

# The role of the separation of powers and the parliamentary budget setting processes

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## Introduction

The complex division of power between parliament and the executive concerning the finances of the state is a defining feature of Westminster-derived systems of government. The executive must obtain the consent of parliament for both the levying of taxes and the appropriation of funds, and this fact is fundamental to the influence of parliament over government. As White and Hollingsworth explain:

In the British constitutional tradition, the ‘power of the purse’ is central to the ability of Parliament to call government to account. The power of the purse flows from the basic constitutional principle that government expenditure must be authorised by legislation. This forms the basis of requirements of financial control and accountability.[107](#)

In this sense parliament holds the supreme power over government finances: without the consent of parliament the government can neither raise new taxes nor undertake expenditure. The relationship between parliament and government on the matter of financial control is, however, not so one-sided or so straightforward as it first appears. While the government depends on the parliament for its ability to tax and spend, and therefore for its viability as an administration, parliament itself has no means of independently spending public funds to carry on its own activities and is reliant on the government for its own budget.

That parliament holds ultimate control over government finances but cannot direct resources towards its own operations comes about because only members of the executive are able to bring appropriation legislation before the parliament for its consideration.[108](#) Thus, the parliament’s control over public finances is by way of a veto or limited power to amend proposals put to it by the government, rather than by way of initiating appropriations or authorising new taxation measures of its own design. The financial control parliament exercise over government is reactive in nature. This arrangement is known variously as the financial initiative of the government, the executive or the crown and is outlined in Erskine May in the following terms:

It was a central factor in the historical development of parliamentary influence and power that the Sovereign was obliged to obtain the consent of Parliament (and particularly the House of Commons as representatives of the people) to the levying of taxes to meet the expenditure of the State. But the role of Parliament in respect of the State expenditure and taxation has never been one of initiation: it was for the Sovereign to request money and for the Commons to respond to the request. The development of responsible government and the assumption by the Government of the day of the traditional roles and powers of the Crown in relation to public finance have not altered this basic constitutional principle: the Crown requests money, the Commons grants it, and the Lords assent to the grant.[109](#)

Thus, the power of the purse operates in two directions, with parliament holding ultimate control over government finances by way of approving or declining appropriations, and the government in turn holding the sole authority to initiate appropriations, including those for the parliament itself.

The inability of parliaments to control their own budgets has in recent times been a focus of attempts at reform. Such attempts face the obvious difficulty of somehow overcoming the executive's financial initiative. In the case of the Commonwealth Parliament, this initiative is ultimately protected by the Constitution, which cannot be amended by an act of parliament alone. As such, it appears that there is no direct means by which such budgetary independence could be achieved. Barriers to budgetary independence for parliaments can also be found in state constitutions; however, procedures for amending these constitutions are in some cases less stringent than those that apply to the Commonwealth Constitution.<sup>110</sup> Although parliaments may only veto or reduce government spending proposals, they have no power to propose their own appropriations or to increase those put forward by the government.

If this reform is to be pursued, it can therefore be done in one of two ways, the first more moderate than the second. First, it may be possible to create a mechanism whereby the parliament can formulate its desired budget and transmit its wishes to the government and then, if the requests are reasonable, to develop a convention over time that the requests are always granted. This method would leave in place the established legislative framework but subvert it in practice. Second, if it is established that the financial independence of the parliament is of such importance that it outweighs the arguments in favour of the government enjoying the exclusive financial initiative, constitutional change could be pursued.<sup>111</sup>

In this article I will outline what reforms have been attempted in Australian parliaments with regard to making parliamentary budget setting more independent. I will argue that, while some progress has been made in presenting parliamentary budgets as a distinct area of appropriation to that of the ordinary annual services of government, and that in some cases parliamentary committees have become involved in formulating and recommending a parliamentary budget to treasurers, these measures have not fundamentally altered the distribution of powers set out in the doctrine of the executive financial initiative. Thus, in cases where the executive and the parliament disagree on an appropriate budget, it will still be the executive's preferred budget that is put before the parliament.

