Australasian Parliamentary Review

JOURNAL OF THE AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Editor - Dr Sarah Moulds, Senior Lecturer in Law, University of South Australia

Scrutinising the National Cabinet

Integrity agency funding

Upper house committees

Australasian Study of Parliament Group

AUTUMN/WINTER 2022 • VOL 37 NO 1 • RRP $A35

AUSTRALASIAN STUDY OF PARLIAMENT GROUP (ASPG) AND THE AUSTRALASIAN PARLIAMENTARY REVIEW (APR)

The APR is the official journal of ASPG, which was formed in 1978 for the purpose of encouraging and stimulating research, writing and teaching about parliamentary institutions in Australia, New Zealand and the South Pacific (see back page for Notes to Contributors to the journal and details of AGPS membership, which includes a subscription to APR). To know more about the ASPG, including its Executive membership and its Chapters, go to www.aspg.org.au

AUSTRALASIAN PARLIAMENTARY REVIEW

Editor: Dr Sarah Mould, University of South Australia. Email: Sarah.Moulds@unisa.edu.au

EDITORIAL BOARD

Australasian Parliamentary Review
AUTUMN/WINTER 2022 • VOL 37 NO 1

Table of Contents

* Indicates that the article has been double-blind reviewed.

From the Editor

Sarah Moulds

Senior Lecturer in Law, University of South Australia

It is with much gratitude that I have accepted the role of Editor of the Australasian Parliamentary Review following an approach by outgoing Australasian Study of Parliament Group President Professor Colleen Lewis and outgoing Editor of the Review Professor Rodney Smith. The contribution of these two acclaimed scholars to the study of Parliaments in Australia and the region cannot be overstated, and I hope will continue to be evident through the pages of this publication for many years to come. Thank you for your leadership, collegiality, intellectual rigour, and sheer hard work. You have inspired many readers of this publication, including me, to pursue new knowledge and share ideas to improve the quality, accessibility and impact of our parliamentary democracies.

In this bumper edition of the Review, you will see a strong focus on oversight and accountability, with contributions from Dr Emma Banyer and Emma Wannell, both senior researchers with the Department of the Senate, on the role of the National Cabinet and its relationship with the federal and state Parliaments. These authors interrogate the promise of cooperative federalism, with the reality of emergency lawmaking and offer powerful insights into how to ensure this body remains accountable to the Australian people. Peter Wilkins, Adjunct Professor at the John Curtin Institute of Public Policy, also explores the theme of accountability from the perspective of integrity agency funding, with a focus on Auditor Generals and the role these important statutory office holders play in holding governments to account for their expenditure.

Complementing this theme is a contribution from Anthony Close and colleagues at the Victorian Parliamentary Budget Office, offering practical insights into how to improve Victoria's fiscal framework, with relevance for other jurisdictions seeking to improve the accessibility and effectiveness of their budgetary processes.

Aleisha Westgate, Acting Committee Secretary in the House of Representatives, Maddison Evans, Research Officer, Legislative Council Committee Office in the Parliament of Western Australia, and Lisa Butson, Senior Research Officer, Department of the Senate, offer useful insights into other key bodies and processes within parliaments that play an integral part in our parliamentary discourse. This includes highlighting the potential power and impact of parliamentary resolutions in Australia and the United States and reflecting on the role of upper house committees in the

Senate and in the Western Australian Parliament, as well as discussing who counts as 'a stranger' in our House of Representatives.

Dr Kelvin Matthews, Chief Executive Officer in WA Local Government, continues with a comparative analysis, this time considering what lessons the Japanese approach to local government and delegated legislation might hold for Western Australian local government bodies.

Cenz Larcione from the University of South Australia also shares his experience as part of a wonderful team of teachers supporting the South Australian Parliamentary Internship Program, designed and proven to open up the world of parliament to many bright, ambitious students over the years.

This edition also includes three great book reviews reflecting on the life and times of two political heavy weights from two very different eras in Australian politics: Bob Hawke (by Troy Bramston) and Sir William McKell (by David Clune). Reviewer Michael Easson also shares his thoughts on *The Party,* a history of the Communist Party in Australia, written by Stuart McIntyre.

This diversity of contributions and contributors is one of the most valuable assets of the Australasian Parliamentary Review and one I am keen to foster as editor. So, dear reader, whether you are a budding scholar, distinguished academic or practitioner with on the ground experience please do not hesitate to share your work with the Review.

Articles

A 'cabinet without a parliament'? Scrutinising the National Cabinet

Emma Banyer[1]

Principal Research Officer at the Department of the Senate. The views expressed in this article are her own, and do not represent the views of the Department

Abstract The National Cabinet represents a dynamic and innovative approach to crisis management across the Federation. However, it cannot be said to be a cabinet in the Westminster sense. Lacking cabinet solidarity, and answerable to nine separate legislatures, its members have nevertheless been bound by the rules of cabinet secrecy, at times frustrating parliamentary scrutiny of its decisions. In the wake of a successful challenge to its foundations, an attempt was made to embed the National Cabinet —and its secrecy provisions— through legislation.

INTRODUCTION

Many of the key decisions impacting the lives and livelihoods of Australians during the COVID-19 pandemic have been made at National Cabinet meetings. But what *is* the National Cabinet? What authority does it have? Who, or what, does it answer to? Are its decisions subject to parliamentary scrutiny? If so, by which parliaments, and what mechanisms? The National Cabinet has replaced the Council of Australian Governments as an ongoing fixture of Australia's Federation. Have its decisions been

[1] This article is an abridged and updated version of a paper submitted towards the completion of the Graduate Certificate in Parliamentary Law, Practice and Procedure at the University of Tasmania, awarded in 2021. It incorporates a 2022 update on the National Cabinet—specifically the government's efforts to maintain cabinet secrecy in relation to the body. The views expressed in this paper are her own, and do not represent the views of the Department.

subject to scrutiny by the Australian Senate and its committees? Will the Senate, and state and territory parliaments, be able to scrutinise decisions emerging from National Cabinet in the future?

This article discusses the constitutional status of the National Cabinet as a decision-making body within Australia's Federal governmental structure. It considers the implications of National Cabinet for ministerial accountability and parliamentary scrutiny, applying theoretical and practical lenses. The article concludes by looking at Senator Rex Patrick's challenge to the secrecy provisions applied to all National Cabinet documents and proceedings.

COVID-19—A CHALLENGE TO PARLIAMENTARY SCRUTINY

> [T]he Coronavirus pandemic poses a dual challenge for legislatures: the pandemic makes it difficult and even dangerous for legislators to operate according to regular order in their elected assemblies; and it creates a sense of emergency that empowers the executive branch and emboldens its motivations to assert greater authority at the expenses of the legislature.[2]

COVID-19 was recognised as a pandemic by the World Health Organization on 11 March 2020.[3] Choosing to adopt a 'suppression approach' as opposed to an 'elimination strategy',[4] Australian governments used a combination of lockdowns, border closures, social distancing measures, and testing and contact tracing to contain outbreaks. In the early days of the response, Australian parliaments 'transferred unprecedented powers' to executive governments and public service agencies, who issued health directives and guidance, and used legislation and regulations to impose significant restrictions upon the movement and actions of Australians, as well as to

[2] Ittai Bar-Siman-Tov, 'Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic—A Comparative Overview', *SSRN Electronic Journal*, 2020, p. 3.

[3] Bar-Siman-Tov, *Parliamentary Activity,* p. 2.

[4] J Craft and J Halligan, 'Executive governance and policy advisory systems in a time of crisis', in: A Boin, K Brock, J Craft, J Halligan, P Hart, J Roy, G Tellier and L Turnbull, 'Beyond COVID-19: Five commentaries on expert knowledge, executive action, and accountability in governance and public administration', *Canadian Public Administration*, 63(3), 2020, p. 345.

provide financial supports.[5] It is not unusual for governments to centralise authority, and reduce normal accountability mechanisms, during national emergencies or in wartime situations. In order to act swiftly and effectively, executive governments often find ways to work around 'cumbersome' legislative processes, with the effect that parliamentary scrutiny can be curtailed.[6] In such an environment emerged the National Cabinet—a novel and innovative approach to crisis management across the Federation.

Parliaments sidelined? Committees step up

Daly writes that parliament is 'the central mechanism for representation of the people, deliberation, production of legislation, and oversight of government', and its role in democracy is critical.[7] Bar-Siman-Tov contends that legislatures must continue their 'crucial role in checking the executive and ensuring that countries will not lose their constitutional values and democratic soul' while responding to the pandemic.[8] Daly argues that parliaments were sidelined across Australia early in the pandemic, with Australian governments at state and Federal levels relying on executive power, delegated legislation and the National Cabinet to make decisions, and making 'little provision to keep parliaments functioning during the pandemic', compared with other Western countries.[9]

When the Federal Parliament was suspended on 23 March 2020, the suspension was expected to last until 11 August 2020, sparking fears that Australia's parliaments had been 'deemed surplus to requirements',[10] with the cancellation of sittings initially 'hampering scrutiny of government pandemic measures'.[11] Moulds observes that, when parliaments *did* sit in this early period—sometimes for just a day or two—laws

[5] Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', *Alternative Law Journal*, 45(3), 2020, p. 180.

[6] Bar-Siman-Tov, *Parliamentary Activity*, p. 2.

[7] T Daly, 'Prioritising Parliament: Roadmaps to Reviving Australia's Parliaments', *Governing During Crises, Policy Brief No. 3*, Melbourne School of Government, University of Melbourne, 1 August 2020, p. 3.

[8] Bar-Siman-Tov, *Parliamentary Activity* 1, p. 3.

[9] Daly, *Prioritising Parliament*, pp. 2-3. Note: Ittai Bar-Siman-Tov studied 26 parliaments in the pandemic, finding that 'most' (22 out of 26) continued to operate during the pandemic. This included Italy's parliament and parliaments in countries where 'several MPs and minsters have been diagnosed with the coronavirus'. Bar-Siman-Tov, *Parliamentary Activity*, p. 7.

[10] Scott Prasser, 'A Funny Thing Happened on the Way to the National Cabinet—Out Goes Good Policy, One, Two, Three', *Australasian Parliamentary Review*, Winter/Spring 2020 35(1), p. 154.

[11] Daly, *Prioritising Parliament*, p. 4.

relating to COVID-19 were passed 'within days, sometimes hours, with limited safeguards', and little opportunity for parliamentarians to scrutinise the bills.[12] However, Moulds also notes the establishment of the Senate Select Committee on COVID-19 (the COVID-19 Committee) on 8 April 2020, saying:

> The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days, parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.[13]

With COVID-19 inquiries running in New Zealand, Canada and the United Kingdom, similar inquiries were also established in Australian jurisdictions, including South Australia and the Australian Capital Territory. In New South Wales (NSW), the task of overseeing the NSW government's handling of the pandemic was referred to the Legislative Council's Public Accountability Committee,[14] and in Victoria, the Public Accounts and Estimates Committee was tasked with conducting the COVID-19 inquiry.[15] In the Senate, existing scrutiny committees also stepped up. The Parliamentary Joint Committee on Human Rights continued meeting regularly by teleconference, applying rigorous human rights scrutiny to primary and delegated legislation relating to the pandemic; and the Senate Standing Committee for the Scrutiny of Delegated Legislation increased its activity in response to a burgeoning reliance on delegated legislation during the pandemic.[16] During the period in which sittings were reduced, the COVID-19 Committee held a large number of public hearings—an average of two per week—at which it scrutinised numerous aspects of the government's pandemic response, including questioning the Department of the Prime Minister and Cabinet (PM&C) about the National Cabinet and the National

[12] Moulds, *Scrutinising COVID-19 laws*, p. 181.

[13] Moulds, *Scrutinising COVID-19 laws*, p. 181.

[14] Moulds, *Scrutinising COVID-19 laws*, p. 182.

[15] Parliament of Victoria, Public Accounts and Estimates Committee, 'Inquiry into the Victorian Government's response to the COVID-19 pandemic' Accessed at www.parliament.vic.gov.au/paec/inquiries/inquiry/1000.

[16] Moulds, *Scrutinising COVID-19 laws*, p. 3.

COVID-19 Commission Advisory Board a number of times, and questioning the Department of Health on multiple occasions.[17]

As it turned out, the Federal Parliament sat again in April, for one day, then in May and June. By the end of 2020, it had sat for 58 days[18]—only about 10 days fewer than the average yearly figure of 67 days.[19] The fact that Australia was able to contain the spread of the coronavirus as effectively and quickly as it did over this period is, arguably, the only reason that Federal parliamentary sittings reached the number they did in 2020. Critics have cautioned that Parliaments must plan for future crises, and have alternative arrangements in place, to allow parliamentary business to continue under exceptional circumstances. The Centre for Comparative Constitutional Studies submits:

> The COVID-19 crisis has demonstrated that a more structured approach to Parliament in times of crisis is needed. Parliamentary sittings are presently ad hoc and their timetable is set by the Government. This situation is clearly unsatisfactory and Parliament should ensure that arrangements are put in place which would allow it to continue to discharge its constitutional functions in times of emergency.[20]

[17] Parliament of Australia, Senate Select Committee on COVID-19, *First Interim Report*, December 2020, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024513/toc_pdf/Firstinterimreport.pdf;fileType=application%2Fpdf.

[18] Parliament of Australia, House Procedure Office Website, 'House of Representatives Statistics', Accessed at www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics.

[19] D Elder (ed), *House of Representatives Practice*. Canberra: Department of the House of Representatives, 2018, p. 681.

[20] Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, Parliament of Australia, 2020, p. 2.

THE NATIONAL CABINET

Cartoon: M. Golding (cartoonist), *Sun Herald Sunday*, 30 August 2020, p. 28.

As well as truncating democratic processes, national emergencies can often 'accelerate' political or administrative change. Prasser contends that the need for 'urgent and authoritative decision making' during a crisis can speed up long-term political trends and lead to the creation of 'new institutional arrangements'.[21] The national response to the coronavirus pandemic was initially coordinated through existing intergovernmental agreements, including the 2011 *National Strategy for Disaster Resilience*, and the 2018 *National Disaster Risk Reduction Framework*—agreements negotiated through the Council of Australian Governments (COAG).

[21] Scott Prasser, *A Funny Thing Happened*, p. 144.

However, at a scheduled COAG First Ministers' meeting in March, a new initiative—the National Cabinet—was formed, with its inaugural meeting held two days later.[22]

The National Cabinet is an intergovernmental forum and decision-making body incorporating the Prime Minister, state premiers and territory chief ministers. It has been described as an example of 'executive federalism' and 'leader-centred politics'; where interactions between governments are conducted mostly by members of executive branches.[23] In relation to the pandemic, the National Cabinet receives advice from the Department of Home Affairs' National Coordination Mechanism, which is responsible for the non-health aspects of the pandemic (banking, food supply, etc), and from the Australian Health Protection Principal Committee (AHPPC); a body comprising state and territory Chief Health Officers, the Australian Chief Medical Officer and other government officials.[24] The Prime Minister also established the National COVID-19 Coordination Commission on 25 March 2020. It was renamed the 'National COVID-19 Commission Advisory Board' on 27 July 2020, to reflect its 'strategic advisory role in providing a business perspective to Government on Australia's economic recovery'.[25] When first established, Prime Minister Scott Morrison presented the National Cabinet as a 'temporary body' for coordinating the COVID-19 response, designed to supplement COAG, and not to 'bypass' Commonwealth or state parliaments.[26]

While originally envisaged to be temporary, on 29 May 2020, the Prime Minister announced that the National Cabinet would become a permanent entity, replacing COAG, and operating 'under Federal Cabinet rules', just 'like a fair dinkum Cabinet'.[27] The Prime Minister maintained that National Cabinet owed its success to the fact that it was 'less bureaucratic' and more 'streamlined' than COAG.[28] National Cabinet would meet weekly, instead of twice a year, and the meeting would be covered under the 'same confidentiality and freedom of information [FOI] protections and protocols as

[22] Prasser, *A Funny Thing Happened*, p. 146.

[23] Prasser, *A Funny Thing Happened*, p. 142.

[24] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

[25] Department of the Prime Minister and Cabinet, 'National COVID-19 Commission Advisory Board', PMC Website, Accessed at: https://pmc.gov.au/ncc.

[26] Prasser, *A Funny Thing Happened*, p. 147.

[27] Scott Morrison, PM, quoted in Prasser, *A Funny Thing Happened*, p. 150.

[28] Scott Morrison, PM, *Media Release: Update following National Cabinet*, 29 May 2020, Accessed at www.pm.gov.au/media/update-following-national-cabinet-meeting.

the federal Cabinet'.[29] To facilitate this in practice, the Prime Minister declared the National Cabinet, the AHPPC, and the National COVID-19 Commission Advisory Board to be 'committees of cabinet', so that discussions, documents and decisions would be classified cabinet-in-confidence.[30] But is the National Cabinet a 'cabinet'?

The cabinet in Westminster tradition

Australia's federated system of government was constructed as a kind of 'hybrid' parliamentary system, or 'Washminster Mutation', borrowing ideas from British, American and other constitutional traditions.[31] In common with British parliamentary democracy, Australia adopted a system of 'responsible government', meaning the executive is *part of* the legislature (rather than separate from it), and ministers are accountable, individually and collectively, to the parliament. From this flows the notion of 'collective responsibility', expressed in two key conventions: 'cabinet solidarity', and the assumption that the whole executive will resign if the government loses a vote of no confidence in the House of Representatives. As a means of protecting cabinet solidarity, 'cabinet secrecy' requires that 'documents and discussions' within cabinet are kept confidential.[32]

In Westminster-style parliamentary systems of government, including in Australia's 'Washminister' system, cabinets are 'the primary decision making organ of executive government' at both state and federal levels, and operate according to the conventional rules of cabinet confidentiality, uphold cabinet solidarity, and function through collective responsibility to their respective parliaments.[33] Members of a cabinet are bound by convention to publicly support the decisions of cabinet (whether or not they were present, or agreed with a decision) and uphold cabinet secrecy, and deliberations are protected by law and exempt from FOI requests. These provisions are designed to ensure that discussions within cabinet can be frank and robust to facilitate good governance. However, because the National Cabinet has a bipartisan

[29] Scott Prasser, *A Funny Thing Happened*, 148.

[30] R Lewis, 'Rex Patrick will challenge cabinet-in-confidence rules capturing national cabinet, AHPPC', *The Australian*, 25 August 2020, Accessed at www.theaustralian.com.au/nation/politics/rex-patrick-will-challenge-cabinetinconfidence-rules-capturing-national-cabinet-ahppc/news-story/b2df53607cd1381bff72a6fec6f0dae8

[31] Elaine Thompson, 'The 'Washminster' Mutation', Chapter 4 in P. Weller and D. Jaensch (eds), *Responsible Government in Australia*, Richmond Vic: Drummond, 1980, p. 33.

