for integrity systems is that in a sense this fourth arm of government power is actually diffuse. Some people used to say to me that exact thing: 'The Ombudsman has no power. How many divisions has the Pope got? What's the point of ethics? How powerful are you?' I think one of the interesting things with the integrity system is that a lot of the elements aren't particularly powerful, so individually there is no chance of them running amok, but collectively they are actually quite strong. When somebody said to me 'the

Ombudsman is just a weak reed' I actually came up with a new way of imagining integrity systems. Originally I saw a Greek temple with legislature and judiciary with separate strong pillars, but no, they are actually weak reeds and it's good that they are weak reeds. My image of integrity systems is actually a bird's nest. Several weak reeds which hold the egg of integrity, and the thing is that it's actually good that none of them are really strong because they themselves aren't going to be the problem, but collectively, if they do the right thing, they can actually preserve integrity.

You can see how this analogy goes. At first they are built of local materials, and so it is not a standard model and also the thing is that a few of the reeds can blow away and people think everything is fine. But then if you let too much blow away the egg falls out and everything goes apart. And the final thing, which I want to really emphasise, is that integrity systems have a natural tendency to degrade and they degrade for a very simple reason. Not because they are made out of twigs and they blow in the wind, but because every holder of public office has a temptation to abuse their power slightly in order to retain office, to allow the office to degrade a little bit of integrity to increase the likelihood of retaining office. I say that this is a risk. Some people jump in immediately and say 'it's not a risk, every politician would do that'. I don't agree with that. But again it's a risk, and therefore you should look to it. And what actually happens is that if you just leave an integrity system by itself, and you think you have solved everything, then in that case it will degrade and you may have to wait until the next scandal before you get some improvement, although it is better if, like the birds do, they are constantly tending to it. In Queensland we actually noticed that a lot of people were complacent, even though there had been quite a lot of tending to the nest and, in fact, you suddenly have a wake-up call that it's not quite as strong as you thought it was, it's better to get a few more twigs.

Question — My first question is a follow-up from my original one. You said it's going to be important for the Integrity Commissioner to have support from both sides of parliament. But I'm wondering if that's still a closed group—so you've got the parliament supports the commissioner and the commissioner supports parliament, but perhaps there is still a vacuum as to who is deciding exactly what is right and wrong for either of them to be doing.

Secondly, I'm wondering if this whole system is really dependent on the parliamentary system or parliamentarians actually being concerned with exposure, so it relies on a certain ethical standard initially. If your parliament is corrupt enough already not to actually care if it's found out that what they are doing is immoral or corrupt then the exposure of that is not going to have a huge amount of impact on their behaviour. I'm wondering how this would apply to somewhere not so fortunate as ourselves?

Charles Sampford — Again, good points. In a sense the thing is the reason why you go into politics. There are some places in which you actually enter the army in order to gain political power; you enter politics in order to gain economic power. I think that it's quite a good thing that going into politics is a very bad way to make money, although, of course, for some local politicians in local politics that's not true. Lee Kuan Yew says the best thing to do—he is the poorest but the highest paid prime minister in South-East Asia—is to have absolutely rigorous anti-corruption mechanisms. Actually democracy is a useful thing as well, but I think it is true that you can get to that thing. And in fact there is some work we are doing. Someone from the 'clean hands' campaign in Italy who really liked our worker integrity system said 'Charles, I think this is really important, but what you should do is study corruption systems, because often corruption systems have everything that you would like the integrity system to have: long-standing relationships, strong institutions, clear norms, positive incentives and very strong sanctions'. It's more than just a joke, because the thing is that it actually explains why when you study integrity systems, some countries with apparently strong integrity systems have high levels of corruption and some of these integrity systems that seem to be quite weak, like Holland for instance, actually don't have much corruption. The reason is there is another independent variable to the corruption system. To some extent, if in fact the corruption system takes hold, it's extremely hard for people to get out of it. We do work in the Philippines now, and one of the things is how do you break that cycle?

Interestingly enough, Fitzgerald was a question of breaking that cycle, because the corruption system was fully entrenched from the copper on the beat, up to the chief of police and the person who appointed him. So it was actually a classic thing of a corruption system and so, yes, the thing is it is a real problem and we really need to recognise it, and to also recognise the job of the integrity system is to recognise corruption systems and actually seek to break them in the same way as a corruption system will seek to disrupt an integrity system.

The other thing is that whether in a sense, as I put it, the Integrity Commissioner might be in collusion with the parliamentarians, and I think that this is a possibility. An integrity system isn't just parliament. The integrity system is also going to be hopefully an independent judiciary, a strong independent media, watchdog NGOs. So if that piece of paper is produced by the Integrity Commissioner and it looks like rubbish then the newspaper will say that's rubbish and the watchdog will say it's rubbish and so in one sense because you are doing it publicly, transparency is not everything, but it constrains behaviour in some various significant ways. I don't see transparency is everything, but it's a very useful part of it, and it does constrain behaviour. This business about asking yourself hard questions about your values and giving honest and public answers, the very publicity reduces the number of answers

you could give. There might be some answers that might be true, but there is no point in actually putting them out.

The idea of an integrity system is that you don't just rely on getting good people in parliament, you try to articulate what the values are, which is very much for parliamentarians who care. And probably on both sides of politics they are more likely to come together and agree on higher standards of values, and say 'well we know what the temptations are, we know what the dilemmas are'. How do we structure affairs so that people have a clear idea of what they should be doing because of the code and the advice, and that it is actually easier to do the right thing and you will be found out if you do the wrong thing? And that, if you like, is the essence of an integrity system. It brings together ethical standards to the legal regulation and institutional design. It is actually what modern governance is and should be about and there is no jurisdiction in the world that has it perfect. A lot of them have it quite good, but if they don't continue to work on it, it will get worse, it will degrade. In the Fitzgerald setup, the governance reform commission looked very carefully at the structure of government to see how its integrity could be improved. The one thing that wasn't followed is that Fitzgerald recommended that there be a permanent body. He actually recommended the Criminal Justice Commission (CJC) be created for five years and looked at again because he recognised just how powerful it was and that you have got to be careful with any powerful body. But actually the thing is the governance reform commission, the EARC, ultimately can't do anything by itself. All it can do is keep on producing these reports which become embarrassing if you don't do something about them, and the idea of every jurisdiction having a permanent body, it doesn't have to be huge like EARC. Initially EARC was very large because they had a big job to do, but the one that continually reviews it is something any jurisdiction should seek to do. No jurisdiction has done it and that's an interesting question, but that may change somewhere sometime soon.

Elections, Money and Free Speech in the United States*

Diana Dwyre

Everywhere, not just in the United States, we often turn to our government to try to protect us against political corruption, to prevent political corruption through the rules and regulations, laws that make it difficult for someone to do something corrupt. Some examples are laws against outright bribery. In just about every democracy in the world it is illegal to bribe someone directly, to buy their vote. For example, to buy a vote of a member of parliament. The secret ballot, which in the US we call the Australian ballot and around the world they call it the same, is intended to protect our right to vote the way we want to as individual citizens. That we not be bribed or intimidated into voting a particular way. Campaign finance laws are written and hopefully followed in an effort to prevent corrupt activity to unduly influence the outcome of an election or to have an influence in law making after the election, so I'm going to focus on campaign finance.

Any society that decides it wants to try to regulate the behaviour of human beings, whether we are talking about politics or the behaviour of business executives or how people act with one another in society, we tend to examine what is important to us. We focus on various values—things like liberty, equality, privacy, fairness—that societies hold dear but not always do we focus on exactly the same things in the same measure. In the United States almost always if you look at the way we approach how we try to regulate behaviour by human beings, corporations, politicians, interest groups, parties or whatever, we tend to put the value of liberty above all other values and I think this will become a little more clear.

One of the ways to look at it might be to look at, for example, the United States as one of the biggest—probably the biggest—advanced democracies in the world. It is the one country that is probably the least furthest along towards the idea of equality in economics so we are firmly still in sort of the laissez-faire economic system as opposed to other countries. Certainly we have socialist sorts of programs, so away from complete laissez-faire or no government intervention in the economy towards things like social security for the elderly, Medicare for the elderly, food stamps, welfare payments for people who are out of work or poor etc. There are certain things that we've moved in that direction but compared to other countries, like most of the European countries and Australia, we have not moved as far down that path. One of the reasons is because of our focus on liberty and if you go back to our original

---

documents, the Articles of Confederation and our Constitution, for example, you see this importance of liberty. We believe it's important in the United States, for example, that we have freedom *from* things more than freedom to do things and that's a kind of a hair-splitting distinction. However, if you look at it in terms of rules and regulations or laws passed by the government, freedom from government regulations. So if you look at environmental laws, for example, corporations and businesses will say 'We don't want to be over-regulated. We want to be free from government regulation so that we can continue to exist. If we can't turn a profit we can't continue to exist. If you over-regulate us it's going to cost us too much to protect the environment so that we won't have a business any more'. So these are tensions that we see in all types of policy areas. Freedom from government intrusion into my own life. Don't tell me what I can do in my own bedroom, my own living room. Don't tell me, government, what and how I should be living my life as long as I am not harming other people, I shouldn't be stopped by the government.

My argument about campaign finance is that currently and pretty recently, in particular, the ability to prevent corruption in the United States is limited by our interpretation of liberty. In particular our Supreme Court's interpretation of liberty and how they apply the idea of liberty. That this interpretation constrains the United States Government's ability to ensure political decisions are made in an environment free from corruption. So political decisions like how we vote on election day, political decisions like how members of Congress will vote when they get to government—those are the kinds of political decisions I mean.

Just a little bit of background because everybody's coming from different places about some things that are different in the United States. In the United States every lawmaker is elected independently. What that means is that every person running for the House of Representatives, the Senate or for President of the United States, for example, is running their own campaign. The party's not running their campaign for them, the party may assist them but in the United States currently the parties really don't participate in too many of the races for Congress, for example. Each one is independently elected which means they are raising their own money and spending it themselves. There is other money going through the election system, and I'll talk about where that is coming from too, but they're pretty much responsible for their own election and re-election.

We have single-member districts with the winner take all system. We don't have a preference system or any of that. We have a first past the post system which pretty much ensures, although not absolutely guarantees, that you have a two-party system which we've had for a very long time. With a few minor parties every once in a while

gaining some strength but for the most part not being able to achieve majority status by taking over government for example.

Candidates don't need the party to win because in the late 1800s and early 1900s the political parties had very important powers stripped from them and that was the power to nominate their own candidates, so now candidates are nominated through primary elections. It's just like a regular general election, but held before, so that voters from each party will select themselves who is going to run as the nominee from the Democratic Party or the Republican Party. These primaries are really disputes within the party. Who's going to run? We've got two, three, maybe four people from the same party running against each other to determine who the nominee is going to be. The political parties themselves tend to stay out of those family feuds because, really, they're not going to choose favourites over people who are all from the same party. It doesn't always happen. Sometimes, of course, the party establishment has preferences about who they'd like to see win and usually it's the person who they think can win the general election when they go up against the person from the other party. Yet, for the most part candidates are on their own in the primary elections as well.

As I'm sure you know voting is not compulsory, it's voluntary and that means a lot of different things. One of the things it means is during the elections most activity—whether you're talking about the candidates, political parties, outside groups, unions, corporations, everyone involved in elections—is focused on turning out the vote. Not necessarily getting the most people to vote but getting the right people to vote. If I'm running for office I'm not going to try to mobilise your people and if you're running against me I want my people, but I want a particular set of people. People I know who are members of my party because they're registered, for example. People who I know have voted in the past. People who I know other things about—they have all kinds of sophisticated data sets so they learn all kinds of stuff about us. The focus is not necessarily on the biggest turnout but just the right turnout—enough to get you elected.

Finally, Supreme Court justices (and this will be important when we talk about some of these court cases) are not elected but appointed by the president, approved by our Senate and they serve for life so they are there for a long time (most of them).

Just a little bit of history so we can get to the present. As early as the 1860s some of the states in the United States started passing regulations to curb primarily the activities of corporations in their campaigns and then on the federal level we started to see in 1907 the same kinds of activities. All of these reform efforts are attempts to pass laws to regulate people's activities and behaviour in campaign finance. It generally came in the wake of scandal so something bad would have to happen. Teddy

Roosevelt was accused of having the corporations front his campaign and that is why he became president, and he really came under a lot of attack and so he championed finance laws. He got the Congress on board too, although they were ready to go after him, actually, and they banned corporations from participating in campaigns. So that's how most of it started off. Between 1907 and 1947 we see some important principles established in the law. First, and maybe quite importantly, because it may be the only thing we end up left with after a few years, is that we have a pretty robust disclosure system that candidates and political parties needed to disclose everything that they were taking and spending on a quarterly basis. Anything over $100 back then was a lot of money but the idea here is that the principle was established very early on.

Spending limits were instituted for parties and their candidates. Even way back then they were saying there is too much money in politics. One way to try to reduce the amount of money out there with people maybe having too much influence over the outcome of elections is to just not let them spend too much and so spending limits was another principle that was put into the law pretty early. And then there was this ban on corporate and later union contributions and spending. The union ban came in 1947 and was a reaction to the growth and the strength of the union movement and their participation in elections. The ban on corporate participation started way back in 1907—that was the very first law on the federal level. These are some principles that go way back so they have been in the law for a long time. The problem was that they weren't enforced. There was no agency established to regulate them, to look after people to make sure they were following the rules. People could easily evade them. It wasn't clear who to report disclosed information to so even though the laws were on the books it didn't really matter.

In the midst of, before, and after, probably one of our biggest scandals, the Watergate scandal—I'm sure some of you have heard of that one—we passed the biggest campaign finance reform legislation we've seen in the US called the Federal Election Campaign Act. It was originally passed in 1971 with amendments in the wake of Watergate in 1974. It did a number of things. First it sort of reiterated in many ways what the previous laws had tried to do but tried to do this with some teeth so that it would actually be enforceable. Donations were banned from corporations and unions that had already been on the books. They added banks, government contractors and foreign nationals. This was particularly important in the midst of the Cold War in the wake of red scares etc. It wasn't that there was a fear that the communists were going to come in and take over our politics but the idea that the United States, and nobody else but the United States, should be running our own campaigns. The idea of adding foreign nationals to this was an important one that has stayed in the law since then (an important addition).

Again, quarterly candidate disclosure of contributions and expenditures was reiterated with teeth behind it so that in fact there would actually be disclosure. We'd be able to figure out what was going on. Because the disclosure is quarterly it happens before the election. I'll get to that when we talk a little bit about Australia at the end. I think that one of the most important lessons that a lot of countries might take from the United States is that the voters know what's been raised and spent before we actually go and vote on election day. That's a really important element. It's something about elections and our politicians that gives us more information about them.

Voluntary public funding for presidential elections was instituted for the first time and it was tied to spending limits. So in the United States the idea is that you can't force anybody to take public money. 'If you want to throw me money that's great', but if you are trying to limit the amount of money in politics, one way to do this is to provide public funding so you don't have to go out and raise more money. In order to make sure that they don't just raise and spend more money on top of that, get the candidates to agree to spending limits so the two are tied together: 'We'll give you public money if you agree to limit your spending'.

Just a few more points with the Federal Election Campaign Act. Contributions were limited to candidates from themselves first. This law said that you cannot spend all the money you have in the world, even if you are a billionaire, to get yourself elected to office. Contributions from individuals to candidates were limited. You can only spend so much money. You can only give so much money as a donation, a gift to a candidate to run for office. Remember, in the United States almost all the money is going to the candidates themselves, not to the political parties, although they raise a good deal of money too. Contributions were limited to the parties. The idea here is that the most severe or serious avenue for possible corruption was the candidates themselves—giving them a lot of money to run for office, them getting elected and them voting the way you would like them to vote because you've sort of helped them get elected. The parties, too, could have great influence over the way the candidates would vote once they got into office. This was seen as the potential for a quid pro quo kind of corruption and limiting contributions to candidates and the political parties was seen as important, in particular for that reason.

Then the Federal Election Campaign Act created a brand new kind of entity that we call a political action committee and it said 'Everybody can participate in elections, even corporations and unions, but if you are going to do it you have to do it according to these rules'. These rules are that you must set up this thing called a political action committee, you can only raise money in limited increments and you can only give money in limited increments to candidates and political parties. This was an attempt to regulate how the money flowed, where it came from and where it went to and how

it was spent and this was all, of course, disclosed. The Act also attempted to limit spending by the candidates themselves so to put a cap on how much they were allowed to spend overall. It also limited independent spending. So let's say you are running for office but I really don't want you to win and so I am going to go out and spend my own money, maybe I have millions of dollars to spend on this, I am going to go out and spend my own money to try to make sure you don't get elected. Or if I belong to a group that does the same thing. The Federal Election Campaign Act attempted to limit that as well so that nobody's voices are drowning out other people's voices. You can see here this emphasis on equality, getting everybody sort of on a level playing field here. And then very importantly it created the Federal Election Commission. This is an agency that only deals with campaign finance, that's it. They don't run elections; they don't do any other jobs. Their job is to make sure people are following the rules. Their job is to take in all the information that's given to them through disclosure and to make it publicly available.

So up to this point we have some principles that are pretty much now carved into the law and have some bite to them so we have a commission now that's going to make sure the law's enforced and we have some real penalties in place so that if you break the law there's actually something bad that can happen to you but hopefully that will serve as a deterrence more than anything. The principles are in place so that corporate and union contributions are banned to prevent corruption. The whole idea is that these guys have the most money and if we allow these very wealthy groups of people to participate in our elections they will very quickly override the interests of the regular citizenry. So this is the idea behind this principle: that candidate, party and group spending would be limited. So that's to try to reduce the overall amount of money in politics and to try to sort of equalise that playing field. Overall the government's interest is in preventing corruption and so in order to prevent corruption the government is justified in regulating or intruding on people's freedom because it's important enough so the interest in preventing corruption is more important than liberty in certain cases. That's the justification for these rules and regulations.

Not too many years later, by 1976, the entire act is challenged in the US Supreme Court and the court does a very interesting thing. They say not all of this is going to work and they really turn to the value of liberty and they say 'We're going to look at both contributions and expenditures here and we're going to look at them differently', whereas in the law you haven't really distinguished between the two. We're going to say yes, it's important that you limit contributions to candidates because they're the ones who are going to get elected and then go on to vote on public policy, and we don't want to leave them open to bribery. So you should limit contributions to candidates to prevent corruption or even the appearance of corruption. Limits on candidates and individual independent expenditures they say are a violation of the

First Amendment right—freedom of speech. This is the very first right in the Bill of Rights. It's seen as primary, quite important. In this case the court applies it to the area of campaign finance, really for the first time in a clear way. They distinguish between contributions and expenditures and say you really can't gag someone, you can't stop, even candidates from spending as much as they want to spend on their own races, or individuals who just happen to have a lot of money. By telling them they can't spend that money you're violating their right to freedom of expression, and so after 1976 in the *Buckley v. Valeo* case we see the strong connection between campaign finance regulations and freedom of expression.

The First Amendment deals with other things like freedom of religion, freedom of the press and one of the most important things is this freedom of expression and freedom of speech. The First Amendment right to freedom of expression has since 1976 really shaped our view of campaign finance and now campaign finance is all about money and so this decision was highly criticised and continues to be criticised today. The criticism comes primarily from people towards the left end of the political spectrum but not necessarily always. The justices on the Supreme Court did not say money equals speech but this is the accusation: that the court has equated money with speech which then allows those with the most money to speak the loudest in the name of liberty. We're doing all this because we want to protect people's liberty, but the consequence of that protection of liberty is problematic so that's the criticism out there and it remains a very prominent criticism, particularly recently.

So what do we have after the Federal Election Campaign Act and the *Buckley v. Valeo* decision? Contributions are still limited to candidates and political parties and that may, as was intended by the lawmakers and the Supreme Court, actually prevent some corruption so that may be considered a good thing. Extensive pre-election disclosure allows for accountability. Now pre-election, as I said before, we consider pretty important because we think that this is information that voters should know about. It's in addition to everything else you might know about a candidate. Where does this candidate get his or her money from? Who's funding this campaign? Who might they be listening to once they get elected? Those are the kinds of questions that we're concerned about when we say that pre-election disclosure is important. One of the consequences of all this disclosure and all the data that is available virtually 48 hours after it's filed with the Federal Election Commission—now all on the internet, very easily accessible, anybody can go there and look at it—is that we have a very informed media. We have a lot of journalists who understand the data, and its reams and reams and reams of data. If you understand how to look at it you can really draw some important conclusions about what's going on, and so the media has been sort of trained to be more attentive to this information and it has become part of the reporting on our elections.

We also have a number of very active watchdog groups that use the data and the information that's disclosed to sort of call out 'what's happening with this? Are there certain industries or businesses or groups that are playing a big role or are they overshadowing other groups? What kinds of things? How much money's being spent?' And they are always putting out press releases and reports that too become part of what the public receives through the media and by these groups. We have a very low disclosure threshold compared to a lot of countries. If you as an individual give $200 to a candidate or political party as soon as you reach $200—even if you give it $10 every day for a few days—your contribution will be disclosed. So $200 is considered a pretty low threshold if you're going to participate. Even at that low level people are going to know about it. It's not a private act.

**Figure 1: Money in presidential elections, 1996-2008**
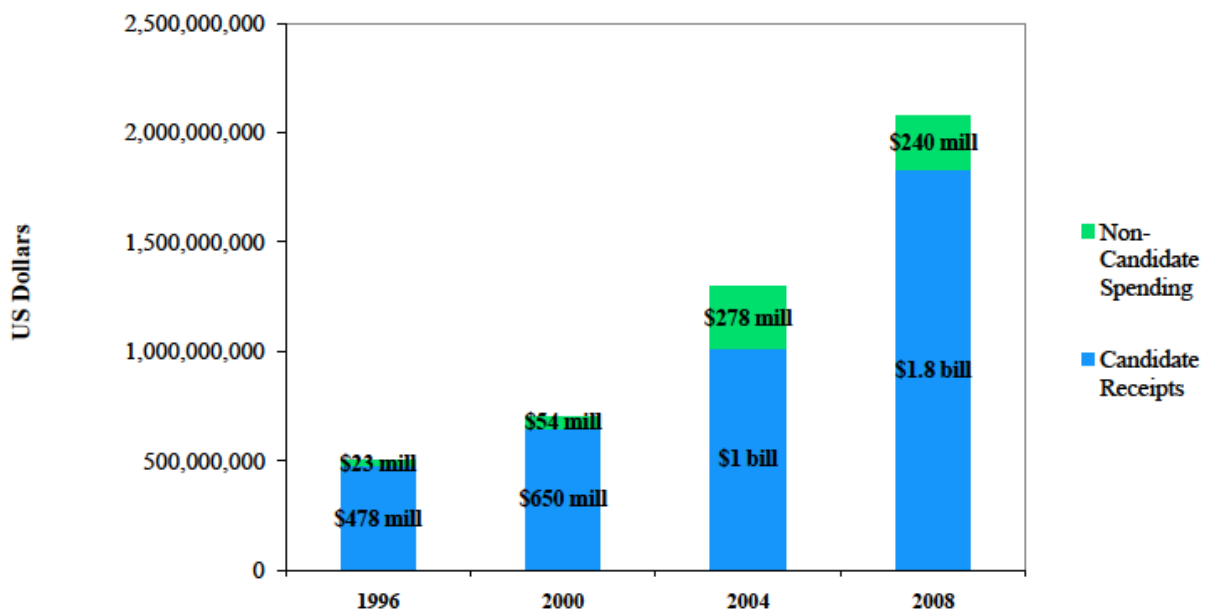
Source: Federal Election Commission, '2008 Presidential Campaign Financial Activity Summarized', News release, 8 June 2009.

Then there are some not so good consequences as a lot of people argue all the time … this is what you always hear about politics in the United States—there's too much money. Yes, there is a lot of money in United States elections. Figure 1 is an illustration of money in the last presidential campaigns. You can see the blue line is the money that the candidates took in and so the trend is obvious. It's gone up since 1996 and if you looked before this you would see the trend was going in exactly the same direction. These are just the last few presidential elections. The small bit of money at the top (it looks small but it's $240 million so that's a lot of money) is all

the money that's raised and spent by anyone other than candidates—political parties, interest groups, various individuals who want to participate. So put that all together and we can estimate, and I say estimate for good reason, it was about $240 million in the last election. This is an area where we are not capturing everything through disclosure because, as human beings will be human beings, people find ways around the law. As soon as you pass a law somebody's going to find a way to get around it and many groups in particular have found ways to raise and spend money that isn't required to be disclosed. The law makers try to keep up with human behaviour and sometimes they capture it and sometimes they don't, so this figure at the top, the green money, is not quite as accurate as the money the candidates have to disclose. They do disclose. We know everything that is going on, hopefully, unless they're really bad and they're just violating the law outright. There's no reason for them to. The punishment is pretty bad, so hopefully they are deterred. One of the consequences as well, not only do we have a lot of money, but what I like to think of is really where's the money coming from, how's it being spent, where's it being distributed, what consequences does it have for things like governing or the electoral system?

Figure 2: Limits on campaign contributions for House candidates
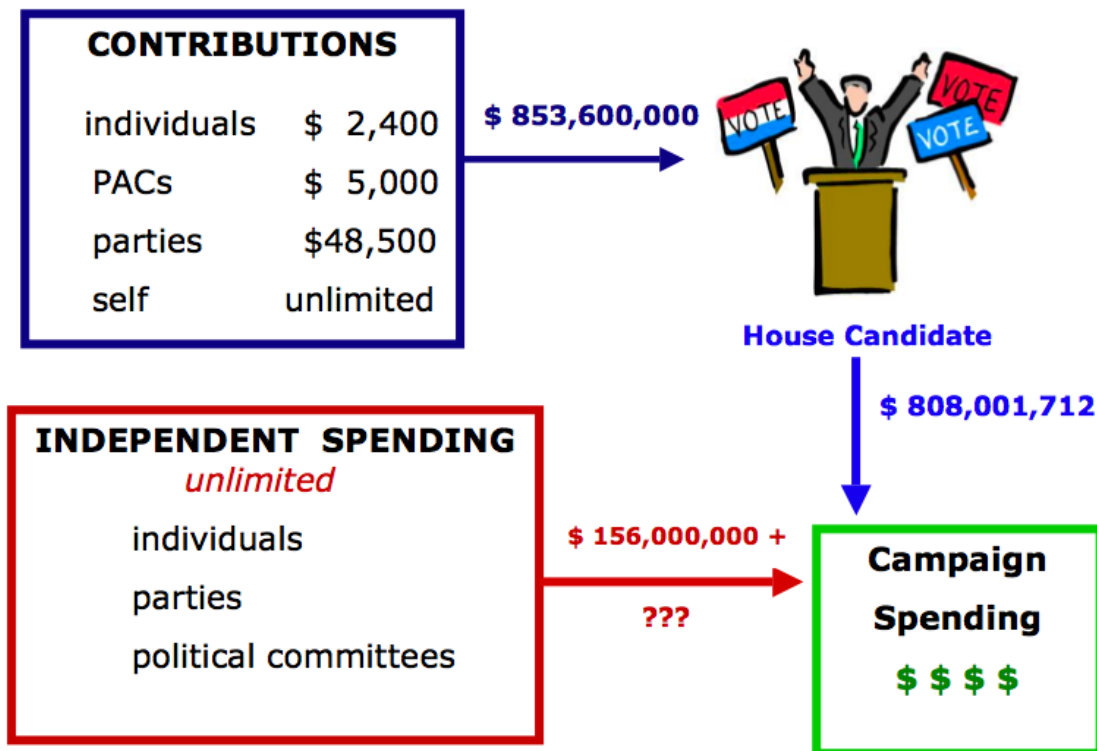
One of the things that happens is we don't have a lot of competition. Very few races are actually fought competitively. Most people win by very large percentages and so I just want to explain how the money flows in a typical race for the House of

Representatives. In figure 2 there's our candidate up there so happy getting ready to win his election and so what can he do, how much money can he take in from what sources and how can he help himself get elected? He can take from each individual up to $2400 per election so that means $2400 for the primary election, if he has one, and $2400 for the general election. That's the limit. That's as much as somebody like you and me could give to an individual House candidate. From a political action committee he can take up to $5000, again one for each election, so that equals $10 000 if he's getting money for both the primary and the general election. It looks like he can get all this money from his political party but what you have to know is that although the party can give a candidate directly almost $50 000, the party doesn't really do that very often and just concentrates on those very few close, marginal races.

The Supreme Court overturned that limitation on self independent spending and so the candidate now can give him or herself as much of their own wealth as they want. They said that that would be a violation of their liberty, the freedom of speech of an individual candidate, so if I happen to be a billionaire and I want to spend all that money running for office I'm allowed to do that. The Supreme Court said that that is okay. We see some examples that people find very disturbing in the United States. Quite recently Carly Fiorina, who's running for US senator in California, the state that I come from, just gave herself $39 million to run for the Senate. That's a lot of money. California's broke right now. I wish she'd just transfer it over to the Treasury, it would help. We will see how that one turns out in November.

Other money comes from other sources. People can spend independently, parties can spend independently and political committees—I say political committees rather than political action committees because it encompasses political action committees and these other groups—some of them have found ways to raise money and spend it without having to disclose it. That's why that figure of $156 million has a big bunch of question marks under it because we're not sure if we're capturing all the money through disclosure and we know we're not. Here's how much we have captured and if you look at the amount of money raised by all the candidates and that figure $853 million is all the candidates, all 435 seats where there is usually at least two candidates. That's all the money raised by them and then they spend $808 million. Some of them still have money in the bank at the end of the election and all that money is being spent on elections throughout the country and not all in one place and you can see it is a lot of money. But here's where it comes from and here's how these things are funded. The contributions that candidates get, remember, are limited except for the money that they can give themselves. If I spend a lot of money to defeat someone or help elect them, or a political party or a group decides to do that, we can spend as much as we want. Those aren't limited.

Figure 3: Sources of campaign contributions for House candidates, 2008
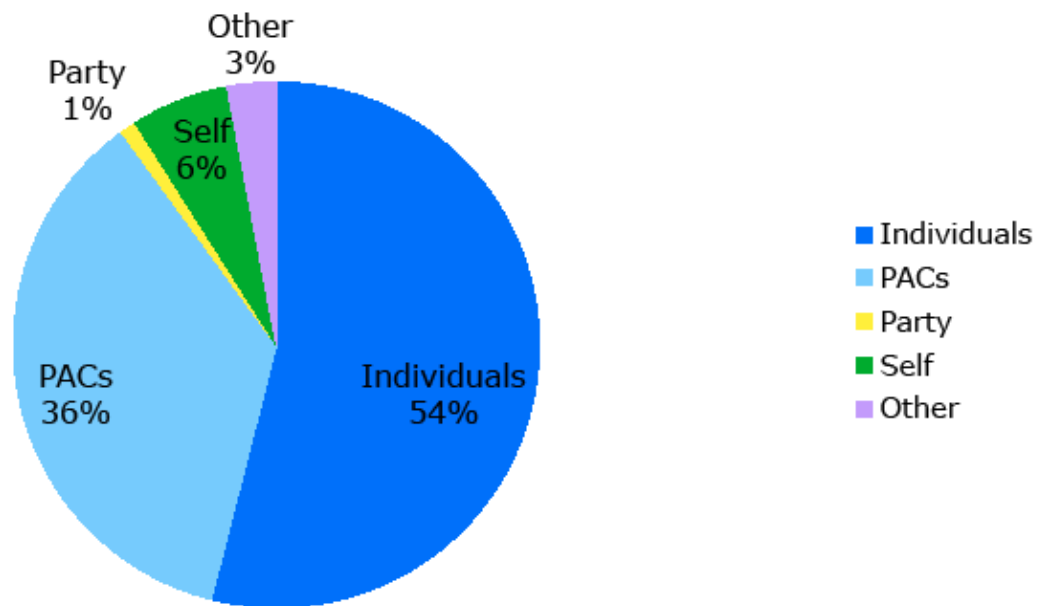
Source: Michael Malbin, Norman Ornstein, and Thomas Mann, *Vital Statistics on Congress 2008*. Washington, D.C., Brookings Institution Press, 2008, updated by Campaign Finance Institute at http://www.cfinst.org/data.aspx.

So where does the money from just the contributions come from? Most of it comes from individual, regular people who write limited contribution cheques to candidates—that's 54 per cent (see figure 3). Thirty-six per cent of it comes from political action committees. So that constitutes about 90 per cent of it is coming from these two sources. One per cent, hardly any of it, is coming in contributions from the political parties. The parties choose to spend their money independently. That means they're not talking to the candidate at all. They're out there running ads primarily and trying to get their people elected or trying to defeat the other party's person. So the money they're contributing, writing cheques to the candidate, is only one per cent. Most of their money they spend independently so that they can spend in an unlimited fashion. Candidates are spending a lot of money on themselves—six per cent—that's a lot of money. The other category is what I call the 'sad category' because it's really sad that some people do things like take out second mortgages on their homes to run for Congress and those sorts of things, take out loans from their uncle. That's that category. It's gotten bigger and bigger with the years. This chart is for 2008. This is where the money is coming from going directly to candidates and in the form of contributions.

As I said my concern here is that competition is diminished. That we don't have very competitive elections which are seen as important in a democracy, because if I as a voter don't have a choice between at least two candidates, how can I say that I am really playing a part in my democracy if I don't have a choice, if one person is always

going to win no matter what and the other one is just a sacrificial lamb? Why should I really feel that I play any kind of part in elections? The lack of competition or very little competition is seen as a very unhealthy thing in most democracies. Only 16 per cent of our 435 races for the House of Representatives were won with 55 per cent or less of the vote. Now that is seen as pretty competitive—55 per cent. The other person gets 45 per cent. The number is not much better if you go up to 60 per cent and so most of our elections are not competitive. The person who is going to win is pretty much known. Watch elections coming in November 2010, you get pretty good coverage of that here. You'll see that we probably have more competitive elections than we have had in a while. In part because politics is pretty controversial now and there's a lot of disagreement with what the party in power is doing in Washington and so there might be some more interesting races and therefore more competition.

Sixty-seven per cent of all contributions go to incumbents. Those are the people who already hold the seats, so they also have a lot of other advantages. Incumbents get more media attention. People generally already know their names—at least more so than they know the person who is running against them. They already have a lot of advantages and they get the most money. That's a huge advantage when running against someone. Lawmakers always complain that they're spending all their time raising money and for the House of Representatives it's probably true that they spend a lot of time raising money. The House races are only two years apart, so as soon as you get elected you're facing another election in two years. That's not very much time to get ready to raise, in most cases, millions of dollars. Remember, you're raising it in limited chunks, limited increments.

If we look at the trajectory over time (figure 4) you can see the pattern is obvious again, it keeps going up. This is the average expenditure by House candidates over time since 1996. The trend is primarily that, 'wow, look at that blue line. Those people are spending a lot of money'. Well, those are the open seats. Those are the races where there is no incumbent so somebody has retired or died or moved on to run for another office, something like that, and so neither of them have those incumbency advantages. They also tend to be the only races sometimes that are even competitive and so lots of money is poured into those races. In 2008, however, there were only 41 of those races, so that big blue line constitutes only 41 out of 435 races. That's where most of the money went, so it's kind of an odd thing right there. The rest out of the 435 are challengers versus incumbents, and so as you can see the incumbents are the green line, the challengers are the lavender or the pink line and the incumbents almost always outspend their challengers. Overall these are averages. If you look at individual races you will often find that there are challengers who spend more than their incumbents. This doesn't mean that they are going to win necessarily. Just because an incumbent spends more than the challenger doesn't mean they're going to

win but money is important, so if you just look overall at the averages you can see that in fact money is not distributed at all evenly among the different people running for office and the consequence is that over 90 per cent of incumbents win their re-election contest, so that's not a lot of competition. Again, this is usually seen as a kind of unhealthy thing in a democracy.