Having established an outline of how these reforms have fared, I will turn to an examination of one of the motivating arguments that is commonly found in discussions of parliamentary budget setting—that is, that the executive holding ultimate control over the parliamentary budget represents a contravention of the doctrine of the separation of powers. The point I wish to make here is that we must be careful to distinguish between the separation of powers as it is actually embedded in Australia's constitutional framework and the separation of powers as advocates for reform in this area might wish it to be. As it stands, the separation of powers that is found in the Commonwealth Constitution and the High Court's rulings provides very little support to advocates for greater parliamentary independence.

By emphasising this difference I do not intend to argue that there is not a compelling case for reforming budget setting procedures; the practical difficulties presented by the current arrangements should be made clear by the following review of the progress of reforms to date. My intention is rather to point out that such reforms are not mere administrative reforms. Removing the exclusivity of the executive financial initiative, even if only for the

relatively small proportion of the budget expended on parliament, represents a fundamental change to the separation of powers, as it exists in practice.

## Progress on budget setting reforms

In their history of Australia's Commonwealth Parliament, Reid and Forrest write that the issue of budgetary independence for the parliament was not raised as a significant issue between 1901 and 1964, at which point, in a debate on controversial changes to the structure of the appropriation bills, Senator Lionel Murphy raised the issue of "whether the parliament had 'become one of the services of the Government' to be financed like any other Government department." In fact, Reid and Forrest note, this was exactly the arrangement that had been in place since 1901—that is, for the purposes of appropriations and budget setting, the Commonwealth Parliament had indeed been treated as a service of government.[112](#)

The goal of attaining greater budgetary independence for parliaments has repeatedly been raised since this time with regard to parliaments at both state and commonwealth levels in Australia. In its 1981 report, the Senate Select Committee on Parliament's Appropriations and Staffing summarised the connection between this goal and the hope that parliaments might play a more independent role in the system of government:

A common source of concern to all Parliaments is the growing imbalance in the relationship between Parliament and the Executive, the rapidly increasing power and influence of the Executive, the need for the Parliament to strengthen its oversight and check of Executive activity, and the concurrent need for the Parliament to regain or assert greater independence and autonomy in regard to its own internal arrangements.[113](#)

In more recent times, the Latimer House principles—that is, the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government—have provided a reference point for calls to reform the process of parliamentary budget setting. Those principles, agreed to by the executive branches of Commonwealth member states at the Commonwealth Heads of Government Meeting in Nigeria in 2003, emphasise that 'Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.'[114](#) Annexed to the principles are the 'Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles' drawn up in 1998, which include the following recommendation:

An all-party committee of members of parliament should review and administer parliament's budget that should not be subject to amendment by the executive.[115](#)

Expanding our scope beyond Australia, something approaching this ideal of parliamentary independence regarding budget setting has been achieved in the form of the United Kingdom's House of Commons Commission, which is a body comprising the Speaker, who is the chair, the Leader of the House, another member nominated by the Leader of the Opposition, and three further members nominated by the House, none of whom can be a minister.[116](#) This commission, established by the House of Commons (Administration) Act 1978 is responsible for appointing staff of the House, for determining the pay and conditions of those staff, and for preparing and laying before the House the annual estimates for the House of Commons Service.[117](#) The estimates prepared by the House of Commons

Commission remain subject to the approval of the executive; however, in practice, the executive does not exercise this power.[118](#)

This appears to be a successful example of the first strategy for achieving budgetary independence for parliaments mentioned in the introduction—that is, leaving in place the framework of the executive financial initiative but subverting it in practice through the establishment of a precedent whereby the executive simply adopts the budget put to it. In her comparison of the parliamentary administration arrangements of the United Kingdom, Canada, Australia and New Zealand, Verrier describes the House of Commons Commission as the generally acknowledged best practice model and writes:

The Commons not only has de facto control over its own budget but an active and what appears to be unique involvement of its stakeholders, the MPs, through its Commission, a statutory body with administrative responsibility, including setting the budget and employment of staff.[119](#)