[32] Thompson, *The 'Washminster' Mutation*, p. 34.

[33] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

membership, and contains members from *nine* separate governments, Tulich, Rizzi and McGaughey argue that '[t]he principle of collective responsibility cannot apply in the usual way':

> As an intergovernmental body, its members are not collectively responsible to one Parliament, but individually responsible to nine separate parliaments. Similarly, cabinet solidarity cannot be enforced, leading, as we have already seen, to public dissention by members of the National Cabinet.[34]

As an example, the authors point to the National Cabinet meeting on 22 March, after which the Premiers of NSW and Victoria, and the Chief Minister of the ACT 'broke ranks' by recommending that parents in their jurisdictions keep school-aged children at home, 'while the Federal Government maintained that schools were safe to attend and should remain open'.[35] Another example can be found in the interim report from the Opposition-led COVID-19 Committee, which says that National Cabinet:

> …has not functioned in accordance with longstanding Westminster conventions on cabinet government in relation to collective responsibility and solidarity. The Prime Minister's public criticisms of certain state premiers' decisions (school closures and internal border measures) fractured the national response and created unnecessary public confusion and anxiety.[36]

Although it is called a 'cabinet', numerous legal scholars and commentators have argued the National Cabinet is simply another intergovernmental forum, like its predecessor, COAG. Twomey told *The Australian* that the word 'cabinet' has always meant 'a body comprised of ministers who were responsible to one parliament and government', and it is 'completely inappropriate' to describe the AHPPC and National Cabinet as cabinet committees. Twomey said that, while 'government may want to label something 'cabinet' or a 'cabinet committee', a court would not necessarily accept just because you gave it a label that's what it really is for the purposes of legislation'.[37] Similarly, Tulich, Rizzi and McGaughey argue that the National Cabinet 'bears little resemblance to a cabinet in the Westminster tradition'.[38] Nor does it resemble a 'war

[34] Tulich, Rizzi and McGaughey, *Cooperative Federalism,* p. 2.

[35] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 3.

[36] Parliament of Australia, Senate Select Committee on COVID-19, *First interim report*, December 2020, p. xxii.

[37] A Twomey quoted in Lewis*, Rex Patrick will challenge*.

[38] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

cabinet', such as those formed in World War II comprising government and opposition members of the Federal Parliament.[39]

Podger argues the term 'National Cabinet' 'disguises the nature of federalism: that each jurisdiction has sovereign powers'.[40] Podger suggests the name of its predecessor, the 'Council of Australian Governments', better reflected the 'Constitutional reality'.[41] Keating critiques the 'job creation' focus adopted by National Cabinet in late 2020. Keating observes that COAG traditionally focussed on '[c]oordinating the activities of each level of government to improve service delivery'.[42] This, Keating argues, is the constitutionally-correct function of an intergovernmental body like COAG (or the National Cabinet).[43]

Ministerial accountability

Not only does the National Cabinet lack substantial cabinet solidarity, and any mechanism to enforce it, as a virtual 'black box' in which decisions are made that affect states and territories, it could also be seen to obscure ministerial accountability at all levels of government. The paradox of ministerial accountability and the National Cabinet is beautifully captured in Pope's cartoon. The National Cabinet is wielding 'expansive power', making decisions that restrict people's freedoms and impact the livelihoods of Australians… yet, this 'expansive power' is operating 'outside of the normal accountability mechanism of collective cabinet responsibility to one Parliament'.[44]

[39] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

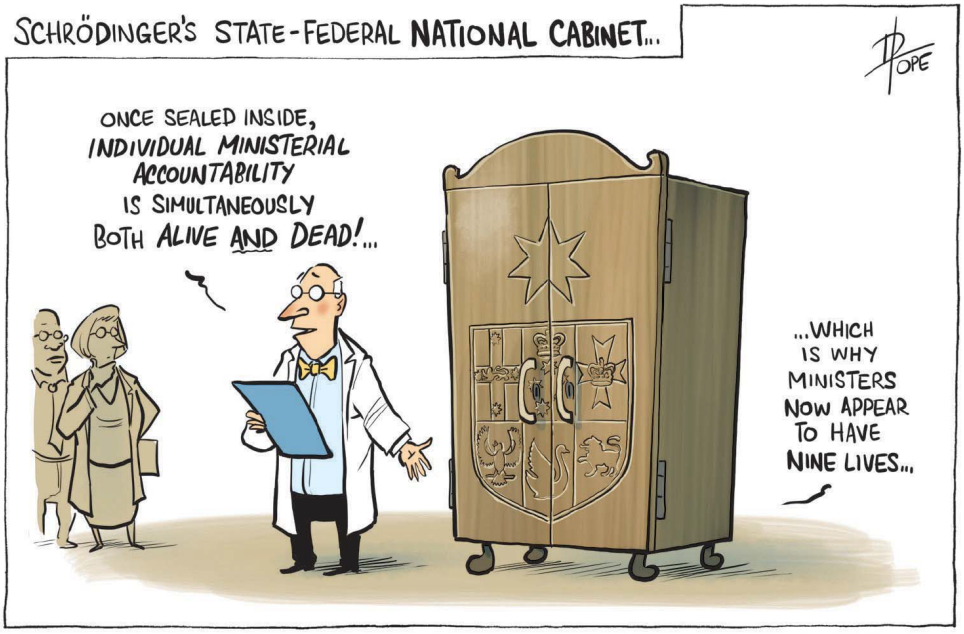
[40] A Podger, 'Federalism does not need an ongoing 'National Cabinet'', *Pearls and Irritations: John Menadue's Public Policy Journal*, Online, 19 July 2020 Accessed at https://johnmenadue.com/ .

[41] Podger, *Federalism*.

[42] M. Keating, 'National Cabinet to replace COAG: Part 2 of 2', *Pearls and Irritations: John Menadue's Public Policy Journal*, Online, 9 June 2020. Accessed at https://johnmenadue.com/ .

[43] Keating, National Cabinet to replace COAG: Part 2, p. 2.

[44] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 5.



Cartoon: David Pope (cartoonist), 'Schrodinger's state–federal national cabinet', *The Canberra Times*, 1 September 2020, p. 2.

Boughey argues that National Cabinet 'is not accountable in the same way that federal, state and territory cabinets are', because the split responsibilities of its members complicates how responsible government can function:

> Leaders will be able to answer any questions of their respective parliaments and parliamentary committees by simply explaining that the jurisdiction is committed to a particular course of action through the intergovernmental agreement. This tends to curtail any opportunity for parliamentary input or debate.[45]

The Federal *Cabinet Handbook 14th Edition*, which guides the functioning of the National Cabinet, defines ministerial responsibility and requires that ministers 'not talk publicly about matters that they propose to bring to the Cabinet nor announce a major

[45] J. Boughey, 'Executive power in emergencies: Where is the accountability?'. *Alternative Law Journal*, 45(3), September 2020, p. 169.

new policy without previous Cabinet approval'.[46] When questioned about the attendance, rules and processes applying to the National Cabinet, the Secretary of PM&C, Gaetjens confirmed:

- that he, the Prime Minister, Professor Brendan Murphy (the Chief Medical Officer), a Commonwealth note taker, and a state note taker attend National Cabinet meetings, along with the First Ministers of the states and territories;
- that '[g]enerally…the Commonwealth has been taking the positions it takes to national cabinet through its own cabinet first';
- that 'discussions with [his] counterparts have indicated that the states have done the same'; and
- that National Cabinet has received presentations from other parties, including Treasury, the Reserve Bank and the Mental Health Commission.[47]

National Cabinet is supported by the Federal Cabinet Secretary, a position held by 'a political staffer', employed under the *Members of Parliament (Staff) Act 1984* (Cth), rather than a public servant.[48] PM&C's *Cabinet Handbook* was updated in October 2020 to incorporate a section on the National Cabinet and related bodies. It clarifies that the National Cabinet can co-opt 'expert advisors',[49] as it has done with the AHPPC. The Handbook states that the Commonwealth Cabinet Office 'provides secretariat support to the National Cabinet, in collaboration with State and Territory support areas', and requires strict confidentiality protocols.[50] It is notable that the Secretary of PM&C is the 'formal custodian of National Cabinet records' and, in the event of a change of government at Commonwealth, state or territory level, successor governments are

[46] Department of the Prime Minister and Cabinet, *Cabinet Handbook 14th Edition*, October 2020, p. 11, www.pmc.gov.au/resource-centre/government/cabinet-handbook.

[47] Philip Gaetjens, Secretary, Department of the Prime Minister and Cabinet, Select Committee on COVID-19, *Committee Transcript*, 13 May 2020, p. 2. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F608011bb-99d9-4b10-9fa8-521eaa899fa5%2F0000%22.

[48] Answers to written questions on notice by the Department of Prime Minister and Cabinet, asked by Senator Gallagher on 22 May 2020, received 5 June 2020, Qu No: 0037, www.aph.gov.au/DocumentStore.ashx?id=01d0ef02-6a35-49e1-8130-b215d1bc14fb.

[49] Department of the Prime Minister and Cabinet, *Cabinet Handbook 14th Edition*, October 2020, pp. 30–31, www.pmc.gov.au/resource-centre/government/cabinet-handbook.

[50] *Cabinet Handbook,* pp. 30–31.

required to apply to PM&C for access to historical records. In making a decision regarding release, PM&C 'will consult' with the party that was in government when the record was created.[51]

Prasser asks: with the Prime Minister alone determining which documents and information associated with National Cabinet are released to the public, 'how can ministerial accountability be practised'—particularly at the state and territory level? How can first ministers returning to their parliaments 'be held accountable…about the decisions made by National Cabinet? Indeed, can those First Ministers even discuss those issues?'[52]

Rather than being responsible to nine parliaments, the Hon. Colin Barnett calls National Cabinet a 'cabinet *without* a parliament', saying it holds no 'constitutional or legislative powers', and is 'simply a meeting'.[53] Barnett insists that 'the states remain sovereign in their own right', as demonstrated by their unilateral action on border closures, often against the wishes of the Commonwealth.[54] Western Australia's decision not to participate in the 'opening up plan' and 'hotspot definition' agreed by all other jurisdictions on 4 September 2020 can be seen as a public acknowledgement that parties within National Cabinet are *not* bound by cabinet solidarity.[55] Prasser notes that the states' 'digression' from National Cabinet decisions have resulted in 'no penalties':

> Commonwealth funding flowed regardless of the decisions that the States took, whether or not they were in accord with the increasingly weak enunciations from the fortnightly National Cabinet meetings. This was most vividly seen in relation to border closures, where several states practised what Paul Kelly described as 'pandemic protectionism' taking Australia back to the state

[51] *Cabinet Handbook,* p. 32.

[52] Prasser, *A Funny Thing Happened*, pp. 152–153.

[53] C Barnett, 'A cabinet without a parliament, a meeting with no power', *Australian Financial Review*, 1 June 2020, emphasis added, www.afr.com/politics/federal/a-cabinet-without-a-parliament-a-meeting-with-no-power-20200601-p54y83.

[54] Barnett, *A cabinet without a parliament*.

[55] Scott Morrison, PM, *Media Release: Update following National Cabinet*, 4 September 2020, https://www.pm.gov.au/media/national-cabinet-040920.

> sovereignty model of the 1890s when the colonies were unencumbered by the responsibilities or constraints of nationhood.[56]

Power and authority

It is fair to say the National Cabinet is not a cabinet in the Westminster sense. Accountability for decisions made at National Cabinet meetings lies in nine separate jurisdictions, and ministerial accountability is obscured (if not erased) by its structure and processes. The National Cabinet is not, however, 'a meeting with no power', as Barnett wrote.[57] Boughey observes that National Cabinet has been the body responsible for making many of the key decisions regarding 'when to impose and ease restrictions' relating to COVID-19, which have then been implemented by the states and territories, who have the constitutional authority to enact and enforce the necessary orders.[58] These decisions have far-reaching ramifications.

Tulich, Reilly and Murray propose that National Cabinet exemplifies a growing 'presidentialisation of Australian politics'; a trend towards greater emphasis on 'leaders as individuals rather than leaders of a collective executive', and ultimately, a trend that de-emphasises the role of parliaments.[59] The rhetoric suggests that each first minister is able to participate freely at National Cabinet, as an individual, but this rhetoric:

> …elides the underlying reality under our Westminster system of government that their executive positions are all subject to the potentially shifting sands of parliamentary majorities. Parliamentary supremacy and indeed sovereignty remains in form, but in function the National Cabinet resembles a meeting of US governors and the President — each of whom are of course directly elected and thus able to claim their own mandate. In this way, the National Cabinet could be seen as an exemplar of thesis, as an institutional innovation which shifts power further away from Parliament and towards individual leaders.[60]

---

[56] Prasser, *A Funny Thing Happened*, p. 155.

[57] Barnett, *A cabinet without a parliament*.

[58] Boughey, *Executive power*, p. 169.

[59] T Tulich, B Reilly and S Murray, 'The National Cabinet: Presidentialised Politics, Power-sharing and a Deficit in Transparency', *Australian Public Law*, 23 October 2020, Accessed at https://auspublaw.org/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency/.

[60] Tulich, Reilly and Murray, *Presidentialised Politics*.

Prasser reaches a similar conclusion, saying the change from COAG to the National Cabinet model has 'further enhanced executive federalism, extended executive power and increased the role of First Ministers', as well as sidelining parliaments.[61] When asked to comment on the benefits of the change from COAG to the National Cabinet, Gaetjens praised the secrecy component and described the new model as 'more tightly focused' and 'leader-driven'.[62]

Boughey argues that the National Cabinet's decisions are not legally enforceable; a view echoed by others.[63] Saunders' work on intergovernmental agreements suggests it is not that simple. Saunders applies the term 'soft law' to describe those agreements made between jurisdictions that 'have no legal effect either as contracts or through legislation'.[64] Saunders' identifies section 61 of Australia's *Constitution* as the 'principal source of power' relied upon by the Commonwealth in facilitating intergovernmental agreements, but raises doubts as to the certainty of the application of section 61 to any matter for which the Commonwealth does not have 'a head of substantive legislative power'.[65] In relation to the pandemic, the Commonwealth appears to be relying on a combination of non-statutory executive powers, and statutory powers contained in the *Biosecurity Act 2015*. The Centre for Comparative Constitutional Studies submits:

> The lack of clarity about the precise role of Commonwealth executive power within the Government's COVID-19 response is therefore troubling on a number of fronts. Opacity with respect to this issue makes it hard to understand whether some decisions have legislative support or not: and if not, why not. Those that do not have such legislative support are presumably reliant, at the Commonwealth level, on non-statutory executive power.[66]

This situation puts the National Cabinet, and decisions emanating from it, on constitutionally 'shaky ground'. Saunders argues the terminology of 'cabinet is misleading', as the National Cabinet is simply 'a group of chief ministers, heading

[61] S. Prasser, National Cabinet, p. 154.

[62] Mr Gaetjens, Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 8.

[63] J. Boughey, Executive power, p. 170.

[64] C. Saunders, 'Intergovernmental agreements and the executive power', *Public Law Review*, 16(4), 1 January 2005, p. 299.

[65] C. Saunders, Intergovernmental agreements, p. 301.

[66] Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, p. 6.

different cabinets, through which they are individually and collectively accountable to different parliaments':

> The problem is compounded by the suggestion that, somehow the national cabinet fits within the commonwealth cabinet structure. This is a logical impossibility, apparently driven by a desire to keep proceedings confidential.[67]

Saunders proposes that the National Cabinet would be on a surer footing if its structure and processes were 'crafted to fit this distinctive need', rather than 'imported' from the Federal Cabinet.[68] Properly codifying the role and structure of National Cabinet would also provide an opportunity, Saunders suggests, for intergovernmental arrangements to be appropriately integrated into 'the cabinet and parliamentary processes at each level of government'.[69]

Confidentiality

Asked why the National Cabinet should have the same rules of confidentiality as Federal and state cabinets, the Prime Minister is widely quoted as saying: '[I]t's not a spectator sport. It's a serious policy deliberation between governments and by cabinet members within cabinets'.[70] A number of parliamentarians have not been satisfied with this response.

Independent Senator Patrick appealed to the Administrative Appeals Tribunal in mid-2020 after being refused access to National Cabinet documents. Senator Patrick argued it is an 'abuse of cabinet convention' to apply cabinet secrecy to groups of ministers from different parliaments, and to people who are not ministers, including 'groups of doctors'.[71] Part of Senator Patrick's claim relates to a request for information from the Department of Health. The Department cited cabinet-in-confidence provisions to refuse to answer questions about 'high-level decisions around domestic border

[67] Saunders, *The National Cabinet has worked*.

[68] C. Saunders, 'A New Federalism? The Role and Future of the National Cabinet', *Governing During Crises: Policy Brief No. 2*, University of Melbourne: Melbourne School of Government, 1 July 2020, p. 6.

[69] Saunders, *A New Federalism*, p. 5. This opinion is in keeping with legal advice provided by Barrister Jeremy Farrell quoted in P Karp, 'National cabinet secrecy under fire in first-of-its-kind challenge to new arrangement', *The Guardian Australia*, 19 August 2020, www.theguardian.com/australia-news/2020/aug/19/national-cabinet-secrecy-under-fire-in-first-of-its-kind-challenge-to-new-arrangement.

[70] Prasser, *A Funny Thing Happened*, pp. 152-153.

[71] Lewis*, Rex Patrick will challenge*.

closures by the AHPPC'. These provisions were also used to refuse two FOI requests from Senator Patrick for National Cabinet minutes and information about its 'rules and procedures'.[72] Senator Patrick argued that expanding the conventions of cabinet in this way, 'interferes with the accountability of government that is the very essence of responsible government'.[73] The Senator also maintained that the decision to make the National Cabinet permanent—replacing COAG, whose documents were generally subject to FOI[74]—'creates a confidentiality span that is so broad it intrudes on rights created' by the *Freedom of Information Act 1982* (Cth).[75] Senator Patrick's case was ultimately successful—an update is provided at the end of this paper.

Along with Senator Patrick, other non-government members and senators publicly expressed concerns about the blanket application of cabinet confidentiality rules to the documents and proceedings of the National Cabinet.[76] In its *First Interim Report*, tabled in December 2020, the COVID-19 Committee stated: 'The Australian Government has *improperly* applied cabinet conventions to avoid transparency in relation to decisions made by the National Cabinet'.[77] The Chair of the COVID-19 committee expressed frustration that departments including Health and Treasury reported being advised by PM&C *not* to provide information—such as economic or health modelling—to the committee on the basis that the information contributed to National Cabinet deliberations.[78] Committee Chair, Senator Katy Gallagher concluded that 'the change from COAG to a national cabinet has actually reduced the transparency of the discussions and the decisions taken by the Prime Minister and the state and territory

[72] Lewis, *Rex Patrick will challenge*.