Figure 4: Average House candidate expenditures, 1996-2008
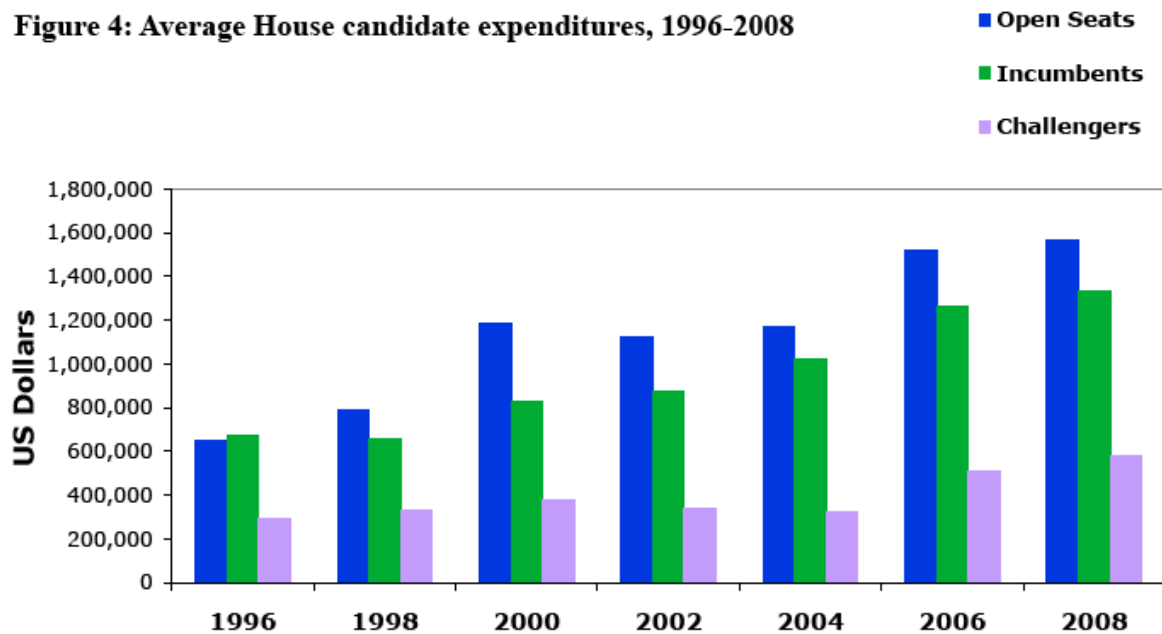
■ Open Seats
■ Incumbents
■ Challengers

Source: Michael Malbin, Norman Ornstein, and Thomas Mann, *Vital Statistics on Congress 2008.* Washington, D.C., Brookings Institution Press, 2008 updated by Campaign Finance Institute

Another issue, and this is a fairly recent one, is that this outside spending—that unlimited amount of spending that can be done by political parties, groups and individuals—is now outpacing, in some contests, the money that the candidates actually raise and spend themselves. Now this is happening in these very few competitive races all because that is where everybody is concentrating on this opportunity to either pick up a seat for your party or to maintain that seat if you already hold it. I just took two cases from the last election. In Minnesota, in this case the third congressional district, the outside groups, political parties and individuals spent 52 per cent of all the money spent. Candidates only spent 48 per cent and so the candidates were outspent by these people who weren't running for office. Remember the candidates are the only people who appear on the ballot on election day. Their names are there, they're held accountable for what happens during the election. So if negative ads run that the voters don't like, even though the candidate might say 'Hey, I didn't run it. That group called Citizens for a Pretty America ran it. It wasn't my idea'. It doesn't matter. Voters tend to not like negative advertising if it's way out of whack and they will blame the person who seems to be helped by the negative advertising. Candidates hate this outside spending because they get blamed even when

they don't misbehave. Even if they don't run negative ads, people trying to help them get elected aren't doing the best favour for them. It often backfires.

Figure 5: Outside spending limits accountability

		Outside spending (US$)		Candidate spending (US$)	
MN	3	$6 004 387	(52%)	$5 632 148	(48%)
MI	7	$5 873 605	(57%)	$4 473 491	(43%)

Source: Federal Election Commission, ˹Congressional candidates raised $1.42 billion in 2007–2008˼, News release, 29 December 2009

In Michigan, in the seventh congressional district, we saw a race where these outside spenders spent 57 per cent of all the money. The other thing to remember about the outside spending numbers is that this is only what we know about. We know about candidate fundraising and spending. They have to report all that and there are not too many ways they can get around it. With outside spending, this is only what we know so the numbers are probably even bigger. The candidates' voices, if you also track the campaign ads on TV for example, they're really outspent and outmanoeuvred on television and on radio. If you count the number of minutes, whether it's a negative ad or a positive ad, where people remember the ads, people do research like this so they know this stuff. Sure enough the candidates' voices are often quite drowned out. They know more about the ads that the other groups or individuals are running, for example. So this is seen as a real problem because it limits accountability. These people come in to your election, they spend a lot of money but they don't appear on the ballot on election day, they don't get held accountable for running very negative campaigns, almost always they are negative campaigns. If your group is not going to be held accountable you don't have anything to lose. Hopefully you want your guy to win but they'll tend to sling a little bit more mud than will a candidate who knows that it is going to come back on them. So there's a lack of accountability as the candidates' voices are drowned out by others.

Another problem of consequence is that although the public funding system did work for quite a number of years, we've seen quite recently, and this is just an example from 2008, that candidates now realise they can do better without taking the public money. The public money used to be seen as quite a good thing. It's very helpful. You don't have to spend all your time raising money. You get all this cash and then you agree to limit your fundraising and spending after that point. It worked pretty well up until 2008 when Obama decided not to take the money—it was quite controversial—

and McCain did take it and there was a large disparity between how much each one had to spend on the election ($350 100 000 for McCain and $745 700 000 for Obama).[1]

Then in January 2010 everything changed or at least potentially changed. There was a big lawsuit that made it to the Supreme Court in January and was called *Citizens United v. Federal Election Commission* (2010). Remember it's the Federal Election Commission that's in charge of all this. The agency is in charge of campaign finance on the federal level. Anytime somebody wants to challenge some part of the law they sue the Federal Election Commission so that's why they're named in this suit. The court said the case is about a non-profit corporation that wanted to be able to spend as much as they wanted to influence the outcome of elections. The court said, 'well, the law currently says the corporations can't spend as much as they want to'. Those things are limited. Corporations are not permitted to participate directly in campaigns. They're supposed to form political action committees and limit their income and their output.

But the court said 'no, we're not going to look at it that way anymore', so they changed their minds. They said 'no, that law is invalid. It's unconstitutional'. In fact they say the government may not suppress speech, because remember this idea that freedom of speech is what's under contention here. The government may not suppress speech on the basis of the speaker's corporate identity. 'You shouldn't be distinguishing', the court said, 'between a corporation and an individual, you shouldn't discriminate against corporations in this way'. They said these independent expenditures, including those made by corporations, just don't give rise to corruption or the appearance of corruption so they're just stating that this is not a problem with corruption. There is no potential for corruption here so we don't have the justification to regulate in this area. There is no government interest that justifies limits on the political speech of non-profit or for-profit corporations. For a hundred years the court has upheld laws that have said corporations actually should be limited in their ability to spend on federal elections, and so in January 2010 the court says 'no, because we don't see that as a potential avenue for corruption'. It's quite a U-turn in a lot of respects.

Many people were critical of the issue. President Obama was one of them. He said that the Citizens United case will 'open the floodgates for special interests … to spend without limit in our elections'. So the concern again is that you're allowing those who already control a lot of wealth to be able to have more of a larger voice in elections. 'I don't think elections should be bankrolled by America's most powerful interests',

---

[1] Source: Federal Election Commission, '2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total', News release, 8 June 2009.

Obama said. This is very consistent with a lot of the criticism that we're hearing from primarily, again, the left side of the political spectrum but not exclusively. On the right side of the political spectrum there has been a pretty long-standing effort to try to erode a lot of the regulations to deregulate campaign finance very much along the same time line as we've seen attempts to deregulate the regulations of business practices. We see it beginning in the 1980s through the 90s and to today, and this case *Citizens United* was part of that effort to deregulate, to stop the regulation of or limitation on political fundraising and spending and so many conservatives hailed this as a good decision and say this is the direction we should be going in because, in fact, this means more liberty for people and in this case for corporations. Those are the two sides. The Supreme Court overturned previous laws and court decisions that had very clearly established this. One hundred and two years of prohibitions on corporate electoral spending. That's a long precedent for them to make this change.

On the heels of *Citizens United* came another case at the end of March. Again, really recently, just weeks ago, and the court—this is not the Supreme Court, this is the lower court and I would assume that this case is probably headed to the Supreme Court. It's *SpeechNow.org v. Federal Election Commission* (2010). They sued the commission to try to get this case into court. SpeechNow.org is an organisation that was created exclusively to challenge the campaign finance laws in the United States. That's the only reason it exists. It's an office full of lawyers and they sit around thinking up cases. That's what they do. The DC circuit court heard this case and they said 'Ah, this case is about contributions, the last one was about expenditures'. The court said we can't limit the amount of money corporations—non-profit or for-profit—can spend in elections. This case and SpeechNow, they brought a case about how about the money we can *raise* as non-profit or for-profit corporations.

The court said limits on individual contributions to independent expenditure groups are unconstitutional. They're saying that, too, is unconstitutional. We've had all these limits. Again back to the political action committee model. If you want to raise money to participate in elections you've got to do it in limited increments. The court is saying 'no, no longer. We are changing our minds about this. We're saying no, these limits are unconstitutional as well'. Since the expenditures do not corrupt, that's what *Citizens United* established, neither do the contributions that come into the groups. It allowed them to make those expenditures, so it's saying 'no corruption in, no corruption out'. That the money coming in can't be corrupting because the money going out we've already determined, the Supreme Court said, isn't a potential for corruption. So they concluded 'the government has no anti-corruption interest in limiting contributions to an independent expenditure group'. So now the courts have looked at both sides of the equation. The money being raised by these profit and non-profit organisations or corporations and the money being spent by them and basically

saying limits on that in any way are unconstitutional, a violation of freedom of expression.

This new interpretation really limits our ability to prevent corruption. The court has said, and clearly I disagree, that this is not the potential for corruption that everybody is so worried about, so maybe I'm just a nervous academic that sits around worrying about these things. But a lot of other people do as well and the idea here that the only entities that are now really regulated by law are the candidates and the political parties who still must raise money in small increments and spend it in limited increments. If they are limited in that way but everybody else who can participate in campaign finance is not limited in that way, then I think that you can tell what we might see in the future in our elections. Remember it's the candidates who are held accountable on election day because their names appear on the ballot. The political parties, their label appears next to them, they are the ones who we're really focusing on. That's who we send to government. Everybody else who is attempting to influence elections is pretty much free to raise and spend money with very little regulation. Now they do have to disclose this although it's still being worked out exactly how we're going to make sure we capture all that.

So, now, what's going to happen? I think it's fair to say that outside spending by profit and non-profit corporations will increase in future elections. That's something I would actually put money on. I think that that might happen. One thing that a lot of lawmakers have anticipated and of course are not happy about is that corporations may come to them and shake them down and say 'Hey, we have a big vote coming up on this oil drilling thing. We need you on this one. Hey I know the public is really upset about oil rigs right now but we really need you on this vote and we're prepared to let you know exactly what we will do in the next election if we don't have your support for this. Here's a script for an ad that we're getting ready to run against you'. They never have to run that ad, they don't spend a penny on it, they don't have to do anything but they can use their potential to spend unlimited amounts to 'shake down' lawmakers to get them to go their way. That was a kind of exaggerated example, but this is something that has come out of the mouths of many lawmakers, that this is a concern. Conservatives and left-leaning people as well.

This is a very highly organised effort by conservative groups and it's been going on for a couple of decades. There are many, many more lawsuits in the pipeline. Things to try to not put any limits on any fundraising or spending and so some people say 'well that would be good because then the candidates and parties will be on the same level playing field'. But, boy, watch how much money ends up being in elections. You have to decide what is important to you as a society. Some of the lawsuits also involve lowering disclosure. There is an argument that—and I have heard of this in

Australia because many of you probably know that the campaign finance reforms are being considered here too, both at the federal level and in many of the states—people shouldn't have to disclose when they make a campaign contribution because it is an invasion of their privacy and maybe they will be harassed for that or something. That's some of the stuff coming through our pipeline. That is evidently an issue in Australia as well.

I'm going to dare to make a few suggestions, some lessons you might learn from the United States here in Australia. I have read all kinds of things and talked to people about the efforts here on the federal level. I know things are stalled in the Senate but most of what I propose is not controversial really but doesn't mean it's going to become law either. I haven't seen too many people, except for a few scholars out there advocating this idea of pre-election disclosure. The United States is not unique in making sure its citizens know about the money that's coming in and out of campaigns and what's being spent but certainly we have a very well-developed effort to do that, so as I said, the information is available very soon after it's filed with the Federal Election Commission. We have a pretty well-trained media that concentrates on these kinds of things and at least makes this information known and groups that keep an eye on how the system's being run so we know what's going on. By not having that kind of pre-election disclosure, if you find out 'oh my gosh, the mining companies supported the party and that's why they got elected—they got billions of dollars from them after the election'. If you find that out after the election, what good is it? Maybe it might influence somebody's vote. If you're not concerned about where the money comes from you don't have to pay any attention to it. It's a public act to give money to candidates' political parties and it's not publicly known until after the election. Election day is really the only day that it matters. The next time you are going to be able to hold people accountable is the next election.

I would also say consideration of limiting contributions. There are proposals out there to do that. Not at the federal level but the idea that if in fact there is a recognition that this is a potential avenue for corruption, particularly the most nefarious quid pro quo 'I'll give you money if you vote my way' kind of thing, then limiting contributions is a way to do that. You don't want to make contribution limits too low because then of course all anybody's doing is spending their time raising money and there's not going to be a lot of motivation to participate. If they are too high then a limit doesn't have any effect so finding that balance is important.

Limit or ban foreign donations right now in Australia. Foreigners—foreign people, foreign entities or corporations—are permitted to participate financially in your elections and all I can really say about that is why? I'm not sure why that's important, and why would you want money coming in from other countries? There have been

some hints that that has already happened and when a million dollars comes from some Lord in England and comes to Australia that's a lot of money going from one place to another and what interest does this person have in the country of Australia? They don't live here, they don't vote here etc.

There's a tax deduction for corporate donations. Why would you want to subsidise corporations to participate financially in your elections? They've got enough money. If they want to participate they are going to do that anyway so why give them a subsidy to do so?

Question — Just in relation to the last bit: corporate donations tax deductions are gone. They went in legislation earlier this year. In relation to PACs (political action committees) and third parties in campaigns, one of the key things we've had in Australia is ideas like the unions and GetUp! would be very strongly against any limitation on their ability to campaign. That seems strange because in the US it is the right which says we have the right to run PACs and spend as much as we like whereas over here it is the GetUp!s and the unions who say why can't we have unlimited expenditure in campaigns? What's your view on that?

Diana Dwyre — Well groups like GetUp! in the United States who are on the left side of the spectrum, they don't criticise some of these decisions either. They would like to be able to raise and spend unlimited amounts and so it is those groups in general that are interested in not being regulated. That's not necessarily partisan or ideological.

Question — Isn't it a consequential amendment that any limitation on expenditure and donations to parties has to be consequential, that there has to be a limitation on third parties or else money will simply flow through. I won't give money to the Liberal Party I'll give a million dollars to Citizens for Lower Taxes who then run negative campaigns against the Labor Party so that the net effect is that my money is going towards arguably a stronger more negative campaign. It is a consequential thing, surely, that third parties have to be capped.

Diana Dwyre — I think that that is where societies really have to look at what kind of elections you want. Do you want elections that come from parties and their candidates or do you want elections where these third party groups, interest groups really are speaking the loudest? And so by regulating in particular ways you can create certain

consequences. So if you don't want to allow third party groups to overpower the voices of candidates and their parties then you have to limit both sides. That's why limitations can work in that way. In Australia I'm not so sure that your courts would decide in the same way that ours have recently and say that such limits are unconstitutional. I don't think they will. Most of the scholars who've commented on pending legislation have said no, that's not the same kind of limitation that we see happening in the United States. But you are absolutely right. That's where you have to step back and say what's important to us? What kind of elections do we want to have? And you are also right to point out that those elections run by third party groups who have nothing to lose and aren't on the ballot tend to be more negative. So you'll get that as a consequence if that's the kind of system that you create.

Question — In terms of the American system where you've got contributions going to the candidates from individuals and PACs that are limited and then you've got the independent expenditure that's essentially uncapped, how is the difference between those things defined? If a candidate was to collude with an independent group to organise, how does that work itself out?

Diana Dwyre — You are not allowed to. It won't be independent. The rule is that if you want to spend in an unlimited fashion independently it has to be independent. You are not allowed to talk with the candidate or communicate with them or anyone from their staff in any way. And both sides kind of keep an eye on things and make sure that is not happening. There have been lots of accusations from one candidate about the other candidates: 'Oh, you must have talked to this group, they are saying the same thing you are'. 'Well', the other candidate will say, 'they just saw my ad on TV and they are saying the same thing'. The penalties again for that kind of collusion are very high. It is probably not worth it. The political parties who can spend independently as well: if you go into the Republican National Committee headquarters you will see that there is a different floor of the office building that's dedicated only to independent spending. They don't talk to the staff people who do the contributions and the other strategy. So they even keep that separate within a party office. Just to make sure they are not breaking the law.

Question — As a dual American–Australian citizen I really appreciated listening to your talk with both halves of my brain. With the American half of my brain, I'm really curious about when freedom of speech, freedom of expression got equated with money. I'm also curious about the First Amendment which in my understanding applies to the individual, how that got extended to the corporation?

Diana Dwyre — By the courts in 1976 in *Buckley v. Valeo*. That's the first time we see the courts applying very directly this idea of the First Amendment freedom of

expression to money and politics. It's not the very first time we've seen the Constitution or the Bill of Rights applied to corporations. Back in the 1920s corporations were given the right of corporate 'personhood' under the Fourteenth Amendment which is the due process clause which allows one to be treated fairly under the law. That is really a two-sided thing so corporations could then defend themselves in court but also be able to act as individuals so that if I accuse a corporation of harming me in their workplace or something they would be able to defend themselves at court. They have due process rights. Also it allows me, because there is someone to sue. A corporation has due process rights and so do I. Before that time a corporation could say well there is nobody here to blame. That's just how things are. And there is no law saying we can't have child labour or unsafe working places or whatever. So until the 1920s that was something that corporations could get away with. So it was important to establish that. But it wasn't until 1976 that it was applied to money and politics.

One of the criticisms of this recent *Citizens United* case is that what it's done is to create eligibility for corporations to have First Amendment rights and this is the point at which that happened. Before this time corporations did not have any First Amendment rights really, the only place in the Constitution and the Bill of Rights where corporations have any protections is the Fourteenth Amendment, the due process clause of the Constitution, and that has been utilised many times over. So this is new territory. A lot of legal scholars are suggesting it could have a lot of different kinds of consequences, things like corporate liability for fraud, the kinds of advertising they are permitted to do, all kinds of areas where this might encourage corporations to push the envelope. We don't know how they might interpret it, what they might do with it, but that is what people are talking about.

The Pryor Perspective: Sharply to the Point*

Kathleen M. Burns

What a great thrill it is to return to Australia, where I came to live in 1990 for almost five years, while my husband had a posting to the US Embassy. And it's a thrill to return to Canberra, where I had the honour and the privilege of being the only accredited US reporter to work in the Parliamentary Press Gallery at that time.

During my years of wandering these hallowed halls of government and power, I wrote almost 500 articles for various US publications and I also served in the press pool during the visit of Queen Elizabeth II and US Secretary of State Warren Christopher, and other US, Australian and international dignitaries. I was also standing in this very building, on the steps of the Great Hall, when the first President Bush arrived for a state visit, only days after former Prime Minister Bob Hawke had moved aside and Paul Keating became the new prime minister. What an amazing sight it was to see US flags flying over your Parliament as a gesture of welcome.

This visit galvanised for me the importance of '*nuance*' in words, drawings and body language, which I will talk about shortly in the form of political cartooning. But it quickly acquainted me with the fact that US and Australian words—and gestures— can mean very, very different things. And sometimes generate unintended interpretations and embarrassing results.

In 1991, at a lovely lunch the Australian Government hosted for the visiting President Bush, I was sitting at a table of young and enthusiastic Republican aides who were amazed to hear Canberra described as 'the bush capital'. One US staffer promptly noted: 'I had no idea they loved our president!' A State Department aide quietly pointed out that 'bush' in Australia meant the 'the outback' and had nothing to do with politics. The US fellow turned bright red.

Unfortunately, in all the briefings Bush had received for the trip, no one had thought to say to the president: these gestures and words are not appropriate. Do NOT use them! So there he was, in the midst of angry farmers, upset over some protective US agricultural legislation, waving his hands in front of your parliament, in what he thought was the 'V for Victory' sign—instead of a *very* negative admonition! Like all campaigning politicians, Bush was eager to get out there and shake hands with the crowds. One eager bystander caught the US president totally off guard when she

thrust a squirming infant into his arms and said, 'Would you like to nurse this baby?' Well, since no one had bothered to tell him the Australian meaning for that word, Bush presumed she meant the biological function and he sheepishly replied: 'I may be the President of the United States, but I know my limits!'

You did not see this story in the US papers—or in a Pryor cartoon!

You may remember this trip, since it had not gotten off to a good start. President Bush (the first) was about to kick off his re-election campaign, and to show how 'fit' he was, aides insisted he get out jogging as soon as his plane landed in Sydney, in spite of his age and the gruelling flight. I was part of the CNN pool coverage for this visit. As you may remember, later on, there he was, on international TV, when CNN first announced he had died, because of garbled reports that 'he had taken ill'. And if you could die from pure embarrassment, he surely would have, after throwing up on the Japanese prime minister, while the TV cameras were rolling with an international feed. Not the best diplomatic move!

Such are the follies and foibles of men and nations! Their actions do not go unnoticed by an ever vigilant press.

As a long-time journalist, I have always believed that 'the pen is mightier than the sword'. And, as a writer, I also subscribe to the cliché that 'a picture is worth a thousand words'. Nowhere is this more true than when that pen is in the skilful hands of a political cartoonist, who uses a deft stroke to level tyrants, to puncture the pompous, to reflect on aspects of humanity, to question social norms (or the lack thereof) and to create needed humour and comic relief in viewing the weaknesses and quirks of nations and men. Besides the artistic vision and drafting skills needed to generate an instant impact, the political cartoonist must also have a grasp of human psychology, history and geography, world events and perspective. Often, the drawing is not to make people laugh, but to force them to confront moral issues that others seek to avoid or to force a re-thinking on aspects of the status quo.

Cartoonists are a rare breed of observers, and one of the most skilful at this craft has been Geoff Pryor, who was the cartoonist at the *Canberra Times* for 30 years, from 1978 to 2008. There were no 'sacred cows' that escaped his powerful pen as he focused on politicians and the public alike, both in Canberra and across the world. In 2004, he won the People's Choice Award, sponsored by the National Museum of Australia's 'Behind the Lines' exhibit. He beat out 65 fellow cartoonists for the prize. Pryor's winning entry, 'The Decision', was in response to John Howard's announcement to continue as Liberal Party leader, and shows the prime minister in his Sydney home, Kirribilli.

Geoff Pryor, *Canberra Times*, 4 June 2003

Another signature cartoon shows Howard after being nominated for the Order of the Garter.

Geoff Pryor, *Canberra Times*, 12 February 2008

A retrospective exhibit of Pryor's three decades of work opened on 29 November 2008, at the National Museum of Australia in Canberra and ran through to 12 February 2009. Described in the exhibit as an 'astute observer and commentator' on the world around him, 'Pryor carefully dissected and exposed the motivations of Australia's politicians. All of his work, to the last cartoon, was produced via simple pen and ink rendering—an increasingly rare skill in the new era of born digital

cartoons', according to the show's promotional brochure[1]. But leaders around the world were also fair game for his stiletto pen, including dictator Idi Amin of Uganda, the Shah of Iran, and the Pope. He also focused with laser-like precision on many US presidents, from Nixon to George Bush II. He loved skewering US politicians as much as he did Australian ones.

He was always looking for overlapping themes on the world stage, including the military, global environmental issues, immigration, racism, government spending and tax payer money, greed, hypocrisy, religion, morality, and the universality of human foibles.
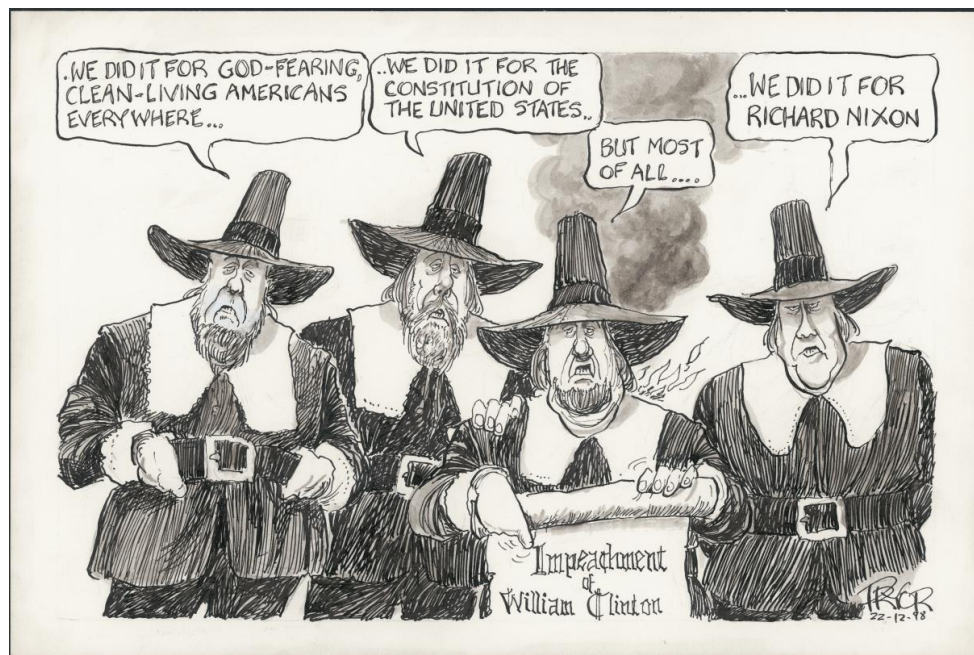
Geoff Pryor, *Canberra Times*, 22 December 1998, nla.pic-vn4699031,
National Library of Australia

While Pryor could be very entertaining, his goal was to be provocative, to strip off the façade of respectability, and to dig into the questionable core. One of his US-related works that I still vividly remember was sketched during the congressional impeachment trial for Bill Clinton in 1998, and the drawing compared it to the political climate of the Salem (Massachusetts) witch trials back in the 17th century.

In looking at Pryor's cartoons, I need to remind myself that some US audiences still have strong ties to the Puritan culture, and many of Pryor's works would never have made it into print in our country. This is aside from the fact that we readily proclaim

---

[1] Geoff Pryor retrospective, National Museum of Australia, viewed August 2010, www.nma.gov.au/exhibitions/now_showing/the_hall_exhibitions/geoff_pryor_hall_retrospective/.

our First Amendment right to free speech. But there are also questions of 'taste' and 'shock value' and 'ethnic sensitivities'. I will talk about those later.

Pryor had no qualms lampooning American politicians and practices, with bullseye skill. He tackled the wars that Americans and Australians fought in jointly, from Vietnam to Afghanistan and Iraq. And while mindful of the Aussie mantra that 'We fought shoulder to shoulder with the USA in every war', Pryor was quick to point out that that wasn't the case for the Trade Wars, where American agricultural protectionism undercut Australian markets. He took a hard look at the catastrophic attacks of September 11, 2001, in New York City, Pennsylvania, and Washington, DC, and examined the worldwide ripples it created. His drawing board tackled questions in both the US and Australia of the US Government's new uses of powers of detention, secrecy, torture, and rendition versus privacy, personal freedom, and transparency.

Pryor hit a nerve where he zeroed in on controversies of immigration and asylum, race, and guns, with wide reverberations. One of the most powerful directed against the USA was the 'Fair Trade Bible' with a handgun tucked inside the pages of that book.

Geoff Pryor, *Canberra Times*, 10 March 1994

Love him or hate him, Pryor proved to be a national icon. He evoked strong national sentiments, depending on the viewer's perspective on controversial issues. He was always a hot topic at the breakfast table or at the bar after work. While he often focused on strictly domestic issues in Australia, he never lost the international perspective, with the world as his drawing board. And my hope is that some day he will be honoured with a show in Washington, DC, just like his Australian

countryman, cartoonist and sculptor, Pat Oliphant, has had. I thought he had gotten close. Just before I left on this trip, I was speaking to the Australian Ambassador to the US, Kim Beazley, during a story interview. He misunderstood my question because of a bad phone connection and launched into a discussion of an upcoming embassy show on Geoff Pryor. But his cultural aide called back to correct this mistake and said it was 'Greg Pryor', an artist from Western Australia with whom I am not familiar, and not Geoff Pryor, who was slated for this upcoming exhibit. This is how rumours get started!

In examining the vital role of cartooning in modern life, Australian ABC commentator Phillip Adams[2] once noted that

> Australia produces so many good cartoonists. So many, that you'd swear our political life existed to mimic their cartoons. For, as the days pass, I have the strange feeling that their art precedes rather than imitates life. That they are not *descriptive* but *predictive*.

He further adds that

> their skills are, by order of magnitude, greater than ours [as writers] and infinitely more important than the anonymous huffings and puffings of editorial writers. I may say that through clenched teeth, but it must be said.

In his remarks, Adams compares cartoonists to seismologists who chart the shifts under the earth's surface and the responses of the onlookers:

> The cartoonists have their ears to the ground, ready to amplify every tremor, right up to and including the major upheavals … Not content with mere reactions, or with simple calibration, the cartoonists are duty-bound to exaggerate the scale of conflict—in the hope of alerting us to an untoward event or preposterous utterance. Okay, I'm straining for metaphors—so do cartoonists. But if Richter and his scale are too distant from human events, then perhaps I should equate cartooning with lie detection.

In their work, 'Two Men and Some Boats: The Cartoonists in 200l',[3] researchers Haydon Madding and Robert Phiddian reviewed 350 Australian cartoons that ran

---

[2] Phillip Adams, 'Introduction', in Ann Turner (ed.), *In Their Image: Contemporary Australian Cartoonists*. Canberra, National Library of Australia, 2000, pp. 1, 4.

[3] Haydon Manning and Robert Phiddian, 'Two Men and Some Boats: The Cartoonists in 2001', in John Warhurst and Marian Simms (eds), *2001: The Centenary Election*. St Lucia, Qld, University of Queensland Press, 2002, pp. 41–61.

during that election year. In assessing the variety of interpretations and topics covered by the cartoonists' work, the two observed that Australian

> cartoonists do not consistently fit into the 'elites' category derided by [John] Howard; their hostility towards the business of politics, policy making and political correctness makes them unreliable members of the chattering classes. Many of them cherish their status as voicing the little bloke's view on the editorial page and they are as cynical as the best of them.

But one issue where the artists were galvanised was on ethical and moral questions surrounding the asylum debate, following the drowning of 350 refugees off the Australian coast near Java. 'Surely, the cartoonists thought, this was enough to humanise the refugees and make Australians feel the issue with greater sympathy'.

Geoff Pryor, 'We'd love to mate, but we're choc-a block', [2001]

Added Manning and Phiddian,

> On this issue, however, they [the cartoonists] took a moral stand. It could not be written off as a 'conspiracy of class traitors' in the liberal broadsheets, either, because cartoons ran just as strongly outside Sydney, Melbourne and Canberra and in the tabloids as well.

Another triggering event was the terrorists' attacks in the United States on September 11, 2001, and the impact they had not only on the United States but also on Australia as well. In tandem with the asylum issue, 'the other essential component of the xenophobic hysteria was the war against terrorism and Australia's rallying in exuberant loyalty to the US'.

Researchers Manning and Phiddian wrote that 'Australian newspaper cartoonists worked in the shadow of 11 September and the "war against terrorism". It was a dark shadow', the two stressed.

> In the last couple of [Australian] elections we have argued that cartoonists have become increasingly disgusted by and disengaged from the process. We must tell a different story for 2001: cartoonists were more disgusted than ever by electioneering but they were certainly not disengaged. The issues that inspired them were the moral question of how we should treat asylum seekers who arrive in boats and the sense that the war in Afghanistan (viscerally, if not entirely logically, connected to it) was being exploited for political purposes. This anger tended to wash over into their coverage of other issues, leading to a cartoonists' campaign marked by plenty of satirical darkness and little comic relief.

The authors criticised the cartoonists for this shift into emotion. 'They were more unfair and powerful than in any campaign we have yet covered', Manning and Phiddian stated.

Pryor jumped into the fray.

His cartoon (of 5 November 2001) is titled 'Subtlety', and shows John Howard and campaign staff listening to an unseen television voice which says, 'Vote Labor … and get a terrorist for a neighbour'. An adviser chimes in: 'It's the subliminal subtlety of the subtext that does it!'

Geoff Pryor, *Canberra Times*, 5 November 2001

In another cartoon, from 8 November 2001, Pryor is described by Manning and Phiddian as highlighting 'the amorality of retiring [Peter] Reith', the Liberals' treasurer, Peter Costello, and a cartoon reference to the 'asylum seekers fiasco'.

Geoff Pryor, *Canberra Times*, 8 November 2001

Writer Malcolm McGregor of the *Australian* was cited by the two researchers for his comment that

> When federal Liberal MP Julie Bishop and Labor candidate Peter Knott cannot say what at least a significant minority of Australians think about refugees and terrorism—the two most visceral, totemic issues of this campaign—there is something seriously wrong with our electoral system.

Cartoonists did not share that silence:

> This was the conclusion of the cartoonists in their focus on the sanctimonious, hypocritical and mean-spirited treatment of boat people by our political leaders and the sickening discipline that showed in beating the drum or playing the race card.

Manning and Phiddian, commenting on the strong tone of cartoons in the last week of the 2001 Australian election campaign, added:

> Other forms of political analysis might wish to insist on a more nuanced summary of the issues, but the cartoonists went for force rather than subtlety just about every time. They tried to tell the public that the darker angels of our nature were being played on by cynical, poll-driven

politicians. They tried to get Australians to recognise the morally decent view on asylum seekers and to think other than jingoistically about the war on terrorism. We did not listen.

But throughout his life, Pryor is someone who did listen—to a wide gamut of influences, and he looked at, questioned and wondered why things were the way they were. From childhood on, he had lots of curiosity and chutzpah, signing his own absence notes when he missed classes in school. Born in Canberra in 1944, his father (a surveyor, engineer and draftsman) was the city's superintendent of Parks and Gardens, a science researcher, and an adept watercolourist. His mother, who was the first woman to start and finish a university degree in Canberra, he described as 'a great reader [and] frustrated writer'[4] who worked for a South Australian parliamentarian. Both his grandfathers were good draftsmen, one a freelance cartoonist who often listened to political debates on the radio.

'From the earliest days, I was interested in drawing. I was a diligent doodler on just about anything that had a white space', said Pryor. He won his first prize, at age six or seven, for a competition held by the Farmer's department store in Sydney. 'I even drew on the desk top at school and got into all sorts of trouble'. But it was years before he began cartooning as a serious pursuit, and he never had any formal study of art.

He went to the Australian National University (ANU) to study law—'the parents didn't see much future in art for anybody, let alone myself', but he did caricatures of the faculty and staff and got commissions from the Economics and Law school faculties. And then he published his first cartoon strip. But halfway through ANU, he dropped out of school in 1965 and held a series of jobs, including work as a labourer, weighing sugar at a grocery store, driving a taxi, working 'as a go-for' in the public service, and photo retouching and press art for the *Canberra Times*. He saved his money so he could go overseas. He took a ship to Panama, then flew to Miami, visited his brother living in Indiana in the United States, and then headed to Toronto, Canada, in 1969. 'It was easy to find work—no language difficulties—and it was a good launching pad for travelling further afield', Pryor said.

He got a job with the Canadian Broadcasting Corporation (CBC) and first worked in accounting and then moved to production, and then to videotaping. He was also studying television production, and eventually found a job at a studio—that lasted two days. 'But during that stage, I kept up with the drawing and I did caricatures and

---

4   Quotes from Geoff Pryor in the remainder of this paper are from the transcript of oral history interview with Ann Turner, 1998, ORAL TRC 3671, National Library of Australia, pp. 3–4, 7, 15, 17–18, 22, 25–6, 29, 32, 37, 48–9.

drawings for people, sometimes on commission', including the CBC newsletter, which went throughout the country. He also visited many Canadian art museums. In 1974, he went off with a friend to visit the Mediterranean and the Middle East, including Spain, North Africa, Sicily, Italy, Greece, and Turkey.

It was literally 'on the road to Damascus' that he decided it was time to get serious about the direction for his life, instead of the vagabond existence, and to pick up some formal training.

When the money ran out, Pryor decided to head for London and got a job at Asprey's, the regal jewellers on Bond Street, in the packing room—wrapping up consignments of crystal and jewellery for distant destinations. He was still working on his drawings and visiting contacts on Fleet Street. On the job as a packer, he was also working his wicked sense of humour. Pryor popped in a note on a package for the Sultan of Oman, saying: 'Help support the Israeli war effort'!