In Australia's Commonwealth Parliament, following recommendations made by the 1981 Senate Select Committee on Parliament's Appropriations and Staffing mentioned above, significant changes have been made to the process for setting parliamentary budgets. First, a separate appropriation bill has been introduced for the departments that support the operations of the parliament, a move that allowed the Senate to directly amend the appropriations for parliament by separating them from the appropriations bills that deal with the ordinary services of government.[120](#) Second, appropriation and staffing committees have been established in both the Senate and the House of Representatives to examine annual estimates of each house and, jointly, of the annual estimates for the Department of Parliamentary Services. Third, control of staffing matters was transferred from the former Public Service Board to the presiding officer of each house, and a parliamentary service was created, distinct from the public service.[121](#) Whilst these changes represent progress over previous arrangements, the situation remains one in which these administrative committees examine and make recommendations to the executive regarding the appropriations for the parliamentary departments, rather than setting the appropriations with complete independence. The Senate committee has had a considerably longer history than the equivalent House committee, and the current Deputy President, Senator Stephen Parry, has stated that:

... the Appropriations and Staffing Committee has provided a backstop, safeguarding a degree of independence for the Senate by insisting on scrutiny of any changes in parliamentary administration, and maintaining a watching brief on security policy, as well as taking an active role in determination of the budget. The committee has not always prevailed but, for more than 30 years, it has maintained a consistent institutional line that, within the broader constraints of a government's budget, the Senate Department must be funded sufficiently to support the operations of the Senate and its committees—at the level that the Senate determines they should operate.[122](#)

In State and Territory parliaments around Australia, the most consistently implemented reform concerning parliamentary budgets has been the introduction of separate appropriation bills. Only the parliaments of South Australia, the Northern Territory and Western Australia do not have separate appropriation bills covering their parliamentary budgets. The further aim of having parliamentary committees participate in budget setting has been implemented in only the Australian Capital Territory, the Commonwealth, as discussed above, and Queensland.[123](#)

The ACT Legislative Assembly has developed a further innovation as part of recent administrative changes that sought to strengthen the independence of the Assembly's support agency, now known as the Office of the Legislative Assembly, from the broader ACT public service. Changes introduced into the Financial Management Act 1996 state that there must be a separate appropriation bill for the Office of the Legislative Assembly; that the Speaker must, after consulting with the relevant internal committee, advise the Treasurer of the appropriation the Speaker considers should be made for the Office, accompanied by a draft budget; and, if the Treasurer presents an appropriation for a lesser amount than that recommended, he or she must provide a statement of reasons to the Assembly.<sup>124</sup> Since the introduction of these provisions no statement has been made, indicating that the recommendations of the Speaker have been adhered to.

A good example of the some of the difficulties faced by parliaments with very little control over their own budgets was provided by the President of the Victorian Legislative Council at the Presiding Officers and Clerks Conference in Honiara in 2012. Whilst the Victorian parliament is funded via a separate appropriation bill, this has done little to increase the independence of the parliament from the executive. The bill is drafted by Treasury officials, in consultation with presiding officers, clerks and the secretary of the Department of Parliamentary Services, but is subject to the approval of the Treasurer. Mr Atkinson explained that:

The problem extends beyond who drafts the legislation to how it is drafted. The purchaser-provider model, in which the Government 'buys' policy outcomes from its various departments, is radically unsuited to the funding of a separate and equal democratic institution: the parliament is not a service-provider with the ability to guarantee outcomes; nor should the Parliament contribute—or even be seen to be contributing—to the policy successes and failures of the executive it holds to account. The quid pro quo funding arrangement also leads to an unintended reversal of the lines of accountability, in which the Department of Treasury and Finance audits the functions and performance of the Parliament to ensure adequate returns on its budgetary 'investment'.<sup>125</sup>

Apart from the formal impropriety of such a reversal of accountability, the inability of the Legislative Council to control its own budget has led to a reduction in parliamentary scrutiny of the executive via the committee system:

The work of parliamentary committees has been severely compromised. In the face of limited (or simply uncertain) funding, committees must restrict the number of references they take on and commit far fewer resources to those they do. Whether by deliberate strategy or simply unintended consequences, the current funding system allows the executive to determine the degree of scrutiny to which it is subjected.<sup>126</sup>

This final point goes to the heart of the problem with the executive exercising control over the parliamentary budget. Whilst the parliament fulfils a variety of functions, perhaps two of the most important are the determination of who will form the executive and subsequently the holding to account of that executive. To fulfil the second function adequately, the parliament must be resourced such that it can provide support to non-executive members in such areas as committee secretariats, library and research facilities, procedural advice and staffing. However, it is clearly in the political interests of the executive to minimise the ability of the parliament to pursue this accountability role and, with that in mind, it will not be inclined to provide extensive resources.