[73] P Karp, 'National cabinet secrecy under fire in first-of-its-kind challenge to new arrangement', *The Guardian Australia*, 19 August 2020. Accessed at www.theguardian.com/australia-news/2020/aug/19/national-cabinet-secrecy-under-fire-in-first-of-its-kind-challenge-to-new-arrangement.

[74] Tulich, Reilly and Murray, *Presidentialised Politics*.

[75] Karp, *National cabinet secrecy under fire*.

[76] For instance, independent MP Zali Steggall, leader of the Australian Greens, Adam Bandt MP, and Labor Senator Katy Gallagher. J. Butler, 'Dark room' dealings: Secretive COVID council deciding Australia's future', *The New Daily*, 28 July 2020. Accessed at: https://thenewdaily.com.au/news/2020/07/28/covid-commission-secret/.

[77] Parliament of Australia Senate Select Committee on COVID-19, *First interim report*, December 2020, p. xxii. E, phasis added.

[78] Senator Katy Gallagher, Parliament of Australia, Senate Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 12.

leaders'.[79] In its Interim Report, the COVID-19 committee recommended the government 'publish all previous and future minutes of the AHPPC to provide the public with access to the medical advice behind all decisions affecting the community's safety, livelihoods and personal freedoms'.[80] The committee also recommended all reports of the National COVID-19 Commission Advisory Board be made public, along with the conflict of interest declarations made by commissioners.[81]

Not all commentators hold negative views about the National Cabinet's levels of transparency. Craft and Halligan's comparison of pandemic responses in Australia, Canada, the UK, and New Zealand, found Australia's response to be more 'open' than the Canadian and UK governments'.[82] The authors speak positively about Australia's National Cabinet, and its practice of 'providing details of meeting decisions and key advisory documents'.[83] Mr Gaetjens described the process as highly transparent, saying statements from the Prime Minister about the decisions and outcomes of National Cabinet 'have been the most transparent that I've ever seen in terms of what is actually happening'.[84] The Centre for Comparative Constitutional Studies agreed that the Prime Minister and first ministers have kept the public well-informed about the decisions of National Cabinet. However, the Centre argued that more transparency was warranted and would not affect the 'efficacy of the body'.[85]

Moulds also offers a positive perspective, highlighting the 'deliberative potential' presented by this kind of bipartisan 'safe space'—a space in which ministers can leave 'entrenched ideological positions' at the door, working together, free to change their minds 'in the face of compelling evidence' that is provided by interacting with experts.[86] This deliberative potential would likely be lost if discussions at National Cabinet were public.

[79] Senator Katy Gallagher, Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 13.

[80] COVID-19 Committee, *Interim Report*, p. xv.

[81] COVID-19 Committee, *Interim Report*, p. xv.

[82] Craft and Halligan, *Executive governance*, p. 350.

[83] Craft and Halligan, *Executive governance*, p. 350.

[84] Philip Gaetjens, Secretary, Department of the Prime Minister and Cabinet, Select Committee on COVID-19, *Committee Transcript*, 13 May 2020, p. 8.

[85] Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, p. 5.

[86] Moulds, *Scrutinising COVID-19 laws*, p. 6.

CONCLUSION

The National Cabinet has been an innovative and often effective way to coordinate a national response to the pandemic, but, as Senator Gallagher pointed out, changing from COAG to the National Cabinet may have 'reduced the transparency of the discussions and the decisions taken by the Prime Minister and the state and territory leaders'.[87] It is understandable that leaders in an unprecedented crisis have preferred the freedom and cover provided by the rules of cabinet secrecy, but the National Cabinet presents a number of perplexing 'accountability challenges' for parliaments, as well as leading to 'ambiguities in the messaging to the public and distinctions in measures implemented across the Federation'.[88]

The National Cabinet is *not* a cabinet in the Westminster sense, and cabinet solidarity cannot be expected, or enforced. As such, proceedings and documents relating to the National Cabinet cannot be said to be entitled to 'cabinet secrecy'. Secrecy may be appropriate where there is a public interest imperative—such as in relation to critical national security decisions—but to insist upon cabinet secrecy as the foundation for all future intergovernmental interactions risks creating a 'transparency deficit'.[89] Parliamentary scrutiny is a critical adjunct to responsible government, and responsible government must be 'limited government—not mere majoritarian [rule]'—with decisions subject to oversight and scrutiny.[90] Brock and Turnbull write:

> Westminster parliamentary systems work by striking a well-calibrated balance between a powerful executive branch that can take decisions and actions effectively and a functional legislative branch that holds the government to account. In times of emergency, the balance between decisiveness and accountability tends to lean more heavily towards an even more powerful, effective executive….Once an emergency or exceptional circumstances pass, the equilibrium between the branches should be restored to normal levels of

[87] Senator Gallagher, *Committee Transcript*, 4 June 2020, p. 13.

[88] Tulich, Rizzi and McGaughey, *Cooperative Federalism*, pp. 5-6.

[89] Tulich, Reilly and Murray, *Presidentialised Politics.*

[90] Thompson, *The 'Washminster' mutation*, pp. 667-668.

> accountability, lest we lose the healthy and vital system of counterweights in a parliamentary democracy.[91]

The National Cabinet's 'presidentialised' approach and secrecy provisions may have been well-suited to facilitating a fast, bold, and dynamic pandemic response, but scrutiny and accountability will suffer if blanket secrecy provisions remain in place.

Postscript: 2022 update and developments

In August 2021, Federal Court Justice Richard White ruled in the Administrative Appeals Tribunal that the National Cabinet is not a cabinet, and its documents are not exempt under the related provisions of the FOI Act.[92] Outlining his reasons for the decision, Justice White noted that 'the National Cabinet does not derive powers from the Cabinet'; stated that a group 'which is not 'of' the Cabinet will not be a committee of the Cabinet'; and concluded that 'none of the subject documents is an official record of a committee of the Cabinet and accordingly exempt from production by reason of s 34(1)(b) of the FOI Act'.[93]

In response, the government introduced into Parliament the COAG Legislation Amendment Bill 2021—legislation designed to update existing laws by removing legacy references to COAG, setting out new definitions, and codifying that the deliberations and decisions of the National Cabinet are protected from disclosure through cabinet-in-confidence provisions (Schedule 3 of the Bill).[94] The Explanatory Memorandum states:

> The confidentiality of information and decision-making is critical to the effective operations of the National Cabinet, enabling issues to be dealt with quickly, based on advice from experts. The sharing of sensitive data, projections and judgements—which relies on these principles of confidentiality—has been the

[91] Brock, et al, *Beyond COVID-19*, pp. 350-351.

[92] *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719.

[93] *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, paras. 64, 149 and 276.

[94] Parliament of Australia, Website, 'Bills Homepage: COAG Legislation Amendment Bill 2021, 'Summary', 2 September 2021, Accessed at www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6782.

> foundation of effective decision making in the interests of the Australian people.[95]

The Bill was referred to the Senate Finance and Public Administration Legislation Committee (F&PA), as well as being considered by the Senate Standing Committee for the Scrutiny of Bills. In her submission to the F&PA inquiry, Professor Twomey argued that the amendments contained in Schedule 3 'defy the self-evident facts, which brings the law into disrepute'. Twomey said enacting 'a law that asserts things that are not true…is unwise…and damages public confidence in the law'.[96] The government-controlled committee, however, determined that it was not the committee's 'role to adjudicate on the structure and operation of Cabinet or its committees', and recommended the Bill be passed.[97]

Conversely, the Labor Opposition Senators' dissenting report expressed support for Justice White's decision, and said:

> The defeat in the AAT is the reason the Senate is dealing with the proposed bad law subject to this inquiry. … [Evidence to the inquiry provided] a comprehensive legal and policy demolition of a schedule to a bill that, if passed into law, would have substantial, systemic and negative consequences for transparency, accountability and the functioning of the federation.[98]

Similarly, in its report, the scrutiny committee stated it was 'concerned' that the Bill seeks to 'extend Cabinet-related exemptions in some instances to *all documents* submitted, or proposed to be submitted to, National Cabinet', rather than applying confidentiality only as required.[99] Ultimately, Labor recommended the bill be passed

---

[95] Explanatory Memorandum, COAG Legislation Amendment Bill 2021, p. 17. Accessed at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6782_ems_47ebe52c-03ad-4726-9ac1-b80d2c015dd8/upload_pdf/21034EM.pdf;fileType=application%2Fpdf.

[96] Anne Twomey, *Submission 8*, p. 2, quoted in Senate Finance and Public Administration Legislation Committee (F&PA), *COAG Legislation Amendment Bill 2021 [Provisions],* October 2021, p. 26. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG.

[97] F&PA, *COAG Legislation Amendment Bill 2021 [Provisions],* October 2021, pp. 37–38.

[98] 'Labor Senators' Dissenting Report' in F&PA, *COAG Legislation Amendment Bill 2021 [Provisions],* October 2021, pages 40 and 43.

[99] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16/21*, 21 October 2021, p. 12, emphasis added. Accessed at: www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2021/PDF/d16_21.pdf?la=en&hash=D09A5D8494209FA2C89A83D0825DDB666C695C84.

with Schedule 3 omitted; or that it otherwise be opposed.[100] Lacking support—including from some government members—the bill did not progress.[101] As at 29 March 2022, the Bill has not advanced past the second reading stage in the House of Representatives.[102]

[100] Labor Dissenting Report, *COAG Legislation Amendment Bill 2021 [Provisions],* October 2021, p. 43.

[101] Paul Karp, 'Government's bill to keep national cabinet discussion secret may fail as Liberal senator says he will vote against it', *The Guardian Australia*, 29 September 2021, Accessed at www.theguardian.com/australia-news/2021/sep/29/bill-to-exempt-national-cabinet-from-foi-in-doubt-after-liberal-senator-says-he-will-cross-floor.

[102] *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, paras. 64, 149 and 276.

[102] Parliament of Australia, Websites, 'Bills Homepage: COAG Legislation Amendment Bill 2021', 2 September 2021.

Fiscal Objectives, Targets and Risks: Options to Improve Victoria's Fiscal Framework

Anthony Close [1]

Parliamentary Budget Officer, Victorian Parliamentary Budget Office

Ross Hutchings

Principal Analyst, Victorian Parliamentary Budget Office

Abstract A transparent fiscal management framework supports sound government decision making and public accountability. This article examines the Victorian Government's framework of fiscal objectives, targets and risks over the past 10 state budgets. It assesses this framework against international best practice benchmarks, and finds it has not been clear or cohesive. Components of the framework are spread throughout the budget papers, and are vague, making objective assessment of performance difficult. The article identifies options to strengthen the framework, including clearer fiscal performance reporting, better alignment between objectives and targets, more durable fiscal targets, a consolidated statement of risks, and longer run forecasting. As Victoria's net debt climbed following the COVID-19 pandemic, a transparent fiscal framework has never been more important.

[1] This Article is based on paper published by Parliamentary Budget Office, *Fiscal Objectives, Targets and Risks: Options to Improve Victoria's Fiscal Framework*, Parliament of Victoria, 2021 Accessed at: https://pbo.vic.gov.au/files/PBO%20-%20Fiscal%20objectives%20targets%20and%20risks.pdf.

INTRODUCTION

Victoria's net debt has tripled since the start of the COVID-19 pandemic, reaching $89.6 billion in December 2021, and is forecast to rise to $162.7 billion by June 2025.[2] The state lost its AAA credit rating with both major rating agencies in 2020-21, which was seen as a cornerstone of state government financial management for decades. While the economy is now rebounding strongly, state finances have a significantly reduced capacity to absorb additional shocks if further risks materialise. It has never been more important that the government uses a transparent fiscal management framework.

In this article, we examine the framework of fiscal objectives, targets and risk assessment in Victorian budget papers over the past 10 years, drawing on best practice benchmarks in the International Monetary Fund (IMF) *Fiscal Transparency Code and Handbook*.[3] Fiscal objectives and targets are widely accepted as a foundation for transparent fiscal management. They help guide government budget decisions by setting constraints on planned fiscal outcomes over a defined period, and support public accountability by enabling comparison between planned and actual outcomes. Assessment and management of fiscal risks is also essential to a transparent fiscal framework, communicating uncertainties around the fiscal outlook and helping to limit fiscal disruption if risks materialise.

We find that Victoria's fiscal management framework in recent budgets has not been clear or cohesive. Fiscal objectives and targets, and performance reporting against them, are dispersed across different budget papers. Most long-term objectives have no targets to guide policy or measure performance, and fiscal targets have been modified or abandoned when economic and fiscal circumstances have changed. The government modified or abandoned most of its fiscal targets following the impacts of

[2] Department of Treasury and Finance, *Victorian Budget 2021/22 – Mid-year Financial Report*, Parliament of Victoria, 2021. Accessed at: https://www.dtf.vic.gov.au/sites/default/files/document/2021-22%20Mid-Year%20Financial%20Report.pdf; and Department of Treasury and Finance, *Victorian Budget 2021/22: Budget Update*, Parliament of Victoria, 2021. Accessed at: https://www.dtf.vic.gov.au/state-budget.

[3] International Monetary Fund, *Fiscal Transparency Handbook*, 2018. Accessed at: https://www.elibrary.imf.org/view/IMF069/24788-9781484331859/24788-9781484331859/ch04.xml; International Monetary Fund, *Fiscal Transparency Code*, 2019. Accessed at https://www.imf.org/external/np/fad/trans/Code2019.pdf.

the COVID-19 pandemic, and there are now fewer and less clearly defined objectives and targets.

Assessments of risk are also spread across the budget papers, with no consolidated assessment of the wider risks to Victoria's fiscal outlook or clear outline of how the budget strategy is managing risk. Crucially in the current fiscal environment, the budget's 4-year forecasts are not sufficient to show when the government expects net debt to peak or stabilise. The absence of longer-run forecasts means it is not possible to assess the layered fiscal impacts of COVID-19 and the substantial transport infrastructure program.

We identify options to improve the framework based on IMF guidance.[4] In particular:

- for clear and cohesive objectives and targets, the government could report progress in a central location, provide more specific timeframes, and set short term targets to measure progress against long-term objectives;
- for more credible targets, the government could design targets to be durable through economic cycles, and consider enshrining well-designed targets in legislation;
- for a more comprehensive assessment of risk, the government could publish a consolidated statement of fiscal risks, include an assessment of the most significant risks to the fiscal outlook, and publish probabilistic forecasts for key fiscal variables; and
- longer-term (10-year) fiscal projections, and a periodic intergenerational report projecting long-term demographic and workforce trends, would enable assessment of long-term policy impacts.

These options are discussed further below.

[4] The Public Accounts and Estimates Committee (PAEC) of the Victorian Parliament scrutinises the government's budget papers for transparency and accountability each year in its budget estimates inquiry. PAEC has made 6 recommendations in recent budget estimates reports that are directly relevant to options identified in this advice, but the government has either not supported or not acted upon them. See PBO, *Fiscal Objectives, Targets and Risks*, Appendix 1. Accessed at: https://www.parliament.vic.gov.au/paec/publications.

BACKGROUND AND CURRENT FRAMEWORK

Fiscal objectives and targets

Fiscal objectives and targets – also called fiscal rules – generally focus on debt, budget balance, revenue or expenditure, but may cover a range of variables. 'Fiscal objectives' generally refer to qualitative fiscal goals, and 'fiscal targets' to quantitative fiscal goals. For example, a fiscal objective is to ensure a sustainable net operating balance over the medium term, while a fiscal target is to ensure the net operating balance is at least $100 million in each year of the budget and forward estimates. Both are most effective when they remain in place over an extended period, allowing subsequent comparison against actual outcomes achieved.

The *Financial Management Act 1994* (Vic) sets out legislative requirements for Victoria's framework of fiscal objectives and targets. It requires that the Victorian budget:

- specifies long-term financial objectives
- sets 'short-term financial objectives' and 'fiscal targets for key financial measures' for the budget year and the subsequent 3 years, or forward estimates. [5]

The government publishes an updated fiscal strategy and assessment of risks in compliance with these requirements as part of each state budget and budget update.

Table 1 – Framework of fiscal objectives and targets in the Victorian Budget 2021/22[6]

Category	Objectives / targets
Long-run financial objectives	Sound financial management: Victoria's finances will be managed in a responsible manner to provide capacity to fund services and infrastructure and support households and businesses in the economic recovery at levels consistent with sound financial management Improved services: Public services will improve over time Building infrastructure: Public infrastructure will grow steadily over time to meet the needs of a growing population

[5] *Financial Management Act 1994* (Vic) s23G(d).

[6] Dept Treasury and Finance, *Victorian Budget 2021/22*.

Category	Objectives / targets
	Efficient use of public resources: Public infrastructure will grow steadily over time to meet the needs of a growing population A resilient economy: Public sector resources will be invested in services and infrastructure to maximise the economic, social and environmental benefits
Targets for key financial measures	A net operating cash surplus consistent with maintaining general government net debt at a sustainable level after the economy has recovered from the coronavirus (COVID-19) pandemic General government net debt as a percentage of GSP to stabilise over the medium term General government interest expense as a percentage of revenue to stabilise in the medium term Fully fund the unfunded superannuation liability by 2035
Sustainability objectives	An operating cash surplus will be achieved before the end of the forward estimates The operating deficit will reduce over the budget and forward estimates

Assessment of fiscal risks

Fiscal risks are potential shocks to government revenues, expenditures, assets, or liabilities, causing actual fiscal outcomes to deviate from central forecasts. If risks materialise, they may in turn affect achievement of, or progress towards, fiscal objectives and targets. Assessment and management of fiscal risks communicates the uncertainties around the central outlook and helps a government to proactively manage disruption to the budget if risks materialise. The OECD report *Best Practices for Managing Fiscal Risks* classifies fiscal risks into 5 categories:

- macroeconomic risks – from either cyclical or structural changes in the economy, e.g. an economic downturn in major trading partners
- policy or program risks – that tax collection or spending controls do not work as planned, e.g. higher than expected take up of a government program
- uncertain budgetary claims – risks from commitments or obligations that are uncertain or impossible to measure, e.g. guarantees, indemnities and legal claims
- balance sheet risks – associated with assets and liabilities owned by the government, e.g. equity shareholdings or loans

- debt risks – associated with holding debt, e.g. changes to interest and foreign exchange rates.[7]

Macroeconomic risks generally have a greater potential to disrupt the fiscal outlook than other risks, as they have broader impacts to the budget balance. They potentially affect revenue streams over multiple forecast years and may require increased expenditure to support the economy.