He moved back to Canada, getting a job as a rust-proofer for cars while looking for cartooning jobs. But he also kept his eye on the *Canberra Times* which was among the Australian papers on display at the Australian Trade Commission. One day he noticed their resident cartoonist Larry Pickering had left the paper (for the *Australian*) so he decided 'I would go back to Canberra and become the cartoonist of the *Canberra Times*'.

The year 1975 was a turning point for Pryor. The death of his mother sent him back to Canberra, where he re-enrolled in ANU in an arts program. This time, he dove in, studying things like international relations, Marxism, African history, the world's revolts and insurgencies. Pryor was also fascinated by courses in comparative religions. Having travelled through Muslim countries and encountering Islam, Pryor said, 'I was curious to know how they ticked, how people, how they existed in their societies, how much of a role religion played and what it meant to them'. Outside the classroom, he began to freelance for the *Canberra Times*.

In 1978, he had another major sea change. At age 34, he got married and gained a wife and a son, bought a house, and officially joined the staff of the *Canberra Times*, where he remained until his retirement in February 2008.

He has never looked back.

As to his evolutionary process of being a cartoonist, he adds,

I can't remember when, I couldn't put my finger on it in terms of time, when I decided that I wasn't going to be anybody else; [that] I was going to be me; and that I would draw the cartoons in a way that suited me to get the idea across. And then, over time, I began to develop a sense of political knowledge, political history, and my grasp of issues became much surer. I became much more competent about which issue was worth a cartoon comment, and which wasn't.

He is quick to echo the comments of a British cartoonist who influenced him, who emphasised that 'humour is a serious business. It's not something that you fall about in a state of permanent laugher. It's a serious business of creation'. It can also be a 'daily strait-jacket', with a demanding schedule. But it also provides a worldwide vehicle. Oral history interviewer Ann Turner (for the National Library of Australia collection) remarked to Pryor: 'You're drawing for a Canberra audience, but you seldom choose local themes. Is that deliberate?' Pryor responded with an emphatic 'Yes!':

> You have to cast the net as wide as reasonably possible because we are in this business for survival, if nothing else. We have to keep going from day to day. You've got to be able to deepen and broaden your bag of reference material. Using local references constantly would be self-defeating, because I think the readership of Canberra is, by and large, highly educated. They're not parochial. They're cosmopolitan, so you can often refer to foreign parts as sources of metaphor and assume that the readers will know. You can refer to historical incidents … and assume your readers will know.

I would like to say a few words about political cartooning in the USA, by way of contrast, with the styles, techniques and topics. Probably the most well known would be Herb Block, whose pen name was 'Herblock'. His career began in 1929 with drawings of President Herbert Hoover and ended in 2001 under President George W. Bush. He spent 55 years at the *Washington Post*, from 1946 to 2001, winning three Pulitzer prizes. This year, the US Library of Congress honoured him with an extensive exhibit, with works selected from the more than 14 000 pieces on file. The things he focused on decades ago—unemployment, racial tensions, energy policy and over-compensated executives—are still timely issues today in the United States.
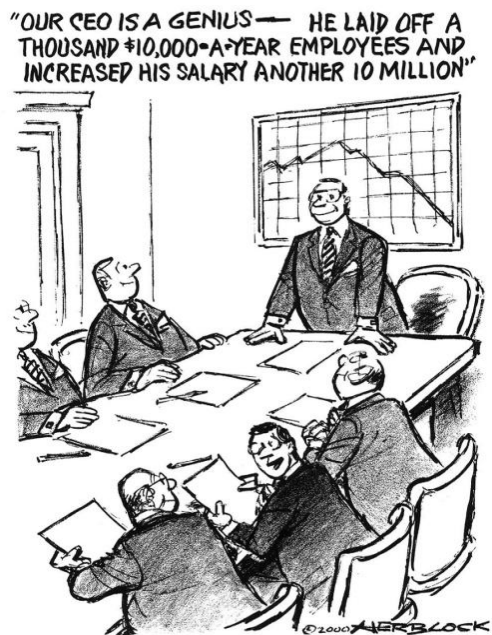
Don't Look Now, But He's Still Standing There

Race

'Don't look now but he's still standing there', 1936 Herblock cartoon, copyright by The Herb Block Foundation

'Race', 1968 Herblock cartoon, copyright by The Herb Block Foundation

HOSTAGE

"OUR CEO IS A GENIUS— HE LAID OFF A THOUSAND $10,000-A-YEAR EMPLOYEES AND INCREASED HIS SALARY ANOTHER 10 MILLION"

'Hostage', 1979 Herblock cartoon, copyright by The Herb Block Foundation

'Our CEO is a genius—He laid off a thousand $10,000-a-year employees and increased his salary another 10 million', 2000 Herblock Cartoon, copyright by The Herb Block Foundation

Regardless of country of origin, Herblock seemed to set out the criteria that most top-notch cartoonists follow: 'A cartoon does not tell everything about a subject. It's not

supposed to. No written piece tells everything either. As far as words are concerned, there is no safety in numbers. The test of a written or drawn commentary is whether it gets at an essential truth', he said.[5]

Herblock's successor in 2002 was Tom Toles. He tends to focus more on US issues than international ones. In a country with 300 million people, there are plenty of volatile topics to choose from.
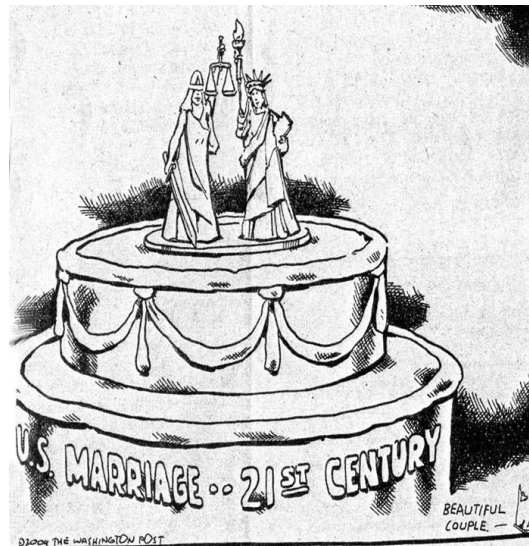
'Gay wedding cake', Toles © 2009 *The Washington Post*.
Reprinted with permission of Universal Uclick. All rights reserved.

In the United States, we have seen a severe economic consolidation of media, especially for print, and this has hurt political cartoonists. Randy Barrett, a reporter for the *National Journal*, estimated there are now only 80 full-time cartoonists at leading metropolitan dailies—down from about 200 only 20 years ago. About 85 per cent are older white males, who earn an estimated US$50 000 to $75 000 a year. He notes that cartoonists, like reporters, guard their autonomy fiercely. While working for the now defunct *Buffalo Courier-Express*, Tom Toles 'won the right to lampoon anybody and everybody … and he insisted on full creative control when he joined The *Washington Post* in 2002'. Added Toles, 'Once you have [editorial freedom], it's so important and intrinsic it's inconceivable to work without it'.[6]

But having independence does not mean that all cartoons get published. Rather than raising the issue of censorship, it can be a question of taste, sensitivities, raw emotions or being perceived as too offensive to various segments of the audience. In 2004, editors vetoed a cartoon by Jeff Danziger for the *New York Times Syndicate* showing

5   Herb Block, 'The Cartoon', Herblock's History: Political Cartoons from the Crash to the Millennium, Library of Congress, viewed August 2010, www.loc.gov/rr/print/swann/herblock/cartoon.html.

6   Randy Barrett, 'Trying Times in Toontown', *National Journal*, 2 July 2007, http://news.nationaljournal.com/articles/070207nj1.htm.

President George W. Bush and Vice President Dick Cheney paddling an American GI's corpse down a river, during the Iraqi and Afghani wars.

Jeff Danziger, 'Stay the course', 2004.
Reprinted with permission of Cartoonists & Writers Syndicate

Rob Rogers, president of the American Association of Editorial Cartoonists and a staff cartoonist for the *Pittsburg Post-Gazette*, had his drawing rejected of Osama Bin Laden inside a Catholic church during the wide-ranging child molestation scandal involving Catholic priests throughout the United States.

Copyright 2003 Rob Rogers. Reprinted with permission

Pryor also had some drawings pulled. Both dealt with depictions during the 1998 impeachment furore over President Bill Clinton. One showed Palestinian Liberation Organisation leader Yassar Arafat, in Washington for Middle East peace talks, but kept waiting while Clinton was sidetracked by US reporters, wanting to talk about the scandal involving a White House intern. A second one, which was described as

censored, 'for taste, not politically', showed Clinton at the zoo as snake specialists warned him: 'We've got a trouser snake on the loose!'

<center>❖</center>

Question (Ian Matthews) — I am going to bask in Geoff Pryor's fame because I appointed him. You mentioned about some cartoons not being published in the United States because of sensitivities, one of the things that differs in Australia is that our defamation laws are much stricter than yours. I hid behind Geoff Pryor a lot because you can't call a politician a liar, but you can draw him with a Pinocchio nose and Geoff Pryor did this very well. My question really is, in what way do cartoonists defame people?

Kathleen M. Burns — I know that the Australian press law is very different from US media law. A case that comes to mind is that of Leo Schofield, the *Sydney Morning Herald* restaurant critic, who wrote that the food at some restaurants was terrible, and some people who ate there agreed. But the owner filed suit, and won. In the USA, we go back to 1793 with the beginnings of libel law, with the principle that: 'truth is a defence'. It is traced to colonial printer John Peter Zenger and the Zenger Defence. If you can prove something is true, then it is not defamation. Today, I think it is tough to know who is a public and who is a private person. What is covered by privacy law? I am amazed we can get anybody to run for office in our country anymore, because if you had a third cousin that ran off at age 12, or there is anything 'questionable' that you have ever done, it is open to public scrutiny. In terms of defamation, I have seen some things in the Australian newspapers in the last two weeks that I thought were verging on defamation. It think it is interesting, too, with this particular election campaign, that the media would focus on the fact that someone did not have children (Julia Gillard) or somebody's swimming gear (Tony Abbott) or their hair (Gillard) or their nose (Gillard) versus someone's ears (Abbott) and skip things of substance, like the Afghan war, international trade or the state of the economy. I think Geoff Pryor would have done a whole lot more editorial comment with his cartoons if he was still involved in this election, versus what the local and national media have done.

In the United States, with more than 300 million people, you are bound to offend someone with every cartoon you draw, but it's a long way from defamation. I am not a lawyer but when I worked at the *Chicago Tribune* and many other publications, everything goes to the lawyers for review—including cartoons. What is interesting is that Tom Toles of the *Washington Post* does four cartoons a day, and they are circulated among the editorial staff to see what will be published. It would be hard enough to create one a day!

The Disillusionment of Sir John Downer*

John Bannon

The scene is the third day of the National Australasian Convention in Sydney in March 1891 under the chairmanship of Henry Parkes. General speeches are being made on the principles to be embodied in a federal constitution for the Australasian colonies, and Edmund Barton of New South Wales has just spoken at length and eloquently on the subject. He is followed by a delegate, who has already had an influence on the procedural debates of the convention, drawing not just on his experience as a former colonial premier and attorney-general but also as a delegate to the Imperial Conference of 1887 in London.

This is Sir John Downer of South Australia, who congratulates Barton on a speech that

> will be of very great service to us in this discussion—a speech most admirably conceived, most logical in its construction, and one which, as it to a large extent falls in with my own views, not unnaturally carries the greatest conviction to my mind.[1]

It was, as Barton's biographer Geoffrey Bolton comments, 'the beginning of a lasting friendship'.[2]

It was a friendship that saw Barton make regular journeys to Adelaide over the following decade to stay with his friend, often during the Christmas/New Year period, to get some much-needed rest and recreation in congenial and like-minded company. Sir John in turn visited and stayed with Barton. In 1896, after the untimely death of his wife, who had been seriously ill during a crucial (and unsuccessful) election campaign and died a week or so after, Downer sought solace with his friend in Sydney. A couple of years later as a guest of Barton he was introduced to a young woman friend of the Barton's, Una Stella Russell, who was present at a dinner as company for his son, sat between father and son and favoured the father. In December

---

1   *National Australasian Convention Debates*, Government Printing Office, Sydney, 1891, 6 March 1891, p. 100 (available online at www.aph.gov.au/senate/pubs/records.htm).

2   Geoffrey Bolton, *Edmund Barton: The One Man for the Job*. St Leonards, NSW, Allen & Unwin, 2000, p. 77.

1899 she became Sir John's second wife. The marriage took place from Barton's house with Edmund as best man.

Downer was elected as a delegate to the new Constitutional Convention of 1897/8. Over three strenuous sessions Barton and Downer with their mutual NSW colleague Richard O'Connor and secretarial services provided by Robert Garran, after the delegates had retired for the day, had laboured into the night over the detailed drafting of the Commonwealth Constitution. With federation accomplished at the end of 1900, as Barton fretted over what course to take when Lord Hopetoun had bypassed him in favour of the anti-federal Premier of New South Wales William Lyne to form the first federal Cabinet, Sir John was on the spot to give advice and support. And he would do so again as a member of the first Senate in support of the Barton Government and its measures, remaining on intimate terms with the prime minister. But by late 1903 the relationship came under severe strain and fractured for many years. Sir John's disillusionment with the public course of events was matched by a personal feeling of betrayal by his closest friend and colleague.

Before examining this I should explain some more about Downer himself. He was born in 1843 in Adelaide, like Barton a 'native-born' Australian, the fifth child of six (five boys and a girl) of a tailor Henry Downer and his wife Jane, who emigrated from England in 1838, just eighteen months after European settlement was established. Henry never really prospered, either at his trade or when trying his hand as an importer of groceries, as a hotelier, or chancing his luck on the Victorian goldfields. But the next generation ensured he was well looked after. Four of the five brothers qualified as lawyers. George, five years older than John, became a very wealthy solicitor, financier and pastoralist. John went into partnership with him soon after being admitted to the Bar in 1867, effectively becoming a full-time barrister in what was an undivided profession, and handling the firm's court work. The profitable and highly successful association lasted until John's death in 1915. George died the following year.

John was a brilliant scholar and quickly became a leader of the profession in South Australia becoming a QC at the age of 34 on his own merits, not, as was often the case, by means of political or Crown office. This coincided with him taking his place in the House of Assembly. He accepted nomination for the regional seat of Barossa from a sense of public duty; he consistently opposed payment of members on the grounds that service in politics should be because people 'wanted to do something for a mere sense of honour and not for personal emolument'.[3] He was to be a member of parliament—colonial, federal and state—for all but one year of the rest of his life—a total of 37 years service, undefeated in eleven elections. He quickly achieved

---

[3]   *South Australian Parliamentary Debates*, 24 June 1881, p. 139.

ministerial office and was a successful and progressive attorney-general from 1881 to 1884 in the Bray Government, premier on two occasions (1885–87 and 1892–93) and Leader of the Opposition for much of the 1890s.

His views were a mixture of the socially liberal (for instance, he was an early champion of women's rights and opposed a racially-based immigration policy) and the broadly conservative, with sometimes equivocal policies on the issues of the day such as free trade and protection. But there was one cause he espoused and pursued relentlessly—the federation of Australia. When he entered the first Commonwealth Parliament as a senator he could claim a longevity in the cause of federation unmatched by any of his colleagues in either house. He was the only member who had been present as a delegate at the initial significant federal gathering, the Australasian Intercolonial Conference held in Sydney in 1883, which resulted in the establishment of the precursor of federation, the Federal Council of Australasia (1885–99).

In 1887 the first Imperial Conference was summoned to London, and Downer, by this time premier of his colony, was a delegate and, as one of only two Australian premiers present, played a significant part in the proceedings. This had earned him a knighthood at the age of 42. In 1891 he was part of the seven-man delegation from the South Australian Parliament to the Constitutional Convention chaired by Sir Henry Parkes in Sydney. Here he was among the select group of passengers on the famous voyage of the Queensland motor launch *Lucinda* aboard which the first constitution was drafted. In 1897 he was elected by the South Australian people to its 10-man delegation to the convention, which drew up the final version of the Constitution, and at which he had been elected to the three-man Drafting Committee which gave substance and legal form to the document.

With federation achieved, the period from 1901 should have been one of fulfilment and personal satisfaction for Downer. But it was not to be. His protectionist credentials and personal association with Barton made him a possible ministerial candidate, if, as expected, Barton was called on to form the first government. In the last days of 1900 Downer went to Sydney for the inauguration celebrations, staying, as was his custom, at his friend Barton's house. He was thus a close witness and confidant during the period of the well-named 'Hopetoun Blunder' when the newly arrived Governor-General decided to ignore advice that Barton should be asked to form a government and instead commissioned the anti-federal Premier of New South Wales, William Lyne. Lyne sought the support of a number of the key players from the various colonies. Charles Kingston of South Australia had been adamant that Barton should be chosen and declared he would not serve under Lyne. Alfred Deakin had been similarly committed to Barton, but his Premier George Turner and the SA Premier Frederick Holder were now contemplating the possibility of joining a Lyne

ministry and Deakin began to waver. Lyne had attempted to recruit Barton as a member of his Cabinet but Barton had made it clear that he was not interested. Downer was there to support his friend in the decision and help him make clear to Deakin that he must get Turner to hold the line. Barton telegrammed Deakin on 24 December 1900, asserting that Lyne 'won't succeed … my succession inevitable unless possibly Turner'. Downer followed up with a succinct message to Deakin: 'If you are firm your best desires certainly assured'.[4] I found a letter from Barton to Downer written following the death of Holder, then Speaker of the House of Representatives, in 1909 when Barton was a judge and not in a position to comment publicly. There was speculation that Holder had been the person to 'break the chain' and resolve the issue in Barton's favour. In J.A. La Nauze's fine account of the Blunder, he notes the meetings Lyne held with Turner and Holder in Sydney at which he offered them places in his ministry and reports that they held firm and refused to serve, but does not seem to be aware that they were initially inclined to accept.[5] As Barton reminded Downer:

> In Sydney Turner and Holder came over (if I remember it was at Lyne's request).They came to see me at Miandetta and told me he had offered them office. They asked what I would do. I rather think they wanted me to take office under Lyne anyhow. If I had done so they would have followed suit. I told them … that I had refused in writing and by word to serve under any opponent of Federation … When I told them that nothing would induce me to alter my resolve they too refused to join Lyne. Deakin was then in Melbourne. He had suggested to me by letter that it would be better I should do so, but I said it could not be … Deakin after my answer did all he could to hold the others together … 'The Chain'—if there was one— did hold, but it was never in Holder's power to break it. Had I not stood my ground the chain must have broken if there was one.[6]

Lyne was forced to return his commission and recommend that Barton be asked to form the first government.

Despite their close association Downer was realistic about the limitations on Barton's ability to offer him a ministerial place. Apart from the prime minister, there were eight posts to be allocated and it was generally understood that each colony would be represented. In practice this meant that the ministry would comprise two from NSW and Victoria and one from each of the small states. Places would be offered to those

---

4 Downer to Deakin, 24 December 1900, NLA MS1540/14/41.

5 J.A. La Nauze, 'The Hopetoun Blunder' in Helen Irving & Stuart Macintyre (eds) *No Ordinary Act: Essays on Federation and the Constitution*. Melbourne, MUP, 2001, pp. 36–81.

6 Barton to Downer, 12 September 1909, NAA/M1002/281.

premiers or leaders who were making the transition to the federal parliament. In South Australia's case, Holder, the premier, and Kingston, the convention president and delegate to London, were both available. As a small state South Australia could only claim one position, and Barton commented on his choice in the letter to Downer cited above.

> The fact about Kingston was that I offered him his choice between ministerial office and (so far as I could influence the matter) the Speakership, intending to offer Holder office if Kingston refused it, and to do my best to get my friends to vote for Holder for the Speakership if Kingston preferred office. Personally I hoped Kingston's answer would enable me to ask Holder to be my colleague, but it was the other way.

A revealing comment, given that the volatile Kingston had been the most adamant supporter of Barton to become PM, and interesting in the light of Kingston's resignation from the ministry in 1903 which was the first of a number of events that caused Barton to relinquish office.

The election of the first Parliament was set for 30 March 1901. In South Australia both the Senate and the House of Representatives were to be elected on a whole-of-state or single-constituency basis. Downer opted to stand for the Senate rather the House of Representatives, not surprisingly, given his advocacy of its role and fundamental importance. He saw it as the guarantor of true federalism—a body he had done much to bring into existence and clothe with appropriate powers.

When nominations closed there were eleven candidates for the six Senate places. It was a strong field. Ten of them were sitting members of the South Australian Parliament, six in the Legislative Council, including its President, and four in the Assembly. The exception was Josiah Symon who had not sat in parliament since his defeat in the 1887 elections but had been an influential delegate to the convention. Seven of them had held ministerial office, two as premier. Four had been delegates to Australian Constitutional Conventions.

The various combinations among the South Australian Senate candidates were intriguing. A simple colonial party or faction alignment was not really possible. The election was broadly fought between free-traders, who could be expected to support George Reid and his allies, and protectionists, comprising not only some of the conservatives and liberals but also Labor candidates, who could be expected to support the incumbent Barton Ministry. There were five declared free-traders and six protectionists on the ballot. Downer's protectionist leanings were one reason for him to support the ministry, but an overriding factor in this first Parliament would be his

personal affinity with Barton. Each elector could vote for up to six candidates. For free traders with only five choices, Downer could be seen as an acceptable non-doctrinaire choice among the others. Based on colonial parliamentary reputation and contribution to federation Downer had a considerable advantage. On this first occasion the term of the first three elected would go to the end of 1906 and the second three to the end of 1903. Downer was confident of the long term.

The campaign was short and intense. The Senate result was an even division between the supporters of free trade and protection. The protectionists gained 52 per cent of the vote and three seats, divided between non-Labor (35 per cent) with two seats and Labor (17 per cent) with one. The free traders gained 48 per cent and also three seats. This was no great surprise, although the free traders had done better than expected. What was a surprise was the order of election. The poll was topped by Symon, the non-parliamentarian, although a leading lawyer with a reputation as an active federalist who had chaired the Judiciary Committee of the convention (37 642 votes). Second elected was Thomas Playford, a former premier and agent-general and mentor of C.C. Kingston. Richard Baker, conservative President of the Legislative Council and Chairman of Committees of the Convention was next elected. Then followed Downer (30 493 votes) with 60.6 per cent, ahead of a dissident Labor free-trader Charleston (57.9 per cent) and the United Labor Party's Gregor McGregor.

Symon's success was largely attributable to Kingston, who had decided to endorse his old foe, despite once having called him 'a forensic compound of squid and skunk' and other less kind things. This support was in acknowledgement of his vigorous opposition to amendments to the Constitution sought by the UK Government to make the High Court secondary to the Privy Council. Downer had also supported Kingston in this matter, but for Kingston, Symon was like a prodigal son who had returned to the fold. As a member of Barton's Cabinet, Kingston should have owed some loyalty to those who supported the ministry, but the fact that Symon supported George Reid's free trade was overtaken by Kingston's feelings of gratitude to his new-found ally. Kingston had even managed to secure an endorsement of Symon from a very sceptical Labor Party. Downer was understandably disappointed and annoyed by the result. He wrote bitterly to both Barton and to Alfred Deakin, Barton's Attorney-General. His letter to Barton is not preserved, but he told Deakin:

> I am glad to hear from Barton that you have a good working majority. That your ministry has the support and influence of myself and my friends is in no way due to any action of your Government—on the contrary your colleague Mr Kingston has succeeded by his intrigues against your principal supporter here—myself—in placing that support low on the list

instead of being on top—and in electing the principal opponent of your policy here to the leading position.[7]

For Downer the disappointment was compounded by the fact that his old enemy Thomas Playford had also come in ahead of him, and that in coming fourth he had been relegated to the short term, expiring in 1903.

What were Downer's expectations on entering the Senate? It was his house of first choice: his concern throughout the Constitution-making process was to ensure that the Senate had the power and authority to play its role in protecting the states from federal domination. A state needed to be able to look to its senators to safeguard its rights and authority. His proposal that it be called the 'States Assembly' had been unsuccessful, but there was no question in his mind that this was what it was, and what the majority of delegates to the conventions believed they had created. There were at least three assurances that this would be its role.

Firstly, its claim to be a house of democratic representation. The advocates of popular democracy had asked how an 'upper house' whose members were drawn in equal numbers from the states without regard to the population discrepancies between them could claim authority against the popularly elected lower house? Ninety years later this argument was most colourfully expressed as the Senate being comprised of 'unrepresentative swill'. In response to it being seen as unrepresentative, Downer had always been careful to distinguish the Senate from the upper houses of the colonies. In the colonies, legislative councils were there to protect particular landed or property interests and were comprised in some cases (such as New South Wales) of appointed members and in others of members elected under a limited franchise. Early drafts had the Senate appointed by the state parliaments but this was rejected in favour of election directly by the people of the state under the same voting qualifications as applied to the House of Representatives. This gave the Senate special authority making it totally democratic on a state basis. It is arguable that a state-wide electorate and proportional representation have made it even more so in the present day—it has after all been the only chamber in recent times to consistently provide an opportunity for minor parties and independents to be represented.

Secondly, Downer believed the quality of its members would ensure that the equality of the Senate with the House of Representatives as expressed in the Constitution would be sustained as intended by the founders. While he saw no analogy with the British House of Lords nor desired to preserve or create a form of aristocracy, it is also true that Downer hoped the Senate would attract senior statesmen with authority and status similar to that of their United States counterparts. He acknowledged that

---

[7]   Downer to Deakin, 2 April 1901, NLA MS1540/14/67.

the Australian Senate did not have the same sweeping powers as the US Senate, but believed it would at least match the House in authority and be seen as a place to which the most able politicians of the states would aspire. Ideally it should, at least initially, be comprised of men who had been part of the making of the Constitution. As it happened, of the 36 members of the first Senate only nine of the former delegates were elected in 1901. Four of them were South Australians, and it was noted by Langdon Bonython, proprietor of the *Advertiser* and himself standing for a seat in the House of Representatives, that in that state 'surprisingly the best of the candidates' had stood for the Senate.[8] This was not to last, indeed some key retirements from the first two Senates, including that of Downer himself, saw the quality of Senate representatives begin to lower very early. The concept of 'swill' in 'unrepresentative swill' was in large part directed to the first 70 years or so of preselections by the major parties that had tended, with a few outstanding exceptions, to use the Senate for 'placemen' and loyalists who might not succeed in a representative contest but could shelter under a Senate ballot. This has changed somewhat with the advent of the tighter and less predictable contests of contemporary times, but such candidates have not yet disappeared from major party tickets.

Thirdly, a very few delegates had presciently suggested that party loyalty would prevail over state affiliation among senators. Downer was of the old school of factional government. He accepted that candidates would have broad party affiliations, but did not believe that they would or should override their responsibility to the state. Liberals and conservatives could find themselves in either the free trade or protectionist camps, while Labor favoured protection. The first federal ministry was protectionist but contained conservatives such as Prime Minister Barton, as well radical liberals such as Kingston. In this situation Downer felt that it would be impossible for party whips to enforce a discipline when state interests were at stake. The opposing view was put to the test quite early, and it was quickly apparent that party rather than state lines would be the hallmark of Senate divisions.

At this point the future national political career of Downer looked bright indeed. His seniority and prominence in the federal movement gave him high eminence and authority. His reputation for a mixture of liberal and conservative values, and his independence cast him as a statesman rather than a political operative. The *Bulletin*, basically hostile to his politics and a champion of Kingston, nonetheless provided an interesting portrait of him as the Senate assembled for the first time. It described him as 'perhaps the homeliest-looking man in the Federal Legislature' whom

> nature built for a champion bruiser but circumstances made him, like three
> other brothers, a lawyer. John has been a prominent SA politician for 23

---

8   Bonython to Cockburn, 10 April 1901, SLSA PRG 979/1.

years, representing the same district from the very start and became a QC in 1887. An absolutely straight man of great grit, he never loses a personal friend … Though just on 60 Downer married a handsome and charming Sydney girl two years ago and has fully determined to live on until he is 100.[9]

He was in the Senate to ensure that the federal compact was realised as he had envisaged. But apart from a role as a senior statesman of the Senate, there were in prospect two further avenues for his talents. Both of them became achievable in 1903, but, as will be seen, by then the timing was wrong for all sorts of reasons.

Firstly was the ministry. Apart from the Senate another sphere of influence for the smaller states of the federation was through membership of the Cabinet, firstly by ensuring that each state had a minister of origin and secondly that the Senate had representation. Barton's first Cabinet of nine contained three from NSW, two from Victoria and one from each of the other colonies. Two of his ministers were senators: Richard O'Connor, who became government leader of the Senate, and James Drake from Queensland.

Downer's claim to a cabinet post has been referred to earlier. Kingston's presence as the South Australian in the initial ministry precluded Downer from initial consideration by the prime minister. At the time it was noted that Downer had some claims, but, as the *Review of Reviews* put it, although Downer and Kingston were both protectionists, Downer 'does not represent dominant opinion in the state, and politically he is, if not an extinct, at least a slumbering volcano'.[10] Two events in 1903 opened up the possibility of the volcano waking. The first was Kingston's resignation in July 1903, which provided an opportunity for another South Australian, while the second, O'Connor's appointment in September to the High Court, created a Senate ministerial vacancy. His friend Barton had also resigned and departed to the court, so the incoming Prime Minster Alfred Deakin could have found a place for Downer.

It would have been a seamless and appropriate change for Downer to take the South Australian spot as well as O'Connor's role in the Senate. Of the South Australians, Holder and Baker were both presiding officers (and, as it happened, free traders), and Symon, also a judicial rival, was Leader of the Opposition in the Senate. The other SA members who had been founding fathers, Patrick Glynn and Vaiben Solomon, were both free trade. Alexander Poynton and David Charleston were free traders while McGregor and Egerton Batchelor as Labor members were bound by policy not to enter the ministry. The choice therefore came down to Senators Downer and Playford.

---

[9] *Bulletin*, 27 April 1901, p. 13.

[10] *Review of Reviews*, November 1903, p. 576.

Deakin and Downer had been associated in the federal movement since their voyage to the Imperial Conference together in 1887. They had been allies there, but had later clashed on a number of issues. Keen on stamping his government as strongly liberal protectionist, Deakin chose Playford, Kingston's ally and Downer's long-term opponent.

Secondly was membership of the High Court of Australia. It was not until 1903 that the Attorney-General Deakin introduced a bill to create the High Court as provided by the Constitution. As the Judiciary Bill made its progress through the processes of Parliament there was considerable speculation about who would be asked to serve on its inaugural bench. It was no secret that Downer's name was high on the list. He had outstanding qualifications for the post as a principal draftsman of the Constitution and one of the country's leading barristers. But more than that, he had always been a great advocate for the court's prime place in the Constitution and had always seen it as a fundamental part of the federation. He saw it as the only guarantee that the Constitution could not be arbitrarily flouted by any government, however popular. Typical of his feeling on the issue was his interjection in the course of consideration of the draft constitution in the House of Assembly in 1897—'I think the Supreme Court is the one protection of the Constitution'. When the value of its establishment was questioned by the Labor leader John McPherson he again interjected 'It is to prevent the evasion of the Constitution!' Impatient with attacks on the court on the grounds of that it was just a way for lawyers to make money, he pointed out at the Adelaide convention session that this was a court analogous to the American Supreme Court in its constitutional role. 'It is a not a paltry question of lawyers and lawyers fees'.

He was concerned that the judges should be protected from arbitrary dismissal by a hostile parliament or government. 'The Bench ought to be placed in the highest independent position'. It had to be 'noble and lofty'. This was particularly so because of the type of conflict that could arise, where the court would need to be strong enough to stand its ground against the legislature and the executive. He felt there should not be authority to remove judges 'without the greatest cause and the gravest trial'. For this reason he opposed the system favoured by Kingston and others of a motion of both houses of Parliament. He insisted the procedure must ensure that there was a trial, conducted 'in the most solemn circumstances', and not by way of political debate where the judge 'might be accused on account of all sorts of causes and prejudice apart from the merits'. The best method he felt was that of the United States, where the two houses had a separate role in the process. Accordingly he moved for an impeachment process to be conducted by the House of Representatives, which would then be tried before the Senate, with the further safeguard of a two-thirds majority

being necessary for conviction. He was not able to gather support for this, and did not press it to a division.

The other matter of debate on the court was the question of appeals to the Privy Council. Some members argued that this right should be maintained. It would ensure that there was uniformity of laws and high standards of decision. If there was no appeal from its rulings the Australian court would do just as it liked. Downer rejected this, arguing strongly that the High Court should be the final Court of Appeal. Here he showed himself as an Australian patriot in common cause with radicals like Kingston and at odds with a number of fellow conservatives. To him it was a logical consequence of the creation of the Commonwealth. The following passage of debate shows this clearly.

> Sir John Downer: … I would like to ask … whether we are ever to get out of our swaddling clothes? What are we here for?
>
> Mr Fraser [Victoria]: Not to cut the painter [with Britain].
>
> Sir Edward Braddon [Tasmania]: Not to deprive the British subject of a right.
>
> Sir John Downer: We have come to the conclusion that we must cease to be provincial, and form the foundation of a nation … [While remaining loyal to the Crown] we think we can make laws which will suffice us; in other words, to put it colloquially, we think we can manage our own affairs.[11]

In the Senate four years later Downer took the opportunity of his maiden speech to argue for the importance of establishing the court as soon as possible. 'The Constitution is incomplete without it … Woe betide those who call themselves true federalists who interfere or seek to postpone the establishment of this tribunal'.[12] Using the United States as precedent he argued that the court, through its role of interpreting the Constitution, 'is a superior body and can keep both houses in their proper places'.

On 5 August 1903 Downer addressed the Senate at length on the Judiciary Bill. After recapitulating the history of the proposal in the conventions and its relationship to the American and Canadian models, he repeated his view that the High Court was 'the very basis of the Constitution' which was virtually inoperative without it. 'The

---

[11]   *National Australasian Convention Debates*, Adelaide Session, 20 April 1897, pp. 975.
[12]   Commonwealth Parliamentary Debates (CPD), 23 May 1901, pp. 250–1.

constitutional machine will not be complete until the Judiciary is appointed'. He quoted with approval Alexander Hamilton's description of the US Supreme Court as 'the living voice of the Constitution'. He regretted that there was a constitutional requirement to have recourse to the Privy Council in some instances, maintaining his strong support for the High Court as the highest and final Court of Appeal in Australia. 'With a High Court in Australia we should have justice administered in the broad light of day instead of practically in a back room 13,000 miles away, and really inaccessible to persons acquainted with all circumstances of the cases'.[13] Nevertheless the court had 'immense jurisdiction' and its business would grow in importance and volume over time. Issues surrounding the River Murray were an example of matters waiting to be resolved which could only be done by the court. Downer's views were not shared by all, as there was still a feeling that there was insufficient work for the court, and that it would be expensive in terms of servicing and judges' salaries, and a better alternative might be to appoint state judges in a joint capacity. In the end these objections were overcome, but not without a compromise that would have a major impact on Downer.

Downer was of the view that those appointed should be not only of the highest calibre, but 'much more than lawyers. They ought to be great constitutional lawyers from a federal point of view'. It was, of course, the government, not the Parliament's task to appoint the judges. In its view, appointees would need to have practised in legal jurisdictions which had reputation and standing, which would therefore probably have excluded WA from consideration at this time. Five jurisdictions could provide the five judges provided for in the Constitution. The leading candidates for the first High Court included those in judicial office in the states, as well as those who had been involved in the drafting of the Constitution and were, in most cases, members of Parliament in their own right. Of the early convention delegates with great influence, two were already state justices. The first was Sir Samuel Griffith of Queensland. He had not taken part in the 1897/8 convention but his mark as the leading draftsman of 1891 was on the Constitution, and on this basis he was a prime candidate. On the other hand in 1900 he had supported reserving the right of appeal from the court to the British Privy Council which many saw as devaluing the court's constitutional status. He had earned the wrath of Barton, Deakin, Kingston, Downer, and Symon among others for taking this course. The second was Andrew Inglis Clark of Tasmania, who had done an early and influential draft of the Constitution and been prominent in the debates of 1891 and was the acknowledged expert on the US Constitution. He was, however, absent from the 1897/8 convention and had been a critic of its work. To these could be added Barton himself, although still prime minister, O'Connor, and the state attorney-general Bernhard Wise from NSW; Henry Higgins and Isaac Isaacs from Victoria; Downer, Symon and possibly Kingston from SA. The press called for a

---

[13]   CPD, 5 August 1903 p. 3052.

balanced bench. So the appointments would be made from NSW, O'Connor; Victoria, probably Isaacs; Queensland, Griffith; South Australia, Downer; and Tasmania, Inglis Clark. Barton, as could be expected, was a strong supporter of the claims of Downer and O'Connor, and both men had high expectations that they would be appointed.