To summarise the situation described above, parliamentary budget setting by the executive has been identified as a target for reform in recent decades. The most prevalent step taken to address the problem in Australian jurisdictions has been to separate parliamentary appropriations from those of ordinary annual services of government and provide a separate bill to cover them. A further step has been taken in some jurisdictions to involve a parliamentary committee in contributing to the formulation of the parliament's budget. These steps have not, however, done anything to escape the fundamental restrictions of the executive financial initiative mentioned above. Thus, in all Australian jurisdictions, the executive ultimately remains in control of the appropriation bill that is put before the parliament for its own upkeep. Verrier summarises the situation well:

... governments' retention of ultimate control of parliamentary appropriations in New Zealand and more particularly in Australia, reflects their determination to keep the executive-legislature balance of power in their favour, though this is sometimes presented as a protection against profligacy.[127](#)

### **The separation of powers doctrine in Australia**

The frustrations arising from working with tightly constrained budgets are common to both parliaments and the broader public service; however, the frustrations felt over budgetary control of parliaments are presented by advocates of reform as a symptom of a more fundamental problem, that of an excessively weak separation of powers in Australia. Returning to the paper delivered by the President of the Legislative Council of Victoria concerning the budget of that parliament, we find statements such as the following:

It is important to note that executive dominance is in and of itself incompatible with the doctrine of the separation of powers. This would be the case even if the ultimate budgetary outcomes were not themselves problematic.[128](#)

This sentiment was echoed by the Communique of Presiding Officers of Australian Parliaments, issued at Honiara on 26 June 2012 concerning budgets and parliamentary independence:

The Presiding Officers were unanimously of the view that Parliament must be able to effectively carry out its role of scrutinizing the activities of the Executive. This is a fundamental principle of the Westminster system of responsible Government in respecting the doctrine of the separation of powers. To achieve this essential objective Parliament must be independent, autonomous and adequately resourced.

The Presiding Officers strongly believe that the best way to achieve this necessary financial autonomy is for steps to be taken for Parliament to responsibly determine its own budget free from the constraints of the executive, having regard to the prevailing financial circumstances of each jurisdiction.[129](#)

A final example of this general line of argument can be drawn from Odgers' Australian Senate Practice, where reference is made to the 1981 Senate Select Committee on the Parliament's Appropriations and Staffing, already referred to above:

The select committee referred to the unsatisfactory situation then prevailing whereby the appropriations for the parliamentary departments were included in the appropriation bills for the ordinary annual services of government, thus making Parliament dependent on the

executive for funds and contradicting the principles of separation of powers and parliamentary independence.[130](#)

In the following discussion I will demonstrate that the invocation of the doctrine of the separation of powers in these circumstances is problematic. First, it appeals to ‘the doctrine’ as though a settled and well-recognised position on the correct separation of powers were ready to hand, when such a singular and agreed view has never been reached.[131](#) Second, the version of the separation of powers doctrine that is being appealed to in these passages is more characteristic of American constitutionalism than of the Australian variant of the responsible government tradition. Third, the variant of the separation of powers doctrine that has emerged in Australia at the Commonwealth level, through both the wording of the Constitution and its subsequent interpretation by the High Court, provides little support for a stronger separation of parliament and executive.

In his work *Constitutionalism and the Separation of Powers*, Vile provides an outline of the theory of the separation of powers in its most extreme form:

A “pure doctrine” of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way the each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[132](#)

As Vile explains, this ‘pure doctrine’ is an ideal type rather than a description of any existing system of government. It has, he notes, rarely been held and even more rarely been put into practice in this purified form. He therefore puts this doctrine forward as a mark against which to measure the many theories concerning the separation of powers and the many systems that partially exhibit it.