The *Financial Management Act 1994* (Vic) sets out legislative requirements for Victoria's consideration of risk. It requires:

- prudent management of financial risks as a principle of sound financial management
- preparation of a statement of risks as part of the fiscal strategy in the budget papers. [8]

Table 2 – Framework of risk assessments in the Victorian Budget 2021/22[9]

Risk type	Content
Macroeconomic risks	Global and domestic economic risks to Victoria's economic outlook. Modelled fiscal impacts from a renewed COVID-19 outbreak. Sensitivity of fiscal projections to one per cent changes in economic variables.
Policy and program risks	General risks to revenue, expenditure and asset investment, and specific fiscal risks.
Uncertain budgetary claims	Quantifiable and non-quantifiable contingent assets and liabilities, such as from guarantees, indemnities and warranties, and legal proceedings and disputes.

[7] Organisation for Economic Cooperation and Development, 'OECD Best Practices for Managing Fiscal Risks', 2021. Accessed at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/SBO(2020)6&docLanguage=En.

[8] *Financial Management Act 1994* (Vic) s23D. See also PBO, *Fiscal Objectives, Targets and Risks*, Appendix 2 which provides the *Financial Management Act 1994* (Vic) requirements for fiscal objectives, targets and risk assessment.

[9] Dept Treasury and Finance, *Victorian Budget 2021/22.*

Risk type	Content
Balance sheet and debt risks	Interest rate risk, foreign currency risk, equity price risk, credit risk, liquidity risk.

FISCAL OBJECTIVES AND TARGETS

This section considers the framework of fiscal targets and objectives in Victorian budgets over the past 10 years and identifies options for improvement based on IMF guidance.[10]

REPORTING PROGRESS IN A SINGLE, CENTRAL LOCATION

The IMF *Fiscal Transparency Handbook* states:

> The budget documentation should include a section that clearly states each target or rule, discusses historically the extent of compliance with, or deviations from, the rules, and how the budget forecasts are consistent with them.[11]

The Victorian Budget 2021/22 lists fiscal objectives and targets, and reports on progress against them in various locations across the budget papers (Table 3). It would help readers to understand how outcomes and forecasts are tracking against objectives and targets if future budgets consolidate all fiscal objectives and targets in a central location – most likely in Budget Paper 2 as part of the budget strategy discussion. This section would also report systematically on progress against targets in the same location and show how the projections over the budget year and forward estimates align with achievement of the objectives and targets.

[10] For a summary of Fiscal Transparency Code principles and practices relating to fiscal objectives, targets and risks, see PBO, *Fiscal Objectives, Targets and Risks*, Appendix 3.

[11] IMF, *Fiscal Transparency Handbook*, p. 76.

Table 3 – Location of objectives and targets in the budget papers[12]

FMA required objectives and targets	Location of objectives and targets	Location of reporting performance
Long-run financial objectives	Budget Paper No. 2 'Strategy and Outlook', Table 1.2	No quantitative targets for reporting
Targets for financial measures	Budget Paper No. 2, 'Strategy and Outlook', Table 1.3	Victorian Budget Financial Report, Chapter 2 – General Government Sector Outcome, 'Fiscal Objectives'
Short term financial objectives	Budget Paper No. 5 'Statement of Finances', Chapter 1	

SETTING FISCAL TARGETS WITH SPECIFIC TIMEFRAMES

The *IMF Fiscal Transparency Handbook* states:

> A fiscal objective carries considerably more weight if it is to be achieved by a specified date, rather than being stated as an open-ended commitment. Good practice is to establish intermediate milestones to determine with precision if progress is being made year by year to reach the fiscal objective.[13]

Prior to 2015-16, Victorian's fiscal targets had specified timeframes, whether on an annual basis – such as 'a net operating surplus of at least $100 million' – or set for a specific year – such as 'general government net debt reduced as a percentage of GSP over the decade to 2022' (Table 4). However, since 2015-16, the 'targets for financial measures' have mostly referred to the 'medium term,' without stating the period that the 'medium term' refers to. Setting fiscal targets for Victoria with more specific timeframes would provide greater guidance for decision makers and public accountability. These could follow the Australian Government budget which specifies the 'medium term' as 10 years, and would preferably include intermediate milestones to measure year by year progress.

[12] Dept Treasury and Finance, *Victorian Budget 2021/22*.

[13] IMF, *Fiscal Transparency Handbook*, p. 76.

Table 4 – Targets for financial measures, comparison over time[14]

	2012-13 to 2014-15 budgets	2015-16 to 2019-20 budgets	2020-21 to 2021-22 budgets
Net debt	General government net debt reduced as a percentage of GSP over the decade to 2022	General government net debt as a percentage of GSP to be maintained at a sustainable level over the medium term	General government net debt as a percentage of GSP to stabilise in the medium term
Net operating balance	A net operating surplus of at least $100 million and consistent with the infrastructure and debt parameters	A net operating surplus consistent with maintaining general government net debt at a sustainable level over the medium term	None
Net operating cash surplus	None	None	A net operating cash surplus consistent with maintaining general government net debt at a sustainable level after the economy has recovered
Infrastructure investment	Infrastructure investment of 1.3 per cent of GSP (calculated as a rolling 5-year average)	None	None
Superannuation liabilities	Fully fund unfunded superannuation liability by 2035		

BETTER ALIGNING WITH GOVERNING LEGISLATION

The *IMF Fiscal Transparency Handbook* states:

[14] PBO, *Fiscal Objectives, Targets and Risks*. Note: This figure contains all targets formally identified in Table 1.3 of the Strategy and Outlook budget paper from the past 10 budgets. It does not include goals that budgets mention in discussion of fiscal strategy but do not formally identify as targets.

> Clarity about fiscal policy objectives is critical for guiding the budget process and holding the government accountable for its strategies and priorities. It enables ex post comparison of what was achieved and thus holds the government accountable for its performance.[15]

Of the 3 sets of fiscal objectives and targets outlined in the Victorian budget, 2 sets (long-term financial objectives and targets for financial measures) clearly align to requirements in the *Financial Management Act 1994*. However, it is not clear whether the third set (the 'sustainability objectives' in the 'Statement of Finances') corresponds to the requirement for short-term financial objectives (Table 5). *Budget Paper 5: Statement of Finances* Appendix C,[16] which outlines how the budget complies with legislation, states that Strategic Outlook Chapter 1 and Statement of Finances Chapter 1 comply with Sections 23E-G, but provides no further detail. It would be clearer if the names of each set of objectives and targets aligned directly to the legislative requirements.

Table 5 – Legislative requirements for objectives and targets

Financial Management Act 1994 Section 23G	Objectives, targets and budget location
(1) A financial policy statement must—	
(a) specify the government's long-term financial objectives within which financial policy for the financial year to which the budget or budget update relates and the following 3 years will be framed	Long-term financial management objectives in Strategy and Outlook Budget Paper No. 2, Table 1.2
(d) specify, for the financial year to which the budget or budget update relates and the following 3 financial years	It is not clear whether the budget provides specific short-term financial objectives. They may be the 'sustainability objectives' in the Statement of Finances Budget Paper, Chapter 1
(i) the government's short-term financial objectives	
(ii) the targets for each specific key financial measure	'Targets for financial measures' in Strategy and Outlook paper, Table 1.3

[15] IMF, *Fiscal Transparency Handbook*, p. 73.

[16] Dept Treasury and Finance, *Victorian Budget 2021/22*, Budget Paper 5: Statement of Finances Appendix C.

ALIGNING LONG-TERM OBJECTIVES WITH SHORT TERM OBJECTIVES AND TARGETS

The Victorian budget has five long-term financial management objectives, but four of these have no corresponding short-term objectives or targets to guide policy or measure performance (Table 6). This limits both the capacity of the long-term objectives to inform decision-making and public scrutiny of progress against them. Setting targets to measure progress against the long-term financial management objectives would benefit both capacity of the long-term objectives to inform decision-making, and public scrutiny of progress against the objectives.

Table 6 – Alignment between objectives and targets, Victorian Budget 2021/22[17]

Government priority	Long-term financial management objectives	Fiscal sustainability objectives	Targets for financial measures
Sound financial management	Victoria's finances will be managed in a responsible manner to provide capacity to fund services and infrastructure and support households and businesses in the economic recovery at levels consistent with sound financial management	An operating cash surplus will be achieved before the end of the forward estimates	A net operating cash surplus consistent with maintaining general government net debt at a sustainable level after the economy has recovered from the coronavirus (COVID-19) pandemic
		The operating deficit will reduce over the budget and forward estimates	
			General government net debt as a percentage of GSP to stabilise over the medium term
			General government interest expense as a percentage of revenue to stabilise in the medium term

[17] PBO, *Fiscal Objectives, Targets and Risks*, Table 6.

Government priority	Long-term financial management objectives	Fiscal sustainability objectives	Targets for financial measures
			Fully fund the unfunded superannuation liability by 2035
Improved services	Public services will improve over time	None	
Building infrastructure	Public infrastructure will grow steadily over time to meet the needs of a growing population	None	
Efficient use of public resources	Public sector resources will be invested in services and infrastructure to maximise the economic, social and environmental benefits	None	
A resilient economy	Increase economic resilience by supporting an innovative and diversified economy that will unlock employment growth, long-term economic growth and productivity in Victoria	None	

ENHANCING DURABILITY OF TARGETS THROUGH THE ECONOMIC CYCLE

The *IMF Fiscal Transparency Handbook* states:

> To provide a credible anchor for decision making, fiscal objectives must have been in place long enough, at least a period of three or four years, and any changes to specified fiscal targets/objectives should have been undertaken only under the respective escape clauses under the fiscal rule.[18]

Some of Victoria's objectives and targets have remained in place for significant periods – for example, the target to eliminate the unfunded superannuation liability by 2035 has been in place since the 2000-01 budget. However, the government has modified

[18] IMF, *Fiscal Transparency Handbook*, p.76.

or abandoned several objectives and targets when economic and fiscal circumstances have changed. For example, the government changed the net debt sustainability objective three times in five budgets before dropping it in the 2020-21 budget. They have often not remained in place for a sufficient period to be useful or credible. Table 7 shows the evolution of the 'sustainability objectives' listed in the Statement of Finances Chapter 1 over the past ten budgets.

Table 7 – Sustainability objectives, comparison over time[19]

Fiscal outcome	2012-13 to 2014-15 budgets	2015-16 budget	2016-17 to 2018-19 budgets	2019-20 budget	2020-21 budget	2021-22 budget
Net debt	None	Net debt as a percentage of GSP reducing from the commencement of the budget year to the end of the forward estimates period	Net debt to GSP no greater than its peak over the last 5 years by the end of the forward estimates	Net debt to GSP will be not greater than 12 per cent over the medium term	None	
Net operating balance	A net operating surplus of at least $100 million	Net operating surpluses in each year over the budget and forward estimates			The operating deficit will reduce over the budget and forward estimates	
Operating cash balance	None					An operating cash surplus will be achieved before the end

[19] PBO, *Fiscal Objectives, Targets and Risks*, Table 7. Note: This figure contains all sustainability objectives identified in Chapter 2 of the Statement of Finances from the past 10 budgets. It does not include goals mentioned in fiscal strategy discussion but not formally identified as sustainability objectives.

Fiscal outcome	2012-13 to 2014-15 budgets	2015-16 budget	2016-17 to 2018-19 budgets	2019-20 budget	2020-21 budget	2021-22 budget
						of the forward estimates
Expenses	None		Expenditure growth no greater than revenue growth, on average, over the budget and forward estimates		None	

In the Victorian Budget 2020/21 – the first to reflect the impacts of the COVID-19 pandemic – the government modified or abandoned most of its fiscal targets.[20] In the Victorian Budget 2021/22 it set one new fiscal target – for the operating cash surplus. There are now fewer and less clearly defined fiscal objectives and targets than prior to the pandemic. The government also modified its 'long term financial objective' of sound financial management in the 2020-21 budget, removing the reference to maintaining a AAA credit rating just prior to losing it.

The Victorian Government could draw on principles of 'second generation' targets to increase the lifespan of its targets. Second generation' targets were developed after the Global Financial Crisis following widespread international lack of compliance with fiscal targets. They are designed to allow governments to sustain government spending through economic downturns, while containing debt levels over the economic cycle.

The IMF report, *Second Generation Fiscal Rules: Balancing Simplicity, Flexibility and Enforceability,* recommends three guiding principles for fiscal targets:

- A debt anchor – this is a medium-term objective for net debt, usually expressed as a percentage of GSP, which may allow a buffer for debt to rise to facilitate responses to future shocks such as natural disasters or recessions.
- One or two operational rules – these are short-term targets, usually for the net operating balance (for example, the budget balance not to exceed a specific percentage of GSP) or expenditure (for example, capping real or nominal

[20] Dept Treasury and Finance, *Victorian Budget 2021/22*.

expenditure growth). Operational rules can also apply to a structural budget balance, which adjusts for the economic cycle by separating structural and cyclical movements in the budget position.

- Escape clauses can help a fiscal target remain in place over a longer period, because an economic shock will trigger the escape clause rather than abandonment of the target. Escape clauses should define the conditions under which a government must revert to following the operational rules.[21]

Case study: Iceland's fiscal target framework[22]	
Debt anchor	A general government debt ceiling of 30% of Gross Domestic Product.
Operational target	The fiscal deficit to be less than 2.5% of Gross Domestic Product in each year, with the fiscal balance in surplus over a 5-year period.
Escape clause	Fiscal balance objectives may be departed from for up to 3 years in case of economic shocks, national crisis or other circumstances that cannot be remedied by available measures.

LEGISLATING SPECIFIC FISCAL TARGETS

All Australian state jurisdictions have legislated requirements to set fiscal objectives and targets. However, only NSW has taken the further step of legislating specific fiscal targets. The *Fiscal Responsibility Act 2012* (NSW) legislates maintaining a AAA credit rating as the overarching objective. It also legislates that annual growth in general government expenses is less than long-term average general government revenue growth, elimination of the unfunded superannuation liability by 2030, and a review of

[21] International Monetary Fund, 'Second-Generation Fiscal Rules: Balancing Simplicity, Flexibility, and Enforceability', 2018. Accessed at: https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2018/04/12/Second-Generation-Fiscal-Rules-Balancing-Simplicity-Flexibility-and-Enforceability-45131.

[22] PBO, *Fiscal Objectives, Targets and Risks*, p. 10.

the legislation after five years, including fiscal objectives and targets.[23] Internationally, the United Kingdom and Germany have legislated specific targets at the national level, alongside British Columbia and the German states at the subnational level.

The Victorian Government could consider enshrining well-designed fiscal targets in legislation, with a schedule for regular review. Legislating targets provides advantages of increased visibility and accountability, because once legislated, a target is more likely to influence debate and decisions on fiscal policy, and governments cannot change or abandon targets without a parliamentary vote. Legislating targets can also embed a requirement for regular and orderly review.

The main disadvantage of legislating targets is the potential to cement drawbacks of fiscal targets in general, such as having a narrow focus (for example, including not factoring in the cost or the purpose of borrowing), exacerbating cyclical economic variations by placing arbitrary restraints on expenditure, and encouraging manipulation of fiscal outcomes with a focus on performance against targets rather than achieving the overarching strategy. This can be managed by ensuring that targets are well-designed, flexible and reviewed regularly.

ASSESSMENT OF FISCAL RISK

This section considers the framework for risk assessment in Victorian budgets over the past ten years and identifies options for improvement based on IMF guidance.[24]

Consolidating the statement of risks

The *IMF Fiscal Transparency Handbook* states:

> An increasing number of countries produce summary reports in the form of a fiscal risk statement as part of their budget documentation… A comprehensive fiscal risk statement helps to identify possible gaps and to ensure full coverage of

[23] *Fiscal Responsibility Act 2012* (NSW) s3(1).

[24] PBO, *Fiscal Objectives, Targets and Risks*, p. 10, Appendix 3.

> risks. Its content should reflect the key fiscal risks facing a country and their evolving circumstances.[25]

The Victorian budget papers currently assess different types of risk in multiple locations across the budget papers – macroeconomic risks, policy and program risks, uncertain budgetary claims, balance sheet risks and debt risks (Table 8). This makes it difficult to assess Victoria's aggregate exposure to fiscal risks, or to identify systematic relationships and interactions among risks. A consolidated statement of risks could provide a more comprehensive and transparent discussion of risks, whether in an extended appendix to the Strategy and Outlook paper, or as a separate budget paper.

[25] IMF, *Fiscal Transparency Handbook*, p. 99.

Table 8 – Location of risk assessments, Victorian Budget 2021/22[26]

Risk type	Content	Location
Macroeconomic risks	One-page description of global and domestic economic risks to Victoria's economic outlook	Budget Paper No. 2: Strategy and Outlook, Chapter 2
	Nine-page appendix outlining modelled fiscal impacts from a renewed COVID-19 outbreak, and sensitivity of fiscal projections to one per cent changes in economic variables.	Budget Paper No. 2: Strategy and Outlook, Appendix A
Policy and program risks	Five pages describing general risks to revenue, expenditure, asset investment and specific fiscal risks.	Budget Paper No. 2: Strategy and Outlook, Chapter 4
Uncertain budgetary claims	Eight pages on quantifiable and non-quantifiable contingent assets and liabilities, such as from guarantees, indemnities and warranties, and legal proceedings and disputes.	Budget Paper No. 4: Statement of Finances, Chapter 6
	Six pages of additional information on contingent assets and liabilities.	Victorian Budget 19/20: 2019-20 Financial Report, Chapter 4
Balance sheet and debt risks	Eleven pages on interest rate risk, foreign currency risk, equity price risk, credit risk, liquidity risk.	Victorian Budget 19/20: 2019-20 Financial Report, Chapter 4

The *IMF Fiscal Transparency Handbook* also states:

> In addition to the disclosure of fiscal risks, it is useful to provide an explanation of how these risks have been taken into consideration in setting the government's overall fiscal stance, and what policies the government is pursuing to reduce and manage these risks. [27]

A consolidated statement of risks could include a comprehensive discussion of how the fiscal strategy is managing the main risks. This would outline how the government has

[26] PBO, *Fiscal Objectives, Targets and Risks*, Table 8.

[27] IMF, *Fiscal Transparency Handbook*, p. 107.

considered the risk profile in developing the overall fiscal strategy, the level of risk the government is willing to bear, and policies to mitigate key risks.

ASSESSING MAGNITUDE AND LIKELIHOOD OF CRITICAL RISKS

The *IMF Fiscal Transparency Handbook* recommends:

> …disclosing the likelihood of risks materializing, in addition to quantifying the government's gross exposure. This practice provides a more realistic picture of how risks might impact on the budget and a better estimate of the policy changes that might be required during the budget year to keep to the government's announced fiscal target… In cases where estimates of the probability of realization are too difficult, risks may be classified into categories (e.g., probable, non-remote, and remote) based on judgements about their likelihood.[28]

Recent Victorian budgets have outlined useful analyses of selected macroeconomic risks (Table 9). For example, the Victorian Budget 2021/22 provides risk assessment associated with a protracted recovery from COVID-19. However, these risks are discussed individually, making it difficult for readers to understand how these risks compare and relate to other budget risks. Furthermore, while the budget provides sensitivity analysis for net operating balance and net debt to economic variables such as GSP and employment, these are not linked to specific risks.