The attack on the costs of the judiciary resulted in a vigorous attempt to reduce the number of judges. Downer had no time for these arguments. As far back as 1891 he had said that the importance of a national court overcame any questions about its cost. He was certainly consistent—12 years later speaking on the Judiciary Bill he said that questioning the expense of the court was 'beneath contempt'.[14] At the convention in 1897 he had also rejected proposals to limit the court's numbers, which again was being argued on the grounds of economy.

If the Constitution is to have stability we must take care of this court that protects the Constitution. Look at its power. Both houses may pass an Act and the court can upset it if it is unconstitutional. Surely if a court is to have such an excessive power it must be strong in numbers.

Numbers would give weight and authority to its decisions. He did not prevail then nor later. To get support of those who felt there would be little business for the court to do and were concerned at its cost, the government was forced to accept that the number of judges to be appointed initially would be reduced from five to three.

The reduction need not have spoiled Downer's own chances of appointment. A bench comprising O'Connor, Griffith and Downer would have suited the temperament and geographical spread of the government. But the prime minister, facing political difficulties and wanting a quieter life, reserved a place for himself, while still persisting with O'Connor (although this meant that there would be two from NSW) and the third place went to Griffith ahead of Downer. Incidentally, O'Connor was the only senator to serve on the High Court until Lionel Murphy was appointed 72 years later.[15] The decision was a devastating one for Downer, particularly as he had been let down by his close friend and ally who had given him every encouragement on the matter. The Chief Justice of South Australia, Sir Samuel Way, who knew Downer well, wrote to an acquaintance two days after the announcement that 'Poor Sir John Downer is very disappointed. There is no doubt that Barton had committed himself to him'. A month later he corresponded with the former Governor of South Australia, Lord Tennyson, who was now acting as Governor-General of the Commonwealth.

---

[14] CPD, 5 August 1903, p. 3056.

[15] Thirteen justices, of which Murphy was the last, had parliamentary experience: O'Connor and Murphy in the Senate; Barton, Isaacs, Higgins, Latham and Barwick in the Representatives; and Griffith, Powers, Piddington, Knox, Evatt, and McTiernan in state jurisdictions.

Downer I think is now getting over his disappointment, but he could hardly expect to be one of three. When Barton committed himself to him it was expected that five judges would be appointed.

There may have been another factor working against Downer which was hinted at in earlier correspondence by Way. By this stage Downer was feeling uncomfortable and frustrated in a Senate that was increasingly operating on party lines against his loftier expectations. He was unhappy spending much futile time in Melbourne at the sittings away from his family, his home and his legal practice. His young wife accompanied him in Melbourne on occasions but it was not much of a life for her. During one session they were involved in a nasty carriage accident and suffered some injury. It seems it was the only time in his life that he suffered bouts of depression. Way had heard that he was spending too much time in the parliamentary bar, in contrast to his friend Barton, who had been renowned for enjoying the good life to excess, but now was very disciplined. 'Sir John Downer has Barton's very strong support but he is constantly [word inked out—but probably 'drunk'] so it is questionable if any Government would dare to appoint him'. At this stage, Way felt that if Downer was not appointed it would be 'through his own folly in not having become a total abstainer soon enough'. Bonython, writing to Sir J. Cockburn in London, commented enigmatically but significantly on the preference for Playford for the ministry that 'we guess here, and I am afraid you will be able to guess too, why Downer was passed over. I am sorry for him, but he has himself to blame'.[16] On the High Court decision he commented that 'John Downer is terribly disgusted although for a reason you may guess he has not for a very long time even been in the running'.[17] It is worth remembering that both Way and Bonython were teetotallers and somewhat censorious of those who weren't, but clearly at this stage there was a problem.

He may have been putting a good face on it, but relations between Downer and Barton were now very strained, and it took some years to repair the friendship. The new High Court went on its first circuit to Adelaide in November 1903 and Way took charge of their welcome. Griffith stayed in Government House during the visit, and O'Connor with Sir Samuel at his mansion Montefiore. But significantly, for the first time in many visits to Adelaide over more than a decade, Barton was not resident at Sir John's Pennington Terrace house just down the road from the chief justice, but lodged with Griffith at Government House. Way hosted a banquet for the court at the Adelaide Club but he noted: 'Sir John wouldn't come'.

Three years later during the second Deakin ministry a further two High Court places were added for appointment by the government. Victoria clearly had claims to one

---

16   Bonython to Cockburn, op. cit., 1 September 1903.

17   ibid., 30 September 1903.

and Isaac Isaacs, Deakin's Commonwealth Attorney-General, was first choice. There was a strong claim for a South Australian appointee. Downer however was now without the patronage of Barton. He had an uneasy if not hostile relationship with Deakin, although he would not have been aware of Deakin's then unpublished negative view that he was 'reserved and indolent'. In Cabinet Downer would have had the support of Sir John Forrest, but that would be more than matched by the opposition of William Lyne and the solid veto of his oldest political opponent, Thomas Playford. He was again put at the rear of the queue. Chief Justice Way was offered the other place, but refused, seeing it as a demotion from his joint appointments as Chief Justice of South Australia and a Privy Councillor. Way's refusal resulted in the appointment of a second Victorian, the radical Henry Higgins. Sir John's claims lapsed at this point forever. There has still not been a South Australian appointee.

There had been other disappointments in Downer's public life, including the bleak years of opposition in the 1890s and being denied an opportunity to serve with his friend and colleague Barton in a federal Cabinet, but not being appointed to the High Court of Australia was the greatest. Nearing the end of its first term in 1903, the Senate was showing signs of very partisan behaviour and failing to live up to the standards of independence from the executive and House of Representatives he had expected. He announced that he would not be standing for a second term in the election, but would return to full-time legal practice in South Australia. His federal disillusion was underlined a year later when he became a South Australian elder statesman by entering the Legislative Council in which he served until his death in 1915.

In retrospect it is easy to see why Downer became disillusioned. His concept of federalism was based onto a system of factional organisation which did not properly account for the rise of the parties and was no longer possible. The Senate was not able to live up to his expectations of a United States model as Australian federation was grafted onto the Westminster system. His hopes of office or the bench were not to be fulfilled. And politics generally now wearied him. To bow out of the federal scene almost exactly 20 years after he had made his first major contribution and where he had been so important was the right thing to do—and he lived on to enjoy an Indian summer, blessed by the unexpected birth of a son in 1910—the future federal minister and diplomat, Sir Alexander Russell Downer.

Question — There was such a surfeit of talent in politics in 1901 and particularly from South Australia. If you look at the senators from South Australia—all stars in their own right—what was it about the colony of South Australia that promoted these people? What was it that allowed South Australia to come up with all these innovations in electoral matters?

John Bannon — I think it was obviously part of the political culture. The thing that really distinguished South Australia was the way in which there was this general consensus about federation being the way to go, that what had happened in the settlement of Australia was sort of incomplete and this moved across all party lines. Some of the Labor Party people were a bit sceptical. Thomas Price, who became Premier of South Australia, was one of those. Although, interestingly, he put his hand up to be a federal representative having denounced the federation—a bit like William Lyne. But there was this broad consensus and I think part of it was a very strong national concept. South Australia's origins as a convict-free colony was something that—whether it made much difference in reality—its tradition of radical, sometimes utopian politics saw this as a high ideal but secondly was very pragmatic too. South Australia was concerned that it was going to be caught outside the major economic developments and other things that would happen; that Australia would fracture, Western Australia would go its own way and the eastern coast, leaving South Australia isolated. Whereas, in fact, federation could make it the hub, the transport hub, the railway connector, the communications and various other links which could make it a significant player. So it was partly the concept of how the colony could thrive if it was part of a national body that drove them to it. The best and brightest worked at this assiduously, which is why Alfred Deakin could see that they were the ablest delegation of the convention and others commented on their imprint which is on just about every section of the Constitution.

Question — And of course it even goes down as far as humble clerks: the first Clerk of the Senate being the former Clerk of the Assembly in South Australia.

John Bannon — Interesting that Edwin Blackmore, who was appointed clerk in the 1897 convention because it was being held in Adelaide, did such a brilliant job that he remained in place for the sessions in both Sydney and Melbourne, held in those parliament houses, as did the President. Richard Baker was his chairman of committees so he and Blackmore worked very close together. By smooth transition Baker became the first President and Blackmore the first Clerk. In fact, to the extent that the Senate has some elements of, or independence in, its procedures and standing orders relates to that combination of South Australian gentlemen who strongly felt they were asked virtually to reproduce standing orders and rules of procedure that would mirror the House of Representatives so there would be no real difference and

the two would be indistinguishable in that sense. Baker and Blackmore both insisted on the special nature of the Senate and recognised its composition and that has certainly remained in force today.

Square Peg in a Square Hole: Australia's Parliament House*

Andrew Hutson

Introduction

The 1979 competition for the design of Australia's new Parliament House followed decades of political consternation on the character and site of what was to become, arguably, the most symbolically important building in Australia. A project of this scale was rare and the competition was much anticipated by the architectural community before its announcement in April. At the close of the first stage of the competition 329 entries had been received with 131 from international architects.[1] The number of overseas entrants was encouraging given the competition restriction that entrants must be registered as an architect within Australia by the date of submission and pointed to the international interest in the project.[2] At the end of the first stage 10 prize winners were announced from which five were selected to prepare a submission for the second stage. On 26 June 1980 Mitchell/Giurgola and Thorp were announced as the winning architects.

In reviewing the architectural competition one needs to understand the historic background to the decision regarding symbolism and location of a permanent parliament house. A home for federal parliament was integral to the establishment of the national capital at Canberra in 1911 and became a perennial topic for consideration by governments since the ill-advised decision to construct a provisional Parliament House in 1923. This historic context will form the basis of the first section of this paper which will look at the physical and cultural issues that fashioned the political framework for the competition. The second part of the paper will analyse how the political agendas were incorporated as explicit and implicit requirements of the competition brief. The paper will also look at what entries attracted the interest of the judges and the criteria used by them to determine the ultimate winner.

---

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 17 September 2010.

[1] Entries for the competition were to be submitted prior to 31 August 1979, three months following the release of the competition brief on 31 May.

[2] *Parliament House Canberra: Conditions for a Two-stage Competition*, vol. 1. [Canberra, Parliament House Construction Authority], 1979, p. 11. Answers to entrants questions dated 27 June 1979 confirm that entrants must be registered as architects before the closing date of the first stage.

Political sensitivities: site, symbolism and the Griffins' legacy

The process for selecting an appropriate site for a new and permanent Parliament House (NPH) was complex, lengthy and involved arguments over a number of decades on the merits of a range of potential locations within the parliamentary triangle. The final location would need to balance the history and status of the Griffin plan, the ambitions of parliamentarians and the sensitivities of a wary Australian public.

Walter Burley and Marion Mahoney Griffin won an international design competition for the new federal capital in 1912. Within this plan for Canberra they designated the site of Capital Hill as the focus at the apex of the urban design characterised by triangular geometry. The Griffins intended that Capital Hill would host an open public structure and not the legislative functions of government that were to be located down on the river plains to the north in what is now called the parliamentary triangle. The axes of roads and landforms within the Griffins' plan anointed Capital Hill with an urban power similar to that of the Palace of Versailles but in the case of Canberra it was the public who were to have symbolic ownership of the site.
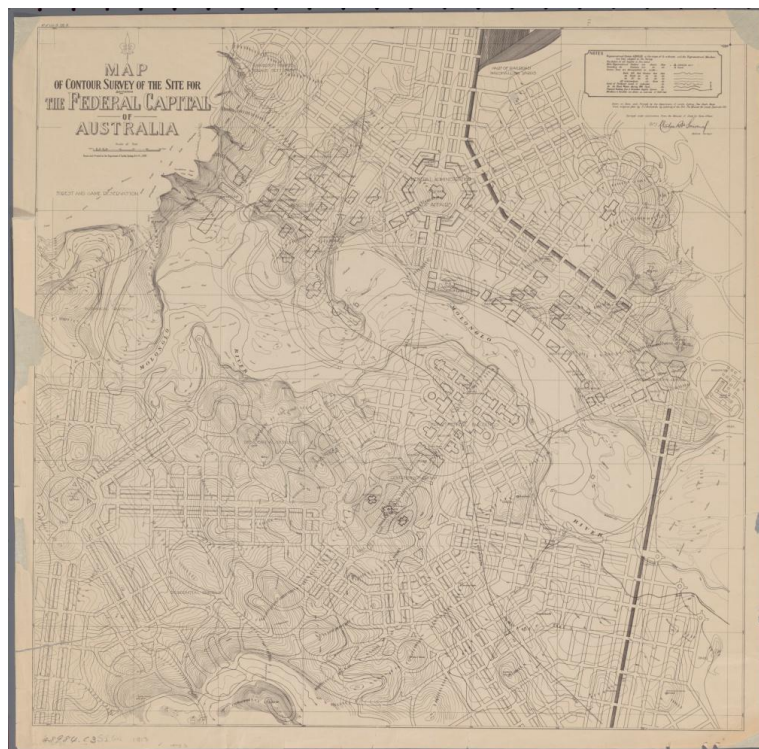

Figure 1: 1913 plan of the Griffins' scheme with Capital Hill within the circular road in the centre of image, nla.map-gmod30, National Library of Australia.

The Griffins' architectural vision for Capital Hill was for a stepped pyramidal roofed structure called the 'Capitol'. This was intended to be the prime building of the new

city that would house 'popular assembly and festivity rather than deliberation and counsel'; a monument to the new federation. The 1912 report by the Griffins that accompanied the competition entry made reference to Parliament House being situated on a small rise called Camp Hill within the river plain below.[3]

The Griffins' intentions were unravelled with the government decision to construct the provisional Parliament House (PPH) in 1923 at the foot of the modest Camp Hill where according to the Griffin plan the permanent parliament was to be sited. As may be expected the decision to construct the PPH in this location prompted concern and as early as 1923 planners saw problems with the decision. At issue was whether the construction of this 'temporary' house would negate the potential of the permanent site.[4]

In light of the interference to the proposed site for Parliament caused by the location of the provisional building, submissions were sought by government from planning bodies and interested experts on relocating the site for the permanent Parliament House. These 1923 submissions were split between locating Parliament on Capital Hill and retaining the original location of Camp Hill. Reasons were offered to support each site, the most telling being that it was symbolically inappropriate to place Parliament in such a prominent location as Capital Hill. Typical of this stand was that of Senator Gardiner who argued that Capital Hill would visually require a monumental structure and he believed the utilitarian function of a parliament building should not provide the massive form necessary.[5] Considerations on a suitable site continued after the Second World War and by the 1950s political support was foundfor Capital Hill.[6] But while it appeared that the site selection of Capital Hill had political backing the saga was not complete.

---

3   Walter Burley Griffin as quoted in John W. Rees, *Canberra 1912*. Melbourne, Melbourne University Press, 1997, p. 144. Also from a written description that accompanied the Griffin competition entry in his Plans and Reports (1912, 1913) contained in *Extracts Regarding Permanent Parliament House*, miscellaneous material kept at the National Capital Authority library. A 1913 explanatory submission by Griffin added that the Capitol would also house archives and commemorate Australian achievements and would represent the sentimental and spiritual head of the nation.

4   I use the term 'temporary' although the building was referred to as 'provisional' to avoid an unsavoury impression that Australia's parliament would be located in a temporary structure. The term was reportedly coined by Colonel Owen, Director General of Works, who was a member of a three-man departmental board to oversee the design of Canberra. This is discussed in Jenny Hutchison, 'Housing the Federal Parliament', *Working Papers on Parliament*. Canberra, Canberra College of Advanced Education, 1979, p. 84.

5   *Report Together With Minutes of Evidence, Appendices, and Plans Relating to the Proposed Erection of a Provisional Parliament House, Canberra*. [Melbourne], Government Printer, 1923, pp. 5–13.

6   *Parliament House, Canberra: Statement on the Case for a Permanent Building*. Canberra, Government Printer, 1957, extracts regarding permanent Parliament House, miscellaneous material kept at the National Capital Authority library, Part D.

The Commonwealth Government commissioned a report on the development of Canberra from Sir William Holford, a town planner from the United Kingdom, which was tabled in Parliament in May 1958.[7] In this report Holford concluded that NPH should be sited at a lake-front location at the north edge of the river plain below Capital Hill. Holford conceded that Capital Hill was the 'generally preferred location' but again expressed the opinion that symbolically it would be out of place. The houses of Parliament, in Holford's opinion, should be modelled on an active democratic forum and not a hilltop monument.

These recommendations were quickly endorsed by the newly created National Capital Development Commission (NCDC), the establishment of which was also a Holford recommendation, and the government of the day.[8] This decision appeared to have accepted the political opinion that Capital Hill was too prominent a landform on which to place the Parliament of Australia as it may infer an unacceptable dominance over the public.
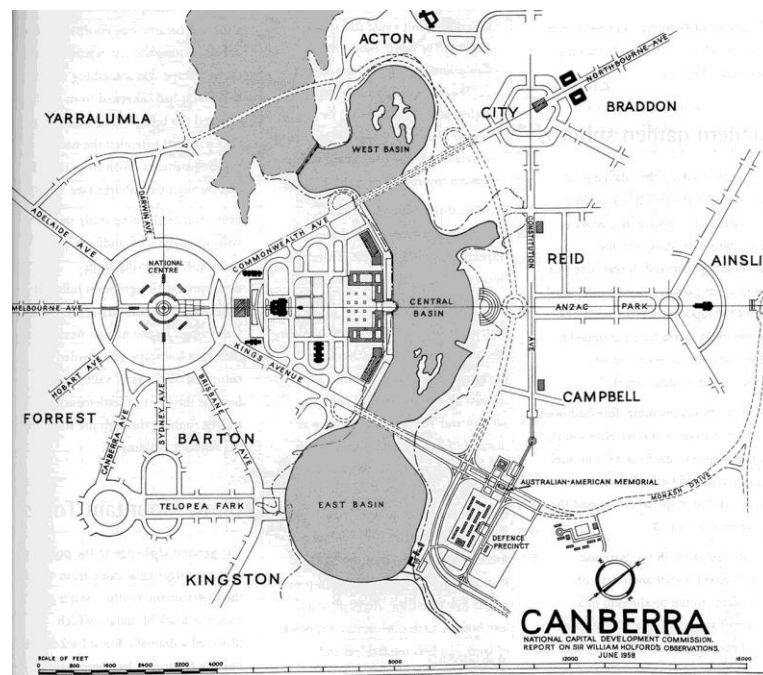

Figure 2: Post Holford plan of Canberra with Parliament House located on the edge of the lake and a 'National Centre' located on Capital Hill

---

7   Sir William Holford, *Observations on the Future Development of Canberra ACT*. Canberra, Government Printer, 1958, relevant discussion pp. 12–15.

8   The creation of the NCDC was part of the political power play concerning control over the planning over Canberra. An excellent description of these power struggles between bureaucracies and Parliament with regard to the new Parliament House in the 1970s can be found in James Weirick, 'Don't you believe it: critical responses to the new Parliament House', *Transition*, Summer/Autumn, 1989, pp. 8–16.

Holford remained involved and continued to provide advice on aspects of Canberra's planning and the location of NPH, the tone of which reflected the unease previously felt by some for the Capital Hill site. In 1963 he again discussed the attractiveness of Capital Hill but stressed that the scale of building required for Parliament may prove to be an architectural embarrassment, a point that played upon the fears of politicians. This same report evoked the Griffins' intentions to support the inappropriateness of the Capital Hill site, although it dismissed the Griffin location in favouring the lakeside site.[9] The NCDC reaffirmed the lakeside decision and prepared development strategies of the parliamentary triangle based on this location.[10]

Although endorsed as the site by both the government and the NCDC the lakeside site did not have general support from politicians. In 1968 a motion to confirm the lakeside site, and supported by the leaders of both sides of Parliament, was put to a free vote of members of Parliament. The motion was defeated and the NCDC was forced to reconsider the options of Camp and Capital hills. In the absence of a 'lakeside' option the NCDC favoured Camp Hill describing a Capital Hill parliament as being potentially dominant and separated from the other components of government. Once again a majority of politicians disagreed and a vote of both houses of Parliament in May 1969 favoured the prominence of Capital Hill although the Prime Minister John Gorton overrode the decision and informed the NCDC that the lakeside site remained the government's decision. A change of government and Commissioner for the NCDC (Tony Powell) again led to a vote in Parliament regarding the site and, as before, a combined vote in 1974 of both houses led to a majority for Capital Hill and the site was finally established by an Act of Parliament.[11]

This decision did not end political unease at the positioning of a new and expensive parliament building on the most prominent location in Canberra with a newly elected government in 1975 having little enthusiasm for the project. Ultimately the matter was referred to Parliament for another joint party vote which clearly supported an immediate start on a new parliament house and with some reluctance the government agreed to proceed.[12] Commentators voiced concerns of the public that the executive of government may have shared. *The Bulletin,* in an article provocatively titled 'A House on the Hill for our MPs', presented some of the salient political sensitivities:

[9]   Report to Parliament, Richard Gray, William Holford, December 1963, extracts regarding permanent Parliament House, miscellaneous material kept at the National Capital Authority library, Part F.

[10] National Capital Development Authority, *The Siting of the Houses of Parliament*. Canberra, NCDA, 1963.

[11] Hutchison, op. cit.

[12] Michael Prain, *Sun*, 16 November 1978.

Successive governments have always feared giving the go-ahead to such an enormous undertaking because of possible electoral backlash … In 1958 the then member for the ACT, Labor's Jim Fraser, agreed with Menzies [on the lakeside site] and said there was something degrading about people having to crawl up a hill to see a politician.[13]

A newspaper editorial also offered a caution:

We [*The Age*] agree with the decision [to proceed] and hope that most Australians will resist the temptation to mock the project as a monument to political self-interest, self importance and extravagance.[14]

Contrary to this entreaty, a cartoon by Moir only two weeks after this editorial presented a contrary view that the project was an expensive undertaking for the benefit of politicians.[15]

Political context: lessons of the Sydney Opera House competition

Preparations for the competition for NPH followed the recent 1972 opening of the Sydney Opera House. This world heritage listed building began as a design competition. As a major public building in the most prominent location in Sydney it became embroiled in a range of controversies and political machinations and as such it provided political lessons for the planning of the competition for NPH.

The winning scheme by Jørn Utzon was announced in late January 1957 but proved to be difficult to build using the technologies of the day and costs and time for construction extended well beyond expectations. As it was a New South Wales government project, funded partially through lotteries, there was a great deal of political exposure to public concerns regarding propriety and prudence. The outcomes are well documented with political interference and the ultimate downgrading and eventual departure of the architect Jørn Utzon with associated hue and cry from various sectors of the public.[16] The political problems with the design and construction of the Sydney Opera House stemmed from the spectacular but unresolved form of the original design entry. The nebulous nature of the original scheme required radical innovations in construction techniques. Also remarkable was that the judges chose

---

13   Jacqueline Rees, *The Bulletin*, 5 December 1978, p. 26.

14   Editorial, *The Age*, 17 November 1978, p. 11.

15   Moir, *The Bulletin*, 5 December 1978.

16   For a detailed account of the background, competition and construction of the Sydney Opera House I would commend, David Messent, *Opera House Act One*. Balgowlah, NSW, David Messent Photography, 1997; and Anne Watson (ed.), *Building a Masterpiece: The Sydney Opera House*. Sydney, Powerhouse Publishing, 2006.

(albeit through an anonymous process) a scheme designed by a small firm headed by an architect without experience with large-scale projects.[17]

There was political resolve that the controversies that dogged the Sydney Opera House would not be revisited with NPH. As these problems were related to the difficulty of construction then it would have been considered politically expedient for the ultimate winner of NPH to comply with a number of conditions to prevent a similar outcome. These were that the scheme would not be reliant on new technologies and could be constructed within the tight time frame of eight years.[18] Secondly the winning architects must have a demonstrable capacity to undertake a project of such a scale.

Tracing the political in the competition processes

Within a few months of the commitment for the site for NPH[19] the Parliament House Construction Authority had been established, the competition brief completed and an international competition launched in April 1979. Within the framing of the competition brief and conditions we can see the response to the politically sensitive contexts of site selection, vexed symbolism and the lessons gleaned from the Sydney Opera House.

The first indications of these concerns can be seen in how the expectations for the competition outcome were pre-empted. In 1977 the NCDC staged an exhibition to illustrate the way forward for the development of Canberra and included impressions of a new parliament house on Capital Hill. A local architect, Bert Read, was commissioned to create an indication of how a NPH might appear for the sake of promoting development strategies. The result was a cone-shaped design that spread down the hill creating a new built topography that mirrored the existing hill. It had a large flag pole at its centre that corresponded to the apex of the parliamentary triangle and large-scale angled walls that acknowledged the axes of the main diagonal approaches to the site. This scheme not only was on public display for some weeks but was also chosen by the NCDC to grace the cover and interior of the published reports from the Joint Standing Committee on the New and Permanent Parliament House.[20]

---

[17]   Peter Murray, *The Saga of Sydney Opera House*. New York, Spoon Press, 2003, p. 12.

[18]   The opening for NPH was pre-set for 1988, the bicentenary of White occupation of Australia.

[19]   Prime Minister Fraser announced on 22 November 1978 the commitment to the construction of a new parliament house by Australia's bicentenary of 1988.

[20]   *The New and Permanent Parliament House, Canberra*. First report of the Committee on the New and Permanent Parliament House, Canberra, AGPS, 1977. In this report, prepared with the assistance of the NCDC, an aerial view of the Read scheme graces the cover, while another two views are prominent in the first few pages.

Its initial and continued use implied an acceptable approach in response to the architectural and political problems of the site and symbolism. The cone reference to the hill upon which it was placed was to be a common theme in the entries and had resonances with the final winning scheme. Many local architects, who had entered the competition, would have been aware of the scheme which contributed to the political background noise to the competition, a background that was reiterated directly in the competition brief.

Figure 3: The NCDC hypothetical scheme for NPH on Capital Hill. Reproduced with permission from Bert Read.

The comprehensive competition brief included requirements for all aspects of the building including its symbolism. The section on symbolism contained references to the expression of the building which went directly to the heart of the political sensitivity of avoiding grandiose solutions.

The brief called for the design to be a 'major national symbol' along the lines of both Westminster in London and the Washington Capitol building. It chose these two examples so that it could distinguish between their architectural expressions. The Capitol building is described as being massive and monumental while Westminster is described as informal and romantic. Canberra's provisional Parliament House is also described in this section as being less powerful compared to the other two examples

while having its own grace and simplicity. The aspects formed the basis of a rhetorical question regarding symbolic expression:

> Competitors should consciously evaluate these factors during the design process. They should question whether it is appropriate that a building of the late 20th century use language of bygone eras. What would be the connotations—in the mind of the visitor—of a building with monumental scale, sited on a hill? Does significance mean bigness?[21]

Much appears to have been made as to the impression this building will have on those who visit. It is a public building of which monumentality has no place. The formality of the project was also questioned as the brief discouraged symmetry at the expense of function:

> The requirements are not symmetrical … Symmetry cannot be obtained at the expense of functional efficiency.

Similarly the design should accommodate change as posed in the brief:

> Does the nature of the requirements imply an acknowledgement of the forces of growth and change?[22]

The assessors' report at the completion of the competition described four general criteria against which the entries were judged.[23] Those criteria that applied directly to the design approach and expression were that the design must respond in a sensitive manner to both the natural environment and the Griffins' concept of the most significant national building being at the apex of the parliamentary triangle. The design was to symbolise the unique national qualities, attributes, attitudes, aspirations and achievements of Australia. This alliterated phrase was looking for an architectural interpretation of an Australian psyche that was not known for its respect of authority or its symbols. Both required the successful scheme to engage with the context of the site, the Griffins' intent and the nuances of the political context.

As previously noted, this competition occurred only seven years after the completion of the Sydney Opera House and the subsequent problems associated with the project were thought by the NPH organisers to have been partly a function of the modest size of the winning firm. Jørn Utzon ran a small-sized practice in Copenhagen. In what

---

[21] *Parliament House Canberra: Competition Brief and Conditions*, vol. 1. Canberra, Parliament House Construction Authority, May 1979, p. 15.

[22] *Parliament House Canberra: Conditions for a Two-stage Competition*, vol. 2, op. cit., 1979, p. 15.

[23] Parliament House Canberra, Assessors Final Report, June 1980, p. 4.

appeared to be a strategy to avoid a repeat of such problems, a complex and extensive brief outlining all functional requirements and adjacencies ensured that only the most dedicated of entrants would be able to resolve the planning issues. To address these detailed brief requirements entailed access to considerable resources that may have been beyond many small firms. Similarly the competition entry requirements of 10 large-format boards included photos of a model of the scheme within the site, which also favoured well-resourced architectural firms. The competition jury selected 10 finalists at the end of the first stage through their anonymous submissions. Of these 10, all would be subject to what was described as a 'critical review' which required the entrants to demonstrate that they had the resources and capacity for such a major undertaking.[24] From the 10 finalists, five were invited to the second stage. At the point of determining the 10 finalists anonymity was discarded with the assessors knowing the identity of all. The second stage invitees were given a sum of money to assist in preparing the next submission which entailed detailed resolution of plans and extensive and elaborate models. The entrants were expected to perform at an advanced design level to enable the organisers to have confidence that the winner had the expertise and capacity to see the design of the project through.

The jury deliberations: spots before their eyes

The jury was headed by Sir John Overall, a former chair of the NCDC, who invited the expatriate architect John Andrews to be an assessor for the forthcoming competition. Andrews provided Overall with a suggestion for an international member for the jury. Andrews, an avowed modernist at the time,[25] recommended another prominent modernist, the New York architect I.M. Pei, and both subsequently became the architectural experts on the assessment panel. Other members of the panel were Senator Gareth Evans and Barry Simon MP, representing both houses of Parliament, and Len Stevens, Professor of Engineering at the University of Melbourne, who was appointed to look to the buildability of the schemes under consideration. Paul Reid from the NCDC acted as competition adviser.

Spotted schemes

The five schemes that were selected to advance to the second stage reflected a range of design responses to what was a comprehensive and challenging brief. But the schemes under serious consideration by the panel were wider in the scope of architectural themes than those singled out as potential winners. During the judging process a system of coloured spots was used by panel members to indicate interest in

---

24   *Parliament House Canberra, Competition Brief and Conditions*, op. cit., p. 12.
25   John Andrews, 25 May 2005.

a particular entry. Coloured spots remain on the drawings and reports of a significant number of entries as an indication of the panel's interest in the schemes.

This contention is supported by the recollection of panel members[26] that there was a direct correlation between spotted entries and the 10 top prize winners.[27] There are a range of colours remaining on this group of schemes. Those chosen for the second stage tended to have red spots with the remaining prize winners having blue spots. The other schemes have blue or brown spots on the drawings, and/or blue or green spots on reports.

In total 40 schemes were marked and an analysis of the schemes that attracted coloured spots provides an overview of architectural approaches of interest to the judges. These 40 schemes included the subsets of 10 prize winners, the selected five second stage entries and ultimately the winning scheme of Mitchell/Giurgola and Thorp. The brief required entrants to respond to the criteria of the Griffins' plan, context, buildability, program and symbolism. All criteria played a part in the jury's considerations and the schemes selected were those that responded to all or some of these requirements including specific pronouncements made within the brief regarding the building's image.[28]

First choice: topographical or imposing?

The brief direction on monumentality posed a rhetorical question:

> What would be the connotations—in the mind of the visitor—of a building with monumental scale, sited on a hill? Does significance mean bigness?[29]

In response the selected schemes generally fell into two groups: topographical, where the scheme reflected the rising character of the hill; and imposing, where the scheme placed building forms on the hill. A topographical approach, where the scheme would reflect the hill, may aid in reflecting physical context and reducing monumentality. An imposed building form on the hill required other techniques to dilute monumentality. The spotted schemes demonstrate a range of approaches.

---

[26] Professor Len Stevens, from interview with author and May Eshraghi, 23 September 2004, Melbourne; John Andrews, 25 May 2005.

[27] Nine out the 10 first stage prize winning schemes had spots on either drawings or reports. The scheme by Brown Daltas has no spots on the drawings. The report for this scheme was logged but cannot be traced.

[28] Professor Len Stevens, from interview with author, 2 June 2004, Melbourne.

[29] *Parliament House Canberra, Competition Brief and Conditions*, op. cit., p. 15.

Topographical

The topographical schemes included those that proposed stepped or sloping elements that rose up to an apex. This can be seen in the entries of Synman Justin Bialek (008), Bickerdike (045) and Daltas (145)[30] through to schemes that presented a design that alluded to an abstracted hill. As an example of the latter, the scheme of Staughton (080)[31] presented a low hexagonal cone covering the apex and slopes of Capital Hill (figure 4). Apart from the large forecourt that addressed the land axis it was designed to present an even rise from all view points as one would expect from a gentle hill. This approach accepts the priority of the landscape within the charged context of the Griffins' vision with a design that is civic in scale but secondary to the geography.
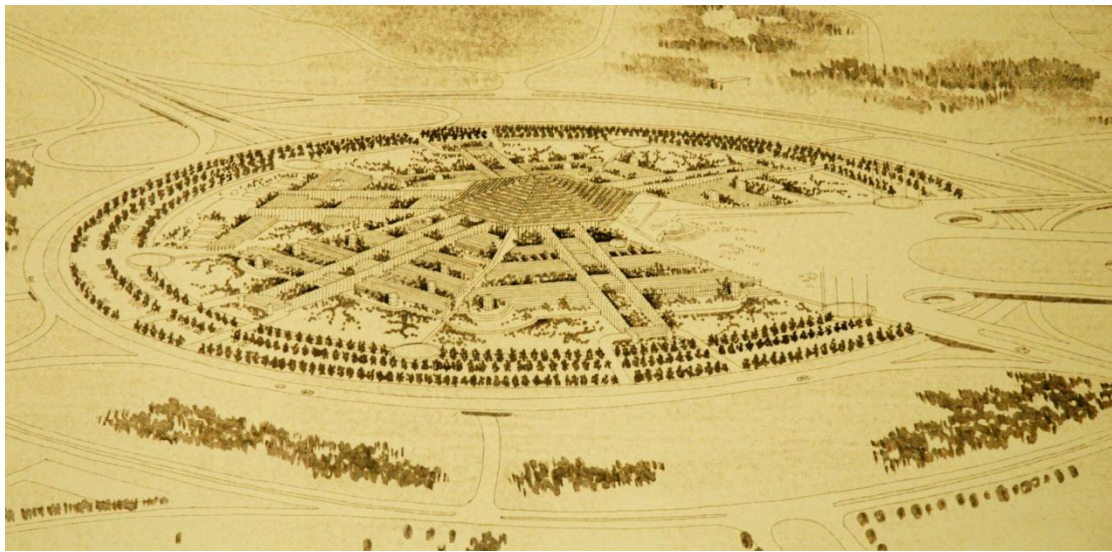

Figure 4: P.S. Staughton, P.S. Staughton and P.N. Pass (080 Vic.), National Archives of Australia, A8104, 80.

Rather than design a building that enhanced the existing topography, the design of the ultimate winner Mitchell/Giurgola and Thorp (177)[32] replaced the top of Capital Hill with a building that mirrored the existing topography. Access to the new apex of the artificial hill would remain available to the public in an overt gesture on the nature of democracy and as a memorial to the lost natural hill. But even this approach to topographical retention was not the most extreme among the spotted entries. The project submitted by McKenna and Cheeseman (063)[33] placed the building substantially underground making the parliament building subservient to the existing terrain with a large-scale mast as a marker for both the building and, equally

---

[30] Synman Justin & Bialek (008 Vic.); J. Bickerdike: Bickerdike Allen Partners (045 UK); Spero Daltas: Brown Daltas and Associates Inc. (145 USA).

[31] P.S. Staughton, P.S. Staughton and P.N. Pass. (080 Vic.).

[32] R. Thorp: Mitchell/Giurgola and Thorp (177 USA).

[33] A.T. McKenna and R.D. Cheeseman (063 SA).

important, the climax of the Griffin geometry. It shared with the Giurgola project the concept that the hill would remain physically and visually available to the public.