Given that achieving a more satisfactory expression of the separation of powers is a recurring motivational theme in arguments in favour of establishing independent budget setting arrangements for parliaments in Australia, a comparison of the existing system of government in Australia, at both state and commonwealth levels, with this ideal type will help clarify that, while a greater separation of powers is presented as a more or less unquestioned goal, such a strong separation has never been enacted in the responsible government systems found in Australia. Furthermore, we will see that although the independence of the judicial power has been significantly protected by law, the legislative and executive powers are very closely intertwined and there are few legal restrictions in this area.

The pure doctrine of the separation of powers, as outlined above, envisages a separation on three levels: first, an institutional separation of the government into three branches; second, a functional separation into three branches; and, third, a division of personnel into three branches. However, as described by Gelber, while the judiciary enjoys substantial independence in Australia, the other two branches are in fact closely intertwined, as they are in all Westminster-derived systems:

Australia's constitutional arrangements ensure only a partial institutional separation of powers. The judiciary is independent from the other two branches, and an independent judiciary is required by a federal system ... In relation to the other two branches, however, Australia's Westminster governmental tradition ensures that the executive is drawn from members of the legislature. The executive, or government, is formed by the political party that wins a majority of seats in the lower house of parliament.

This model allows Westminster principles of parliamentary accountability to be applied, so that the executive can be called to account in the parliamentary chamber. The doctrine of responsible government requires that the executive is drawn from the legislature in order to ensure mechanisms of accountability via the parliament to the people.[133](#)

In his examination of how the separation of powers is established in Australia, Patapan argues that the founders of the Commonwealth Constitution were informed by two distinct views of the separation of powers. The first view was expressed by James Madison and Alexander Hamilton, under the influence of Locke and Montesquieu, in *The Federalist* and was chiefly concerned with arranging the institutions of government in such a way that tyranny would be avoided. The essence of this view is that tyranny can be avoided if power is divided and no single branch of government is able to accumulate an excess of power.[134](#) As Madison wrote:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[135](#)

On this view, it is important not only that government power be divided but that the various branches be able to check one another and that the ambitions of those who work within each branch be identified with the constitutional role of that branch. In this way it is hoped that the tendency of centres of power to accumulate ever more power will be stopped and that the ambitions of government personnel will be set against each other and ultimately work for the benefit of the governed:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[136](#)

This view underpins the presidential system set forth in the constitution of the United States, which provides a much stricter separation of powers than that found in Westminster-derived systems as well as a complex series of checks and balances that limit the independent action of each branch of government. In particular the US Constitution does not allow members of the executive branch to sit in Congress.[137](#)



The competing view of the separation of powers at the time of founding the Australian Constitution is traced by Patapan to Blackstone's Commentaries on the Laws of England.<sup>138</sup> Blackstone outlines the development of an independent judiciary in England as a matter of the King delegating his judicial powers to a body of magistrates, an arrangement that solidified over time such that the King could no longer reverse such delegation except by an act of parliament.<sup>139</sup> Over time members of the judiciary attained greater independence by way of increased security of tenure and fixed salaries.<sup>140</sup> Thus, whilst the judicial power was originally exercised by the King, who combined legislative, judicial and executive powers in the one person, it had, due to the practical necessities of administering justice, and doing so impartially, become a delegated function.

Whilst not the result of explicit constitutional design, as can be said of the US Constitution, the separation of judicial power from legislative and executive powers is, for Blackstone, central to the maintenance of liberty:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative.<sup>141</sup>

It is the separation of the judicial power from both the legislative and executive powers that is most important for Blackstone. The concern to separate all three branches from each other and to set them against one another as checks on the power of each, so evident in *The Federalist*, is not apparent here. For Blackstone, a separation of the judiciary protects the operation of the common law, which in turn is the key to the preservation of the life, liberty and property.<sup>142</sup>