A consolidated statement of risk which indicates magnitude and likelihood for key risks would provide a more complete assessment of the main risks to the outlook.

[28] IMF, *Fiscal Transparency Handbook*, pp. 106-107.

Table 9 – Macroeconomic risk assessments, comparison over time[29]

Budget	Risk scenarios	Description
2011-12 to 2012-13	None	
2013-14 to 2016-17	2006-07 – economic growth exceeding expectations	Past deviation from forecasts – higher-than-expected economic growth and revenue outcomes in 2006-07 (pre-GFC boom)
	2008-09 – global financial crisis	Past deviation from forecasts – lower-than-expected economic growth and revenue outcomes in 2008-09 (GFC recession)
2017-18	A global trade shock	Negative trade shock to the world's major trading economies – the United States, China and the European Union
	Labour supply scenarios	Positive shocks to population growth and labour force participation rate
2018-19	Downturn in household consumption and dwelling investment	Negative shock to the household sector through weakening in national household consumption and dwelling investment
	Sustained high labour force participation	Labour force participation rate is higher than the central forecast
2019-20	Downturn in Victorian population growth	Negative shock to national net overseas migration by 75,000 persons relative to the base case
	A lower trend rate of unemployment	The non-accelerating inflation rate of unemployment (NAIRU) is 0.5 percentage points lower than the base case assumption.
2020-21	A deep and enduring coronavirus (COVID-19) pandemic throughout all of 2021	Lower global growth reduces demand for Victoria's exports and leads to an extension to international border restrictions and a delayed recovery in net overseas migration.

[29] PBO, *Fiscal Objectives, Targets and Risks*, Table 9.

Budget	Risk scenarios	Description
2021-22	A protracted global recovery	Delay to the global vaccine rollouts leads to further outbreaks, slowing the global recovery with shocks to trade, migration, education, tourism, business investment and dwelling investment.

PROBABILISTIC FORECASTS FOR KEY BUDGET AGGREGATES

The IMF advises that:

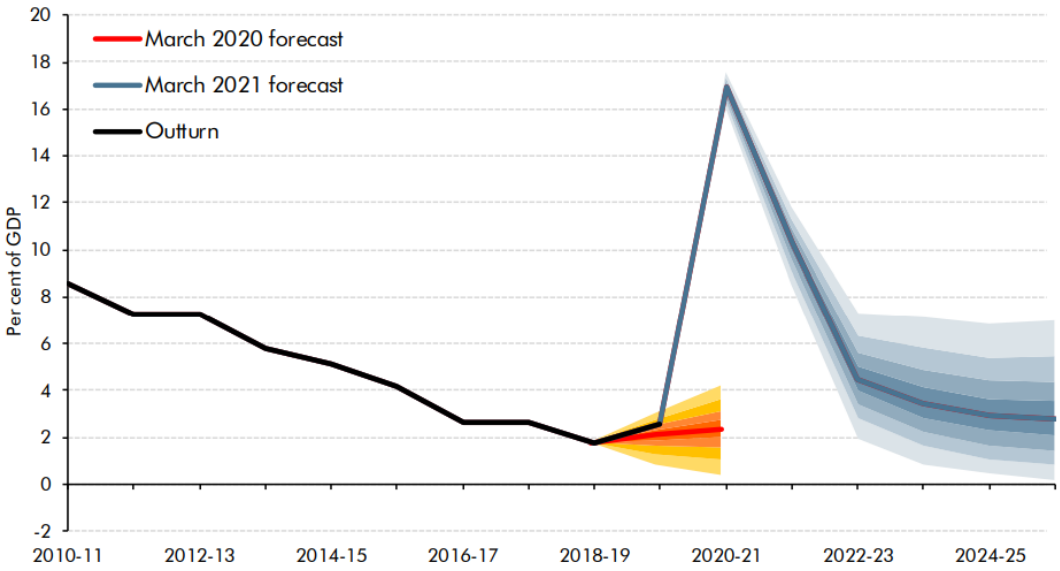
> The most sophisticated forms of macro-fiscal risk analysis present probabilistic fiscal forecasts that provide a set of confidence intervals around the government's central fiscal forecast. These probabilistic forecasts typically take the form of 'fan charts' to illustrate the degree of uncertainty inherent in the forecasting process as well as the distribution of risks above and below the government's central prediction.[30]

Publishing a single central forecast for key fiscal variables can create an impression that the state's fiscal outlook is more predictable than it really is, and that forecast models are more reliable than they really are. Probabilistic fiscal forecasts demonstrate the inherent uncertainty around the central fiscal projections. They present a range of different outcomes that have varying degrees of probability, although they generally do not predict rare, high impact events such as the global financial crisis or the COVID–19 pandemic.

To provide greater information around the risk outlook, Victoria could consider providing probabilistic forecasts based on the standard deviation of previous forecast errors. These could be similar to the Australian Government budget, which provides probabilistic forecasts for selected macroeconomic and fiscal aggregates in the budget year and the first year of forward estimates, or the United Kingdom Office of Budget Responsibility, which publishes probabilistic forecasts over the full forward estimates (Figure 1).

[30] IMF, *Fiscal Transparency Handbook*, p. 103.

Figure 1 – Probabilistic forecast for public sector net borrowing[31]



Source: UK Office of Budget Responsibility.[32]

LONGER-TERM FISCAL PROTECTIONS

The IMF recommends longer-term projections of budget aggregates even at the 'basic' compliance level:

> …countries should produce projections of the fiscal balance and public debt obligations over a decade into the future. These projections can take the form of a relatively simple debt sustainability analysis, where realistic assumptions about the primary fiscal balance, GDP growth rates, and interest rates are used to project how public debt will evolve. This analysis can be used to identify whether

[31] UK Office of Budget Responsibility, 'Economic and fiscal outlook', 2021. Accessed at: https://obr.uk//docs/CCS207_CCS0221988872-001_CP-387-OBR-EFO-Web-Accessible.pdf; Parliamentary Budget Office p. 16.

[32] Note: The darkest line shows the median forecast. Each shaded area represents ten per cent probability bands. Taken together, the four pairs of shaded bands show the central 80 per cent of the probability distribution, leaving a 20 per cent chance the outcome will lie outside the range of the fan chart.

> public debt is on a sustainable or increasing path and, by incorporating some sensitivity analysis, can also provide guidance on how public debt will evolve under less favourable conditions.[33]

The Victorian budget papers currently publish 4 financial years of fiscal projections – the budget year and forward estimates. Longer-run projections are necessary to show when, and at what level, the government expects Victoria's net debt to peak or stabilise. The Victorian Budget Update 2021/22 forecasts net debt to keep rising to $162.7 billion (27.9% of Gross State Product) by 30 June 2025, the end of the forecast period.[34] Longer-run projections would also enable assessment of the long-term fiscal implications of policy and infrastructure decisions. For example, the current practice of 4-year forecasts is not sufficient to assess the implications for future expenditure on the Suburban Rail Loop – the government expects the east section alone (Cheltenham to Box Hill) to cost between $30.0 and $34.5 billion over coming decades.[35]

The IMF also recommends that at an 'advanced' compliance level:

> The government regularly publishes multiple scenarios for the sustainability of the main fiscal aggregates and any health and social security funds over at least the next 30 years using a range of macroeconomic, demographic, natural resource, or other assumptions. [36]

This approach has been adopted in the Australian Intergenerational Report, as outlined under the *Charter of Budget Honesty Act 1998* (Cth), and the NSW Intergenerational Report, as outlined under the *Fiscal Responsibility Act 2012* (NSW). Ideally, the Australian Government would work with state governments to produce an intergenerational report that covers both levels of government. In the absence of such arrangements, the best approach is for Victoria to develop a state-level intergenerational report, similar to NSW.

[33] IMF, *Fiscal Transparency Handbook*, p. 108.

[34] Dept Treasury and Finance, *Victorian Budget Update 2021/22*.

[35] Victorian Government, 'Suburban Rail Loop: Business and Investment Case', 2021. Accessed at: https://bigbuild.vic.gov.au/__data/assets/pdf_file/0004/578281/SRL-Business-and-Investment-Case.pdf; Dept Treasury and Finance, *Victorian Budget 2021/22*.

[36] IMF, *Fiscal Transparency Handbook*, p. 13.

CONCLUSION

Setting and achieving fiscal objectives and targets is challenging. We respect each government's right to specify its financial management targets and long-term objectives in a manner consistent with the requirements of the *Financial Management Act 1994* (Vic). However, we consider that the Victorian budget papers could present the state's fiscal strategy in a more cohesive way, more in keeping with the stated accountability purpose of the Act.

To allow Victorians to better understand the government's fiscal strategy and performance, the government could better align long-term and short-term goals, give more specific timeframes, and provide clearer reporting on progress. These measures would also provide a more cohesive set of anchors to guide government decision making. To increase the lifespan and credibility of its targets, the government could design them to be durable through economic cycles, and consider enshrining them in legislation with a schedule for regular review.

A comprehensive fiscal strategy identifies, assesses and manages fiscal risks. If fiscal risks are realised, the longer-run strategy may remain largely unaltered, even if short-term targets are not achieved. For greater transparency and accountability, the government could publish a consolidated statement of the main fiscal risks. Longer-term forecasts, combined with meaningful risk scenarios, would provide insight into whether public finances are sustainable, and how they might evolve under less favourable conditions.

When, and at what level, is Victoria's net debt expected to stabilise as the economy reacts and recovers from COVID-19? What are the long-term cost implications of current infrastructure policy decisions? These are the types of questions that longer-term forecasting can shine light on.

Upper House Majorities and Committee Activity: A Comparative Study*

Maddison Evans

Research Officer, Legislative Council Committee Office of Western Australia.

* Double-blind reviewed article.

Abstract The incidence of double majorities is rare in the Westminster system. Whilst upper house majorities have been the topic of previous studies, I examine its effects on committee activity. I consider Australian Senate committee activity during the majority of 2005 to 2008, and compare it to Western Australian Legislative Council committee activity during the first year of its majority in 2021 to identify any trends. I find that committee activity decreased and changed during the Senate majority, with increased inquiries into bills but with reduced reporting timeframes. I then find that the Western Australian experience has not followed this trend so far in its first year of an upper house majority. These findings are important in establishing trends in committee activity for future case studies into upper house majorities.

INTRODUCTION

It is accepted that government majorities in upper houses are rare in Australia and its jurisdictions, especially if they are elected on a proportional representation electoral system. Studies have been undertaken previously into double majorities, where governments have had a majority in both the lower and upper houses, especially John Howard's Senate majority of 2005 to 2008, but none have focused predominantly on the impact of the majority on committee activity. Another upper house majority has occurred more recently in Western Australia. This article will consider the legislative agendas of both governments and examine the effects of the double majorities on their respective committee systems. As it is the most well-known and there is more data available, the Senate example will be used as the base of comparison to determine if any patterns arise, and if or how committee activity was impacted in order for the governments to quickly pass its legislative agendas. This article will compare the impact on committee activity of the first year of the government majority in the Legislative

Council of Western Australia to the government majority in the Australian Senate in 2005.

This study of committee activity during upper house majorities provides crucial research to the study of upper houses. As the incidences of double majorities are rare, especially in state parliaments, it is important to investigate the precedents and any resulting patterns for future occurrences of double majorities in Australia. This article finds that committee activity changed during the Senate majority, with the focus shifting from subject matter inquiries to bills inquiries, the committee system was restructured, and there was a decrease in reporting times. It also finds that this trend was not necessarily followed by the Western Australian Legislative Council. These findings give rise to important considerations for future Parliaments who may also face double majorities.

BACKGROUND

In 2004 the Coalition Government led by John Howard won its fourth term, with 46.7% of the vote in the House of Representatives and 45.1% of the vote in the Senate.[1] This resulted in the Coalition having 39 seats in the 76 seat Senate and, after appointing a Coalition Senate President, the Coalition held a one seat majority in the upper house for the first time since the Fraser Government's majority in 1977.[2]

The 2021 state election produced the most one-sided result in Western Australian electoral history, and one of the greatest landslides recorded in any Australian jurisdiction.[3] The incumbent Labor Government won 60% of the primary vote in the Legislative Assembly, translating to 90% of that House's seats.[4]

[1] Australian Electoral Commission, 'Senate Results', 2004. Acccessed at: https://results.aec.gov.au/12246/results/SenateResultsMenu-12246.htm.

[2] Harry Evans, 'The Senate' in C. Hamilton, & S. Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate*, Crows Nest NSW: Allen & Unwin, p. 200.

[3] A Green, *Western Australia State Election 2021: Analysis of Results,* Parliament of Western Australia, 2021, p. 2.

[4] J Paull, 'Pandemic Elections and the Covid-Safe Effect: Incumbents Re-elected in Six Covid-19 Safe Havens'. *Journal of Social and Development Sciences* 2021, pp. 17-24.

Mark McGowan's Government became the first Labor government in the state's history to win a majority in the Legislative Council, with 60.3% of the primary vote in that House.[5] This translates to 22 of the 36 seats (or 61%) in the Legislative Council.[6]

For the purpose of this article, the term 'committee activity' will refer to committee inquiries referred by either the Senate or Legislative Council chamber, including select committees, bills, and other matters, as well as the resulting reports. Changes to committee related Standing Orders and committee composition will also be considered. This article will not examine self-referred inquiries or delegated legislation as they do not directly result from referrals by the respective upper house chambers.

PARAMETERS

For this article, the Australian Senate experience will serve as the base of the comparison between the two upper house majorities. It is worth noting here that upper houses generally have term change over dates that differ from their lower house counterparts, with the Senate's being the 1st of July following the election, and the Legislative Council's being the 22nd of May following the election. The difference in dates allows for an examination of how those houses behave when an impending majority is known, but not yet in place. In order to accurately compare the before and after experiences, the Senate's 40th and 41st Parliaments will be broken into four time periods.

Period	Start date	End date	Description
First period	1 July 2002	31 August 2004	Covers the majority of the 40th Parliament from when the elected Senators were sworn in to the election of the 41st Parliament.
Second period	1 September 2004	30 June 2005	From the election of the 41st Parliament to when the elected Senators were sworn in.
Third period	1 July 2005	17 October 2007	Covers the Senate majority of the 41st Parliament, from when the

[5] C Madden, 'Western Australian 2021 election: a quick guide' Parliament of Australia, 2021. Accessed at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Quick_Guides/WesternAustralianElection2021, pp. 1, 6.

[6] Madden, *Western Australian 2021 election*, p. 1.

			government majority began until its prorogation. This article will predominantly focus on this period.
Fourth period	12 February 2008	30 June 2008	From the beginning of the 42nd Parliament to when the Senate majority ended.

The gap between the third and fourth periods provides for the prorogation of the 41st Parliament, the election in November 2007, the caretaker period and the transition to the new Labor government. The Senate did not sit during this period.

As the Western Australian Legislative Council majority is still ongoing, the time periods for the Western Australian study will be shortened. Coincidentally, the 40th and 41st Parliaments of Western Australia will also be studied, with the 40th Parliament being the government minority before the majority was achieved in the 41st Parliament. In order to accurately compare the two however, as the 41st Parliament is only one year in, this article will focus on the first year of both parliaments; i.e., 2017 and 2021.

EXPECTATIONS

Historically, accountability is imposed on the executive through legislating (that is, scrutinising and amending legislation), and inquiring into government activities and matters of public interest. Traditionally governments dislike both activities, and control of the Senate meant that avoidance of both activities was more than likely.[7]

The Clerk of the Senate during its majority, Harry Evans, believed that in order to dismantle accountability measures such as committee scrutiny of bills, the government had two options: abolish them (for example by restructuring the committee system), or leave them in place but use its majority to ensure that they did not operate.[8]

Many commentators may expect a decrease in committee activity relative to the preceding non-government majority, in part due to the government's wish not to see any inquiries into itself that could embarrass or disrupt the expedited passage of its

[7] Evans, *The Senate,* p. 202.

[8] Evans, *The Senate,* p. 202.

legislative agenda. One might expect that a government with control over both houses of Parliament also may not have referred as many matters to committees.

Conventional wisdom may also anticipate that, as well as decreasing, committee activity will change in order for the government to more easily pass its legislative program. It is well known that government majorities and committees with government chairs mean that committees are more likely to deliver reports that support government policy.[9] This article seeks to test these expectations against data gathered with respect to both the Howard 2007 experience and the more recent McGowan double majority.

AUSTRALIAN SENATE

Howard's legislative agenda

In order to fully appreciate the nature of committee activity during Howard's double majority in the Australian Parliament, it is useful to consider the nature of Howard's legislative agenda. The Howard Government's legislative program for the 41st Parliament consisted of bills that prioritised industrial relations reform, economic security, families, immigration policy and security.[10] The cornerstone of the government's industrial relations reforms was what became known as WorkChoices.[11] It was seen as unfinished business for the Howard Government as its 1996 industrial relations legislation was heavily amended by a hostile Senate.[12] WorkChoices extensively overhauled workplace relations systems and included amendments that had previously been rejected by the Senate.[13]

[9] G Singleton, 'The Senate a paper tiger?' in C. Aulich, & R. Wettenhall (eds), *Howard's Fourth Government*, Sydney: UNSW Press, 2008, p. 85.

[10] M Jeffery, *Parliamentary Debates*, Senate,16 November 2004, p.2; Singleton, *The Senate a paper tiger?* pp. 75-94.

[11] M Groot, 'Missing the wood for the trees: Explaining Howard's 2004 victory' in T. Frame (ed), *The Desire for Change, 2004-2007* Sydney: NewSouth Publishing, 2021, pp. 14-56.

[12] S Prasser, 'Controlling the Senate' in T. Frame (ed), *The Desire for Change, 2004-2007* Sydney: NewSouth Publishing, 2021, p.109.

[13] Prasser, *Controlling the Senate*, p. 104.

Committee composition[14]

This legislative agenda coincided with a period of some significant recalibration within the Senate committee system. At the start of the 41st Parliament, the Senate Committee Office was administering eight legislation committees, eight references committees, nine domestic committees, two legislative scrutiny committees and two select committees.[15] The legislation and references committees were paired and structured around particular portfolios, for example, the Community Affairs legislation and references committees. They were charged with inquiring into referred bills, subject matter references, and estimates. This paired committee system, with government-controlled legislation committees and non-government-controlled reference committees, has a long history dating back to 1994.[16]

The committee system was used to facilitate the government's legislation program but also to hold governments to account, scrutinise executive actions, review and amend legislation, and directly involve the community in the work of the Parliament.[17]

In the August / September 2006 change to the Standing Orders, the government brought about a comprehensive restructure to the Senate committee system by amending Standing Order 25. In restructuring, the government effectively halved the number of committees by combining the legislation and reference committees.[18] Membership of the new standing committees increased from six to eight senators.[19] The amalgamated committees would now be known as legislative and general purpose standing committees.[20]

[14] For the purpose of this article, the term 'Senate committees' will refer to those staffed and administered by the Senate Committee Office.