These topographical approaches offered design responses that were anti-monumental with the McKenna and Cheeseman scheme being not only anti-monumental but anti-building (figure 5). That it attracted serious consideration by the assessors reflected the real concern embodied in the brief that the design must not physically or symbolically dominate the context.
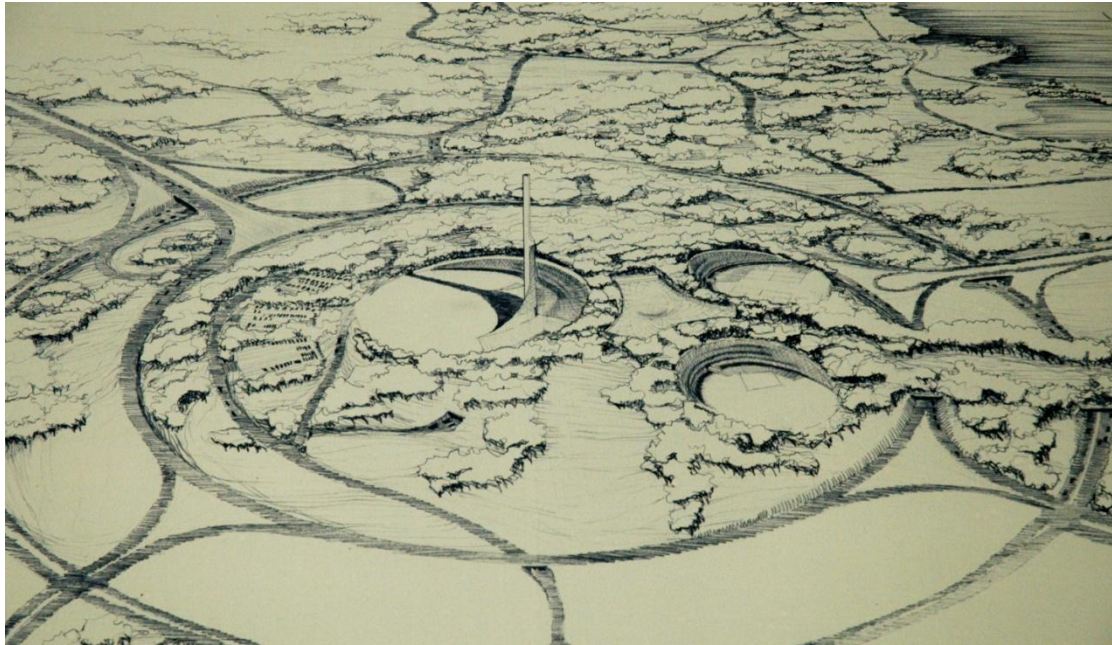

Figure 5: A.T. McKenna & R.D. Cheeseman (063 SA), National Archives of Australia, A8104, 63

Imposing

The converse of this topographical approach was one that imposed buildings onto the hill. Given the discussion within the brief regarding monumentality, the inclusion of schemes that employed this approach bears some analysis as to a finer grained definition of monumentality that was problematic to the panel of judges.

Imposing—organic

One approach to imposing a form onto Capital Hill without representing monumentality was to treat the building as an organism with an expression that reflected the expectation of growth as outlined in the brief. The schemes by Daryl Jackson (136), G.W. Jones (190) and Baird Cuthbert Mitchell (252)[34] demonstrated

---

[34] Daryl Jackson: Daryl Jackson Architects Pty Ltd (136 Vic.); G.W. Jones (190 NSW) and Baird, Cuthbert, Mitchell, Architects (252 Vic.).

systems of planning that encouraged expansion through matrices or the growth of repetitive geometric elements. The buildings proposed had dynamic boundaries and avoided formalism and symmetry. A further development of this expression of growth was seen by the Stephenson and Turner (233)[35] project whose scheme included a programmatically driven arrangement of hexagonal forms of various scales. This scheme incorporated a large central split pyramidal form that exuded an expressionist quality. Such sculptural elements were all but extinguished in the scheme submitted by Karack (241)[36] who produced a design that owed much to the non-stop city of Archizoom and Superstudio's 'Il Monumento Continuo' of 1969. It presented an indeterminate form of fine grids that convey an impression that they could expand infinitely. The organic examples gave literal expression to the directive from the brief that forces of growth be acknowledged while reducing the building to a system (figure 6).
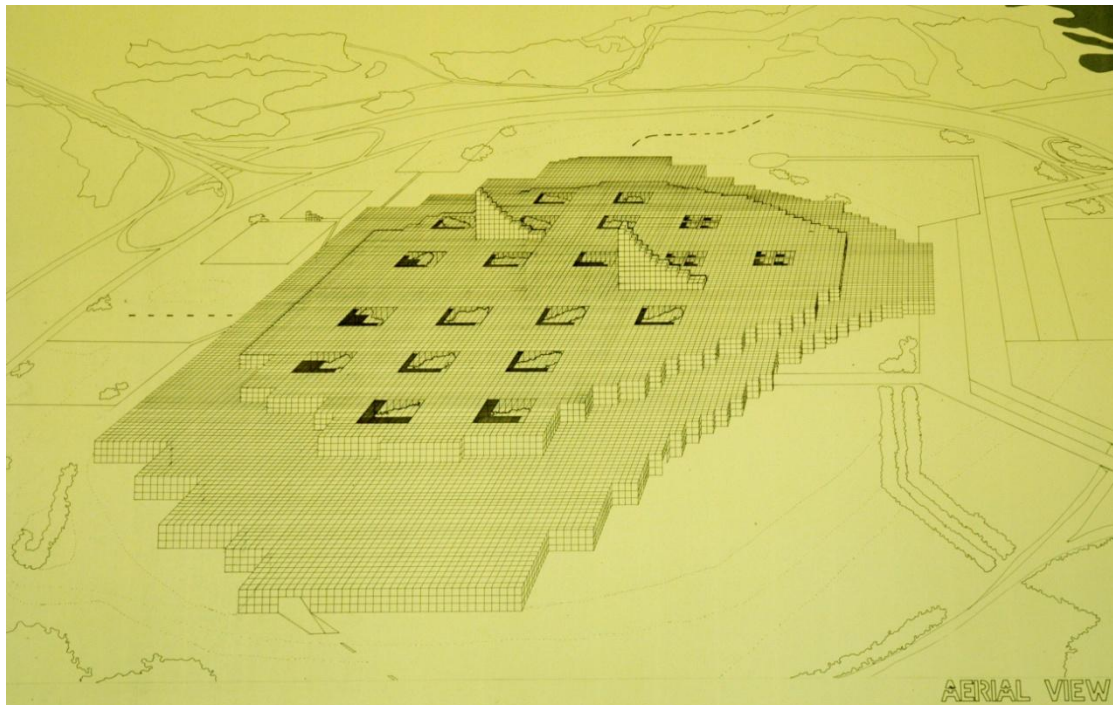
Figure 6: J.D.N. Karack (241 UK), National Archives of Australia, A8104, 241

Imposing—circular

Another design theme popular among the general entries and well represented within the spotted schemes was to draw from the circular geometry of Capital Hill. The Ancher, Mortlock and Woolley (090) scheme and the entry from T.S.R. Kong (260)[37]

---

[35] M.H. Lindell: Stephenson and Turner (233 Vic.).

[36] J.D.N. Karack (241 UK).

[37] Ancher Mortlock and Woolley Pty Ltd (090 NSW) scheme and the entry from T.S.R. Kong (260 Vic.).

both had circular forms with geometric forms enclosed. This follows the modernist technique of formal hierarchy with the main public functions of government housed in abstract platonic forms surrounded by the administration of parliament. The circular geometry was also used in the schemes by Hurburgh of Bates Smart and McCutcheon (176), J.D. Fischer (265) and Lyon (179). In these cases the circles were less complete than previous examples and integrated radial dynamism within the planning. These approaches generally pushed the building form away from the centre of the hill and even when occupying the apex did so with forms that were either recognisably abstract modern, asymmetrically arranged or both.
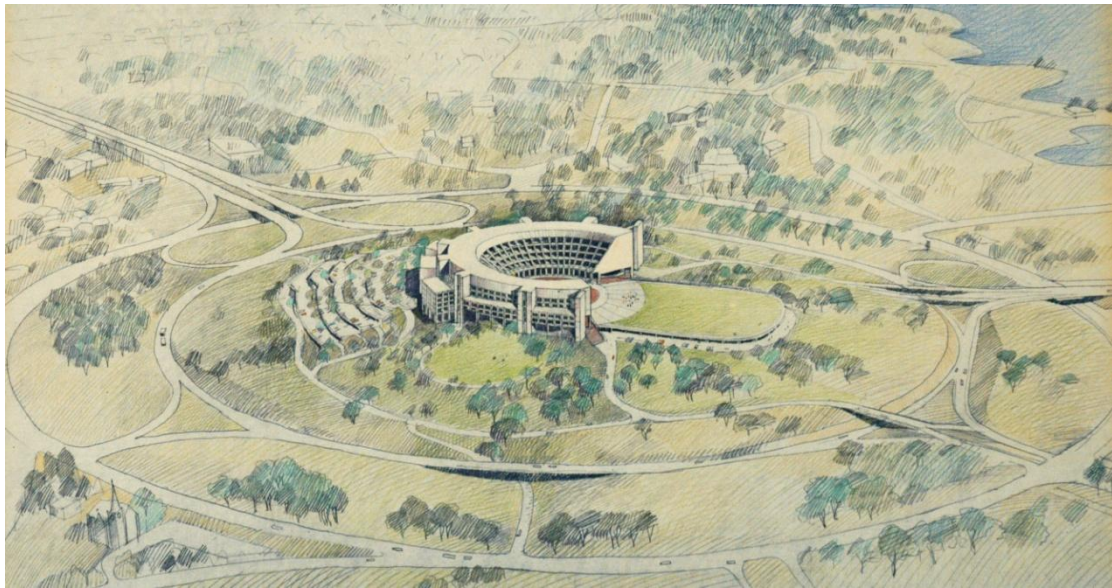

Figure 7: I. Collins, Anderson and Collins (116 NSW), National Archives of Australia, A8104, 116

Imposing—horseshoe

A series of projects within the select group incorporated circular geometry without occupying the top of the hill and open to the Griffins' land axis. These horseshoe plans by Collins (116) (figure 7), Waite (201) and Neilsen (291)[38] represented another popular theme within the general entries. This approach to the site retained the apex for public access and formed the building around this space in the manner of an arena. The character of this approach prioritised the public role in government by making the key space not an internal function but a grandiose forecourt in the mode of James Stirling's project for the Derby Civic Centre (1970). In these examples urban scale is achieved not through built form but the public offering.

---

[38] I. Collins Architect: Anderson and Collins (116 NSW); C.H. Waite: Parsons and Waite Architects (201 NSW, Canada) and J. Neilsen: Arkitektfirmaet, H. Gunnlogsson and J. Neilsen (291 Denmark).

Asymmetry

While the above examples tackled the issue of monumentality through various strategies of distributing formal mass it is apparent that scale in itself was not the only concern, rather the expression of scale was important. In this light the caution contained within the brief warning entrants not to promote symmetry at the expense of program was taken to heart by many entries within the select spotted group. These schemes demonstrated the struggle between asymmetric program and the civic importance of the building. The latter, coupled with the powerful geometry of the site and the urban mirror line of the land axis, could encourage a symmetrical solution empowered by the tradition of the typology of civic architecture and the Griffins' urban legacy.

Of the 40 selected schemes 10 employed asymmetry as an expressive device. This was exemplified by the entries of Williams, Boag and Szekeres (073), Seidler (075), Waclawek and Wojtowicz (030) and Bates Smart and McCutcheon (057).[39] This approach was grounded in the modernist ethos that asymmetry promoted the functions of the building and as the driving dynamic for the architectural expression. This was particularly clear in the entry of Edwards, Madigan, Torzillo and Briggs (234) which was selected for the second stage.[40] This project drew upon geometries unrelated to the site to produce a scheme that challenged the symmetrical urban framework. This entry, as with the firm's projects for the High Court and National Gallery within the parliamentary triangle saw the architectural response as a counterpoint to the powerful geometric overlay of Canberra. Madigan's attitude to the symmetry of the parliamentary triangle was expressed in his comment that the design of his two buildings 'reacted strongly against the asphyxiating order of conformity and responded to the halcyon optimistic spirit of the early 70s'.[41] This project should be considered a monumental imposition on Capital Hill but its modernist dynamic packaged the scale into a form acceptable to the assessors (figure 8). Their acceptance of the scheme extended to it being invited to progress into the second stage of the competition.

---

[39] Peter Williams, Gary Boag and Julius Szekeres (073 Vic.); Harry Seidler and Associates Pty Ltd (075 NSW); Jakub Waclawek and Andre Wojtowicz (030 Poland) and Bates Smart and McCutcheon Pty Ltd (057 Vic.).

[40] Colin F. Madigan: Edwards Madigan Torzillo and Briggs International Pty Ltd (234 NSW).

[41] Colin Madigan, 'The city as history, and the Canberra triangle's part in it', Walter Burley Griffin Memorial Lecture, 5 October 1983, as cited in Paul Reid, *Canberra Following Griffin*. Canberra, National Archives of Australia, 2002, p. 299.
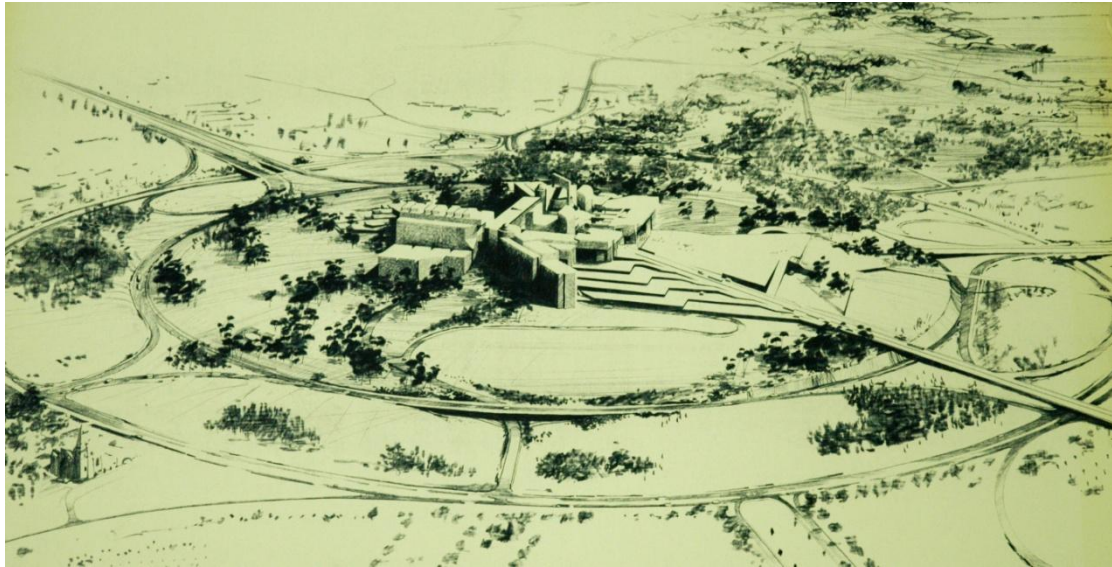
Figure 8: Colin F. Madigan, Edwards Madigan Torzillo and Briggs International Pty Ltd (234 NSW), National Archives of Australia, A8104, 234

Programmatic asymmetry

While expressive asymmetry was employed in some of the selected schemes, others took a more circumspect approach to what appeared to be competing pressures of function and civic presence. These developed a form of programmatic asymmetry where the overall approach was a symmetrical response with asymmetrical nuances. Of the 40 selected entries 15 demonstrated a symmetrical frame or spine upon which asymmetrical elements were attached. This was exemplified in the projects of Bickerdike (045), Addison-Kershaw (061) and Webster and Bray (276). The stage one entry of Mitchell/Giurgola and Thorp (177) also followed this approach. In what, at first glance, appeared to be an emphatic symmetrical design, the secondary buildings that serve the functions of government are balanced but asymmetrically expressed either side of the land axis.

Symmetry

The selection of entries did not exclude symmetrical entries and eight projects demonstrated this approach. But of these schemes only two could be considered to have treated the symmetry in conjunction with elements that could be considered monumental in scale.[42] The other schemes were designed to ameliorate aspects of monumentality. Of particular interest is the entry by Denton Corker Marshall (139). This project was an interesting inclusion on a number of issues, not the least being that it was the only completely symmetrical scheme to progress to the second stage.

---

[42] Robert Day of Hobbs Winning Leighton and Partners Pty Ltd (081 NSW), R.G. Lyon: Lyon and Lyon (179 Vic.).

The plan of the building itself resembled a neoclassical arrangement, a historical reference that seems at odds with the intonations of the brief and the attitude of the judges. But, similarly to the Giurgola scheme, the Beaux Arts planning was abstracted within contemporary, or certainly non-historical, expression. The potential monumentality of the Denton Corker Marshall arrangement was diluted by the use of a three-dimensional Cartesian grid system that encased the design in a transparent network on a range of scales. The building placed in the context of the extended site works can also be appreciated as potentially expanding within the implied Cartesian universe as indicated in the super-grid on the site plan. Although it shared aspects of postmodern appreciation of classical precedence it presented it within a form that eschewed classical solidity (figure 9).

The acceptance of these symmetrical schemes suggest that the veiled warnings in the brief were aimed at a form of symmetry that was aligned with historical monumentality and that it was not a hurdle in its own right.
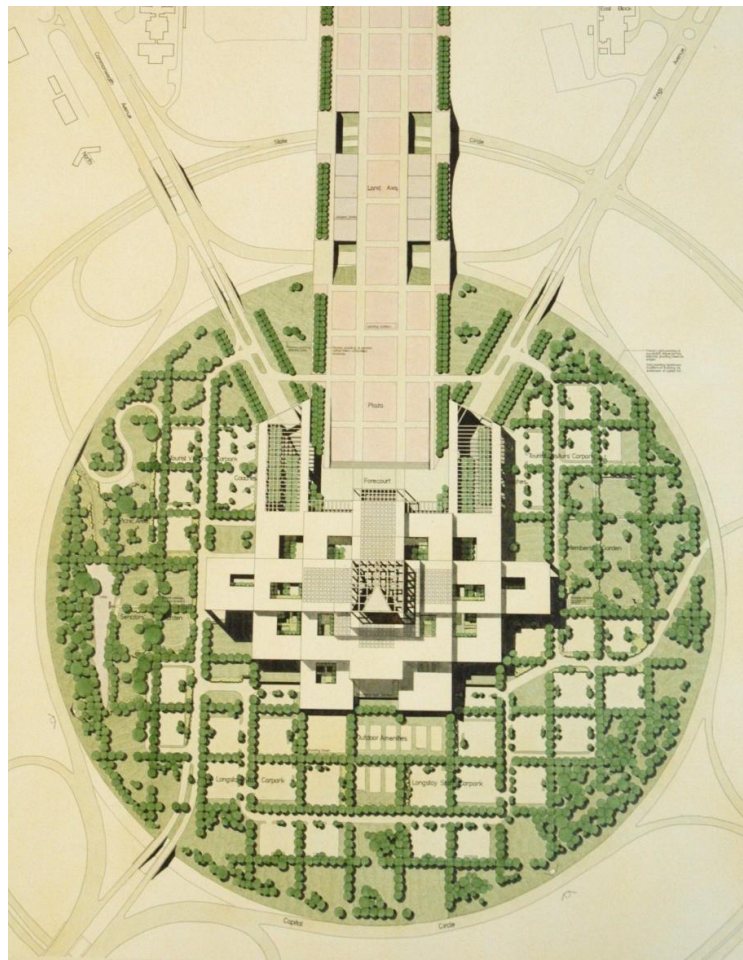

Figure 9: Denton Corker Marshall (139 Vic.), National Archives of Australia, A8104, 139

Crossing the land axis

Another significant theme within the selected projects was the site-planning approach that set the building across the land axis. The four entries by Leech (127), Venturi (207), Borg and Zly (147) and McIntyre (246)[43] all have long rectangular forms that sit across the site. This response to the geometry of the parliamentary triangle is to place a barrier across the urban sight lines in what would appear as significant visual levees. These schemes are something of an oddity within the overall selection as they are, at first glance, monumental impositions upon the Capital Hill that counter the geometry of the context. But they have characteristics that address the issues of scale and bulk. The schemes of Borg and Zly (147) and McIntyre (246) consist of a series of forms set within open hurdles that bridge from one side of the site to the other. This approach, redolent of the mega structures of the Italian Rationalists and Vittorio Gregotti, treated the built form as a frame for the other elements and allowed the impression of visual penetration. The Leech (127) project does not act as a frame but alleviated the visual bulk by battering the façade of the main form balanced by an asymmetrical positioned smaller form. The Venturi scheme (207) curved the front façade of an asymmetrically located form which also stepped down to the east. The eye would be drawn in toward the central opening along the land axis and deflected away to the sides of the site (figure 10).

Figure 10: Jerry Wayne Carrol, Venturi Rouch Brown & Carrol (207 US), National Archives of Australia, A8104, 207

It has been argued in this paper that the spotted selection of schemes represent a range of interpretations of the symbolic parameters contained within the brief that were acceptable to the assessors. There is a broad scope of themes that by virtue of being

---

[43] Denis Leech, Architect (127 NSW); Jerry Wayne Carrol: Venturi Rauch Brown & Carrol (207 USA); M. Borg, J. Zly Architects (147 Vic.) and R.P. McIntyre: McIntyre McIntyre and Partners Pty Ltd (246 Vic.).

within this group were worthy of consideration and as a group they can tell a story as to the collective thinking of the judging panel.

Unspotted themes

While the selected schemes portrayed various architectural themes a range of design strategies within the overall body of the entries were not included. A survey of some of the themes that did not make the grade may add further light on the jury considerations.

Given the prescriptions of the brief the assessors were not going to be easily impressed with singular monumental gestures and despite the preponderance of such schemes within the entries none of this ilk were included in the selected grouping. The large scale equilateral triangular form of Robin Gibson (186)[44] was a well resolved example of this type that relied on the power of a single form to contain the parliament. Other schemes with sculpturally expressive monumental gestures were significantly represented within the entries but those as exemplified by the project by Silver Goldberg (240)[45] were also noticeable by their absence from the selection.

Figure 11: Douglas Norwood (195 UK), National Archives of Australia, A8104, 195

A number of themes current in the late 1970s period are not represented. Journals had given substantial coverage to the Centre Pompidou which had recently been completed but this project did not feature as a significant influence within the entire body of submissions. The project by Pierce (002)[46] could be seen to have a passing

---

[44] Robin Gibson (186 Qld).
[45] Silver Goldberg and Associates (240 WA).
[46] R.F. Pierce (002 UK).

similarity to one of Piano and Roger's early proposals[47] but this theme was a rarity. Although the influences of hi-tech were not immediately apparent the parallel influences of Archigram and the Metabolists were found in a significant number of schemes. This genre of late-modern architecture did not feature within the assessors' selection. It may have been the mega-structure expression of this genre, as demonstrated by the Norwood (195) scheme,[48] which gave the assessors pause (figure 11).

A number of entries departed from conventional geometry and proposed schemes of informal planning, often coupled with organic expression. Within the spotted group, projects were controlled by geometric frameworks and even Madigan's asymmetrical scheme retained control over the arms of the design that acted as balanced counterpoints to the rectilinear structure of the design. Viewing the relaxed geometries of Corrigan (118) and David Moore (109) as examples of this type, the urban planning owed more to the Acropolis and the hilltop village than the fortified citadel. These typified schemes that eschewed monumentality and the geometry of the precinct through informality but this lack of geometric stricture did not feature within the spotted projects.
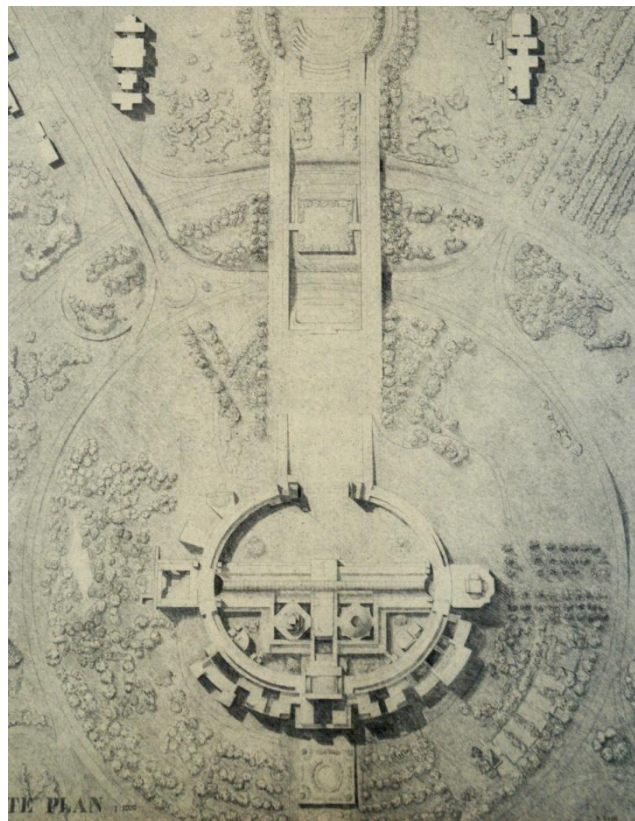

Figure 12: S. Korzeniewski (106 NSW), National Archives of Australia, A8104, 106

---

[47]   Centre Pompidou Issue, *Architectural Design*, vol. 47, no. 2, 1977, p. 103.

[48]   Douglas Norwood (195 UK).

While circular geometry was a common response to the site and the Griffins' planning, the geometry of the oval also featured significantly within the general entries. Despite its relative prominence, the selection of spot-worthy schemes did not include an example of this type. One example was the scheme by Korzeniewski (106) that located the public functions of government within half of the oval with the other half as a semi-enclosed formal forecourt. The language is controlled and abstract but the expression draws from Baroque Rome and it may be this connection between the oval geometry and classicism that had a bearing on the exclusion of this genre from the spotted selections (figure 12).

Conclusion—winning scheme

Within the spotted selection 10 projects received prizes and five were promoted to the second stage. The themes within the second stage were the abstract symmetry of Denton Corker Marshall, the topographical approach of Giurgola, the expressive asymmetry of Madigan, the introverted horseshoe of Parsons and Waite and the restrained British rationalism of Bickerdike. Each of these represented distinct themes and offered a sample box of approaches. They also provided a summary of acceptable responses to the questions posed in the brief regarding the suitable architectural expression. The implications of these questions support an architecture that would not dominate the site through monumental scale, forced symmetry and the language of bygone eras. The discussion within the brief on symbolism was a proactive first strike. As the section on symbolism was couched in passive terms and relied on rhetorical questions, a review of the schemes deemed worthy of consideration reveals the range of acceptable architectural manifestations. The spotted schemes belonged to a much broader range of architectural expression and offer a more detailed picture of the assessors' interpretation of acceptability than that inferred from the second stage participants alone.

The Mitchell/Giurgola and Thorp (177) scheme was the only design that proposed to replace the top of the hill with a topographically formed building.[49] This responded directly to the expressed concerns of the building dominating the site and looking down upon the public. The low profile of the building sat well within the controversy as to whether a building of this scale should be located on Capital Hill. As a climax to the triangle the vistas to the site sweep over the building in the same manner that the public (and children) could once do.[50] The first stage submission by Mitchell/Giurgola and Thorp had all the salient features of the final scheme but did make a limited

---

[49]   Assessor Len Stevens recalls that the Mitchell/Giurgola and Thorp design was the only scheme to take this approach. Interview with A. Hutson, 17 March 2004.

[50]   Public access to the roof from the exterior of Parliament House has been prohibited in fear of terrorist attacks. The temporary bollards that bar access are soon to be replaced with permanent fixtures.

gesture to the asymmetry alluded to in the competition brief. The curved walls symmetrically embrace the two houses and associated administration accommodation which was shown as being able to grow in a piecemeal fashion. In the second stage submission these forms were symmetrically designed signalling a greater commitment to the Beaux Arts compositional undercurrents of the scheme.[51] The issue of asymmetry raised in the competition brief was in part to ensure that by eschewing symmetry then classical monumentality may be avoided. The Mitchell/Giurgola and Thorp design offered a low-key image within a symmetrical framework. It was a non-monumental monument.
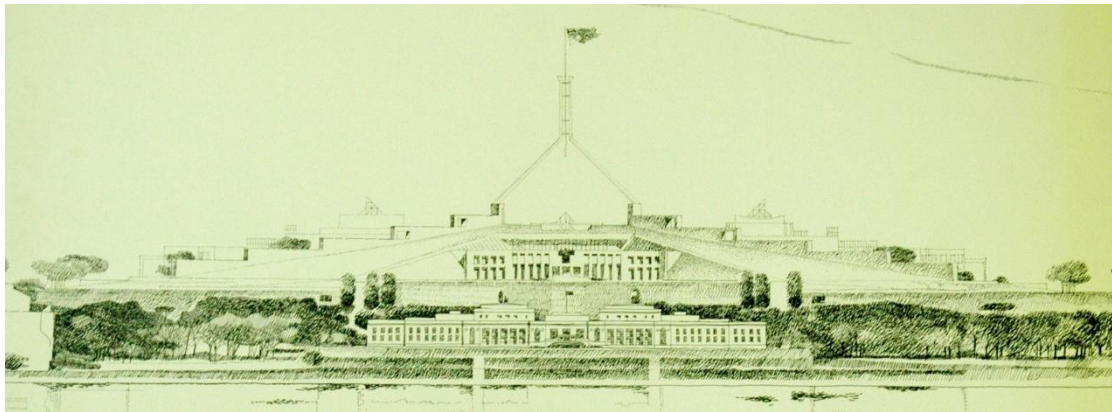

Figure 13: Elevation, Mitchell/Giurgola and Thorp (177 US), National Archives of Australia, A8104, 177

The competition assessors' report on the winning scheme touched on this when they claimed that an 'overpowering building presence' would be 'undemocratic'. Instead the expression of the Mitchell/Giurgola and Thorp scheme will be accessible for all, even children who 'will clamber and play all over its roof'. Presumably the same children 'will not only be able to climb on the building but draw it easily too'. The lack of pretensions of the scheme would allow its simple imagery to become part of the nation's lexicon of kitsch icons 'the obvious boomerang analogy of the curvilinear walls … may in time become as internationally representative of Australia as the kangaroo'.[52] The entreaty for popular acceptance of a design within the conceptual reach of the general public points to the relief felt from the controlling authorities that the winning scheme avoided ostentation and aloofness and that this may dampen the inevitable public criticism of committing the public purse to one of the largest projects in Australia's history. The resultant built topography is a political solution of the most exquisite order, the political parameters for which were firmly in place well before the

[51] Giurgola's architectural education was at the University of Rome under a Beaux Arts framework and he enjoyed an affiliation with the 'Philadelphia School'. Robert Stern, *New Directions in American Architecture*. New York, G. Braziller, 1969; E.B. Mitchell and R. Giurgola, *Mitchell/Giurgola Architects*. New York, Rizzoli, 1983, pp. 8–13.

[52] Parliament House Canberra, Assessors Final Report, June 1980, p. 9.

competition was envisaged. Tracing the political management and concoction of the competition processes and brief it is hard to imagine an acceptable alternative to the winning entry. If the complex criteria to win the competition can be visualised as square hole, the Mitchell/Giurgola and Thorp entry offered a square peg as a perfect fit.
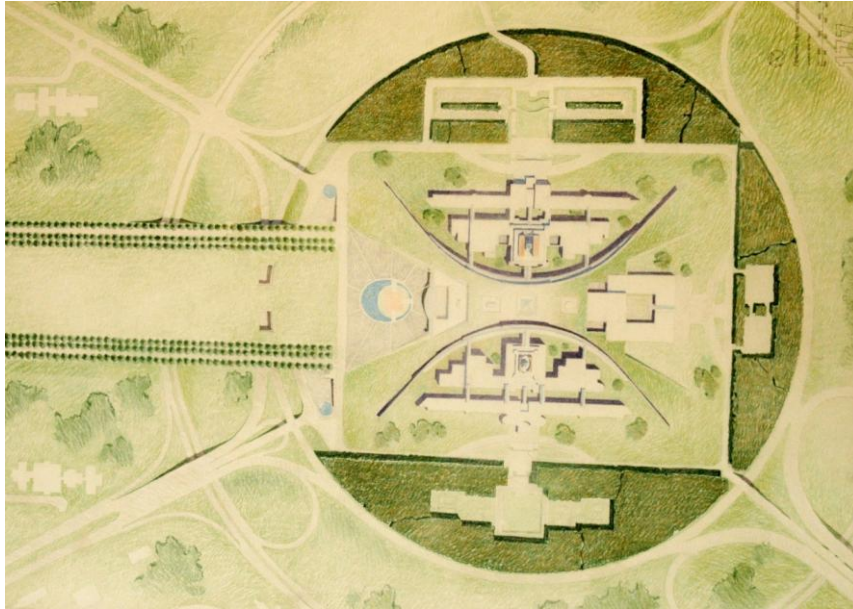
Figure 14: Site Plan, Mitchell/Giurgola and Thorp (177 US), National Archives of Australia, A8104, 177

Question — Will you tell me what this architecture that's been foisted on us is supposed to symbolise?

Andrew Hutson — Well I have spoken briefly about the symbolic expectations of the competition organisers and what we have in this particular design for Parliament House is a symbolism which is supposed to be avoiding monumentality and ostentation. To paraphrase a headline from the 1980s, this building is not meant to look like a 'palace for politicians'. It was meant to look like working houses of parliament. Whether it does or not is open to interpretation but I can perceive from the competition framework that the organisers wished to avoid an outcome of unnecessary grandeur.

Question — As one of probably a handful of people in the world who has seen the designs, do you think the right design won? Secondly, since this building is based on a 30-year design, do you think it has dated?

Andrew Hutson — I knew someone would ask me whether I thought the judges' selection of the winner was the right decision or not. I think everyone has their own opinions about architecture, art and fashion and I think anyone will look at all those entries and find something they would prefer as a potential solution. I don't doubt that for a second. But I do think that the Mitchell/Giurgola and Thorp entry was one of the few solutions that could have won given the way the competition was organised and the context of the political and cultural sensitivities surrounding it. There were very few entries which were able to deal with those pressures in such a proficient and controlled manner. Did I think the right design won? Probably. But did I think it was the only one that could win the competition? Almost definitely.

Now, with regard to fashion—building designs are a testament to the time when they are built and I don't think the fact that fashions and tastes change is relevant when considering whether a building is good architecture. I think they are statements of when they were built and in a hundred years time they'll still be examples of that period. I think that all architects can aim for is for their work to be good examples of a style. The idea that architecture can be timeless is an old-fashioned idea. That's a joke, by the way.

Question — I notice that the tourism authorities tend to play down Parliament House and to attract people to Canberra talk about the vineyards, the sporting facilities, the War Memorial etc but don't mention Parliament House. What can be done to appreciate Parliament House as a great gift to the nation rather than play it down and ignore it?

Andrew Hutson — I don't know that I can answer the question about how you might make it more attractive because it should, for anyone coming to Canberra, be one of the most attractive features here and I'd be surprised if tourists didn't make an effort to come to Parliament House because symbolically it is at the centre of Canberra and there is an air of intrigue about political machinations contained within. You never know whether if you come to Parliament House some of those political situations might spill out onto the foyer or into the forecourt. I think that's a very attractive feature of Parliament House and I don't know what else you could do to make it more alluring.

Question — My understanding is that Parliament House is essentially see-through. There is a very narrow window down at the back of the prime minister's courtyard, it's a long skinny, pencil-like window and you can look all the way through—in theory—and I always wonder what are you looking through to? What's behind here and why does that land axis cut Parliament House in half?

Andrew Hutson — To actually see through the building you'd have to go through the Great Hall, and I think through the prime ministerial executive and then to see the slit window through the back there. For all intents and purposes it stops at the forecourt.

Question — When all the doors are open you can actually see through?

Andrew Hutson — You may, yes, but I don't think it is likely. The other issue is: with what was the land axis supposed to be aligned? The Griffins intended that it would lead to Capital Hill but in their competition scheme the view across the lake shows a mountain behind which actually doesn't exist to that scale and looked a bit like Mt Fuji. You've probably seen it. I think that there was some indication that the axis would line up with that as well as going through Capital Hill. I believe the competition by the Griffins was done without them visiting the site and it was based on topographical maps. I think once they visited the site it was determined that obviously the land axis would logically lead to, and effectively terminate at Capital Hill. In that respect it is not intended to flow through exactly, although that faint possibility is there.

With regard to the idea that you can see through the Parliament, I think that's also part of a symbolic idea of access and should be seen with the symbolic idea of the public being able to walk over the roof of Parliament House. Initially the idea that you could roll over it—and that children could play on it—was a supposedly democratic theme which was taken up by the assessors and the commentators on the final scheme. To say this is a building which is accessible inside and out is to portray it as a democratic building which is not owned by politicians; it's owned by the people of Australia. The fact that you can walk over the top of it and in some cases, you can actually see into and perhaps through it was important. The design was promoted as a way of alleviating the idea that it was an exclusive place. Rather it was intended to be seen as inclusive.

Question — A question that is nothing to do with the architecture but that I have found myself wondering yet again is: is it in the wrong place? Fairly recently Senator Bob Brown made the point that if you are coming over Commonwealth Avenue bridge it is very difficult to get here whereas if you look at other parliaments around Australia, let alone around the world, they're in the city. You can go walking along Macquarie Street in Sydney and there is Parliament House. It's easy to find down the Salamanca Markets in Hobart and I sometimes have wondered whether or not it isn't as accessible to people because they can't walk to it easily.