The question then arises as to which of these two views of the separation of powers prevailed in the drafting of the Australian Constitution and what effects this has had on the independence of parliament from the executive. Patapan argues that, beyond establishing that the independence of the judiciary was considered important for the future federation, records of the convention debates provide no clear guidance on which theory on the separation of powers was held by those involved in drafting the Constitution, nor any guidance on exactly how they envisaged the separation being enacted. He concludes that, in the absence of other evidence, we are left to draw our conclusions from the final form of the Constitution.<sup>143</sup>

The structure of the initial three chapters of the Constitution appears, at first glance, to envisage a separation of powers more inspired by the views of Madison than Blackstone—chapter I vests the legislative power of the Commonwealth in the parliament; chapter II vests the executive power in the Queen and her representative, the Governor-General; and chapter III vests the judicial power in the High Court and any other courts the parliament creates. However, when we examine more closely the relationship between the executive and the parliament, it is clear that a responsible government system is envisaged; with chapter I stating that the parliament will consist of the Senate, the House of Representatives and the Queen. This is further reinforced by section 64 of chapter II, which provides that ministers appointed by the Governor-General to administer departments of state must be members of parliament within three months of their appointment. Thus the Constitution appears to

represent an ambiguous amalgam of political traditions and theories concerning the separation of powers—the legislative, executive and judicial powers are recognised as distinct and vested in separate institutions, but then in the case of the parliament and executive, those bodies are made to share personnel. How the separation of powers has in fact developed since Federation has owed much to the decisions of the High Court.

The decisions of the High Court over the past century have had the effect of maintaining very strongly the independence of the judiciary, whilst steering away from the Madisonian doctrine regarding the legislative and executive branches. As Carney describes this situation, contrary to the situation at state level in Australia, the separation of judicial and non-judicial powers has been given legal effect by the High Court at the commonwealth level. He states that this has been done by way of two related legal principles inferred from chapter III of the Constitution.[144](#)

First, the High Court has ruled that judicial power can only be vested in courts listed in section 71 of the Constitution, and that no other body may exercise this power. In the Wheat Case, Isaacs J argued that the initial three chapters of the constitution vest the three powers of government in three distinct organs, that chapter III restricts the judicial power to those courts listed in section 71 of the Constitution, and that no body other than the courts listed in that section may be vested with such power.[145](#)

Second, the High Court has ruled that powers cannot move in the other direction either—that is, courts listed in section 71 of the Constitution may not take on powers of a non-judicial character. This principle was established by the decision in the Boilermakers' Case, where it was ruled that the non-judicial power of making industrial awards and the judicial power of enforcing awards could not both be vested in the Commonwealth Court of Conciliation and Arbitration. The majority reasoned that, in a federal system, the complete separation of judicial power was vital, as it is the federal judicature, which holds the ultimate responsibility of deciding on the limits of the powers of the governments within the system.[146](#) As the Privy Council put the matter when affirming the majority decision in this case:

In a federal system the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.[147](#)

Thus, the High Court has ruled that the judicial power is vested in the particular courts outlined in section 71, of the Constitution that this list is exhaustive and that the judicial bodies referred to may not exercise any non-judicial powers.[148](#)

A distinct approach has been taken with regard to the separation of legislative and executive powers. On this matter the High Court has come to decisions that allow the exercise of the legislative power, which the Constitution vests in the parliament, by the executive. The nature of the separation of legislative and executive powers was not considered explicitly by the High Court until Dignan's Case in 1931. Here Evatt J argued:

It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far, effective government would be impossible.

...

In truth the full theory of “Separation of Powers” cannot apply under our Constitution. Take the case of an enactment of the Commonwealth Parliament which gives to a subordinate authority other than the Executive, a power to make by-laws. To such an instance the theory of a hard and fast division and sub-division of powers between and among the three authorities of government cannot apply without absurd results.[149](#)

The ability of the parliament to delegate its legislative powers is subject only to the limitations that the parliament must retain the capacity to revoke the delegation and that the parliament cannot delegate a power that is so wide as to fall outside the matters on which it is granted power to legislate under the Constitution.[150](#)

We have, therefore, a situation in which the High Court has interpreted the three opening chapters of the Constitution in dissimilar ways, despite the parallel wording found in each regarding the vesting of powers. A separation of judicial from non-judicial power has been held to be of the highest importance, whereas a similarly strict separation of legislative and executive power has been held to be untenable as it would make ‘effective government impossible’ and lead to ‘absurd results’.