[15] Department of the Senate, Parilament of Australia, 'Standing committee system restructured', 2021. Accessed at: http://navigatesenatecommittees.senate.gov.au/events/standing-committee-system-restructured/58.

[16] Rosemary Laing, and John Uhr, 'The Senate Committee System: Historical Perspectives' *Papers on Parliament No. 54.* Parliament of Australia, p. 11.

[17] C Evans, 'A Not So Humble Anniversary: A Year of Government Senate Control', Australian Fabians, 2006. Accessed at: https://www.fabians.org.au/a_not_so_humble_anniversary_a_year_of_government_senate_control.

[18] Department of the Senate, Parilament of Australia, 'Standing committee system restructured', 2021. Accessed at: http://navigatesenatecommittees.senate.gov.au/events/standing-committee-system-restructured/58.

[19] Department of the Senate, Parliament of Australia, *Annual Report 2006-07*, 2007. p. 55.

[20] Procedure Committee, Parliament of Australia, 'Restructuring the committee system', 2006, p. 3.

After the restructure, the new committees maintained the same responsibilities as the references and legislation committees combined and retained the requirement that half of the members were to be government members from the previous legislative committees. The remaining positions were to be made up of opposition members, minority parties or independent senators. The Chair of each committee was to be a government senator.

It was believed that this restructure was a demonstration of the invoking of the long-observed principle that committees should reflect the composition of the Senate.[21] However, it is not clear if this was the case or if it was an example of the government exerting its control over the committee system. It's worth noting, however, that this committee restructure returned the Senate committee system to the structure that existed under Labor prior to 1994.[22]

The new committee system was found to still be a more effective accountability forum than the Senate chamber, and had become the focus of accountability efforts.[23] The government defended the new committee system, citing its clear mandate, and said that the same number of bills and matters would be referred to committees, if not more.[24]

Matters referred

During the Howard double majority era, this newly recalibrated committee system would be put to the test. More than 150 matters were referred to committees during this period as the following table shows.

	First period	**Second period**	**Third period**	**Fourth period**
Matters referred to committees[25]	156	67	184	70

[21] Department of the Senate, Parliament of Australia, *Annotated Standing Orders of the Australian Senate*, 2021, Chapter 5. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/aso/so025.

[22] Department of the Senate, Parliament of Australia, *Annual Report 2005-06*, 2006, p. 3.

[23] Senate, *Annual Report 2006-07*, p. 3.

[24] Nick Minchin, 'Letter to the Editor'. *Australian Financial Review*, 26 June 2006.

[25] Department of the Senate, Parliament of Australia, 'References to Senate Committees 2002 – 2008'.

This data includes bills, items re-referred after prorogation, but not items that were self-referred by the committees.[26] It includes packages of bills as one reference. It represents an almost 18% increase in matters referred to committees from the first period to the third period and is not commensurate with the 5% increase in days between those periods. This confirms the above statement by the government that there would be more matters referred, although it is not clear whether this is by design or accidental.

It is important to note that these figures do not take into account how many were referred automatically under the Standing Orders, or if the committees were given shorter timeframes within which to conduct their inquiries. It also does not take into account the complexity of the bills or matters referred.

In late 2004 at the end of the 40th Parliament, there were 14 non-government controlled Senate inquiries. That number halved to 7 by April 2006.[27] The number of rejected or defeated inquiries rose from 7 in the early months of the 41st Parliament, before the government gained control in July 2005, to 14 in the following 8 months.[28] While the government claimed it was stopping expensive fishing expeditions by opponents, the list of rejected proposals suggests a desire to avoid issues that could embarrass.[29] While this is of course a preference for governments, it is not always possible to restrict unwanted Senate inquiries during a minority government term. Harry Evans confirmed in 2007 that the government had blocked the referral of some bills to committees, and that this occasionally happened with no reasons given.[30]

Although the number of references to the legislative and general purpose standing committees, 73, was the same in both the 2004-05 and 2005-06 financial years, references to legislation committees increased from 45 to 61, and references to references committees fell from 28 to 12. This is similar however to the figures seen in

[26] Department of the Senate, Parliament of Australia, 'Work of Committees'. Accessed at: Parliament of Australia: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/woc/index.

[27] F Brenchley and S Morris, 'Canberra keeps tight lid on Senate inquiries'. *The Australian Financial Review*, 20 April 2006, p. 8.

[28] Brenchley & Morris, *Canberra keeps tight lid on Senate inquiries*.

[29] Brenchley & Morris, *Canberra keeps tight lid on Senate inquiries*.

[30] Evans, *The Senate*, p. 207.

2003-04. Sixteen proposed references to references committees were negatived in 2005-06 compared to 7 negatived in the previous year.[31]

The Senate's Annual Report of 2005-06 noted references committees either had no work or very little work as a result of fewer inquiries being agreed to by the Senate. However, there were more bills referred to legislation committees and less time allowed for these inquiries.[32] This trend continued in the following year, which was marked by continuing severely constricted time frames for bills inquiries and a lack of reference inquiries. At one point, for example, the Standing Committee on Economics was conducting 14 inquiries simultaneously.[33]

Between 1 January 2004 and 30 June 2005, the average timeframe for an inquiry into a bill was 39 days. Between 1 July 2005 and 30 June 2006, after the Senate majority took effect, the average bills inquiry timeframe had decreased to 27 days.[34] The reduced timeframe for inquiries obviously put increased pressure on the committees. For example, in the final sitting week before the autumn 2006 break, the Senate referred 13 bills to committees and sought feedback from stakeholders on all of them before the end of the parliamentary session.[35]

The Senate's 2005-06 Annual Report noted there was an increase in extensions of time given to Senate committee inquiries to report on bills, from 35 in 2004-05 to 55 in 2005-06.[36] Based on this 57% increase in one year, the average reporting deadline increased slightly, to 30 days for bills inquiries, however the number of packages of bills referred also increased, from 59 to 79.[37]

In some cases, committees were given a week to examine and report on bills, or were referred bills that were not yet before the Parliament. The reduced inquiry timeframes also meant a reduced amount of time available to hear witnesses in order to fully inform the inquiries. The inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 was allocated 5 days, during which the committee was required to

[31] Department of the Senate, Parliament of Australia, *Annual Report 2005-06*, 2006, p. 52.

[32] Senate, *Annual Report 2005-06*, p. 3.

[33] Department of the Senate, Parliament of Australia, *Annual Report 2007-08*, 2008, p. 54.

[34] Singleton, *The Senate a paper tiger?* p. 84.

[35] Brenchley & Morris, *Canberra keeps tight lid on Senate inquiries*.

[36] Senate, *Annual Report 2005-06*, p. 52.

[37] Senate, *Annual Report 2006-07*, p. 52.

question 105 witnesses, read 5000 submissions, and was given one day to report.[38] The committee examining the complex Telstra legislation, a package of five bills, was given one day of hearings to take place 24 hours after the bill was introduced in Parliament, a timeframe described as unfair and unreasonable for witnesses and those providing submissions.[39]

The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (Cth) was referred to the Employment, Workplace Relations and Education Committee on 10 May 2007, and was given a reporting date of 14 June 2007, but the bill was not introduced into the House of Representatives until 29 May 2007.[40] This happened 12 times in the 2006-07 financial year.[41]

The Senate Standing Committee on Community Affairs was referred provisions of the National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2007 on 13 June 2007 for report five days later on 18 June 2007. The Committee recorded that the very short inquiry provided insufficient time to analyse concerns in relation to longer term impacts of the reforms.[42]

The Clerk of the Senate at the time confirmed that the government had used its majority to restrict the time available for committees to examine bills, with the average time allotted declining from 40 to 28 days.[43] While the statistics vary slightly, it is clear to see here, when examining the committee inquiry timeframes, that the government in the Senate used its majority to reduce scrutiny of its legislation to accelerate its passage through the upper house. A reduction of legislative scrutiny is evident in committee reports and Hansard.[44]

Reporting time frames in the lead up to the 2007 election were tighter than ever before, with an average reporting deadline of 14.7 days. Following the start of the 42nd

[38] D Humphries, 'Howard's power house'. *Sydney Morning Herald*, 24 June 2006, p. 32.

[39] K Lundy, *Parliamentary Debates*, Senate, 12 September 2005, p. 81.

[40] Senate, *Annual Report 2006-07*, p. 52.

[41] Senate, *Annual Report 2006-07*, p. 52.

[42] Standing Committee on Community Affairs, Parliament of Australia, *Inqury into National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2007*, p. 1.

[43] Evans, *The Senate*, p. 205.

[44] Senate, *Annual Report 2006-07*, p. 60.

Parliament, bill inquiries referred to committees had an average reporting deadline of 49 days, longer than at any time since 2003-04.[45]

This data reveals an overall trend in how references to committees were impacted by the transition to a government majority in the Senate. There was a shift from inquiries into matters referred by the Senate to examination of bills, with more bills referred, and tighter reporting timeframes.[46] This demonstrates a wish for the government's legislation to be expedited without any inquiries into public interest or government matters. These bills also came under the government's legislative agenda for the 41st Parliament, all being significant and contentious bills, but with considerably reduced time frames for examination and report. This trend detracts from the expectations outlined above, as a decrease in committee activity was predicted but this change in committee activity was not.

Select committees

Select committees differ to standing committees in that they are not permanent, they are created by a resolution to inquire into a specific topic, and cease to exist once they have reported. It is necessary to examine select committees as well as standing committees in order to accurately examine committee activity during upper house majorities.

	First period	Second period	Third period	Fourth period
Select committees established[47]	6	1	0	6

Only one select committee operated during the Senate majority, which was established before the majority was sworn in. The Select Committee on Mental Health was established in March 2005, and reported in April 2006.[48] No select committees were established during the government majority in the Senate. The 2005-06 financial year was the first since 1996-97 during which there was no appointment of a select

[45] Senate, *Annual Report 2007-08*, p. 48.

[46] Senate, *Annual Report 2006-07*, p. 3.

[47] Department of the Senate, Parliament of Australia, 'Select Committees'. Accessed at: Navigate Senate Committees: http://navigatesenatecommittees.senate.gov.au/committees#select.

[48] Department of the Senate, Parliament of Australia, 'Select Committee on Mental Health' 2021. Accessed at: http://navigatesenatecommittees.senate.gov.au/committees/c203--mental-health.

committee.[49] Select committees and other inquiries do not fit with the government's legislative priorities, especially while there were fewer constraints on its legislative scrutiny.

The appointment of 6 select committees at the beginning of the 42nd Parliament is an indication that committee activity in the Senate was increasing and therefore returning to normal following 3 years of a government majority.

Committee reports

	First period	Second period	Third period	Fourth period
Committee reports tabled[50]	255	151*	323	48

*31 of these were presented during prorogation.

This data includes all committee reports tabled, including those requesting extensions of time. It represents a 26% increase in reports tabled in the first period to the third period, accounting for the increase in bills inquiries discussed previously and the resulting increase in requests for extensions of time. This increase in committee reports could indicate a higher level of committee activity, and disprove the hypothesis that upper house committee activity decreases in a government majority. However, it doesn't take into account the uneven workloads experienced by the committees or the number of requests for extensions of time. It does show that committee reports increased as the government used its majority to expedite the passage of its legislation through the Senate.

The government response rate to Senate committee reports declined from 39 in 2005 to 29 in 2006.[51] However, after the committee restructure and the increase in referral of bills for inquiry, the number of government responses increased to 45 in 2007, following the pattern of an increased number of committee reports being tabled. This data is clearly in contradiction to the earlier expectation that committee activity would decrease. Although government responses may not be an indicator of committee

[49] Senate, *Annual Report 2005-06*, p. 63.

[50] Department of the Senate, Parliament of Australia, 'Register of Senate Committee Reports' 2021,. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/register.

[51] Department of the Senate, Parliament of Australia, 'General statistics 2001 – 2011'. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_Classic/Consolidations/general2001.

activity, they provide important insight into how the government viewed the accountability mechanism that is legislative scrutiny by Senate committees.

Estimates hearings

Estimates hearings allow senators to scrutinise how the government has spent tax payers' money, and any future plans for government spending. Since estimates hearings began in 1970, they have been a major accountability mechanism of the Senate, providing an opportunity to question ministers and officials about any activity of government departments and agencies.[52]

Estimates are referred by the Senate to the eight legislation committees for examination and report twice a year, as they are contained in the main appropriation bills as part of the budget, and then in the additional appropriation bills later in the financial year.[53] This process differs to the Western Australian Legislative Council, which has a dedicated estimates committee. This will be discussed further in the WA section of this article.

The effect of government control of the Senate was well demonstrated during the February 2006 estimates hearings, which began with a declaration by the government that it had instructed all officers not to answer any questions about the Australian Wheat Board oil for wheat scandal.[54] The only reason given was that the Cole Commission was examining the affair, but given that such commissions are not courts and matters before them had previously been subject to questioning, it is believed that this was simply a refusal to answer.[55] No remedial action was taken that would normally take place because of government control over the Senate.

In May 2006 the government effectively decreased the time allotted for that month's estimates hearings by two days, and these hearings also were marked by several significant refusals to answer questions.[56] Statistics on the number of delayed or

[52] Evans, *The Senate*, p. 210.

[53] Department of the Senate, Parliament of Australia, 'Senate Brief No. 5: Consideration of Estimates by the Senate's Legislation Committees'. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief05.

[54] Evans, *The Senate*, p. 212.

[55] Evans, *The Senate*, p. 212.

[56] Evans, *The Senate*, p. 214.

unanswered questions were not recorded or collected for a sufficient time period to provide an accurate comparison, but the then Senate Clerk Harry Evans confirmed that they were becoming more common during the Senate majority.[57]

Estimates hearings play a central role in parliamentary and executive accountability by providing a channel for government organisations to be held accountable for the decisions made in relation to the use of funds appropriated to them.[58] The trend away from inquiries into matters of public interest seen in the 41st Parliament further emphasised the estimates hearings as the most important accountability forum, despite the increased number of refusals to answer or provide information.[59]

Standing order changes

In addition to the important role of Senate estimates, in 2005, Standing Order 74 was amended to introduce a new accountability mechanism to address the late provision of answers to questions taken or placed on notice during estimates hearings.[60] The amended standing order enabled a senator to ask the relevant minister in the chamber, 30 days after the answer is due, why an estimates question on notice has not been answered. While it was used during the 41st Parliament, estimates reports and questions at hearings also continued to highlight concerns about the provision of answers after the due date.[61]

Standing Order 25 was also significantly amended to allow for the comprehensive committee restructure, discussed previously.

Howard double majority experience – Challenging expectations?

Overall, an immediate decline in committee workload was reported once the government majority was sworn in, but workload pressures continued for a couple of committees that received a disproportionate share of references. The Department of

[57] Evans, *The Senate*, p. 214.

[58] G Bowrey, C Smarks, and T Watts, 'Financial Accountability: The Contribution of Senate Estimates. Australian Journal of Public Administration', 75(1) 2016, p. 30.

[59] Senate, *Annual Report 2006-07*, pp. 3-4.

[60] Senate, *Annual Report 2006-07*, p. 55.

[61] Senate, *Annual Report 2006-07*, p. 55.

the Senate reported staff were working nights and weekends to meet the reporting deadlines as some bill inquiries had time frames of a week or less.[62] This article predicted the decline in committee activity but this change in committee activity was not expected.

During the government majority in the Senate there was a shift from committees being referred inquiries into public interest or government matters to bills (which were examined with shorter time frames). Although this led to legislation committees having a heavy workload, this period was also known as the 'calm before the storm' as the 2007 election recess drew to a close.[63] Committee workload surged in 2008 following the return to the status quo in the Senate – that is, no party holding a majority.[64]

LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA

McGowan's legislative agenda

Fast forward 13 years and another Australian Parliament now finds itself in the similarly unique circumstances of commanding the numbers in both the lower and upper houses. Going into the 41st Parliament, the McGowan Government's legislative priorities consisted of electoral reform, Aboriginal cultural heritage legislation, ongoing COVID-19 public health measures, security and anti-motorcycle gang crime legislation, and protecting its position against mining magnate Clive Palmer and the federal government.[65] Some of these bills had lapsed at the end of the previous Parliament. By the end of the 2021 sitting year, all of these bills had been introduced and passed.[66]

Within six months of the McGowan Government being re-elected, the Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021 was introduced and two months later passed, abolishing the group voting ticket and full preferential voting

[62] Senate, *Annual Report 2005-06*, p. 65.

[63] Senate, *Annual Report 2007-08*, p. 3.

[64] Senate, *Annual Report 2007-08*, p. 3.

[65] K Beazley, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 29 April 2021.

[66] Parliament of Western Australia 'Current Bills'. Accessed at: https://www.parliament.wa.gov.au/parliament/bills.nsf/screenWebCurrentBills.

system on which the Legislative Council was elected.[67] This also means that the case of one member of a micro party being elected on just 98 votes is unlikely to happen again. While not directly related to the impact on committee activity, this demonstrates that certain events can be expected following largely one sided elections, giving rise to the idea of patterns emerging amongst those jurisdictions that have experienced them.

Committee composition[68]

In order to examine any patterns emerging amongst jurisdictions that have experienced double majorities, it is important to examine the composition of that jurisdiction's committees. Of the Legislative Council's eight standing committees, only one was chaired by an opposition member during the 40th Parliament, the Standing Committee on Uniform Legislation and Statutes Review.[69]

For the 41st Parliament, government chairs were appointed for five committees. The Uniform Legislation Committee retained an opposition chair, and while the Standing Committee on Estimates and Financial Operations had a government chair during the 40th Parliament, its practice is to have a non-government chair. The Committee reverted to this practice for the 41st Parliament as a result of a deal being made between the government and the opposition. This deal will be discussed further in the Estimates hearings section. The Estimates and Financial Operations Committee also is required to have a non-government majority under the Standing Orders.

The other committee with an opposition chair is the Joint Audit Committee, however this consists of members of the Estimates Committee and the Legislative Assembly

[67] Parliament of Western Australia, 'Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021'. Accessed at: https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=8244BB10DC5E17A0482587500041A383.

[68] For the purposes of this article, the term 'Legislative Council committees' will refer to standing, select, and joint committees administered and staffed by the Legislative Council Committee Office, as well as the Legislative Council Standing Committee on Procedure and Privileges, which is not administered and staffed by the Committee Office. Joint committees administered by the Legislative Assembly will not be included.