Andrew Hutson —When there was consideration about changing the site from Camp Hill to Capital Hill there was concern among some politicians that they couldn't

expect the public of Australia to trudge up the hill to visit parliamentarians. So the issue has been in the minds of the planners for a long time and has something to do with the reluctance, I think, to finally bed down where the site for Parliament House would be. Whether they made the right decision again is open to interpretation.

Minority Government: Is the House of Representatives Finally Catching Up With the Senate?*

Scott Brenton

When Kevin Rudd was replaced as prime minister, and in the post-election commentary, it was embarrassingly clear how little we as a country know about our political system. How dare those faceless men knife the prime minister that *we* elected? Yet 'we' in the broadest sense do not ever elect the prime minister, and at the 2007 election only 43 957 Australians voted directly for Rudd in the electorate of Griffith. By contrast, at that same election, 1 760 022 Australians voted for Senator Mark Arbib, one the so-called 'faceless' men who led the Labor Senate ticket in New South Wales. This myth of a popularly elected prime minister, in a large part due to presidential-style election campaigns, propagates another myth that we have a single chief executive with a three-year tenure that can only be terminated or extended by the people at an election. That is not our system. That has never been our system. Presidents have such tenure not prime ministers. The change of prime ministers demonstrates that ours is a proper Westminster-derived parliamentary system that works for two main reasons. Firstly, the executive is ultimately accountable to the legislature, albeit imperfectly due to strict party discipline. The executive must retain the support of the legislature, which in practice was the Labor caucus. Secondly, the executive should be collective with the prime minister first amongst equals. Without engaging in an extended critique of the former prime minister, normally Cabinet should be doing things differently behind the scenes, but if it gets to a point where they feel that the government has lost its way or that they as the equals in the collective executive are being sidelined, then they should act as they did. None of this necessarily lessens the shock when it does happen and of course it can be argued that it should not have got to the point that it did, but it is a crucial accountability mechanism.

One positive outcome was that we finally got a female prime minister in government, without having to go through that tired old debate that would have dogged a female Opposition leader attempting to win government: is Australia ready for a female prime minister? Australians have long been ready, it is the media and faceless men in both major parties that have not been. However, focus groups finally told them as much. It is almost hard to believe that Julia Gillard had to battle for preselection and was initially relegated to the third position on the Labor Senate ticket at the 1996 election. It was not a winnable position but she was almost elected. Imagine Senator

---

Gillard now—she probably would have been an effective senator, as she showed as she guided the government's workplace relations legislation through, what is known as a 'hostile' Senate, where the Opposition actually had a majority for the first few months of the new Labor government before the Greens, and an independent and a Family First senator held the 'balance of power'. Gillard talked tough to the media and stridently sold a more uncompromising government position to stakeholders and voters, but behind the scenes briefed any senator who would listen and negotiated and amended and even sat in the Senate at crucial stages. Now that has been the norm for the past three decades bar three years of Liberal–National Coalition majorities in both houses, which incidentally coincided with coalition senators themselves crossing the floor. Even without a government majority in the Senate, legislation has got though during all those periods, governments have been stable, and the markets have not crashed because of legislative uncertainty.

While government is formed in the lower house, governments can be unformed by the Senate as was demonstrated in 1975. Yet that has not been repeated, even when left-wing parties have had the numbers in the Senate while right-wing parties have governed. It is actually not the minor parties and independents that are hostile and threaten to bring down governments, because they are far less secure in their own positions and usually eager to serve as long as possible and extract concessions from being in those positions. It is usually oppositions that fall into the 'hostile' category, whatever the colour, but the Opposition cannot unilaterally bring down a government anyway. There might be a by-election during this term, but often by-elections are caused by retiring members who suddenly realise that they need to spend time with families yet did not act on that thought before nominating and contesting an election for a possible three-year term—that is not likely to happen during this term. Even if there is a by-election, it will not necessarily be caused by a government member, and even if it is, it might not be a marginal seat, and even if it is, voters will well be aware of the stakes and arguably far less likely to punish a government just because they can. Of course this is not going the stop media speculation, as was the case post-election. Who has the right to form government? Is it who won the most primary votes or the two-party preferred vote? Well the answers to these questions are the same as they have been after every single election. The members of Parliament—and I will not be provocative at this point and include senators even though that is theoretically possible—but for simplicity the members of the House of Representatives decide who among them will serve as the prime minister. The major parties have decided that there should only be two candidates for that position and that members of their parties will automatically support them. It was just after this election that the major party leaders could not just phone each other and concede or give victory and concession speeches on election night, but actually had to talk to other elected members of Parliament and outline a plan for the next three years. Now this

might shock some traditionalists, but traditionally leaders have outlined what they plan to do during the actual election campaign and have properly costed their policies. This time they had to talk to people outside of Western Sydney and Queensland, they had to remember there are more voters elsewhere, in places like Melbourne and Hobart and Port Macquarie and Tamworth. And talk they did for 17 days. How to report this? How could the 24-hour news channels and internet news sites provide an hour-by-hour, blow-by-blow account that we are so used to? By speculating, of course, and invoking fear and loathing. What do we do if no one can form a government? Is the Governor-General compromised? How dare the independents take 17 days to decide? Why is it taking the Electoral Commission so long to calculate the two-party preferred vote? How is it possible for minority government to actually work?

Well if you think 17 days is a long time spare a thought for the poor Belgians or the Dutch. It took about four months for Dutch politicians to conclude a workable coalition agreement in order to govern. The Belgians went to the polls well before us in mid-June, and are still in caretaker mode. So 17 days is nowhere near being a record, albeit Rob Oakeshott's speech in announcing his decision might actually be a record. As for minority government, we here in the ACT know that is normal, and there are currently also minority Labor governments in Tasmania and the Northern Territory and a minority Liberal government in Western Australia. Incidentally, the most unpopular governments are arguably in the other states where there are majority governments. Currently other Westminster-derived parliamentary democracies including the United Kingdom, Canada and New Zealand have coalition or minority governments where a major party is not able to govern with a majority in its own right, which is also the case in many, many other countries. A few years ago in Germany, when neither of the two major parties won a majority, they decided the easiest coalition was with each other and they formed a Grand Coalition, which has also been a feature of other countries throughout history. So let us just get a bit of perspective here. As for the Electoral Commission, part of the reason why it took so long to calculate the two-party preferred figure and why it changed dramatically as seats were suddenly included or excluded, is that we persist with the assumption that only two parties are contenders, and this is not the case anymore. This was underlying the shock. That Coke and Pepsi are not the only flavours of cola, and it even comes in other colours. I am not about to predict the demise of the major parties or the end of the adversarial two-party dominated system, but rather acknowledge that this moment has been a long time coming. Many of these independents are not new phenomena— the collective parliamentary experience of Oakeshott, Windsor and Katter across state and federal parliaments exceeds that of Gillard, Swan, and Abbott. One independent has even been in this situation before in New South Wales.

Independents only have this 'balance of power' because the majors oppose each other. Real power is with the Parliament and all parliamentarians. Any other member could have chosen to be part of the negotiations, but most pledged allegiance to a party, and fair enough, they campaigned for, were supported by and were elected as representatives of parties. However, do not complain when other parliamentarians do not have such allegiances and, without the considerable financial and organisational support of parties, win seats and then attempt to secure concessions for their electorates and constituents. Any other parliamentarian could have done that. Any parliamentarian in the new Parliament can choose to judge any piece of legislation on its merits and propose amendments. I am not actually against parties or even the major parties, but rather the ridiculously strong and uncompromising party discipline that is not a feature of Westminster or Washington. Of course members of the same party are probably going to agree 99 per cent of the time anyway, but is it really necessary to force 100 per cent submission? It is interesting that Australia has such tight party discipline and yet is home to more independents than any other comparable democracy. Every state and territory in Australia has had minority governments, and federal governments have had to take notice of the Senate, which they generally have not controlled. The government now has to negotiate with crossbench members of the House of Representatives as well as senators—so?

This is by way of a long introduction to my previous research conducted here at Parliament House last year as the parliamentary fellow. My observations and arguments are based on a survey of 233 current and former parliamentarians, which represents a credible response rate of almost 40 per cent, and a further 29 in-depth interviews with selected prominent politicians. I targeted parliamentarians who had served in both an upper and lower house, whether at federal or federal and state level; a cross-section of all parties in the last Parliament; independents, including some who have been in the spotlight recently; a cross-section of all states and territories; and a mix of urban and rural and regional. What I was most interested in was: what is the difference between the Senate and the House of Representatives or, more precisely, what is the difference between senators and members? I proceeded from the assumption that outsiders do not really know what politicians actually do—what does the job involve, what is a typical (if there is such a thing) day like, what makes a good representative? What I was surprised to find was that insiders—the parliamentarians themselves—also do not have a particularly accurate perception of what their colleagues in the other chamber actually do.

Parliament House is symmetrically divided with the Senate and senators on one side and the House of Representatives and its members on the other. As one interviewed parliamentarian who has served in both houses sharply observed, 'The chambers are only about 70 metres apart, but it could be a kilometre'. Both senators and members,

along with other occupants, light-heartedly refer to the other side as the 'dark side'. However, it has been the Senate that has copped the most ridicule. Former Prime Minister Paul Keating famously derided the Senate as, 'a spoiling chamber … usurping the responsibilities of the executive drawn from the representative chamber'[1] while ridiculing senators as 'unrepresentative swill'.[2] Others have described the Senate in equally unflattering terms including, a retirement home for time-servers, 'a comfortable Home for Old Men' with their 'weak, arthritic wrists and wheezing voices'.[3] Yet the modern Senate slowly became *more* representative of the wider populace than the House of Representatives. The first two Indigenous Australian parliamentarians were senators, although the House is catching up now with its first Indigenous member. However, women only occupy a quarter of the seats in the House, but over a third of Senate seats, although, of course, as mentioned, the most important seat is now held by a woman. While the youngest women to be elected and to sit in the Parliament were senators, a 20-year-old first-time voter now sits in the House. The first Australians of Asian ethnicity to enter Parliament were senators, although now there is a Muslim member. In the last Parliament, the only openly gay and lesbian politicians were senators. There are a number of other minorities that have found a more comfortable home in the Senate, including, again until recently, minor parties such as the Greens, which has become the first minor party to win a seat in the House at a general election in the post-war period, although they had previously won a seat through a by-election.

Part of the reason why a more diverse range of candidates have been able to win election to the Senate is due to the different electoral system, the system of proportional representation that roughly allocates seats in proportion to vote share, and with a minimum hurdle of about 14 per cent as opposed to 50 per cent for a House seat. Electoral legislation was reformed to introduce proportional representation for the Senate in 1948, and *Odgers' Australian Senate Practice* is unsurprisingly complimentary of the reforms:

> The 1948 electoral settlement for the Senate mitigated the dysfunctions of the single member electorate basis of the House of Representatives by enabling additional, discernible bodies of electoral opinion to be represented in Parliament. The consequence has been that parliamentary government of the Commonwealth is not simply a question of majority rule but one of representation. The Senate, because of the method of

---

1.   Paul Keating, Questions Without Notice: Senate Voting System, House of Representatives, *Debates*, 3 March 1994, p. 1746.
2.   Paul Keating, Questions Without Notice: Loan Council Arrangements, House of Representatives, *Debates*, 4 November 1992, p. 2547.
3.   R. Hughes, 1944, cited in S. Bennett, *The Australian Senate*, Research Paper, no. 6, 2003–04, Canberra, Parliamentary Library, 2004, p. 8.

composition, is the institution in the Commonwealth which reconciles majority rule, as imperfectly expressed in the House of Representatives, with adequate representation.[4]

At every Senate election since 1955, candidates from outside the Labor, Liberal and National parties have been elected.[5] Minor parties and independents have held the 'balance of power' from 1981 to 2005 and again since 2008. I am cautious using this term as it is only a construction, and any senator could theoretically exercise such power on any issue. While minor parties have traditionally been more electorally successful in the Senate, there have been more independents elected to the House of Representatives.[6] Although this is changing, as the Greens have broken through an important psychological barrier by winning a lower house seat and finishing second in another two inner-city and formerly very safe Labor electorates. While it is premature to predict the end of majority Labor governments, Labor is also governing with Green support in Tasmania and here in the ACT, and Labor should be concerned about its longer-term prospects. However, I do qualify this by also noting that in recent times where Labor has governed at the state level with independent support in Victoria, Queensland and South Australia, it has gone on to win convincing majorities at the next election (one important difference was that these were all first-term Labor governments). So it is more complicated but Senate experience suggests that this is only the beginning. Once upon a time it was rare for minor and independent senators to clear the minimum hurdles without preferences, but now senators like Nick Xenophon, Bob Brown, Christine Milne and an increasing number of Greens are winning quotas in their own right. They are becoming less dependent on major party preferences, while Labor at least is finding it harder to win lower house seats without Green preferences.

In the House, savvy independents and minor parties, and voters, have realised that while the electoral barrier may appear higher, our system of preferential voting can be beneficial. Provided one of the majors is pushed under 50 per cent, finishing ahead of the other major with 20–30 per cent of the primary vote can almost guarantee election as the majors are still playing the two-party game and putting each other last. When independents win, they too enjoy the benefits of incumbency and can often go onto very comfortable majorities, so they are doing something right. Who knows what will happen to the independents who supported the Labor government, but looking at the results they can suffer a massive swing and still comfortably retain their seats. To the

4   H. Evans (ed.) *Odgers' Australian Senate Practice* (12th edn). Canberra, Department of the Senate, 2008, pp. 90–1.

5   S. Bennett, *The Australian Senate*. Research Paper, no. 6, 2003–04, Canberra, Parliamentary Library, 2004, p. 2.

6   M. Rodrigues and S. Brenton, *The Age of Independence? Independents in Australian Parliaments*. Research Paper, no. 4, 2010–11, Canberra, Parliamentary Library, 2010.

commentators who were trying to make sense of what their constituents thought in two-party terms, while they may be conservative-leaning seats, the line of argument that only minorities voted Labor in those seats is ridiculous because many are now voting independent and the majority have rejected both majors. Even if there are changes in those seats, I wonder how many other voters in other seats will now think, 'Hmmm, our local hospital is also in need of an upgrade, maybe an independent could achieve that'. While this may be derided as pork-barrelling or bad public policy to privilege certain seats, and I do agree, on the other hand this is politics and has been for a long time. If you want to get noticed and get ministerial visits and local infrastructure funded, make your seat marginal. That is how the majors craft their election campaigns. In the Senate, former Tasmanian Senator Brian Harradine was very effective in winning concessions for his state and also furthering his social agenda. Again, this is not necessarily a good process for making public policy but there is something in the idea of all representatives vigorously pursuing the interests of their constituents and through that collectively determining the national interest. In this 'new paradigm', there are already moves, particularly in the government, to involve the backbench more in policy development, because at a base level a disgruntled backbencher now potentially has a lot of sway. This is how it should be. This is actually a Westminster system and a very important link in the chain of accountability, that of the executive to the legislature, and backbenchers scrutinising the frontbench.

While the Senate has responded to criticisms of laziness and irrelevance and evolved into one of our most important institutions for ensuring accountability of the executive through innovations like Senate estimates committees, the House had not been able to shake the tag of being an 'echo' chamber of the executive. Now all members actually have to turn up to proceedings. My interviews were generally conducted during parliamentary sittings and therefore the bells would often ring mid-interview. Members would often simply check their pager and continue as they were rostered on at certain times, while senators would often have to leave, and it was much harder scheduling senators during sittings. Many members confided, and this also came through the survey data on how members and senators spent their time, that sittings in Canberra were in some ways welcome opportunities free from the usual constituent demands and public ownership that they felt in their electorates. This is not intended as a criticism, because as a member every night could easily be filled with a school speech night or community meeting or fundraiser and fairs and sports events on the weekend. By comparison, Parliament was a sanctuary, a political resort if you like, a coffee with friends at Aussies, a swim in the Parliament House pool or a hit on the tennis court, room service lunch to your office, and if you miss a vote, legislation still gets through. There is some artistic licence here but there was definitely a sense that parliamentary sittings were much more stressful for senators than members, and

conversely and just as legitimately, during non-parliamentary sittings there was more pressure on members than senators. The outcome of legislation could change if a senator missed a vote, and in between chamber work, committee work was very important and time-consuming, while lobbyists and interest groups all wanted the attention of senators, especially the crucial swing votes. Members have already started to feel this but it does come with some other positives. We have already seen some parliamentary reform, always promised by oppositions but never delivered by governments. While it remains to be seen if the standard of question time will improve, the Senate is testament to the fact that the overall quality of debate will likely improve. If only simply because the executive can no longer have its own way and rush through legislation and shut down debate. It will have to convince legislators and be open to negotiation. The few parliamentarians that I spoke to or surveyed who have served in both the Senate and House generally agreed that the standard of debate was better in the Senate and that courtesy and respect were more forthcoming and petty name-calling less, although not absent, but less of an issue in Senate. Senators from all sides, particularly current ones or recently retired ones, felt a much greater sense of excitement and interest in the work of their chamber than their colleagues in the House.

Despite the fate of legislation often being decided by the Senate, it has been the House of Representatives that has been considered the 'main game' in politics. This is after all where government is formed, where the prime minister, treasurer and Opposition leader sit, where most ministers sit and it is snippets of question time from the House that often appear on the nightly news. Then again there are more members, twice as many members as senators thanks to the 'nexus' provision of the Constitution. However, that is where the constitutional requirements end. The Westminster convention that prime ministers sit in the lower house is largely based on the democratic legitimacy of Britain's elected lower house, even though British prime ministers have sat in the unelected upper house. However, both Australian houses are popularly elected and the prime minister is not even mentioned in our Constitution. Senators have also reinforced the convention by switching to the lower house to realise political ambitions. Unlike the United States where the most common path is from the House to the Senate and the Senate to the presidency, in Australia senators with leadership or other ambitions have switched to the House. When Liberal Senator John Gorton became prime minister he resigned from the Senate and contested a lower house seat.[7] Liberal Bronwyn Bishop, Labor's Gareth Evans, and Democrat-turned-Labor Party member Cheryl Kernot also switched with varying degrees of success. Treasurers have been more willing to challenge convention, particularly since the Senate showed that budgets are not sacrosanct and it effectively has the same powers as the House. While budget bills must be introduced into the House of

---

[7]   M. Mackerras, 'From the Senate to the Lodge', *The Australian*, 28 May 2009, p. 12.

Representatives, the convention that the treasurer has to actually sit there has been challenged in the New South Wales, Victorian and Tasmanian state parliaments. I do not deny that conventions are hard to change and that they are not just as important for the stability of our political system as our written Constitution is, but at least our written Constitution has precise and transparent mechanisms to change it. Conventions on the other hand are often just repeated without understanding that there is a historical context and without recognising that they have evolved over time and should continue to evolve. For all the talk of the diminishing importance of our state parliaments and poor performances of some state governments, they have generally been better at recognising 'the times they are a-changing'. When Rob Oakeshott suggested that a Liberal serve in a Labor cabinet or vice versa, he was inevitably ridiculed, but a National has served in a Labor cabinet in South Australia and there have been a few independent ministers in state cabinets, just as there are now Greens in the Tasmanian Cabinet. There are likely to be new precedents in this new Parliament, but the House will most probably find that various state parliaments and the Senate have already confronted these questions a long time ago.

They might also discover some other exciting innovations. One of the most common areas of Senate envy amongst members was Senate estimates committees, but also the committee system in general. This came through most strongly from parliamentarians who have served in both houses and also for most members in general this was the most dominant perception of the work activity of senators. Members, particularly shadow ministers revealed that they currently feed questions to their Senate colleagues during estimates hearings via laptops and mobile devices and would relish the opportunity to question public officials directly. Similarly, it is only ministers in the Senate that generally front the committees, even though there are far more ministers in the House. There have been unsuccessful attempts to replicate estimates committees in the House, and there are some signs that the new Parliament might be more conducive to another attempt, possibly with some success, but I would go one step further and radically propose that rather than two doing similar things in parallel, the same estimates process should involve all parliamentarians. There should be some parliamentary mechanism where all parliamentarians can question any member of the executive. Really the only other times senators and members currently interact are in their respective party rooms and the comparatively few joint committees, or informal situations such as the dining room, the airport or the ABC's *Q&A* televised panel discussion. Imagine Senators Bob Brown, Barnaby Joyce or Nick Xenophon directly questioning Prime Minister Julia Gillard or Treasurer Wayne Swan? These are the sort of democratic innovations we should be debating, not just the banal backwards and forwards on the pairing arrangements of the Speaker.

Well that is Senate envy, but senators have been known to also suffer from what could be called representation deprivation syndrome or a longing for constituents and electorates, or more harshly for legitimacy. We often hear that the Senate is for the states and the House for the people. Once again this is a selective reading of history. Certainly the decision to transplant and graft the US federal system and its model of a powerful state-based upper house onto quite a different British system was a political compromise to placate the smaller states. Even the constitutional framers during the conventions of 1890s acknowledge that politically it would not be contests between states in the Senate but contests between ideologies. The voting record shows very clearly that debates and divisions have never pitted states against states. Certainly there have been a few issues where non-Labor senators in one particular state have crossed the floor, but nothing so significant as to warrant the description 'states' house' and indeed suggestions to include the word 'states' in the name of the upper house were explicitly rejected during the constitutional conventions.

The more popular conception of the two houses among the parliamentarians surveyed was that the lower house was the house of government and that the Upper House was the house of review, with about two-thirds of both current members and senators choosing that distinction and slightly lower proportions of former members and senators. Not a single current senator chose the house of the people/house of states distinction. Instead, parliamentarians in both groups observed that with the evolution of the Senate there is now an expectation within the government that the substantial debate and amendments will occur in the Senate and through its committees. However, House debates are not meaningless or ineffectual, as ministers and their offices still follow those closely, take note and make the amendments during or after the Senate process. This is widely seen as being more efficient. Contrary to the predictions that the legislative flow will be disrupted, our institutions will evolve to suit the circumstances, and the House will evolve just as the Senate has. One thing that does not change in the new Parliament is that the government will have to negotiate with either the Opposition or crossbenchers to get its legislation through. It does not really matter whether those parliamentarians are in the House or the Senate, and if managed appropriately, it should not result in a longer process, and even if it does, why is this a bad thing? More time, more scrutiny, more consultation, more perspectives does not necessarily lead to no outcomes but could lead to better outcomes. It is not as though Labor in majority was known for action, and rather had a penchant for summits and reviews and talking to anyone bar other elected parliamentarians. For Labor there is actually a benefit in having a Green in the House because the Greens will assume this mystical balance of power in the Senate in July 2011, so they can commence negotiations with this one party in the House. I think they will also have a much less frustrating time negotiating with the independents in the House than with some unnamed senators in the past.

As I mentioned earlier this has been a feature of the Senate for much longer because its proportional representation system better represents the will of the people. Putting the equality of states issue to one side, in terms of the national vote shares being translated into seats, the permutations of Senate seats have been a much more accurate reflection of how the people actually voted. The House's electoral system traditionally tends to reward a major party with a much greater share of seats than its vote share. So governments have been governing without majority popular support in terms of primary votes for quite some time—since the 1975 election after the Dismissal in fact—which was the last time a government won more than 50 per cent of the first preference votes. Since then, the majority of Australians have actually voted for the other parties at an election and not the governing party or parties. This election result forces Labor to build majorities that reflect majority popular support. At a basic level, the combination of Labor, the Greens and the three independents who supported Labor is the majority both in seats and primary votes. Had those independents gone the other way and supported the Liberals, the Nationals, the Liberal Nationals, the Country Liberals, and the Western Australian Nationals—these are all the parties in the Coalition—without the Greens and their bloc it would not have been representative of the majority of primary votes. However, that's our system, and it would have been a legitimate government too, it is just to provide a different perspective.

One thing the House will probably never copy from the Senate is the proportional representation election system, as the concept of locally based representation is very strong. In the survey I asked parliamentarians who or what did they think that they primarily represented. About a third of current members chose a 'defined geographic area' and a further quarter chose the option 'geographic area through a party' (or vice versa). Interestingly, this was the same for senators, with just over a quarter choosing the same option and a third of respondents split between 'defined geographic area' and just 'party'. Notably not a single member just chose party. This also came through in the interviews with a stronger sense of local attachment for members and a stronger feeling of being party advocates for senators. This is not particularly surprising given that in many parties senators are preselected through a much more centralised party process whereas many preselections for seats in the House have some degree of local party involvement. What was surprising was the almost condescending dismissal of the Senate as a parties' house, even though party discipline is just as strong in the House and is used to stifle debate and negotiation. Another surprisingly claim by members was that the biggest difference is that senators do not have constituents, implicit in which was that members work harder because of this.

Yet senators do have constituencies, they are just not necessarily geographically contained in a defined electorate the way that a member's constituents are. Most

senators pursue particular policy interests and develop policy expertise and key stakeholders within that area become their constituents. It could be unions, or an industry or employer group, farmers, refugee groups, environmental organisations, churches, the list goes on. Senators become key advocates and often become known for pushing certain issues onto the agenda with a freedom that members do not always have. Senators also have more traditional geographic constituencies with the major parties realising long ago that they could be key campaign agents. Once upon a time, with the exception of Tasmania, senators were based in the Commonwealth Parliamentary Offices in the central business districts of the capital cities. Over the last few decades there has been a shift to the suburbs and to the regions. Tasmania has always had a higher degree of geographic spread, but on the mainland the parties realised that it was a waste to have taxpayer-funded offices hidden away in inner city high-rises and moved to shopfronts in electorates where they did not have lower house representation. It gave them visibility, but less cynically, it also gave constituents more points of contact. Senators revealed in the interviews and surveys that constituents would often come to them after trying the local member or a department and perceiving them to be unsympathetic to their concerns. Unlike one local member, if that person happens to hold an ideological position different to your own, there are twelve senators as alternatives, representing a wider range of viewpoints. Parties have now formalised this role, with 'duty senators' allocated a few marginal and Opposition-held electorates, and again the surveys revealed that senators are attending more and more public functions and community events and increasingly becoming well-known or in some cases better known than members. Many crossbench senators, or senators just willing to speak their minds, have become national political figures in a way that very few non-ministerial members have been able to. Again, like their senator colleagues before them, crossbench members are developing significant profiles, and many people now know the names Oakeshott, Windsor and Katter.

Thus far I have couched negotiation in largely positive terms but what about accusations of certain, shall we say, eccentric politicians holding governments to ransom or hostile senates or another 1975. And of course, to borrow from Oakeshott, do not mention mandates. Well all the crossbenchers involved negotiated outcomes to benefit what they saw as the greater good and not just in the interests of the own electorate. Indeed, the common criticism was that some of them went beyond just their own electorate and their immediate electoral interests. Recent experience from the Senate shows that, and once more not mentioning any names, the most troublesome senators have been the ones expelled from a party or elected off a low base with preference deals from other parties. These are problems with our electoral system and candidate selection within parties rather than the institution of the Senate or the presence of the crossbench. As for hostile senates, there is no such thing. There are representative or democratic senates, so when the government is defeated it is

because a majority of senators representing a majority of people after deliberation, vote to defeat legislation. Crossbenchers alone do not have the power to do anything unilaterally; they have to be supported by at least one of the major blocs. Without getting into the 1975 Dismissal debate, if the government does fall it will be for a good reason, and again is a key accountability mechanism in our system. Think the New South Wales Government, where the governing party has the power to last until the bitter end, which is not necessarily a good thing, and so-called stability or rather longevity does not always lead to good outcomes. In any case, the chain of events in 1975 was propelled by the major parties and not genuine crossbenchers. Finally, mandates are another political construction that are rarely based on majority opinion. Remember that governing parties rarely win a majority of votes, and sometimes do not even win the majority of the two-party preferred vote, so a mandate based on the majority of seats in one house is not the strongest representative claim. After this election though, neither side is in the position to claim a mandate, which is another positive because mandates are not necessarily the basis of good public policy. The best legislation is legislation that changes as it makes its way through Parliament—that is why we have a parliament and not a one-party state. Furthermore, each member or senator is elected on a platform or mandate of sorts and cannot be expected just to abandon it. So yes, the Opposition has every right to oppose everything and it has always had that right.

The uncertainty in the outcome of legislation should not be something to fear but something that makes politics more interesting and exciting. Democracy is not premised on providing certainty: authoritarian regimes do a much better job at that. Furthermore, majority government does not provide the certainty that some commentators like to claim. Without commenting on the merits of the policy, the previous majority government's mining super profits tax was not the product of a certain or predictable process. Majority governments often embrace new policies that they did not take to an election, or abandon elements of their published platforms. I do not want to get into whether that is good or bad but simply note that these decisions leading to these outcomes are made behind closed doors. One of the recurring themes from members and senators of the major parties was that the best debates actually occur within the party rooms, and one even suggested putting cameras in there. I think these admissions are really concerning. Of course it is understandable that the parties, and indeed voters, do not like public displays of disunity, but the way that has been interpreted means that we are missing out on some of the best policy debates and important information on where our local members really stand on key issues. This new Parliament does present an opportunity for more public debates, with proposals for debates on euthanasia and the war in Afghanistan already being mooted.

So in conclusion, I do see this election result as the first and quite small step towards positive political change. Just as it has taken the Senate decades to evolve, so too, some of the reforms that the House has made will be reversed when a major party takes control again, but some will be consolidated and built upon. I am not predicting the end of the two major parties, as I think they will still be the dominant players in any alliance or coalition and continue to in effect produce the candidates for the prime ministership and most of the Cabinet. And while their collective share of the vote had been slowly declining over time, the overwhelming majority of voters still support them and there have been swings back at some recent elections. The next election will more than likely produce a majority government, as has happened at the state level. However, I do predict that voters' attitudes will change. A Senate where one side does not control the numbers has come to be seen as a good thing by a significant proportion of voters. Younger voters, in particular, are being socialised into a political system where there are more than two choices and that is where the partisan attachment is breaking down most dramatically. However, that also brings volatility and just as easily as there are swings away from one party there can be a swing back. Nor am I actually against the majors, rather I am against artificial two-party systems with strong party discipline when there are clearly more than just two perspectives in the community, and more than one perspective within any party. If a majority of Australians gives their number one vote to one party, then that party should have a majority but that is not happening. If Australians are simply choosing between two parties, they have a two-party preferred vote, but again that is changing. The Senate and senators have changed, and now the House and members will have to if it really is the *house of representatives*.

***

Question — The first woman member of the US Supreme Court, Sandra Day O'Connor, now retired, has seen it fit to give prominence in her retirement to the persuasive influence of studying in the curriculum of the United States' schools, particularly in Washington DC, the notion of civics. I wonder if you would comment on that and also on how to give prominence in a very competitive national curriculum to such an idea and how to give prominence to it by prominent people taking part.

Scott Brenton — I think former senator Margaret Reynolds has spoken on exactly that issue in a previous Senate lecture last year and there are moves to do that. One of the controversies, though, has been how to do that in a non-partisan way and that's where there's been a bit of caution in preceding. It is quite clear that we do need to know more about the very basics of our system. It's not just people in schools, people in universities or the wider community. I think the biggest group, the most important

group that needs to undertake these sorts of courses is political journalists. That was what was most shocking in this election commentary—the very simple, basic questions that they were asking as if there were no answers where there *are* answers and had they actually done Politics 101 they would know very clearly what those answers were. They were then contributing to some misinformation and fear within the community. So I think it should be compulsory for political journalists to actually do some basics for politics. I do support civics and politics courses in schools; it just has to be designed in such a way that it isn't partisan or politically contentious.

Question — You referred to estimates hearings. I was wondering whether the members and the senators to whom you spoke had different views towards their committee activities more generally and also do you think there will be a change in that now that the government doesn't have control of the House.

Scott Brenton — Committees were one thing that came out very strongly in both the interviews and the surveys. The House does have committees, very valuable committees as well, and they actually commented, which I found quite interesting, that they were much more collaborative, much less partisan than the Senate committees. The flipside to that is that because they weren't necessarily dealing with very contentious pieces of legislation, they were actually dealing with pieces of legislation where there generally was bipartisan support, it was just nutting through the details of it. The two different committee systems have complemented each other very well in that respect but at the same time there was a very strong desire amongst members for estimates committees—they wanted to be asking the questions as well. I think there will be moves, and there have been moves in the past, to introduce estimates committees in the House. But the problem has been because the government has controlled the numbers they haven't been as effective as they perhaps could be. I think that in this new Parliament there will be moves once again, particularly from those few members who have served in the Senate, and I'm thinking here of people like Bronwyn Bishop who would be very keen to see it. She was one of the chief interrogators and really made a name for herself through those estimates committees. On the other side I think that one difficulty, one challenge, will be that senators can do that because they don't have the same sorts of constituent demands. They can spend more time away from their home undertaking those sorts of committees whereas it's much more challenging for members to travel the country during non-sitting periods when they're doing some more investigative committees. They do do that but it does seem to be much more challenging for them compared to senators.

Question — Given the structure of the Senate and the way the states are represented in the Senate and the way the territories aren't particularly represented in the Senate,

how do we move forward reforming the Senate so that it is actually representative of the population as a house of review as opposed to a states' house?

Scott Brenton — I previously looked at this issue of reform of the Senate. I think that one thing that could be done—I doubt it ever will be for many sorts of political reasons—but one thing that could be done is retaining this proportional representation system but having it based on national vote shares. Now of course the smaller states will be up in arms—they don't want to lose representation etc—but one very simple way of getting around that is that you require parties to order their candidates such that they have to select someone from every state and territory in their order of election. That way you would still be getting equal numbers from the states into the Senate but it will be based on national vote share so you couldn't get the situation that we have at the moment where I think in NSW a vote is worth 10 times less than one in Tasmania. By doing that as well you also bring down those thresholds so you get much more precision in how the votes are translated into seats. I think that could be a useful way of doing it. The other thing that has happened now that we have gone back to a Senate that isn't controlled by one side is committees have once again been reformed. When the coalition won control they very much reformed the committees to give them more power in those things. Those institutions are also very important.

Rosemary Laing — Could I perhaps add something there Scott? There are some interesting tables in that well-known work *Odgers' Australian Senate Practice* which show how the proportion of people voting for the Senate nationally is very closely reflected in the actual distribution of seats. I just throw that in.

Scott Brenton — No, that's a very good point. So even without that sort of reform it's still in effect happening. But the other point about the territories—I think it's an outrage that territorians don't have the same sort of vote weight that citizens in the states do but again it's a political thing. They're not going to increase the number of seats because the coalition is less likely to win those seats. There seems to be a partisan advantage there so I can't see that happening but really it should be because as it turns out territory residents are probably the most politically engaged in the country, yet have the least representation.

Question — Minority governments have been given a very bad name, I think in Australia in particular, and yet as you say there are minority governments going on around the country. Clearly it's in the major parties' interests to demonise minority government. I presume that's why it's got such a bad name because in actual fact it doesn't produce unstable government. Is that your sense of why there is such a negative agenda around that?

Scott Brenton — Yes, absolutely. I think one of the most comical aspects was when the coalition was going on about this Labor/Greens/independent alliance and all of these different views. As I mentioned in this speech, the coalition actually consists of multiple different parties because they're different now in Queensland and the Northern Territory so there are actually five parties in their coalition and one of them was saying 'don't necessarily count me in to that, I haven't actually said that I am going to support it'. They are a multi-party coalition in a sense so why there is this fear of another multi-party coalition getting up is quite odd. But then it is a political thing to demonise minority governments, to scare people into swinging back and voting for the majors.

Question — I'm just wondering how amazing it is that in a so-called democracy called Australia that very little attention is paid to the fact that the press is so biased. The press belongs to the Media, Entertainment and Arts Alliance union which is traditionally controlled by the Labor Party and what's amazing is that in this democracy every single interview that you saw on ABC, four-fifths of the interviews, every time they would be interviewing someone from the Liberal Party the interviewer methodically, and this goes across the board on every single ABC program, they methodically cut them off, they never let them finish a sentence. Why doesn't anyone say something about the media and why don't they teach them to be diplomats instead of cutting people off?

Scott Brenton — I think the issue of bias is an interesting one but I don't think you can say that it's all one-sided. You could look at the ABC but then you could look at the *Australian* and Sky News and I think there's bias in all media organisations. But the point I want to make is that research tells us that we as consumers will actually choose the outlets where we agree with them anyway so the media isn't actually that great at challenging or changing our points of view, it's good at reinforcing our existing points of view. Where we do actually come across conflicting information we are more than likely to disregard it. So I'd be cautious of seeing that as necessarily swaying public opinion in that way. The other point to make is that younger consumers aren't actually going to these traditional sources anyway, they're using much more diverse sources of information, so again when talking about the ABC and talking about newspapers they're not actually reaching out to the masses of voters in the same way that they have done in the past.