Patapan ventures the argument that the order in which cases came before the High Court played a significant role in this outcome:

The question of separation of judicial powers was determined early and in isolation from the general question of the separation of powers. The decision regarding the separation of the legislative and the executive was also reached without considering the theoretical question of separation of powers. When the overarching concept of the separation of powers was put to the Court in Dignan it was clear from the explanations and justifications offered that the Court was reluctant to overrule its previous decisions, reconciling ‘jurisitic analysis’ with precedent or stare decisis.[151](#)

This may have played some role in the justifications provided, but it seems that the practical difficulties of preventing the delegation of legislative power combined with the tradition of responsible government, which is itself embodied in the Constitution, would have led to the same result in any case. This conclusion is strengthened by the US example, where a symmetrical approach to the separation of powers was initially adopted by the Supreme Court. The Supreme Court derived from the vesting clauses in the US Constitution the following principle:

... unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.[152](#)

However, whilst it had been originally held that the Congress could not delegate any of its legislative powers on the grounds that what had been delegated to it by the people could not be further delegated, more recently the Supreme Court has loosened this interpretation and held merely that intelligible principles must be given for the exercise of delegated powers. This has not in practice much restricted the scope of delegated legislative powers.[153](#)

In broad terms then, we can see that the separation of powers doctrine, as it has been embedded in the constitutional framework at the Commonwealth level, allows, and in fact requires, very significant overlapping between the executive and the parliament: the executive and the parliament must share personnel; the parliament can and has delegated its

legislative power to the executive; and the parliament is constitutionally excluded from setting its own budget by the provisions that protect the financial initiative of the executive.

## Conclusion

In the preceding discussion I have demonstrated that the goal of reforming parliamentary budget setting, with the aim of increasing the independence of the parliament from the executive, has been raised repeatedly at both state and territory and commonwealth levels in Australia. Some modest reforms have been made in this direction, the most common of which have been the introduction of separate appropriation bills for parliaments and the involvement of parliamentary committees in the formulation of budget recommendations. These reforms have not, however, broken the stranglehold on financial matters enjoyed by executives. In all Australian jurisdictions, only the executive can bring an appropriation bill before the parliament, and this means that, ultimately, only parliamentary appropriations that the executive is prepared to accept will be brought forward.

I then demonstrated that many of the arguments put forward to support calls for reforms to parliamentary budget setting, portray the present situation as a violation of the separation of powers doctrine. However, I have also shown that this is not correct if we take these arguments to be referring to the separation of powers as it has actually developed in Australia. A review of the provisions of the Constitution and High Court decisions relevant to this issue showed that the system of government in Australia exhibits a strong separation of judicial from executive and legislative branches, but a very weak separation of executive and legislative branches. As Patapan characterises this situation, the Blackstonian view that the independence of the judiciary was all-important has prevailed over the Madisonian view that each of the three branches ought to be strongly independent and an effective check on one another.

On the one hand, this clarification of how the separation of powers has been concretely enacted in Australia weakens the arguments cited above—that parliamentary budget setting ought to be reformed as it is a violation of the doctrine of the separation of powers. We might dismiss these advocates for reform by saying that they have simply misrepresented the Australian system of government as it is actually practiced. However, I suggest that this clarification might also allow these arguments to proceed on a more solid foundation. It is now clear that what they are seeking is not to reform parliamentary budget setting so as to bring it into line with the existing separation of powers in Australia, but instead to reform the separation of powers along Madisonian lines such that it would allow greater parliamentary independence, including independent budget setting.

This recasting of the problem makes the reform task appear much greater, but I believe it more accurately reveals that what is at stake is not merely a relatively simple administrative change, but also a change to a fundamental principle of the system of responsible government as it operates in Australia—the distribution of powers over public finances between the parliament and the executive.

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