[69] Department of the Legislative Council, Parliament of Western Australia, 'Standing Committee on Uniform Legislation and Statutes Review'. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/BF7B2C9193BDF5BE48257831003B03AB?OpenDocument#current.

Public Accounts Committee, and is required under the Standing Orders to be chaired by the chair of the Estimates Committee.[70]

Referral of matters

	40th Parliament	2017	2021
Referral of matters to committees[71]	42	7	7

These figures include bills, bills re-referred after prorogation, select committees, and inquiries. Unlike the Australian Senate, bills are not automatically examined by committees. In the first year of the 40th Parliament, five uniform bills were automatically referred to the Standing Committee on Uniform Legislation and Statutes Review under Standing Order 126, one was referred to the Standing Committee on Legislation, and one select committee was established.[72] The Legislation Committee was referred 13 bills in the remainder of the 40th Parliament.[73] In the first year of the 41st Parliament, six uniform bills were automatically referred to the Standing Committee on Uniform Legislation and Statutes Review, and one select committee was established.[74] No bills were referred to the Standing Committee on Legislation in the first year of the government majority. A total of six bills, predominantly the bills making up the government's main legislative agenda, were attempted to be referred to the Legislation Committee in 2021 by non-government members, motions which were

[70] Department of the Legislative Council, Parliament of Western Australia, 'Standing Orders', p. 126. Accessed at: https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/resources/file-lc-standing-orders/$file/Standing%20Orders%20September%202021.pdf.

[71] Department of the Legislative Council, Parliament of Western Australia, 'Work of the Legislative Council in 2020'. Accessed at: https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/resources/file-work-of-the-lc-2020/$file/LC%20Statistical%20Report%202020.pdf

[72] Legislative Council, *Work of the Legislative Council*, p. 41.

[73] Department of the Legislative Council, Parliament of Western Australia, 'Standing Committee on Legislation'. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/100B093DBC8DCE5A48257831003B03A5?OpenDocument#previous.

[74] Department of the Legislative Council, Parliament of Western Australia, 'Legislative Council statistics'. Accessed at: Parliament of Western Australia: https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/content/legislative-council-publications-legislative-council-statistics.

then defeated by the government.[75] This number is up from the two that were defeated in 2017.[76]

The fact that the Legislation Committee have not been referred any bills, and the fact that the time frame allotted for the Uniform Legislation and Statutes Review Committee's bill inquiries is generally required to be 45 days under the Standing Orders, makes it difficult to determine if the Legislative Council is following the Senate's decreased time frame trend.[77] If the shift from subject matter inquiries to examination of bills as seen in the Senate example is present in the Western Australian Legislative Council, it is not yet evident. The trend was occurring in the Senate within the first year of the government majority but this is not occurring in Western Australia as of 2021.

Select committees

	40th Parliament	**2017**	**2021**
Select committees established[78]	6	1	1

One select committee was established in the first year of the 40th Parliament, the Select Committee into Elder Abuse, chaired by an opposition member. The Legislative Council went on to establish another four select committees during the 40th Parliament, all chaired by opposition or cross bench members.[79] The Joint Select Committee on Palliative Care in Western Australia was established by both Houses in the final year of the 40th Parliament, administered and staffed by the Legislative Council Committee Office, and was chaired by a government member of the Legislative Assembly.[80]

[75] S Thomas, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 24 June 2021, p. 2026; T Sibma, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 26 October 2021, p. 4727; N Goiran, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 30 November 2021, p. 6019; N Goiran, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 15 December 2021, p. 6427. N Thomson, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 8 December 2021, p. 6228.

[76] Legislative Council, *Work of the Legislative Council in 2017*.

[77] Legislative Council, *Standing Orders,* p. 67.

[78] Department of the Legislative Council, Parliament of Western Australia, 'Work of the Legislative Council in 2020', p. 9. Accessed at https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/resources/file-work-of-the-lc-2020/$file/LC%20Statistical%20Report%202020.pdf

[79] Legislative Council, *Work of the Legislative Council in 2020,* p. 10.

[80] Legislative Council, *Work of the Legislative Council in 2020,* p. 10.

Generally, non-government controlled select committees or inquiries are established in chambers with government minorities either to foster good will and/or as part of a deal making process. As seen in the Senate example, when the government has the numbers in the chamber, it can negative or refuse to agree to any proposals for a select committee. Interestingly, this was not the case in the Western Australian Legislative Council, with the Select Committee into Cannabis and Hemp established with a cross bench member as chair in October 2021.[81] In 2021 there was one motion to establish a select committee that was withdrawn, to be discussed in the Estimates hearings section.[82] This contradicts the example set by the Senate, possibly indicating that there is no pattern forming in upper house majorities, at least not one being followed by the Legislative Council of Western Australia.

Committee reports

	40th Parliament	**2017**	**2021**
Committee reports tabled[83]	107	18	14

These figures include all committee reports, including those requesting extensions of time. The data represents a 22% decrease in committee reports from the first year of the 40th Parliament to the first year of the 41st Parliament, possibly indicating a decrease in committee activity following the transition to the government majority. This decrease can also be accounted for by considering non-government referred matters, a decrease in self-referred inquiries and in bills referred to the Legislation Committee.

All but one government response requested by Legislative Council committees were received in the 40th Parliament, with the one not being provided due to prorogation.[84] The high government response rate could continue, either because the new majority has not or will not affect the provision of government responses, or because the

[81] Department of the Legislative Council, Parliament of Western Australia, 'Select Committee into Cannabis and Hemp', Accessed at*:* https://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/0496E1B11C984DBD4825876D007EF670?OpenDocument#current.

[82] S Ellery, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 11 May 2021, p. 386.

[83] Legislative Council. (2021). *Legislative Council statistics*.

[84] Department of the Legislative Council, Parliament of Western Australia, 'Tabled Papers - Legislative Council'. Accessed at: https://www.parliament.wa.gov.au/Test/Tables.nsf/screenAdvancedSearchLC.

majority of the committees are government controlled there is a likelihood that the committee findings and recommendations are sufficiently government-aligned. However, it could also increase or decrease. The provision of government responses does not pertain directly to committee activity but is worthwhile to note as a basis of comparison for the remainder of the current parliament.

Estimates hearings

In the weeks before the new Legislative Council members were to be sworn in, a Liberal party member moved a motion to establish a select committee into the transparency and accountability of government.[85] The motion was later withdrawn, as the major parties agreed to the Estimates Committee and the Uniform Legislation and Statutes Review Committee being chaired by opposition members.[86]

Of these two committees now chaired by members of non-government parties, the Uniform Legislation Committee historically has predominantly inquired into and reported on matters relating to bills declared to be uniform by the government.[87] This leaves the Estimates Committee, which has the power to investigate any matter relating to the financial administration of the state.[88]

In contrast to the Senate's experience of estimates hearings during a double majority, the WA Legislative Council Standing Committee on Estimates and Financial Operations did not report any flat refusals to provide information in its first budget hearings since the election. It stated that it was satisfied that its consideration of the 2021-22 estimates positively contributed to the scrutiny of government and its operations. It is yet to find that it has been dissatisfied with the level of non-provision of information.[89] No significant differences were recorded in relation to the new government majority in the Legislative Council.[90]

[85] N Goiran, *Parliamentary Debates*, Legislative Council, Parliament of Western Australia, 5 May 2021, p. 152.

[86] Ellery,*Parliamentary Debates*, p. 386.

[87] Legislative Council*, Standing Orders*, p. 125.

[88] Legislative Council*, Standing Orders*, p. 123.

[89] Standing Committee on Estimates and Financial Operations, Parliament of Western Australia, 'Consideration of the 2021-22 Budget Estimates' p. 13.

[90] Committee on Estimates and Financial Operations, *Consideration of the 2021-22 Budget Estimates*.

It is important to mention here that the Legislative Council's first estimates hearings during a double majority cannot be directly compared with the Senate estimates hearings of 2006, as the Senate's double majority was already well established by 2006. It does, however, provide an important basis for comparison with future estimates hearings in WA. It is also vital to note here that as the Senate does not have a dedicated estimates committee as the Legislative Council does, procedurally the two jurisdictions' experiences with estimates hearings will differ. The Senate's portfolio (or legislation) committees examines estimates relating to their respective portfolios, whereas the Legislative Council's Estimates Committee examines estimates relating to any and all portfolios.

As stated previously, statistics on answers and information provided during Senate estimates were not kept at the time focused on in this article. In order for an in depth comparative study of the effects of a government majority on upper house estimates hearings to take place, information pertaining to answers provided, non-answers provided, and answers not provided by government would need to be collated. The Legislative Council also does not collect this data.

Standing order changes

Through the Legislative Council's Procedure and Privileges Committee, the government made changes to the Standing Orders in the first year of its double majority, however, the amendments were procedural in nature, predominantly impacting the procedures in the Chamber, and did not significantly affect the Legislative Council's committee system.[91] This is clearly in contrast to the committee restructure that occurred in the Senate in 2006, however as with the estimates example, the Senate's government majority was well established by 2006, whereas the Legislative Council's government majority is still in its first year.

[91] Standing Committee on Procedure and Privileges, Parliament of Western Australia, 'Review of the Standing Orders'. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/B79C1B7380770AD24825874400094593/$file/Report%2064%20web.pdf

McGowan double majority experience – Not following the trend?

Examining the Western Australian Legislative Council Committee Office's first year of an upper house majority reveals committee activity on a level comparable with the previous Parliament. If the McGowan Government is following the trend in the Legislative Council set by the Howard Government in the Senate, it was not evident in 2021. Committee activity has only very slightly decreased, not by the significant amount as seen in the Senate, with the Legislation Committee receiving no referral of bills in 2021. However, the fact that a select committee was established, the Estimates Committee reported no significant refusals to answer questions, but all legislative priorities were passed indicates that committee activity does not need to be significantly decreased for the government to expedite the passage of its legislative agenda, nor does there seem to be a desire to actively decrease committee activity.

There is no evidence in 2021 of the preference for bills inquiries over subject matter inquiries, the trend set by the Senate. The results of the Western Australian study pull against the previously stated expectations of decreased committee activity and demonstrate a lack of formation of a pattern within the two studied jurisdictions that have experienced double majorities. These results are surprising due to the wide-spread expectation that governments with such an overwhelming mandate and control over both houses would take advantage of the majority to accelerate the passage of its legislation. The Western Australian example has proven that this is not necessarily the case at least in the first year, as the McGowan Government's legislation was passed easily without any significant changes to Legislative Council committee activity.

CONCLUSION

This article has challenged the conventional wisdom that governments with popular political mandate and control over both houses take advantage of this position when interacting with or participating in the work of parliamentary committees. For example, it was expected that committee activity would decrease with a government majority in the Senate because governments in this position would be expected to take advantage of the majority and attempt to bypass any form possible of legislative scrutiny or accountability imposed on it from the committee system. However, from the data obtained and presented, it seems at first glance that for the most part, committee activity actually increased with the government majority, at least in the Senate example. The government took advantage in a different way; by restructuring the committee system and shortening inquiry time frames it was able to accelerate the passage of its legislative program. The data, however, does not take into account the

disproportionate workloads amongst different Senate committees, or the fact that a decrease in committee activity was actually reported by the Department of the Senate.

The Senate experience was then compared to the Legislative Council of Western Australia to assess if similar behaviours were observed or followed in the first year of its government majority. This does not seem to be the case. The government was able to pass its legislation easily in its first year of a double majority without significantly decreasing committee activity as the Senate did. This disproves the initial hypothesis that committee activity decreases in jurisdictions with a double government majority and reveals that the Western Australian Legislative Council, at least in its first year of a government majority, is not following the trend set by the Senate.

Developing a Typology of Resolutions: A comparative study of the power of resolutions in the Australian and United States Senate*

Lisa Butson[1]

Senior Research Officer, Department of the Senate; Congressional Research Fellow (United States Senate), Australian National University (2020)

* Double-blind reviewed article.

Abstract Resolutions are a common item of debate in legislative bodies; however, they are a relatively understudied aspect of parliamentary procedure, particularly in relation to their scope and power. Drawing upon the author's experience in the Australian and United States Senate, this article develops a typology of resolutions to understand the impact of resolutions inside and outside of the chamber. The article proposes that resolutions can be categorised as procedural, opinion, or statutory. Examining the resolutions proposed in both Senate's in 2021, the article finds that they have commonalities in procedural and opinion resolutions but have a significant divergence in their statutory capacity and that these differences can be linked to their respective institutional design.

[1] This article is an abridged version of a paper submitted towards the completion of LAW702: Parliamentary Law, Practice and Procedure, University of Tasmania, 2021. In 2020, the author received the Congressional Research Fellowship during postgraduate study at the Australian National University and worked in the office of a US Senator. The author is a Senior Research Officer with the Department of the Senate The views expressed in this paper are her own, and do not represent the views of the Department or the University.

INTRODUCTION

Resolutions[2] are a common measure of debate in legislative bodies. Resolutions vary in their power and scope across different systems of government yet are an understudied aspect of parliamentary procedure. In this article I examine the use and powers of resolutions in the Australian and the United States (US) Senate to create a typology of resolutions. This approach enables an examination of how the differences between parliamentary and presidential systems of government is reflected in the powers of resolutions.

To draw comparisons, I examine the institutional design and role of the Australian and US Senate and discuss the procedural history and current practices relating to the consideration of resolutions in both jurisdictions. From this discussion I develop a typology of resolutions based on whether resolutions are binding and who they bind. I propose that resolutions can be categorised as either procedural, opinion, or statutory. Following, I apply this typology to the Australian and US Senate and examine notices of motion from the Australian Senate and resolutions lodged in the US Senate for the year 2021. I find that the Australian and US Senate have commonalities in procedural and opinion resolutions but have a significant divergence in their statutory capacity. Analysing resolutions through an institutional perspective reveals different interpretations of bicameralism and understanding of concepts relating such as the separation of powers that warrant further cross-jurisdictional study of resolutions.

INSTITUTIONAL DESIGN AND THE ROLE OF THE SENATE

Institutional design affects the role and practices of a legislative body.[3] Historically, the Australian and US Senate procedures have been influenced by the practices of the United Kingdom's House of Commons and both legislatures faced the challenge of creating rules for their institutions which reflected their unique institutional design.[4] Among the many differences in institutional design between the Australian and the US

[2] Throughout this article the author uses 'resolution' as a standard term due to the differences in the nomenclature between the Parliament and Congress regarding resolutions and orders.

[3] Rosemary Laing, 'An Introduction to the Annotated Standing Orders of the Australian Senate', *Papers on Parliament* No. 51, 2009; Walter J. Oleszek, Mark, J. Oleszek, Elizabeth Rybicki and Bill Heniff, Congressional Procedures and the Policy Process 10th ed. California: SAGE Publications, 2016, p. 26.

[4] Laing, *An Introduction to the Annotated Standing Orders of the Australian Senate*. Peter J. Aschenbrenner, British and American Foundings of Parliamentary Science: 1174-1801. Oxon and New York: Routledge, 2018, pp. 9-31.

Senate, the core distinction is the relationship between the executive and the legislature.[5] Australia's system of government, although contested, can be classified as a parliamentary system as its executive is chosen from members of the legislature.[6] In contrast, the US has presidential system with a directly elected executive outside of the legislature. Its system is founded on popular sovereignty and is composed of a set of 'separate but equal' institutions designed to provide a check against the other.[7] Despite these differences, the Senates (operating in bicameral, federal systems) in both jurisdictions have a similar role, to represent the states and act as a house of a review,[8] which provides an opportunity for comparison. While the extent to which these functions persist in the modern day is debated, the differences in institutional design and core features of each Senate influence parliamentary procedure.[9]

UNDERSTANDING RESOLUTIONS

Both the Australian and US Senate have been influenced by the procedures regarding resolutions by the House of Commons, where an 'order' refers to the directions a house gives to its 'committees, Members, its officers, the order of its own proceedings and the acts of all persons whom they concern' and 'resolutions' refer to a declaration of

[5] James Rowland Odgers, 'United States Senate. Report'. The Parliament of the Commonwealth of Australia, 1956, p. 5.

[6] See for example: Elaine Thompson, 'The 'Washminster' Mutation' in Patrick Weller and Dean Jaensch (Eds.), Responsible Government in Australia. Victoria, Australia: Drummond Publishing, 1980, pp. 32-40; Stanley Bach, Platypus and Parliament: *The Australian Senate in Theory and Practice*. Canberra: Department of the Senate, 2003; Steffen Ganghof, 'A new political system model: Semi-parliamentary government'. *European Journal of Political Research* 57(2) 2018, pp. 261-281.

[7] Daniel Wirls and Stephen Wirls, *The Invention of the United States Senate*. Baltimore and London: The John Hopkins University Press, 2004, p. 2; Roy Swanstrom, The United States Senate, 1787-1801: *A Dissertation on the First Fourteen Years of the Upper Legislative Body*. Washington, D.C.: US Government Printing Office, 1988; Oleszek, et. al. *Congressional Procedures and the Policy Process*, 2016, pp. 18-20.

[8] Swanstrom, The United States Senate, 1787-1801: *A Dissertation on the First Fourteen Years of the Upper Legislative Body*, 1988; Meg Russell, 'The Territorial Role of Second Chambers'. *Journal of Legislative Studies* 7(1) 2001, 105-118; Harry Evans and Rosemary Laing (Eds.), *Odgers' Australian Senate Practice*. 14th edition. Canberra: Department of the Senate, 2016, p. 1; Harry Evans, 'The Other Metropolis: The Australian Founders' Knowledge of America', *Papers on Parliament* No. 52, 2009, p. 67.

[9] See for example: Richard Mulgan, 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science* 31(2) 1996, pp. 191-204 DOI: 10.1080/10361149651184; James I. Wallner, 'The Death of Deliberation: Partisanship and Polarization in the United States Senate'. Lexington Books, 2013.

an opinion of a house.[10] Resolutions in this manner do not have any direct legal impact (unless there is a deriving source of authority such as statute) but may have varying degrees of political effect.[11] Over time each institution developed its own practices and for managing resolutions based on the scope of the Senate's power and how resolutions are used to create orders, express a view, or legislate.

In the Australian Senate, the distinction between orders and resolutions remains. Orders are 'requirements that some action be taken by some person or body subject to the direction of the Senate' whereas resolutions are matters of opinion and expressions of a particular view that do not have a binding impact.[12] In effect all orders are resolutions but not all resolutions are orders. Orders of the Senate commonly include orders for production of documents, requirements for Ministers to attend the Senate, referral of matters to committees, and changes to the Standing Orders. Resolutions differ in that they take the form of an expression of a view and often use language such as 'That the Senate notes', 'calls on', 'encourages' or 'condemns' some form of action. Resolutions lack the enforceability mechanisms that accompany Senate orders.