Strengthening the British House of Commons: The Unexpected Reforms of 2010*

Meg Russell

On 10 June last year, the then Prime Minister Gordon Brown announced the establishment of a new committee to look at reform of the House of Commons. The committee was to be chaired by the highly regarded backbench Labour MP Dr Tony Wright, who was a well-known advocate of reform. The committee was to be asked, in Brown's words, to:

> advise on necessary reforms, including making Select Committee processes more democratic, scheduling more and better time for non-Government business in the House, and enabling the public to initiate directly some issues for debate.[1]

I will speak only about the first two of these three topics: making select committees 'more democratic', and scheduling more and better non-government time. These were the issues that the committee considered most substantive, and on which it made most progress.

I should clarify that in the British House of Commons select committees are specialist committees which shadow government departments, conducting executive oversight and investigations, but not looking at legislation. (The committee stage of bills is considered by a different set of committees, now called 'public bill committees'.) There had, as I will describe, long been controversy about how the select committees were appointed. As I will also describe, there had not been the same level of controversy about the scheduling of non-government business.

To cut to the end of the story briefly, following the establishment of the Wright committee, wide-ranging and significant reforms were both proposed and adopted. These included a complete overhaul of how select committee members and chairs were appointed, and the establishment of a new Backbench Business Committee, with responsibility for scheduling non-government business in the chamber for roughly one day per week. Both changes significantly reduced the power of the party whips: in terms of patronage, and controlling the agenda, respectively.

---

[1] House of Commons Hansard, 10 June 2009, column 797.

I will explain a bit about these reforms: how they came to be devised, why the Wright committee proposed them, and what they will mean. But I also want to answer the obvious question which is probably already running through your heads: how on earth can this have been allowed to happen? In Britain, like Australia, the lower house of parliament is seen as a strongly executive-dominated institution. Like you, we normally have single party majority governments. Parliamentary parties are largely cohesive in their voting, meaning the government is pretty much assured a majority.[2] Hence it's considered very difficult to achieve reform which doesn't have government backing, and government is unlikely to back reforms that will result in a stronger and more independent House of Commons. Yet the Wright committee reforms did just that. So the obvious question is why? And indeed how? I hope to address these questions in my talk.

I will start by giving you three essential bits of background: on the debates in recent years on reform in the two areas that the Wright committee tackled, where I will argue that the circumstances pertaining to each were very different, and, third and crucially, on the political environment in which the committee was created. Next I'll describe the establishment of the committee, its deliberations, and conclusions. From here it will already be clear that achieving reform wasn't easy: there was resistance from the start. Third, I'll talk about the battle to get the committee's recommendations debated and agreed. Here things got very tough and reform might easily have been blocked. Finally I'll reflect a bit on what we are left with and what we can conclude about the new parliamentary arrangements and the reform process.

Parliamentary reform in the United Kingdom

First, a few preliminary words about parliamentary reform in the UK, from a slightly more academic perspective. In recent years, academics have asked which circumstances are necessary for parliamentary reform to happen, in our usually executive-dominated system. The best established answer has been provided by Philip Norton, who suggests that there are three essential prerequisites:
- First, a well worked out reform agenda, which has already set out what needs to be done;
- Second, a 'window of opportunity', which Norton says usually comes shortly after a general election, when politics is still to some extent in flux;

---

2   Though the extent to which the British parties are cohesive should not be overestimated, and there are many more instances of rebellion (or 'floor crossing') in Britain than there are in Australia. See P. Cowley, *Revolts and Rebellions: Parliamentary Voting Under Blair*. London, Politico's, 2002; P. Cowley, *The Rebels: How Blair Mislaid His Majority*. London, Politico's, 2005.

- Third, leadership, which he suggests 'may come from the back-benches but may also come from the Leader of the House (a government minister who also has a responsibility to the House), or from a combination of both'.[3]

Norton clearly based these criteria, published 10 years ago, on major reforms that had happened in Britain; particularly in the 1960s and 1970s. His three-point framework may help us consider what brought about the reforms of 2010. But as we will see, it has been questioned by other scholars.

The back story

So now I'll say a bit about the background on the Wright committee's two key areas of reform: to select committee appointments, and scheduling of business in the chamber. As already indicated, the circumstances with respect to each were very different. The first had been a long-running saga, but the second was less well established and well defined on the agenda of reformers.

Select committees

The modern select committees were established shortly after the 1979 general election. This is widely seen as the last time a major reform took place at Westminster to strengthen the Commons against the executive, and clearly influenced Norton's framework. The committees are well-respected, but there had long been concerns about their powers, resources, and particularly how their members were chosen. In 2000, the 'Liaison Committee', made up of select committee chairs, published a critical report calling for reform.[4] Their most contentious proposals related to the composition of the committees. In practice, appointment of members lay in the hands of party whips, though they had to be approved by the House.

The Liaison Committee proposed that committee appointments be made instead by a group of senior MPs who would act more independently in the interests of the whole House. But government strongly resisted these proposals, and failed to make time to debate them before the 2001 general election.

After each election the select committees are reappointed, and in 2001 matters got a great deal worse. The Labour whips used their power to block two troublesome former committee chairs from membership of their committees. This caused a huge

---

[3]   P. Norton, 'Reforming parliament in the United Kingdom: the report of the Commission to Strengthen Parliament', *Journal of Legislative Studies*, vol. 6, no. 3, 2000, pp. 1–14.

[4]   Liaison Committee. *Shifting the Balance: Select Committees and the Executive* (First Report of Session 1999–2000). London, House of Commons, 2000.

row when the chamber was asked to approve the names, and MPs actually voted against the list. The whips had to reinstate these members, with the revised lists then approved, and the members in question re-elected as chairs by their committees.[5]

It seemed that the Commons was ready for reform, and—unusually for a government minister—the new Leader of the House of Commons, Robin Cook, was ready to support this. Cook was a respected pro-reform parliamentarian, and had recently been reshuffled by Tony Blair—against his own wishes—from the position of Foreign Secretary. He had spoken out internally against the whips' decision to remove these committee chairs, and now wanted to change the system.[6] He therefore brought forward proposals for reform, similar to those previously proposed by the Liaison Committee.[7] They were put to the vote in the chamber in May 2002. As Cook said in the debate the 'nub of the matter' was that:

> Committees of Parliament, appointed by Parliament to scrutinise the Executive, should be free from party influence, particularly the party representing the Executive.[8]

MPs thus had a rare opportunity to vote to strengthen parliament against the executive.

But despite their previous move to block the whips' choice of names, the House voted against Cook's new system. Votes on procedural matters are officially unwhipped, but there was clearly collusion between whips on both sides to see the reform defeated. As some commentators bitterly noted, all of Norton's three criteria had been met—established proposals, a clear window of opportunity, and leadership by the Leader of the House—and still reform had failed to happen.[9]

After this, there were no reform opportunities, but proposals continued to be made. In 2003 a cross-party group of parliamentarians proposed that, rather than being appointed by any kind of grouping, select committee chairs should instead be elected by a secret ballot across the whole House.[10] This was later taken up as policy by the

---

5   For details, including of the subsequent failed attempt at reform, see A. Kelso, ' "Where were the massed ranks of parliamentary reformers?" "Attitudinal" and "Contextual" approaches to parliamentary reform', *Journal of Legislative Studies*, vol. 9, no. 1, 2003, pp. 57–76.

6   I was working for Cook at the time as a specialist adviser. See also his memoir: R. Cook, *The Point of Departure*. London, Simon and Schuster, 2003.

7   Modernisation Committee, *Select Committees* (First Report of Session 2001–02). London, House of Commons, 2002.

8   House of Commons Hansard, 14 May 2002, column 651.

9   Kelso, op. cit.

10 Parliament First, *Parliament's Last Chance*. London, Parliament First, 2003.

Conservative Party. This is where the issue rested when the Wright committee was formed.

Scheduling of (non-government) business

While there had been bitter battles over this matter over a decade, the same could not be said for proposals about the scheduling of non-government business, and establishing a Backbench Business Committee. This proposal had been made in only one report, in 2007, and I am proud to say that I wrote it.

The research which spawned the report was inspired by the time I spent working for the reforming Leader of the House, Robin Cook.

Not only because of the 2002 debacle, but including this, it was clear that there was nobody who really 'spoke for' the House of Commons. The Leader was compromised by being a member of Cabinet. The Speaker, at that time at least, was weak.[11] The Liaison Committee only represented the select committee chairs. Furthermore, there was an clear problem of members' access to the agenda. The Liaison Committee couldn't get its suggestions for reform debated, because in practice only government could put procedural changes to the vote.

This was traceable to the infamous Standing Order 14, which starts, 'Save as provided in this order, government business shall have precedence at every sitting'. There are exceptions, importantly for Opposition business, private members' bills, adjournment debates and questions to ministers. But while standing orders protected time for government, Opposition, and individual members, there was little provision for backbench members collectively, including for select committees, to initiate debates—and no provision to force decisions. When working for Robin Cook—who ultimately resigned from the government over the Iraq war—this was illustrated by members' inability, for months, to force a debate and vote on that matter. In practice government whips decided which debates would be held, and their plans were put to the House in a 'business statement' as a fait accompli every week.

In response to these kind of concerns, some had noted that many other parliaments had a committee officially representing the whole chamber, which made decisions about parliamentary scheduling. They therefore proposed that the Commons should adopt some kind of 'business committee'.[12] But these proposals were often vague

---

[11] This Speaker (Michael Martin) was forced out as a result of the expenses crisis, and his replacement (John Bercow) has proved to be a more forceful and independent-minded character.

[12] E.g. Conservative Party, *Strengthening Parliament: The Report of the Commission to Strengthen Parliament*. London, Conservative Party, 2000; Conservative Party Democracy Taskforce, *Power to the People: Rebuilding Parliament*. London, Conservative Party, 2007; Hansard Society, *The*

about who should sit on a business committee, or what exactly its functions should be. Notably, they were not strongly grounded in study of the overseas committees to which they referred. There was therefore need for more detailed comparative study.

So what brought me to Canberra four years ago was a study of how other parliaments managed these questions, in New Zealand, Germany and Scotland, as well as Australia. The first three countries all have some kind of business committee, but what I found was that all these committees were completely dominated by party whips. They provided greater access to the agenda for non-government parties, but did nothing to promote opportunities for backbenchers or MPs working cross-party. Their meetings were a mere formality, lasting just a few minutes, to endorse the whips' decisions. This was not attractive. What seemed more interesting was how here in the Senate the default was not for time to be owned by government, but for it to be owned by the House. And in Scotland, the weekly business program was not presented as a fait accompli, but could be amended and voted upon.

Our research report therefore recommended a unique British system, drawing on the best of what we had seen.[13] We concluded that:

- it was desirable 'to establish a far clearer dichotomy between "government time" and time for "House Business" or "backbench business", with the latter guaranteed … ';
- 'at least half a day, and up to a full day, per week';
- that 'the responsibility for allocating time between different items of business on this part of the agenda should no longer rest with the [whips]'; and
- instead that a 'new committee made up of backbenchers (the "Backbench Business Committee") should be established to determine the timetable' of this business.

Furthermore, backbench business should allow members to force votes, including decisions on committee reports, members' motions and bills.

These were detailed proposals, unlikely to attract much attention outside Parliament, but they were launched within Parliament to an audience of members and officials. The speakers crucially included Tony Wright, who was a member of the steering group for the project. The relevance of this will shortly become apparent.

Challenge for Parliament: Making Government Accountable. London, Vacher Dod, 2001; Parliament First. *Parliament's Last Chance*, op. cit.

[13] M. Russell and A. Paun, *The House Rules?: International Lessons for Enhancing the Autonomy of the House of Commons*. London, Constitution Unit, 2007.

The MPs' expenses crisis

The last crucial piece of background is one with which you must all already be familiar: the disastrous MPs' expenses crisis which engulfed Britain in 2009–10. This crisis began in May 2009, the month before Gordon Brown announced the establishment of the Wright committee, with publication of MPs' expenses details in the *Daily Telegraph.* There followed months of accusations, public and media outrage, parliamentary resignations, retirements and deselections, and the resignation of the Commons Speaker.[14] This was genuinely a major crisis, raising concerns about whether public confidence in parliament, and the political class, could ever be restored.

The crisis also briefly focused attention, as it rarely focuses, on parliamentary reform. There were reforms to deal with the immediate problem: ultimately through establishment of the Independent Parliamentary Standards Authority to regulate and police expenses. But the calls from reform-minded pressure groups went far further, for example including demands for wholesale electoral system change and Lords reform. Most of these proposals had little or nothing to do with the problems at hand, but campaigners for reform seemed to share Rahm Emanuel's attitude, that one should 'never allow a crisis to go to waste'.[15]

It was in this febrile environment that Tony Wright wrote to Gordon Brown, suggesting that he:

> announce a new special committee on Parliamentary Reform … with a mandate to come forward quickly with reform proposals.

He went on:

> The key reform would be to separate the control of Government business from House business. There is already a sensible proposal on this in a recent research study by Meg Russell at the Constitution Unit called *The House Rules?* It would not threaten Government business, but it would help to make a more vital Commons, from which other reforms would flow. A further and well-rehearsed reform would be to elect the chairs of

---

[14] For details see A. Kelso, 'Parliament on its knees: MPs' expenses and the crisis of transparency at Westminster', *Political Quarterly*, no. 80, vol. 3, 2009, pp. 329–38.

[15] Rahm Emanuel, Chief of Staff to President Obama, 7 November 2008. On 19 November he said: 'You never want a serious crisis to go to waste: what I mean by that is it's an opportunity to do things you could not do before … The problems are bad enough that they lend themselves to ideas from both parties for a solution'.

Select Committees (and to improve committee selection procedure more generally) … [16]

Wright did not know Brown well, and evidently did not have high expectations of success. He was therefore stunned to hear Brown's announcement creating just such a committee, with himself in the chair, nine days later. But in the depths of the crisis, Brown clearly saw this as an opportunity to restore parliament's reputation. And as a chance to restore his own reforming reputation, having disappointed so far on constitutional reform.

Establishment of the Wright committee

Following this lightning-fast action, things slowed down considerably and became gradually more difficult. First, there were significant delays in actually setting up the Wright committee. Given the restrictions on agenda access already outlined, it fell to the government to table a motion for the House to vote upon to create it. Such a motion was first tabled two weeks later. But due to wrangling over the committee's terms of reference and whether it should be able to consider scheduling of government as well as non-government business, it wasn't until 20 July that government made time for a debate, and the actual establishment of the committee.[17] This was an early portent of the difficulties ahead. It also added to the practical difficulties already facing the committee, which was required to report by the end of the parliamentary session, on 13 November. As the Commons went into summer recess on the day after the motion was agreed, and didn't return until mid-October, the committee now had only four sitting weeks to deal with a large and complex agenda.

By the time the motion was agreed, the committee members had already been chosen. In an unprecedented move, again presaging what lay ahead, all parties chose to elect their members of the committee. Given that one of the key topics for the committee was how select committee members were chosen, it was clearly considered inappropriate that its members should themselves be selected by whips. What resulted was a mixed, but largely senior, membership.

Crucially, the committee was also well served by having a very senior clerk. At its first meeting it agreed that I should be appointed as its specialist adviser.

---

[16] Letter from Tony Wright to Gordon Brown, 1 June 2009.

[17] For a longer account of this process, see L. Maer and R. Kelly, *Establishment of the Select Committee on Reform of the House of Commons*. London, House of Commons Library, 2010.

The committee's work and its conclusions

The committee clearly had to work very fast, and drafting work began immediately, using existing proposals as an initial guide, and offering options over the summer to consider. Despite the Commons officially being in recess, papers were circulated to members, and an early meeting was held in September. Alongside this the committee held a more open seminar, to which outside experts on reform were invited. One of the themes that came through very clearly at this event was that the power of the party whips, and their resistance to reform, should never be underestimated. There were many people present who had been badly burned by the 2002 experience over select committee reform, including many members of the Wright committee itself. This proved to be highly relevant.

Aside from the initial seminar, the committee's time constraints meant it worked almost entirely in private, and took little evidence. It did hold a few closed-evidence sessions with key individuals. A particularly arresting session was that held with Hilary Armstrong, Labour government Chief Whip 2001–07 (i.e. including the time the select committee proposals were blocked). She passionately expressed a principled view—though most on the committee clearly disagreed with it—that any moves to strengthen parliament against the executive were essentially antidemocratic, as they threatened to undermine the government's electoral mandate to get its business through. Perhaps more worryingly similar sentiments were expressed, more mutedly, by the current Conservative Chief Whip. He clearly believed that he would shortly be government Chief Whip, given Labour's low standing in the polls, and he has since been proved correct.

While it had two key issues to consider, the committee made faster progress in drawing up its proposals for select committee reform. These were somewhat easier, as the proposals were well rehearsed, and the question was more mechanical. At an early stage, the committee rejected any notion of returning to 2002-style proposals of committee chairs or members being appointed by any kind of panel of 'wise persons', no matter how independent of the whips. They focused wholly on electoral options. One option was for selection of committee *members* to be democratised, with committees left to choose their own chairs. Another option was for chairs to be elected separately and in their own right. In either case, elections might take place either within party groups or across the whole House.

This last point opened up a real difference of opinion on the committee on a matter of principle. Some members believed that the fundamental building blocks of parliament were the political parties, and that parties should be responsible for choosing their own representatives, without interference. Others strongly believed that the role of the

select committees was to represent the chamber as a whole, not partisan interests, and that the chamber should therefore be responsible for selecting committee members and chairs. In the end, neither side won. The solution proposed didn't adhere to either principle, but sought to integrate both. It could therefore be described as a fudge. It was recommended that chairs of the most important select committees should be elected by all members in a secret cross-party ballot, with the members elected afterwards in secret ballots within their party groups. Partly, the challenges of devising a system whereby all committee members were elected in cross-party ballots were simply too daunting.[18] This plus political pressures from some members, meant that the pragmatic 'pro-party' solution partly won out.

Discussions on the scheduling of business were more protracted and complex. The committee was convinced from an early stage that, despite its terms of reference having been widened to include government business, it should not simply recommend a single business committee responsible for all such decisions. This was for both principled and pragmatic reasons, as previously laid out in my report. First, there was a principle that there should be a clear delineation between government and non-government business, and that government whips should no longer have a role in scheduling the latter. But it was accepted that government whips would always legitimately wish to be involved in the scheduling of government business. This implied the creation of two separate bodies. Second, more pragmatically, had the committee sought to propose only one new business committee to take over all scheduling responsibility from the whips, this would have been strongly resisted. In contrast, a Backbench Business Committee with more limited powers over non-government business was less of a threat to the whips, and also harder for them to mount a case against. The committee therefore agreed, closely in line with my report, that there should be a new category of 'backbench business', 'for not less than the equivalent of one day a week', and that there should be an elected Backbench Business Committee responsible for scheduling it.

The committee didn't stop there, however. While they were convinced that organisation of government and non-government business should be kept separate, the majority also wanted to make recommendations for more transparent scheduling of government time. Consequently they recommended that there should also be a 'House Business Committee', with a wider membership, with overall scheduling responsibility. Members of the Backbench Business Committee would automatically be members of it, and would have delegated responsibility for scheduling of non-government business, which other members of the committee would not be permitted

---

[18] On these narrow points of devising electoral systems for choosing party members and chairs, Professor Iain McLean of Nuffield College, Oxford, was employed as a second specialist adviser. The fact that even he found these questions taxing was clear evidence of their complexity.

to overturn. The other members of the House Business Committee would in practice, it was recognised, probably be party whips, though its chair should be the Deputy Speaker. The report suggested that the House Business Committee should operate by consensus, but that the government should be invited to present its proposals for agenda time and invite comments. It would then be encouraged to revise its plans following suggestions from the committee. Crucially, the weekly 'business statement' presented to the chamber would in future be amendable and could be voted upon. Hence, if the government had ignored objections in the House Business Committee, it might face challenge on the floor of the House. The Wright committee recognised that in practice the government could usually resist such objections by using its majority, but the new system would ensure that it defended its decisions publicly, and that it had majority support. If it wilfully ignored the wishes of its own backbenchers, in particular, it could be subject to defeat.

Put together, these three elements represented a significant agenda of reform. In its report, published on 12 November 2009, the committee stated:

> We believe that the House of Commons has to become a more vital institution, less sterile in how it operates, better able to reflect public concerns, more transparent, and more vigorous in its task of scrutiny and accountability. This requires both structural and cultural change … In order to address this we must give Members back a sense of ownership of their own institution, the ability to set its agenda and take meaningful decisions, and ensure the business of the Chamber is responsive to public concerns. We believe this is what the public demands, what the institution needs and what most Members want. The present crisis presents an opportunity to make some real progress with this.[19]

The struggle to get the committee's recommendations debated and agreed

It is usual for select committee reports to receive a government reply within two months of publication. In this case, the committee stated that it did not seek a government response, as its recommendations were not aimed at government, but parliament. It therefore sought a debate on its proposals within two months: i.e. by 12 January 2010.

The committee's report was well-received in the media. The right-leaning *Daily Telegraph* suggested that 'this is a unique opportunity to rebalance the political

---

[19] Reform of the House of Commons Select Committee, *Rebuilding the House* (First Report of Session 2008–09). London, HMSO, 2009, p. 7.

system to reduce the power of the executive and reinvigorate the legislature'.[20] Similarly the left-leaning *Guardian* carried an editorial entitled 'Reform of parliament: just do the Wright thing'.[21] But the government's response was rather more ambivalent. Asked at Prime Minister's Questions for his views on the report, Gordon Brown stated that:

> I welcome the report from my hon. Friend … on the reform of this Parliament … I believe that there will be a warm welcome for some of the proposals in the report.[22]

Two months later, the Commons was still waiting for an opportunity to debate and agree the report. Many saw the irony that a report seeking to end the government's monopoly on placing items on the agenda was being blocked by government not allocating it agenda time. In the new year, concerns began to be expressed increasingly publicly, and a coalition of reform-minded groups was drawn together outside parliament to press for the committee's recommendations.[23]

On 21 January the Leader of the House of Commons, Harriet Harman, announced that a debate would be held on 23 February, more than three months after the committee's report had been published. But worse, it emerged that this debate would be held using an unprecedented procedure (not used for other parliamentary reforms), whereby the House would be presented with a series of unamendable government motions, which could be blocked by the objection of a single MP. As consensus amongst 646 MPs is virtually impossible on anything, this made the proposals look doomed. Understandably alarmed by this news, the Wright committee sought to assert itself, by reconvening and invited the Leader of the House to give public evidence on the matter. This succeeded in extracting a promise of a second debate if this proved necessary. But time was running short, as it was widely expected that Parliament would be prorogued in April for an election on 6 May. This meant debating time was at a premium.

By now it seemed clear, to reformers both inside and outside the House, that the committee's proposals wouldn't be agreed without a struggle.

---

[20] 24 November 2009.

[21] 25 November 2009.

[22] House of Commons Hansard, 25 November 2009, column 529. Words omitted were 'It is right for us to consider how our Select Committee system can be reformed so that it is better in the future. It is also right for us to consider how non-Government business is dealt with, and how we can improve the workings of the House'.

[23] These comprised: Better Government Initiative, Constitution Unit, Democratic Audit, Electoral Reform Society, Hansard Society, Power, Unlock Democracy. Not all of these bodies signed all campaign communications.

The 16 government motions tabled for the first debate covered most, but not all, of the committee's recommendations. Those speaking in the debate were generally supportive of the committee's recommendations. However objections were raised, including by former Chief Whip Hilary Armstrong, to the motions on select committee chairs, election of select committee members, and establishment of a Backbench Business Committee, meaning that none of these could pass. And no motion on a House Business Committee had been put by the government.

Most of the more important business was therefore deferred to the second debate, on 4 March 2010. Again, most of those speaking were positive, but it was an established pattern that those opposed to reform kept quiet and simply used their votes against it, so the result remained uncertain. But there had been substantial lobbying for reform, from groups both inside and outside the House. As previously, the government's motions included a detailed standing order on election of select committee chairs, which would have immediate effect. Here a backbench amendment was moved to extend this to the chair of the Procedure Committee (responsible for recommending procedural reform). A more general government motion was proposed on election of select committee members by their parties, and here the chair of the Liaison Committee moved an amendment allowing committee members to be sacked if their attendance was below 60 per cent of meetings. Hence members were starting to push for even more than what the Wright committee had proposed. When it came to the votes, both these amendments were agreed unanimously, and then the substantive motions on select committees were also agreed unanimously. The issue of greater independence for these committees seemed to have gone from one of high controversy to one of total consensus.

The same could not be said for the issue of scheduling business. Here the government's motion supported the establishment of a Backbench Business Committee, and a new category of backbench business 'within 10 sitting weeks of the beginning of the next session of Parliament … in the light of further consideration by the Procedure Committee'. To members of the committee this signalled unwelcome delay and likely watering down of their proposals. They debated how to respond, and whether to seek parity with the proposals on select committees by tabling a detailed standing order to bring the Backbench Business Committee into effect. But they settled for an amendment to bring the committee into existence 'in time for the start of the next Parliament' and referring to specific recommendations in their report, on make-up of the committee, and amount of time set aside for backbench business. This appeared on the order paper alongside a surprising amendment moved by the Conservative front bench. Surprising because it seemed somewhat inappropriate for key names on the Conservative front bench (including the party leader and the Chief Whip) to propose an amendment on backbench business. This Conservative

amendment would potentially speed things up, by establishing the committee 'in time for the start of the next Parliament', but also reduce the amount of time available to the Backbench Business Committee, from roughly 30 days per year to just 15.

At the start of the debate there was a further twist, when the Labour Leader of the House indicated that she would support the Conservative amendment to her own motion on the Backbench Business Committee, but not accept the amendment that had been moved by members of the Wright committee. This looked like a conspiracy between the two opposing frontbenches, against backbenchers' demands. The moment of high tension therefore came at the vote on the Conservative amendment (which was taken first). In a direct reversal of what occurred in 2002, backbench wishes prevailed and the Conservative amendment (by now effectively a joint frontbench proposition) was defeated by 106 votes to 221.[24] Following this remarkable victory, effectively all other business collapsed. The Wright committee's amendment on the Backbench Business Committee was agreed unanimously. A further amendment, signed by 131 members including most of the Wright committee, to require establishment of a House Business Committee 'during the course of the next Parliament' (since the House Business Committee had again not been mentioned in the government motions) also passed unanimously. In other words, all of the committee's key recommendations were agreed unanimously by the House.

The struggle to get the chamber's decision implemented

This felt like the end of the story. Britain's famously sovereign parliament had taken a historic decision to reform itself. The standing orders on electing select committee chairs had been agreed, and it was for the parties to divide internal procedures for electing select committee members. All that remained was for the House to approve a standing order to establish the Backbench Business Committee 'in time for the start of the next Parliament', as the chamber had agreed.

On 11 March, Leader of the House Harriet Harman thus told members:

> My mandate is the will of the House as expressed in the resolutions. We need Standing Orders to give effect to them—nothing less. There is no suggestion that we should try to do anything less than what the House agreed to in the resolutions, because that would not be right … I can assure

---

[24] Supporters of the Conservative amendment comprised 33 frontbenchers and 73 backbenchers (66 of them Conservatives); opponents included 42 frontbenchers (mostly Liberal Democrats and minor parties) and 179 backbenchers.

the House that we will bring forward the Standing Orders, and there will be an opportunity for the House to endorse them before the next election.[25]

The general election was imminent, and while the government was not best pleased with the outcome of the votes, it also had much other legislative business that it would rather pursue. Nonetheless, the House had spoken, and it was assumed that the government would accordingly act. To aid them doing so, the Wright committee published an 'implementation report', setting out a draft standing order.[26] All this now required was time, but only the government could give this.

Yet on Wednesday 7 April, a month after the vote and the day after the general election had been called, Harriet Harman set out the final business for the Commons. This allowed no time to debate the promised standing order, by then on the order paper. In a reversal of her previous position she protested:

> I do not want to take time away from any of the Bills that need to reach the stage of Royal Assent by providing time for the implementation of Standing Orders that will not apply until the next Parliament … [27]

She further added that the standing order could be passed immediately, without debate, had not some members tabled amendments to it. She urged that 'they should withdraw the amendments'.[28] In an angry exchange, Tony Wright stated that he had asked these members to do so, and one had agreed. But another, who just happened to be former Labour Chief Whip Hilary Armstrong, had left the building and was uncontactable. Her office responded by referring his enquiry to the Labour whips' office. This seemed clear evidence that the objections were being engineered by the Labour whips. The usually even-tempered Wright concluded that the House was 'being treated with contempt'.[29] Yet no change was made to the agenda, and the Commons broke up without the reform being put in place.

It would fall to the next government, in the next parliament, if the Backbench Business Committee was to be created. This was widely expected to be the Conservatives. Yet their leadership's attitude had been ambivalent. This thereby became an issue—albeit a very specialist one—during the election campaign. The Conservative manifesto did promise to establish a Backbench Business Committee,

---

[25]   House of Commons Hansard, 11 March 2010, column 433.

[26]   Reform of the House of Commons Select Committee, *Rebuilding the House: Implementation* (First Report of Session 2009–10). London, HMSO, 2010.

[27]   House of Commons Hansard, 7 April 2010, column 977.

[28]   ibid, column 978.

[29]   ibid, column 993.

but this of course would have been in line with their earlier watering-down amendment.

The outcome of the election was that the Conservatives did enter power, but in coalition with the Liberal Democrats. The coalition agreement promised to bring forward the Wright committee recommendations 'in full'. But the standing order still required approval by the Commons, and while the new parliament provided opportunities it also created threats. The opponents of reform in the previous parliament had clearly believed that by delaying the decision, the reform might die. This was in part because the impending election had put pressure on all parties to appear reform minded, especially in response to the crisis, and this pressure was now removed. But also, 277 new first-time MPs had entered the Commons (representing over 40 per cent of its membership), while many established members more familiar with the issues departed. This included Tony Wright and other key members of committee. Hence the whips might well believe that the new parliament would not fight for reform as the old one had. Aware of this danger, the coalition of reform groups outside parliament sent a mailing to all new MPs explaining the background to the Wright reforms, and urging them to support them.[30]

These pressures may have strengthened the hand of reform-minded members of the new government, because standing orders were brought forward on 15 June. These created the Backbench Business Committee in more or less the terms that the Wright committee had proposed, and gave it control over 35 days of business per session, at least 27 of them in the main chamber. This could include votable proposals. The standing orders were approved by the Commons without a vote.

The new rules in operation

With the exception of the House Business Committee, which awaits implementation 'during the course of' this parliament, the Wright committee's main recommendations have thus all now been implemented.

At the start of the new parliament, elections were held for the chairs of 24 select committees. In eight cases the positions were uncontested, but 16 competitive elections were held, with in one case six Labour candidates fighting it out to become chair of the prestigious Public Accounts Committee. In total, 590 members voted in the secret ballot for these positions. This marked the beginning of a new outbreak of democracy in the House of Commons. Afterwards, elections were held within party groups for select committee members. These threw up some unexpected results, with

---

[30] The reform groups also set up a website, where these materials can be found: http://wrightreforms.wordpress.com/.

new MPs doing very well. Most notably, the Business Innovation and Skills committee includes 11 members, all but two of whom were elected for the first time in 2010.

An election was held for the chair of the new Backbench Business Committee on 22 June. The committee's seven other members were then also elected in whole-House ballots. To date the committee has scheduled three days of debate in the Commons chamber, one of which facilitated the first vote in Parliament on the country's nine-year-long military engagement in Afghanistan. The committee has issued a consultation paper on its method of working, realising that its biggest challenge is to prioritise from amongst the numerous topics which members want debated, in a way which is seen as fair.[31] It hopes to experiment with new forms of backbench time, perhaps such as short statements by committee chairs when new reports have been published, on the Australian model. It will no doubt take time to get the system right, but the committee is proceeding carefully, to devise mechanisms that enjoy the confidence of members. In turn, hopefully, this process will ensure that the Backbench Business Committee, which has been created for just one session in the first instance, will become a permanent feature.

Conclusions

It is obviously too early to judge the impact of the Wright committee's changes fully. As the committee itself indicated, its principal recommendations were about changing structures, but a key objective was to change cultures.

The select committee chairs now truly represent the whole House, rather than owing their positions to party whips. This should give them a greater sense of legitimacy, and more confidence to speak for the House as a whole, plus perhaps an enhanced media profile to do so. The establishment of these new patterns will, however, take time.

Select committee members, likewise, are now answerable to all of their party colleagues, rather than just the whips. In future where a member is outspoken on an issue, even if this conflicts with their leadership, if other members of their group support them they may be rewarded with election to a committee. Both these changes therefore push in the direction of greater independence and more policy specialisation amongst members.

---

[31] Backbench Business Committee, *Provisional Approach: Session 2010–11* (First Special Report of Session 2010–11). London, HMSO, 2010.

The creation of the Backbench Business Committee complements this. It explicitly allows for the organisation, and airing, of a backbench voice. Where this is in line with frontbench opinion, all will be harmonious. But there is now an opportunity for backbenchers, including committees, to put things onto the agenda that the frontbenches (sometimes jointly) find uncomfortable. The likely result is that the frontbench becomes more responsive to backbench opinion at an earlier stage, while backbenchers are less frustrated. And of course in future, if the Procedure Committee or others want to put new reforms onto the agenda, they have a direct route to do so which the government cannot block.

All in all, therefore, the changes make for a stronger and more independent House of Commons, in particular in respect to the executive. Like the select committee reforms of 1979 they may be looked back on in future as a watershed in this regard.

So returning to the awkward question at the start, of how such changes could have been allowed to happen, I think that some of the answers should be clear from what I have already said. For one thing, they almost didn't: it was a battle, particularly with respect to the Backbench Business Committee. But happen they did, and we should examine why.

It is useful here to return to Philip Norton's three essential prerequisites for major parliamentary reform: an established reform agenda, a window of opportunity, and leadership.

As I made clear at the start, there was an established reform agenda on both these issues, but one was far better established than the other. The select committee question had been well rehearsed over a decade, and opinion had crystallised. What was needed was a moment, and leadership. The general election, in fact, was likely to provide both, given that election of committee chairs had become Conservative policy. This helps explain why there was relatively little resistance to this change in the end: it had the backing of the government-in-waiting, and was liable to happen anyway. The same cannot be said of the Backbench Business Committee. This proposal had been set out in detail, but in only one report, 18 months before the Wright committee was formed. Unlike many previous reforms it had not been recycled repeatedly by different groups before being considered by the Commons. Given the normal run of events, it could be said to have jumped the queue.

Norton suggested that the usual window of opportunity is a general election. Here parties may be competing to show off their democratic credentials, and the new government finds itself faced with implementing policies which it—perhaps rashly— signed up to in opposition. A stronger parliament always seems more attractive when

you are in opposition to when you are in government! In this sense the general election certainly mattered. I've already suggested that it probably would have resulted in the election of select committee chairs, come what may. It also put pressure on both the outgoing Labour government, and its competitor parties, in terms of what went in their manifestoes. But as I indicated before, the election also brought threats. It allowed the previous government to stall on the Backbench Business Committee until time ran out, and opponents of reform clearly hoped that the new parliament, where many people stung by both the expenses crisis and the 2002 debacle had departed, would let this drop.

The election mattered, but the far more important window of opportunity was the expenses crisis itself. This focused attention, suddenly and powerfully, on parliamentary reform. Both the government and reformers reached for ready solutions that could help restore parliament's reputation. This explains why, alongside the select committee proposals, they reached for the relatively new proposal of the Backbench Business Committee. This responded to some members' concerns about the need for a more independent Commons and greater agenda control, without threatening the fundamentals of the system. These changes were both easier, and more acceptable to MPs, than changes such as electoral reform.

Norton's third requirement was leadership, which he suggested might come either from the government or from backbench parliamentarians. Particularly since the 2002 debacle, his suggestion that backbenchers could provide leadership has been criticised by other authors.[32] Back then parliamentarians seemed incapable of standing up for their own interests, and it was suggested that clear leadership from government was essential. But in 2010, government leadership was clearly absent. Gordon Brown may have established the Wright committee, but Harriet Harman as Leader of the House did not champion its proposals, and at times appeared to block them. The Conservative leadership also took a rather lukewarm approach on the Backbench Business Committee. This reform was therefore approved against the wishes of both main party frontbenches. It wouldn't have happened without determined leadership amongst backbenchers, as well as outside groups. This appears to exonerate Norton's view. But more must be added.

Because backbenchers are a large mass, and many of them are not actually that interested in parliamentary procedure, they won't vote for reform without two things: good organisation, and a clear argument for why they should do so. This became clear in 2002, but not sufficiently until after the event. The everyday formal organisation of

---

[32] Kelso. ' "Where were the massed ranks of parliamentary reformers? " ', op. cit.; G. Power, 'The Politics of Parliamentary Reform: Lessons from the House of Commons (2001–05)', *Parliamentary Affairs*, vol. 60, no. 3, 2007, pp. 492–509; T. Wright, 'Prospects for Parliamentary Reform', *Parliamentary Affairs*, vol. 57, no. 4, 2004, pp. 867–76.

backbenchers is of course the whips, so if they oppose reform they can block it fairly easily, unless there is a competing and more effective form of organisation. This is difficult to achieve. In 2010 it happened, because both the organisation and the argument for reform were very strong. The organisation composed people who were well aware of what went wrong in 2002, many of whom had been involved at the time. The argument was a compelling and almost unique one, linked to the crisis. Here is what one pro-reform MP said in a letter to colleagues:

> There is no doubt that in the wake of the expenses scandal our constituents expect us to demonstrate that we are serious about putting reform of the House of Commons back on track … It is difficult to believe that any member of this, of all Parliaments, seriously thinks it is sensible to go into the forthcoming election having voted against reform.[33]

This was persuasion with a hint of menace! Similarly, a letter circulated by outside groups to MPs opened with the words that 'This Parliament, more than any other in recent memory, needs to reform itself'.[34] The window of opportunity identified above thus operated as a powerful lever by which reformers could achieve their goals.

This may seem a depressing conclusion. The circumstances in 2009–10 were exceptional: there was an almost complete collapse of confidence in the House of Commons, in the political class, and indeed to some extent by the political class. Is it only in such apocalyptic circumstances that a reform to strengthen parliament can succeed? One has to hope not. In particular, the possibilities look brighter in the new British Parliament than in the old. It may be a factor in why the Backbench Business Committee proposals were ultimately accepted that already there had been an outbreak of democracy in the Commons in terms of the election of select committee members and chairs. New members are already becoming socialised to expect to control their own institution, and think independently of the whips. The establishment of the Backbench Business Committee reinforces this further. And of course in the new parliament reform proposals from backbenchers can reach the agenda far more easily. While it may have taken disaster to bring these changes about, the prospects for further reform in the future, if needed, therefore look far brighter.

***

Question — Pardon my ignorance about the basics but I'm just wondering if you could outline the underlying rules about who the members of the select committees

---

[33] Letter from Martin Salter (a member of the committee) to Labour MPs, 25 February 2010.

[34] Letter from reform coalition to all MPs, 18 February 2010.

will be. For example, are there rules that a committee will have so many members and so many of them will be from the government side or from the other side? In particular in relation to the election of committee chairs by the whole House, are there underlining rules that for a particular committee the candidates for chair will be from one side of politics to coincide with these rules about who will end up having the voting power or is it the case that the voting power on the committee might end up being affected by who is elected by the whole House as the chair and therefore is a bit unpredictable?

Meg Russell — Thank you, well you neatly allow me to include some detail which got cut out because the talk was already too long. With respect to the balance on select committees it's required that they reflect the balance in the whole House which means that under normal circumstances the government will have the majority but they are quite independent minded and particularly because they don't vote on legislation, they have quite an independent reputation. On the size of the committees they were in the previous parliament anything up to seventeen members but committee chairs were concerned that it was difficult to get a sense of ownership amongst 17 members and that this was a bit too big. There were also problems with attendance, so one of the Wright Committee's more minor recommendations which was accepted was to change the maximum size to 11 and that now applies.

In terms of the candidates for chairs there was a paragraph in the talk which I cut out because it was just too much detail. There was some discussion about that within the committee and my own preference would have been that it was up to the chamber to determine the balance amongst the chairs using some kind of proportional system. We actually had a very distinguished professor from Oxford University who's an expert in electoral systems working with us as a second specialist adviser and he tried his best to put together electoral systems which would allow these things to happen. But it was so phenomenally complicated that even he couldn't manage to do it. So what the committee settled for in the end was an adaptation of the previous system which was that the whips would get together and divvy up the chairs between them because the chairs are also allocated proportionally to the balance of parties in the House. The amendment to the existing procedure was that that division would be put to the House for a vote before the elections took place so that if somehow there had been some dirty deal done and the House didn't approve of it, there would be a vote to approve.

I said that there were six Labour candidates for chair of the Public Accounts Committee and the reason that there were only Labour candidates was because that had been decided. In fact it is now in the standing orders that that particular committee has to have an Opposition chair. But the rest of them are subject to the

whips' agreements and it was clear which party was to be controlling which committee so only candidates from that party put themselves forward.

Question — Can I ask one question about the business committee? Are the recommendations of the business committee subject to endorsement by the whole House?

Meg Russell — That's another interesting question which was discussed by the Wright committee and remains slightly contentious. Once it became clear that the House Business Committee was not going to be put in place, only the Backbench Business Committee—which was my prediction, you might guess, from the start, I had always felt that a House Business Committee was too ambitious and would not be acceptable to the whips and actually might not function as members had hoped because once whips are on there backbenchers would be excluded from its decisions effectively—there was some debate as to whether the Wright committee members should press for the backbench committee proposals to be votable in the House. I felt rather unsure about that. I felt that it was actually a bit wrong that the backbench committee proposals should be subject to approval when government's proposals were not subject to approval. To me there needed to be parity between the two so I incline towards thinking that the backbench committee should have the right to decide and then be judged by its electorate when it came to re-election and that's what they went for in the end. To me—not all members would necessarily agree with this, but to me, particularly having studied the overseas committees—the frightening part of the establishment of the House Business Committee was not the establishment of the committee itself because that was just formalising discussions that already took place between whips. The frightening bit of that proposal was the votable agenda and the fact that if there was backbench unhappiness on the government benches in particular, they could substitute one bit of business for another. That's the thing which I think would make an enormous difference and which I'll be very surprised if I see within my lifetime.

Question — Did the reforms concerning the election of chairmen affect the joint committees of the two houses at Westminster?

Meg Russell — The short answer to that is no. It applied to a list of committees, mostly departmental House of Commons committees. But I think there is now going to be democracy creep. It's going to begin to look a bit anomalous that some committee chairs are elected while others aren't, although how you elect a chair of a joint committee is another technically difficult question because you've got two chambers to decide jointly. Actually their chairs are not such a problem, but there is a problem with how the members of legislative committees are chosen. They continue

to be chosen by the whips and I think some democratisation of that process will be coming onto the agenda in the next few years. The chairs of legislative committees are actually chosen by the Speaker and act in a very neutral capacity and are fairly well trusted, but the committees themselves are very party dominated and rebellious members can be kept off. So that's the next frontier, if you like, for the reformers to aim at.

Question — One of the refreshing components about your presentation was the absence of any reference to Westminster either as a model, or as a term, or as a concept, or as a label. I say that because in Australia we always debate parliamentary reform by reference to some sort of Westminster norm or Westminster model and in this room I have heard Harry Evans on a frequent basis suggest that we lock ourselves into a dark tunnel of despair because there is no reality out there. It's just a term that people attribute to the version they want. Can you just help us with a little more of why you didn't mention Westminster at all and why maybe we could free ourselves from that as well?

Meg Russell — Well probably two reasons. The first is that Westminster is often used as a lazy term meaning House of Commons, but actually Westminster is a bicameral parliament and having spent a lot of time studying the upper house I think that when you mean House of Commons you should say House of Commons. Secondly, I've always found this idea of the Westminster model somewhat problematic: the idea that there is a family of legislatures which are in some way similar whilst outside of that family they are in some way different. I think that what this talk demonstrates is that 'the' Westminster—if not the Westminster model—is changing. It was already different to this place, and the house in New Zealand and the house in Canada and so on and the other members of the family, and it is becoming more so. Actually from an Australian perspective, given what I know about this parliament, I think that we are moving gradually in a direction of more independence and greater strength, which is not what most people think that the Westminster model means. So maybe Westminster itself doesn't follow the Westminster model as traditionally described, particularly well these days.

Question — You ended your talk quite optimistically about future reforms happening that would increase the strength of the parliament relative to the executive. I read in the *Spectator* though this week about a proposal or a bill that was reducing the numbers of MPs in the House of Commons by 10 per cent but not reducing the numbers of ministers. The way the piece was written it was saying that this reform increased the power of the executive against the rest of the parliament. Do you find it dispiriting?

Meg Russell — There are various legislative proposals going through at the moment coming from the coalition government. There's a proposal to move, as many of you may know, towards your electoral system for the House of Commons: the alternative vote rather than the so-called first past the post system that we use now. That will be subject to a referendum. There's a question whether we ever get to the referendum actually—personally I would support the change, but we may not get to the referendum and if we do I think it may fail. One of the reasons the referendum may not happen is that that reform has found itself shackled to another reform. It was the Liberal Democrats who wanted to change the electoral system but their reform is now tied in to a Conservative proposal to reduce the size of the House of Commons and that part of the bill is far more problematic. Some people say it's a gerrymandering bill and in a sense it is because the Conservatives think that they will get electoral advantage out of this reduction.

Two things will happen. The number of MPs will be reduced, and to be honest it's not a substantial change from 650 to 600. I'm not sure we're going to notice a lot of difference in the new parliament if we get there. But what will be noticed will be the redrawing of boundaries all over the UK and an awful lot of pain for existing MPs. The other thing that the Conservatives are trying to do in that redrawing is to ensure that the population size in constituencies is much more equal than it is now, because they believe that the fact that Labour-held constituencies tend to include fewer constituents means that the electoral system is biased against them. It is to a small extent, but the gain in the number of seats that they are going to get over a house of 600 is going to be something like five. So the amount of pain that we are going to be going through in order to get there I don't believe is worth the gain. And I don't think that they are going to get the gain that they think they will out of it.

It's true that a backbench Conservative MP suggested that the number of ministers ought to be reduced in line with the number of MPs and that is absolutely right and he has put his leadership in a difficult position on that because they'd previously been in favour of smaller government and cutting back and all the rest of it. When it comes to fewer ministers they actually opposed his amendment. Again, 10 per cent is not an enormous difference so if you've got a front bench of 100 in a house of 600 versus a house of 650 it is not a huge thing. But on the point of principle that backbench Conservative was absolutely right and I think he's put his leadership in quite an embarrassing position.

The Senate Committee System: Historical Perspectives*

Rosemary Laing

The system of legislative and general purpose standing committees and estimates committees that came into being on 11 June 1970 was probably the most significant consequence of a general business debate in the entire history of the Senate. The debate that brought these committees into being spread over two Thursday evenings in successive weeks during the time set aside for general business. The outcome hinged on votes on three motions which were being considered concurrently. These votes were decided on the narrowest of margins.

How had the Senate arrived at this crucial point in its history?

Clearly, the committee system did not spring from nowhere. A chronology of procedural developments affecting Senate committees, attached to the paper (Appendix 1), shows that, as in any other house, committees were always an essential part of the Senate landscape. The first Senate committee was established within days of the Senate's first meeting, as soon as debate on the Address-in-Reply had been completed (but not before the Senate had agreed to three orders for the production of documents). The usual range of domestic committees was established the following day and within little more than two months after its first meeting, the Senate had its first select committee, to inquire into steamship communication between the mainland and Tasmania. The first committee witnesses appeared at public hearings the following month and, as early as 1904, the first bill was referred to a standing committee.

Further select committees followed, including on a number of cases concerning the treatment of individuals as well as on such policy matters as the effect of intoxicating liquor on Australian soldiers. At this distance, the number of inquiries into individual cases is surprising and a sign that we perhaps take for granted the now well-established role of the Ombudsman and other aspects of the scheme of administrative review in sorting out the problems that individuals have with the system. A list of these early select committees is also attached (Appendix 2).

---

* This paper was presented at the Senate Committees and Government Accountability Conference at Parliament House, Canberra, on 11 November 2010. The main sources for this paper were R. Laing (ed.), *Annotated Standing Orders of the Australian Senate*. Canberra, Department of the Senate, 2009, particularly the introduction, appendix 1 and the entries on standing orders 25, 26, 60 and 62; and J.R. Odgers (ed.), *Australian Senate Practice* (6th edn). Canberra, Royal Australian Institute of Public Administration (ACT Division), 1991.

Also of note during these early years was the Federal Parliamentary War Committee 1914–18, a high-level advisory committee comprising members of both houses and including the prime minister, Opposition leader and defence minister. The committee provided advice to the government in a number of crucial areas relating to support for the war effort, such as recruiting and the welfare of returned soldiers. It was also a way of ensuring that the federal parliament received information about these matters.

There was certainly a degree of self-consciousness about the potential role of committees in this new-style upper house which was given expression in the establishment of a select committee in December 1929 to inquire into the advisability or otherwise of having standing committees in a number of areas in order to improve the legislative work of the Senate and increase the participation of senators in that work.

These were unpropitious times which we now look back on as the Global Financial Crisis of the 20th century. The Senate was having a great deal of trouble with the Scullin Government which, on a dozen occasions over 1930 and 1931, made regulations concerning waterside transport workers which the Senate repeatedly disallowed. As soon as one set of regulations had been disallowed, the government would immediately remake the same regulations and on it went. In this context, the need for some scheme of formal scrutiny of delegated legislation made by the executive pursuant to Acts of Parliament emerged as a priority and was the subject of one of the key recommendations of the Select Committee on a Standing Committee System. The Standing Committee on Regulations and Ordinances was established in March 1932 and the Acts Interpretation Act was amended shortly thereafter to prohibit the remaking of disallowed regulations within six months of their disallowance. The Scullin Government had lost office at the elections of December 1931.

The committee also recommended changes to the standing orders to facilitate the referral of more bills to committees. There was a contemporary context to this recommendation as well. A select committee was established in July 1930 to examine the Central Reserve Bank Bill. Government members declined to participate in the inquiry and were replaced with Opposition members, so it was a committee comprising Opposition members only. The committee's report was unsupportive of the bill which was defeated early in 1931. It is little wonder that the government regarded the referral of a bill to a committee as a hostile move. Although the standing orders were amended in 1932 to facilitate the referral of bills to committees, it would take decades before this early stigma was neutralised.

A third recommendation made by the Select Committee on a Standing Committee System in its first report caused such consternation at the time that the committee was sent back to reconsider. The committee had recommended the establishment of a committee on external affairs at a time when Australia's foreign policy was dictated from 'Mother England'. It would be at least another decade until Australia adopted the Statute of Westminster and accepted the legislative independence conferred by that Act on dominion parliaments and governments. Australia did not appoint its own diplomatic representatives till World War II. Like the referral of bills to committees, a parliamentary committee on foreign affairs was an idea whose time would come eventually.

The flurry of excitement about the potential for Senate committees soon lapsed as the Great Depression failed to ease and the nation's attention turned to the looming war in Europe and in the Pacific. Before then, however, the Senate's standing orders had been amended in 1934 to provide a mechanism for the consideration of committee reports. The absence of such a mechanism had become apparent when the Regulations and Ordinances Committee began presenting reports on its important scrutiny work. Opportunities for the consideration of committee reports have since expanded but it is significant that it was always a corollary of expanded committee activity that there should be adequate opportunities in the Senate to consider the fruits of the committees' labours.

During World War II, several joint committees were established including on war expenditure, social security, profits, broadcasting, taxation and rural industries. Their purpose, according to Menzies, was to keep parliamentarians in touch with information relating to critical functions while ever the necessities of war meant that the Parliament itself was sitting for much shorter periods and the executive was exercising greater emergency powers. Odgers comments that these committees did much useful work but they were not re-appointed after the war.

After the war, the single most important event for the future development of the Senate was the increase in its size from 36 to 60 senators and the adoption of a system of proportional representation. More senators meant more backbenchers with time on their hands and possibly looking for a greater role. Proportional representation led to greater diversity of membership and the ultimate emergence of minor parties. These were significant precursors for the emergence of a committee system. Also significant was the Smith Mundt grant that the then Clerk Assistant, J.R. Odgers won in 1955 to travel to the United States to study the congressional committee system. He wrote a report on his return that was tabled in the Senate in May 1956. At a time when most parliamentary officers automatically made a pilgrimage to Westminster, it was significant that Odgers travelled to Washington and studied a different model. He had

just recently published the first edition of his *Australian Senate Practice* and had therefore studied the constitutional foundations of the Senate and its partial basis on the US Senate. He returned with many interesting ideas but the then Opposition Leader in the Senate, Senator McKenna (ALP, Tas.), urged him to be patient, speculating that it would take at least five years to secure acceptance for a new idea.

In the meantime, select committees began to be established again and while those established in the 1950s may have been on more controversial subjects such as the development of Canberra and payments to maritime unions (which involved many witnesses being formally summoned to appear), those established in the 1960s heralded the dawn of a new era by showing how careful, bipartisan inquiries could highlight directions for policy development in the medium to long term. Reports of select committees on road safety, the encouragement of Australian productions for television, the container method of handling cargoes, the metric system of weights and measures, off-shore petroleum resources and the later inquiries on air and water pollution were well received and influential in the development of policy in these areas. They tapped into sources that had hitherto been largely ignored in government policy-making efforts.

At the 20th anniversary conference in 1990, the late Senator Gordon Davidson (Lib., SA) recounted the opposition of Prime Minister Menzies to the spate of select committees being established by the Senate in the 1960s. 'Backbench Senators', Menzies is reported to have said, 'will have access to matters not meant for them and to material which is inappropriate for their role in Parliament'.[1] Menzies had changed his tune since promoting the advisory joint committees of the war era, but it seems that backbench senators did not agree with this assessment and participated enthusiastically in what came to be seen as work of fundamental importance to their role as senators.

If the new legislative and general purpose standing committees established in 1970 built on the taste for committee work that senators developed through participation in these select committees, the origins of estimates committees were also beginning to emerge in the 1960s along with the growing recognition of the importance of governments being seen to be accountable. From 1961 the Senate began to examine the estimates of proposed expenditure in committee of the whole before the appropriation bills were received from the House of Representatives, thus giving senators more time to conduct their scrutiny of the government's expenditure proposals. The new procedure was not without its critics. It was alleged that it was a subversion of bicameralism, it evaded the spirit of the Constitution and contravened numerous standing orders. This alleged abomination was, however, the kernel of the

---

[1] *Papers on Parliament*, no. 12, August 1991, p. 23.

estimates process as we know it today. The particulars of proposed expenditure were examined in committee of the whole line by line and senators could ask questions of the relevant minister who would often have to trot over to the advisers, sitting off the floor of the Senate, for detailed information. It was a frustrating process but the potential for further development was apparent. By the end of the decade it had developed into proposals for estimates *committees* covering the various departments of state and in which senators would have face-to-face access to public servants in order to question them directly about financial and administrative matters.

It is well known that Senator Lionel Murphy, then Leader of the Opposition in the Senate, was a great proponent of the legislative and general purpose standing committees. He saw the valuable work that US congressional committees were doing in exposing what was happening in the conduct of the Vietnam War. At his behest the Standing Orders Committee produced several reports on various options for committee systems but no particular recommendations were made to the Senate. From another angle, Senator Kenneth Anderson, Leader of the Government in the Senate, promoted estimates committees as a more contained (and containable) expression of the Senate's growing interest in committee work. Senator Vince Gair, leader of the Democratic Labor Party (DLP), thought a hybrid system of committees which included some legislative and general purpose standing committees and a committee exercising oversight of statutory corporations was the way to go.

Thus there were three proposals before the Senate on 11 June 1970. Murphy's motion for legislative and general purpose standing committees was agreed to by 27 votes to 26, with Liberal Senator Ian Wood (Qld) and independent Senator Spot Turnbull (Tas.) supporting the ALP against the combined forces of the coalition and the DLP. Senator Anderson's motion for estimates committees also succeeded by 26 votes to 25, Senators Wood and Turnbull absenting themselves from the vote. Finally, Senator Gair's motion for a hybrid system was defeated on an equally divided vote with Senator Wood again siding with the ALP against the motion and Senator Turnbull not voting. Senator Wood explained that he was opposing the motion because it effectively duplicated Senator Murphy's proposal which had already been agreed to.

What would become the renowned Senate committee system started out slowly and incrementally with the first two committees established in August 1970. Further committees were gradually added and reports started being presented from May 1971. The first of these was the report of the Standing Committee on Health and Welfare on mentally and physically handicapped persons in Australia (as the term of art then was), followed closely by a report from the Standing Committee on Primary and Secondary Industry and Trade on that old favourite subject of shipping services and freight rates to and from Tasmania. Estimates committees met as required, supported

by staff drawn from all over the department on an ad hoc basis, and early reviews suggested that expectations for committees were being met.

The pattern of committee work throughout the 1970s and 1980s was similar. Legislative and general purpose standing committees undertook reasonably lengthy inquiries (by modern standards) into significant policy areas, usually on a bi- or multi-partisan basis. Inquiries usually involved extensive travel throughout Australia for hearings and site inspections ('taking parliament to the people') and reports were often the subject of lengthy deliberation. Those involved in the operations of committees today will be surprised to hear that committees almost never met while the Senate itself was sitting and that motions to authorise them to do so were relatively rare. There were senators who would argue on principle that it was wrong to allow such practices because senators could not be in two places at once and their first duty was to the Senate. Any committee relying on a last-minute motion being moved by leave to authorise it to meet was in a precarious position, dependant on those senators who opposed the practice in principle not exercising their right to deny leave. To place this in context, however, the sitting day used to include generous meal breaks during which time committees might hold meetings.

The early versions of the Committee Office manuals also suggested that secretariats should factor in three weeks for reports to be printed, a far cry from today when whole inquiries are sometimes required to be completed in less time than this, and anything other than camera-ready copy is unheard of.

As well as holding inquiries into policy matters, committees also gradually expanded their accountability work. A leader in this field was the Standing Committee on Finance and Government Operations which did groundbreaking work on the accountability of statutory authorities. One long-term interest of that committee was the compilation of a list of Commonwealth statutory bodies because no one in government could say how many such bodies there were, let alone what their functions were. This task has now been handed over to the Department of Finance and Deregulation which maintains the list and publishes updates from time to time.

An interest in statutory bodies led to an interest in how such bodies could be held accountable to the Parliament. There is a collection of resolutions in the back of the volume of Senate standing and other orders that chronicles the efforts of the Senate to require such bodies to be accountable, to appear before estimates committees, to answer questions about their taxpayer-funded operations and to prepare annual reports to the Parliament. The systematic scrutiny of those annual reports dates from 1973 in its original, discretionary form, with the current form being adopted in 1989 following

the report of the Standing Committee on Finance and Government Operations on the timeliness and quality of annual reports.

It was important that the daily routine of business should provide adequate opportunities for the consideration of committee reports. Equally important was what happened to the reports afterwards. Again as early as 1973, the Senate expressed the view that governments should provide a response to recommendations in committee reports within three months of the presentation of the report. While this resolution had little effect at first, the Standing Orders Committee pursued the issue and the government made a statement in May 1978 that it would try to adhere to a six-month response timeframe. Governments have subsequently reiterated commitments to respond to reports in a timely manner. The President's report on government responses outstanding after three months is another mechanism by which the Senate keeps tabs on overdue responses. This practice also dates from the 1970s.

While the legislative and general purpose standing committees and estimates committees continued to function as originally envisaged, select committees also continued to be established for other purposes. Some of these were on controversial subjects, such as the select committees on the Human Embryo Experimentation Bill 1985, the conduct of a judge and allegations concerning a judge, and the airline pilots' dispute in 1989. Others were long-term inquiries that did not readily fit into the portfolio structure of the existing committees. One of these was the Select Committee on Animal Welfare which ran for many years and eventually metamorphosed into the present Standing Committee on Rural and Regional Affairs and Transport. The animal welfare committee famously inquired into animal welfare in the thoroughbred racing industry and managed to undertake a special study of the Melbourne Cup—on site, of course. There were also at least two more select committees on the perennial subject of shipping links with Tasmania.

The system was never a static one and adjustments were made over time to adapt to changing requirements. These changes are all chronicled in the *Annotated Standing Orders of the Australian Senate*, published in 2009, and also available online as *Commentaries on the standing orders*.[2] One particular challenge to the system occurred in 1987 when, after the double dissolution election on the Australia Card Bill, a system of standing committees was also proposed for the House of Representatives. A government caucus committee developed a scheme for parallel standing committees in each house that would be empowered to meet as joint committees. Amendments moved in the Senate to the resolution ensured that such joint meetings could occur only in accordance with a resolution of the Senate in each

---

2   Available at: www.aph.gov.au/Senate/pubs/aso/index.htm.

case. In practice, the idea of joint legislative and general purpose standing committees never took off.

Perhaps the biggest impact on the committees was the adoption in 1989 of a scheme for the systematic referral of bills to committees which came into operation in 1990, although it had been envisaged as early as 1929. This is not to ignore the work of the Scrutiny of Bills Committee, established in 1981, to assess all bills against particular criteria relating to civil liberties and parliamentary propriety, but the referral of bills under the new orders would involve inquiries into individual bills and would involve scrutiny of any aspects of the bills including their policy merits.

Detailed scrutiny of individual bills has become a hallmark of Senate committee operations and has led to innumerable improvements to bills before the Parliament. In its early days, however, the referral of bills exposed some strains in the system. In the first instance, committee workload increased dramatically and there was correspondingly less time to spend on the longer-term inquiries into matters of policy and accountability. Examination of government bills also led to a much higher incidence of dissenting and minority reports, leading to some cracks in the hitherto highly collegiate operations of committees.

While ever committees remained as fact-finding bodies, there appeared to be general acceptance of the idea that they should be chaired by government senators. Their engagement in more partisan work, however, caused this assumption to be questioned. By 1994 there were concerns that the existing committee structure was not delivering optimal outcomes. Multiple select committees were being established to carry out particular inquiries, often with non-government chairs. There was pressure from the Opposition for a share of the chairs of standing committees. All this resulted in the Procedure Committee (formerly known as the Standing Orders Committee) being tasked with a major reference on the committee system in February 1994.

The committee reported in June 1994 with a scheme to refurbish the committee system so that it would be more responsive to the composition of the Senate and would provide a more efficient structure. The proposals were adopted on 24 August 1994 with effect from 10 October 1994. The committee system as we know it today dates from that restructuring in 1994. The major features of the system, in structural terms, are as follows:

- paired legislation and references committees in eight subject areas to perform all the functions previously carried out by the legislative and general purpose standing committees and estimates committees;

- legislation committees with government chairs to undertake inquiries into bills, examine the estimates of expenditure and annual reports of agencies, and, of their own motion, to monitor the performance of departments and agencies in their portfolio areas;
- references committees with non-government chairs to inquire into matters referred by the Senate;
- membership to be in accordance with the formula designed to reflect the composition of the Senate and non-government chairs to be allocated in accordance with representation of non-government parties in the Senate;
- a new category of committee membership allowing senators who are not voting members of the committees to participate in inquiries with all the rights of full members (other than the right to vote);
- an ability for senators to substitute for members of the committees by resolution of the Senate;
- formalisation of the position of deputy chair and allocation of deputy chairs in reverse to the allocation of chairs;
- formalisation of a Chairs' Committee, chaired by the Deputy President.

The adoption of the new system in 1994 entailed a significant change in the powers of committees examining estimates. Before that time, estimates committees were limited to asking for explanations from ministers in the Senate or officers, relating to items of proposed expenditure and had no inquiry powers. The absorption of the estimates function by legislation committees from 1994 meant that the full range of inquiry powers was available for the estimates function. In other words, committees considering estimates now had the power to send for persons and documents. In practice, these powers have been little used but non-government majorities in the Senate have used their numbers from time to time to pass orders requiring the appearance of particular offices before estimates hearings.

Between 2006 and 2009, there was a brief return to the earlier system of legislative and general purpose standing committees, with these committees also carrying out the estimates function. This change came about when the fourth Howard Government unexpectedly gained a majority of seats in the Senate and used its numbers to bring committee operations under government control. During this time many more bills were referred to committees but new inquiries on matters of policy or accountability became rare.

The system has now returned to what could be regarded as normal practice although the proliferation of joint committees continues to raise questions about their role and effectiveness.

Appendix 1

Senate committees—a chronology of procedural developments

Extracted from Appendix 1, *Annotated Standing Orders of the Australian Senate*.

5.6.1901	Standing Orders Committee established to recommend which state legislature's standing orders should be adopted on a temporary basis pending the development of permanent standing orders
6.6.1901	Library, House, Printing, and Elections and Qualifications committees established for the first time
26.7.1901	First select committee appointed, into steamship communication with Tasmania
8 & 15.8.1901	Mr David Mills, Melbourne manager for the Union Steamship company of New Zealand Ltd, Mr W.T. Appleton, Managing Director of Huddart, Parker & Co. Pty Ltd and Clerk of the Parliaments, E.G. Blackmore, are the first witnesses to be called before Senate committees to give evidence (Select committee appointed to inquire into steamship communication between Australia and Tasmania, and Committee of Elections and Qualifications)
9.10.1901	Standing Orders Committee reported to the Senate with a draft of the proposed standing orders
20.4.1904	First (and only) select committee appointed to inquire into a privilege case (Senator Neild)
20.10.1904	Parliamentary Evidence Bill 1904 referred to the Standing Orders Committee by motion after second reading, the first referral of a bill to a standing committee
5.12.1929	Establishment of select committee to inquire into the advisability or otherwise of having standing committees in a number of areas in order to improve the legislative work of the Senate and increase the participation of senators in that work
9.4.1930	First report of the select committee on standing committees tabled
1 & 8.5.1930	First report of the select committee on standing committees considered and referred back for further consideration
10.7.1930	Second report of the select committee on standing committees tabled. First referral of a bill to a select committee (Central Reserve Bank Bill 1930)
14.5.1931	Select committee's second report on standing committees considered and recommendations (for a new committee to scrutinise regulations and ordinances and for revised procedures for the referral of bills to committees) adopted

11.3.1932	Establishment of Regulations and Ordinances Committee (SO 23) and adoption of amended procedures to facilitate referral of bills to committees
18.5.1932	First report of the Regulations and Ordinances Committee tabled
28.9.1932	Consideration of the First Report of the Regulations and Ordinances Committee raises issues about opportunities to debate committee reports
1.8.1934	Adoption of a new standing order to facilitate consideration of committee reports (SO 60) (effective 1.10.1934)
11.11.1954	Appointment of Select Committee on the Development of Canberra heralds a resurgence of select committee activity from the later 1950s and throughout the 1960s
27.9.1961	New procedures adopted for the consideration of estimates of expenditure in committee of the whole before the receipt of the Appropriation Bills from the House
2.12.1965	First changes to standing orders since 1953, including change to terms of reference of the Regulations and Ordinances Committee and establishment of Committee of Privileges (SO 18)
11.6.1970	Establishment of seven legislative and general purpose standing committees and five estimates committees (SOs 25 and 26)
12.6.1970	Printing Committee reconstituted as the Publications Committee with full inquiry powers when sitting as a joint committee with its House of Representatives counterpart (see SO 22)
19.8.1970	Further resolution relating to the establishment of legislative and general purpose standing committees, including membership formula and other details
17.9.1970	Estimates committees received their first reference of particulars of proposed expenditure
9.12.1971	Declaration by the Senate that statutory authorities are accountable for all expenditures of public funds
14.3.1973	Senate agreed to a resolution declaring its opinion that governments should respond to committee reports within three months after their presentation
7.11.1973	First version of the resolution referring annual reports to legislative and general purpose standing committees adopted (see SO 25)
19.8.1975	Procedure adopted for questions to be asked of chairs of committees (see SO 72)
18.8.1981	Report of the Select Committee on Parliament's Appropriations and Staffing tabled
19.11.1981	Establishment of the Scrutiny of Bills Committee (as part of the Constitutional and Legal Affairs Committee) (see SO 24)
25.3.1982	Establishment of the Appropriations and Staffing Committee (SO 19); a separate appropriation bill for the Parliament introduced for and from 1982–83
25.5.1982	Establishment of the Scrutiny of Bills Committee as a separately constituted committee

22.9.1987	'Standing Orders Committee' renamed 'Procedure Committee' (SO 17). Eight legislative and general purpose standing committees appointed, renamed and empowered to meet as joint committees with similar House of Representatives committees
28.2.1988	Privilege Resolutions agreed to
23.8.1990	Order of continuing effect agreed to regularising the practice of placing written questions on notice at estimates hearings (see SO 26)
23.2.1991	Guidelines for disclosure of in camera evidence in dissenting reports adopted (see SO 37)
6.5.1993	Procedures for supplementary hearings of estimates committees and limitations on consideration of appropriation bills in committee of the whole adopted as orders of continuing effect (see SOs 26 and 115)
17.3.1994	Resolutions for the registration of senators' interests agreed to. Senators' Interests Committee established (SO 22A)
24.8.1994	Proposals by the Procedure Committee adopted for the restructure of the committee system with effect from 10.10.1994. Pairs of legislation and references committees established in each subject area. Estimates committee functions taken over by the legislation committees (see SO 25)
13.2.1997	Several sessional orders and orders of continuing effect incorporated into standing orders, including provision for supplementary estimates hearings and electronic committee meetings
22.11.1999	Resolution of the Senate declaring that all questions going to the operations or finances of departments and agencies are relevant to estimates
6.2.2001	Supplementary hearings on additional estimates dropped
19.11.2002	Participating members of legislative and general purpose standing committees able to be counted towards a quorum (see SO 25). Quorum procedures for committees brought into line with quorum procedures in the Senate (see SO 29)
9.11.2005	Orders agreed to allowing senators to take action in respect of unanswered estimates questions on notice (see SO 72)
7.12.2005	Appointment of Joint Standing Committee on the Parliamentary Library following the creation of a statutory position of Parliamentary Librarian (see SO 20)
14.8.2006	Committee system restructured with effect from 11.9.2006. Legislation and references committees combined under government chairs (see SO 25)
24.6.2008	Motion agreed to for production in time for estimates hearings of information about appointments and grants made by departments and agencies
10.3.2009	Provision for questions to chairs of committees abolished. Procedure adopted on a permanent basis for appointing substitute members of committees when the Senate is not sitting (see SOs 72 and 25)

| 13.5.2009 | Committee system restructured with effect from 14.5.2009 to return to the system of paired legislation and references committees (see SO 25) |

Appendix 2

Senate select committees, 1901–84

For later committees, see Appendix 9, *Odgers Australian Senate Practice*, 12th edition.

Tasmania and Australia Steamship Communication 1901–02
Old-age Pensions 1904
Privilege—Case of Senator Lt. Col. Neild 1904
Retrenchment of Major Carroll 1904
Tobacco Monopoly 1905
Press Cable Service 1909
Fitzroy Dock, Sydney: Partial closing-down 1913
Chinn, Mr H.—Dismissal from Transcontinental Railway 1913
General Elections 1913—Allegations of Roll-stuffing and Corrupt Practices 1913
Mr Teesdale Smith's Contract—Kalgoorlie to Port Augusta Railway 1914
Post Office, Balfour, Tasmania 1914–17
Intoxicating Liquor—Effect on Australian Soldiers etc. 1917–19
Senate Officials 1920–21
Strasburg, Captain J.—Claims for War Gratuity 1922
Warrant-Officer J.R. Allan—Discharge from Military Forces 1923–24
Repatriation Case of First Lieutenant W.W. Paine 1923–24
Case of Munitions Worker J.T. Dunk 1924
Beam Wireless Messages: Charges, Australia to England 1929
Standing Committee System 1929–31
Central Reserve Bank Bill 1930
Conway, Captain T.P.—Case for compensation 1937–40
Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950
National Service in the Defence Force 1950–51
Commonwealth Bank Bill 1950 (No. 2)
Development of Canberra 1954–55
Payments to Maritime Unions 1958
Road Safety 1960–61
Encouragement of Australian Productions for Television 1962–63
Container Method of Handling Cargoes 1968
Metric System of Weights and Measures 1968

Off-shore Petroleum Resources 1970–71

Air Pollution 1969

Water Pollution 1970

Medical and Hospital Costs 1969–70

Canberra Abattoir 1969

Drug trafficking and drug abuse 1971

Securities and Exchange 1974

Foreign Ownership and Control 1972–75

Civil Rights of Migrant Australian 1973–74

Shipping Services between King Island, Stanley and Melbourne 1973

Corporations and Securities Industry Bill 1975

Aborigines and Torres Strait Islanders 1976

Mt Lyell Mining Operations 1976

Passenger fares and services to and from Tasmania 1981

Parliament's Appropriations and Staffing 1981

Government Clothing and Ordnance Factories 1982

South West Tasmania 1982

Industrial Relations Legislation 1982

Statutory Authority Financing 1983

Private Hospitals and Nursing Homes 1984

Animal Welfare 1985

Conduct of a Judge 1984

Allegations Concerning a Judge 1984

Volatile Substance Fumes 1985

Video Material 1984