There are a variety of mechanisms that lead to the creation of an order or resolution, the most common being through a notice of motion (notice). Notices are introduced and, if agreed to, become an order or resolution of the Senate. A notice is also categorised according to its business type. Any notice lodged by or on behalf of a minister which pertains to executive action is government business; business of the senate notices include (among others) disallowance motions and referring a matter to a standing committee; and general business is all other business (except for matters of privilege).[13] For a notice that falls into the order category, if agreed to, it will become either an order of the day and be listed accordingly on the *Notice Paper,* or the change will be incorporated into the Standing Orders. For orders and resolutions that require

[10] Thomas Erksine May. *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*. 25th edition. United Kingdom: LexisNexus, 2019, p. 475

[11] *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*, p. 475.

[12] Evans and Laing, *Odgers' Australian Senate Practice*, p. 227.

[13] Department of the Senate. Categories of Business (Senate Brief No. 10), 2021. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_4; Australian Senate Standing Order 58.

concurrence of the lower house, such as establishing a joint committee, a message is transmitted to the House of Representatives for consideration.

In the US Senate there is a similar concept but different procedures. Historically, resolutions are not binding and deal with facts, principles, and opinions, whereas orders are a command of the House.[14] Resolutions are introduced as either a simple resolution, concurrent resolution, or a joint resolution. Simple resolutions are resolutions of one House of Congress; concurrent are of both houses; and joint resolutions are akin to bill.[15] Simple resolutions are 'restricted to the scope of authority of the Senate acting as a single body of Congress' and concurrent resolutions are restricted to scope of authority of both houses acting in unison.[16] In relation to orders, these may come from within resolutions but may also be the product of other mechanisms, such as unanimous consent agreements which 'order' the routine of business for a certain day.[17]

Joint resolutions differ as they can be used for legislative purposes or for constitutional amendments. Unlike simple and concurrent resolutions, joint resolutions must be read three times in both houses before presentation to the President for signature to become law.[18] Typically, joint resolutions are only used for the 'incidental, inferior or unusual purposes of legislation', such as making corrections to existing law, providing national thanks to individuals, providing notice to a foreign government of the abrogation of a treaty, approval for minor appropriations, or other similar matters, as both houses agreed that the proper form of general legislation was through a bill.[19] The President can also veto these measures and the Congress can override a Presidential veto with a two-thirds majority in both houses.[20] For joint resolutions which propose

[14] Thomas Jefferson, *A Manual of Parliamentary Practice for the use of the Senate of the United States*. Bedford, Massachusetts: Applewood Books 1801, p. 48.

[15] Floyd M Riddick and Alan S, Frumin, *Riddick's Senate Procedure: Precedents and Practices*. Washington, D.C: US Government Printing Office,1993, p. 1202; Oleszek, et al. *Congressional Procedures and the Policy Process*, p. 399.

[16] Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices*, pp. 442 and 1202.

[17] Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices* p. 956.

[18] Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices* pp. 228-229; US Senate Standing Rule 14.

[19] House of Representatives. *Manual and Rules of the House of Representatives*. section 397.

[20] Elizabeth Rybicki, *Veto Override Procedure in the House and Senate*, Congressional Research Service Report RS22654, 26 March 2019.

constitutional amendments, a two-thirds majority of both houses is required before it is transmitted to the states for approval, and it will not have effect unless approved by three-fourths of the states.[21]

Joint resolutions may also be used to veto executive decisions; however, this is relatively recent. Historically, Congress would include mechanisms for legislative vetoes through resolution (simple or concurrent) into statutes where it had delegated some authority to the executive as an oversight mechanism.[22] In 1983 the Supreme Court overruled this procedure in the case of *INS v Chada*. In this case, the House of Representations, through resolution, vetoed a decision of the Attorney-General. The Supreme Court found that this action was 'essentially legislative' as it had the effect of 'altering the legal rights, duties and relations' of persons outside the legislative branch.[23] As result, it did not conform with the requirements of Article 1 of the Constitution (i.e., all legislative proposals are to be read three times and agreed to in both houses) and violated the legislative principles of bicameralism.[24]

In Table 1 below, I summarise the different forms of business that result in a resolution and the requirements for approval in both institutions. To compare the most analogous items in the two jurisdictions I focus on notices lodged and categorised as government business, business of the Senate and general business for the Australian Senate, and simple, concurrent, and joint resolutions lodged in the US Senate.

[21] Richard S. Beth, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements and Uses*. Congressional Research Service Report 98-728, 2008.

[22] Oleszek, et al. Congressional Procedures and the Policy Process. 2016, pp. 345-364; Louis Fisher, 'The Legislative Veto: Invalidated, It Survives'. *Law and Contemporary Problems* 56(4) 1993, p. 277.

[23] Laurence Tribe, 'The Legislative Veto Decision: A Law By Any Other Name'. *Harvard Journal on Legislation* 21(1) 1984, p. 9.

[24] United States Constitution Annotated. 'ArtI.S7.C3.1 The Veto Power'. Accessed at: https://constitution.congress.gov/browse/essay/artI-S7-C3-1/ALDE_00001053/.

Table 1. Forms of resolutions in the Australian and US Senate[25]

Form of Business	Origin	Requirements for approval	Examples
US Senate			
Joint Resolution	Introduced by a member of either House	Three readings in both houses and approval is granted with a simple majority vote. Bills also require approval by the President. *Requires approval in both chambers by a two-thirds majority vote. If successful, ratification requires approval by three-fourths of the states.	Bill Constitutional amendment*
Concurrent resolution	Introduced by a member of either House	Approval by a simple majority in both houses	Matters regarding the use of the Capitol Complex Joint session of Congress Creation of joint committee Sense of Congress resolutions
Simple resolution	Introduced by a Senator	Approval by a simple majority of the Senate	Establishing, adoption or amendment of chamber or committee rules Matters of privilege, censure, contempt, and expulsion Authorisation of response to subpoena Sense of Senate resolution

[25] Adapted from: Richard Beth, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements and Uses* 2008 and The Senate, *Standing Orders and other orders of the Senate*, Senate Table Office, Commonwealth of Australia, July 2021.

Australian Senate			
Government business	Introduced by a Senate Minister	Simple majority of the Senate	Introduction of a bill Exemption of a bill from the cut-off period Referrals to the Public Works Committee Affirmative regulation approval
Business of the Senate	Introduced by any Senator	Simple majority of the Senate	Rejection of an item of delegated legislation New committee inquiry
General business	Introduced by any Senator	Simple majority of the Senate *Motions requiring action by both houses such as establishing a joint committee needs approval by a simple majority in both houses	Order for production of documents Introduction of private senators' bills Establishment of a select or joint committee* Instruction to committee Requirement for ministerial attendance or explanation Statements of opinion

FACTORS AFFECTING THE DELIBERATION OF RESOLUTIONS

The methods for the consideration of resolutions differs between the jurisdictions. In the Australian Senate, there is a routine of business which allocates times to debate measures.[26] Notices are most commonly dealt with during the 'discovery of formal business'. 'Discovery of formal business' enables a senator to seek leave of the chamber to move their notice without amendment or debate. This procedure was developed to streamline consideration of matters due to a lack of time afforded to general business in the Senate's proceedings.[27] By convention, notices moved during discovery should be non-contentious matters which do not require extensive debate. If formality is granted, the notice will either be determined on the voices or by a division. If formality is denied, the notice is still available for consideration, but it can no longer be taken as formal and must be debated. Generally, it remains on the *Notice Paper* until it lapses at the conclusion of a parliament. Notices may also be debated for one hour on a Thursday afternoon, with the party whips agreeing on a roster for allocation of this time. Senators may use other mechanisms such as requesting leave of the chamber or proposing the suspension of standing orders to allow for the consideration of a matter.

There are other factors which constrict notices, including the requirements of Standing orders 66 and 76. These rules state that notices must relate 'to matters within the competence of the Senate'; general business notices must not exceed 200 words unless it is a reference to a committee or order for production of documents; and provide the President of the Senate with the power to remove extraneous material from notices.[28] Additionally recent changes to the standing orders restricted the use of general business notices during discovery to the following matters: the consideration of legislation; alteration the conduct of Senate or committee business; or an order for the production of documents.[29] All other general business notices can only be considered during the general business debate time slot.

[26] Australian Senate Standing Order 57.

[27] Laing, *An Introduction to the Annotated Standing Orders of the Australian Senate*, pp. 242-247; Evans and Laing, Odgers' *Australian Senate Practice* p. 234.

[28] Australian Senate Standing Order 66 and 76.

[29] Australian Senate Standing Order 66.

In the US Senate, the order of business in the Standing Rules is rarely followed, and daily Senate activity is often based on unanimous consent agreements which cast aside the Senate's rules and specify what and how business will be considered.[30] The US Senate conducts its session in either legislative or executive session and a procedural motion must be moved to alternate between these sessions. Unlike the Australian Senate, there are no rules regarding the content of resolutions or requirements to meet word limits. However, there are rules regarding the period between the introduction and debate of a resolution, and rules for specific resolutions such as the concurrent budget resolutions.[31] Senators lodge resolutions at the table and in most cases they are immediately referred to a committee (based on subject matter) by the Senate Parliamentarian.[32] Once a resolution is referred to the committee it is up to the committee to decide how to proceed. Resolutions can be reported to the Senate with or without amendment, and with or without a report of the committee, but most commonly resolutions 'die' in the committee space.[33]

Consideration of a resolution cannot occur until it is placed on the appropriate Calendar of Business. If a resolution is reported out of committee and to the Senate, it is placed on the Legislative Calendar of Business as a general order (or on the Executive Calendar if it relates to executive business). Items on the Legislative Calendar of Business are not set for a certain day and can be called on for debate in several ways. The most common mechanism is a unanimous consent agreement. Other measures include a 'motion to proceed' which can be moved by any senator to bring on debate of the resolution. Measures may also be 'hot-lined' which in effect bypasses the regular Senate procedures and is put immediately on the calendar. In addition, any Senator may place a 'hold' on a legislative measure. A hold indicates that there is not unanimous consent for a measure, and it will not be called on for the threat of filibuster.[34] A further constraint are the procedures that have been developed to prevent filibusters. One

[30] Oleszek, et al. *Congressional Procedures and the Policy Process*, pp. 39 and 213; Martin B. Gold, *Senate Procedure and Practice* 4th ed. Lanham, Maryland: Rowman and Littlefield, 2018, p. 11; Riddick and Frumin. *Riddick's Senate Procedure: Precedents and Practices*, p. 1311.

[31] US Standing Rules 14 and 15; Senate Manual 2014, section 632; Riddick and Frumin. *Riddick's Senate Procedure: Precedents and Practices*, p. 1290.

[32] Oleszek, et al., *Congressional Procedures and the Policy Process*, p. 107; US Standing Rule 14.

[33] Gold, *Senate Procedure and Practice* p. 78.

[34] Gold, *Senate Procedure and Practice*, p. 87.

mechanism used is cloture, which limits the time for debate and can also set a time for when a debate occurs. For cloture to be agreed to a three-fifths majority is required. Therefore, while some resolutions only need a simple majority to pass, in effect unanimous support or a three-fifths majority is required to bring on the debate on the resolution.[35]

DEVELOPING A TYPOLOGY OF RESOLUTIONS

Resolutions can be examined in a variety of ways. The extant literature examines resolutions at one level, in terms of their function as it relates to accountability, legislative, and political purposes. For example, there is analysis on no-confidence motions and the accountability function[36] and literature which examines resolutions through lenses such as agenda setting, collective decision making and behavioural analysis, and voting analysis frameworks.[37] The literature also examines resolutions through a 'quasi-legislation' perspective in order to understand the role and power of resolutions when they do not have a statutory purpose, such as their ability to influence public opinion or the behaviour of other legislative bodies or the executive.[38] Literature from the fields of rhetoric and debate seek to understand the purpose of parliamentary

[35] Valerie Heitshusen and Richard S. Beth, *Filibusters and Cloture in the Senate*, Congressional Research Service Report RL30360, 7 April 2017.

[36] David Blunt, 'Responsible government: ministerial responsibility and notions of 'censure'/'no confidence''. *Australasian Parliamentary Review* 19(1) 2004, pp. 71-87; Laron K. Williams, 'Unsuccessful Success? Failed No-Confidence Motions, Competence Signals, and Electoral Support'. *Comparative Political Studies* 44(11) 2011, pp. 1474-1499; John D. Huber, 'The Vote of Confidence in Parliamentary Democracies'. *American Political Science Review*, 90(2) 2014, pp. 269-282.

[37] Amie Kreppel and Michael Webb, 'European Parliament resolutions—effective agenda or whistling into the wind?'. *Journal of European Integration* 41 pp. 383-404 DOI: 10.1080/07036337.2019.1599880; Samuel E. Finer, Hugh Berrington, and David Bartholomew, *Backbench Opinion: In The House Of Commons 1955-59*. Oxford: Pergamon Press, 1961; Mark Franklin and Michael Tappin, 'Early Day Motions as Unobtrusive Measures of Backbench Opinion in Britain'. *British Journal of Political Science* 7(1) 1977, pp. 46-69; Sarah Childs and Julie Withey, 'Women Representatives Acting for Women: Sex and the Signing of Early Day Motions in the 1997 British Parliament'. *Political Studies* 52 2004, pp. 552-564; Daniel Bailey and Guy Nason, 'Cohesion of Major Political Parties'. *British Politics* 3 2008, pp. 390-417; Roel Popping and Rafael Wittek, 'Success and Failure of Parliamentary Motions: A Social Dilemma Approach'. *PLoS ONE* 10(8) 2015, pp. 1-18.

[38] Jacob Gersen and Eric Posner, 'Soft Law: Lessons from Congressional Practice'. *Stanford Law Review*, 61(3) 2008, pp. 573-628.

discourse.[39] Within this subfield a typology has developed which classifies resolutions as being of facts, values, or policy.[40]

This literature is useful in thinking about broader questions of the role of the Senate and how parliamentary procedure supports the functions of the institution but it does not examine the nature of resolutions and there has yet to be a comprehensive work of this sort in either jurisdiction. This gap in the literature provides an opportunity to study resolutions at a different level. Before comparing the nature of resolutions in the Australian and US Senate there first needs to be a mechanism to enable effective analysis of the similarities and differences between their use in the two systems, and as such I propose a new typology of resolutions. Typologies are an accepted heuristic tool in political science that enables comparison.[41] The limitations of typologies are well known; however, these limitations do not invalidate this method. I seek to understand substance of resolutions in terms of their powers to draw comparisons of resolutions in a parliamentary and presidential system of government.

I propose a new typology of resolutions as follows: procedural resolutions, opinion resolutions, and statutory resolutions. In creating these categories I have examined examples of resolutions from both the Australian and US Senate and sought to analyse the substance of the resolution based on its effect and have reflected the historical and modern understandings of resolutions in the typology. As discussed above, the parliamentary and congressional texts describe resolutions according to the effect it

[39] Cornelia Ilie, 'Parliamentary discourse and deliberative rhetoric' in Pasi Ihalainen, Cornelia Ilie, and Kari Palonen, K. (Eds.). Parliament and Parliamentarianism: A comparative history of a European concept. New York: Berghahn Books, 2016, pp. 133-146; Marion Deville and Christopher Lord, 'Parliaments as places of discourse' in Cyril Benoit and Oliveer Rozenberg (Eds.). Handbook of Parliamentary Studies: Interdisciplinary approaches to legislatures. United Kingdom and United States of America: Edward Elgar Publishing, 2020, pp. 465-479.

[40] Chris Harper, 'Running Topicality on Trichotomy'. *Journal of International Public Debate Association* 7(1) 2015, pp. 1-6; Scott Stroud, 'Habermas and Debate Theory: A Putative Link between the Theory of Communicative Action and Traditional Resolutional Typologies'. Paper presented to the National Communication Association/American Forensics Association Conference on Argumentation, Alta, UT, 1999; Geoffrey Brodak and Matthew Taylor, 'Resolutions of Fact: A Critique of Traditional Typology in Parliamentary Debate'. *The Journal of the National Parliamentary Debate Association* 8(1) 2002, pp. 24-34.

[41] Colin Elman, 'Explanatory Typologies in Qualitative analysis' in David Byrne and Charles Ragin (Eds.) *The SAGE handbook of case-based methods*. United Kingdom and United States of American: SAGE publications, 2009, pp. 121-132; David Collier, Jody LaPorte, and Jason Seawright, 'Putting Typologies to Work: Concept Formation, Measurement, and Analytic Rigor'. *Political Research Quarterly* 65(1) 2012, pp. 217–232; Matthias Lehnert, 'Typologies in social inquiry' in Thomas Gschwend and Frank Schimmelfenning, F. (Eds.). *Research Design in political science: how to practice what they preach*. New York: Palgrave Macmillan UK, 2007, pp. 62-83.

has on those within the remit and the varied statutory and constitutional powers the Senate. Below, I define each type of resolution and provide and an example from the Australian and US Senate.

Procedural resolutions are those concerned with the regulation of activity in a House of Parliament (or Congress) and are binding on persons and groups within the remit of the Senate's and/or the parliament's power. These resolutions include those which determine the practice and procedure of the Senate and its committee, enable acts to occur within the chamber or parliamentary complex, and other similar matters.

An example from the Australian Senate:

> To move on the next day of sitting—That the following bill be introduced: A Bill for an Act to require reporting on electric vehicles, and for related purposes. *Electric Vehicles Accountability Bill 2021*.[42]

An example from the US Senate:

> … That paragraph 11 of rule XXVI of the Standing Rules of the Senate is amended—…
>
> (c) Each committee report shall also contain a detailed analytical statement as to whether, and the extent to which, the increased budget authority, outlays, or revenue produced by the enactment of the bill or joint resolution into law may have an inflationary impact on prices and costs in the operation of the national economy…[43]

Opinion resolutions are resolutions that express a view of the House and often deal with matters of fact, values or opinions and are not binding on the Senate or those subject to its powers. These resolutions often call for some sort of action, policy or otherwise.

An example from the Australian Senate:

[42] *Journals of the Senate,* No. 100, Tuesday, 15 June 2021, p. 3515.

[43] Senate Resolution No. 327, 117th Congress.

> That the Senate— (a) notes:
>
> (i) the horrific mouse plague continues to significantly impact multiple states, including South Australia, Queensland, New South Wales (NSW) and Victoria, costing farmers millions and hurting regional communities…[44]

An example from the US Senate:

> That the Senate—
>
> (1) designates November 17, 2021, as 'National Butter Day'; and
>
> (2) encourages the people of the United States to celebrate National Butter Day with their favorite buttery dishes and baked goods.[45]

Statutory resolutions are those which directly impact on legislation and are binding according to statute. These resolutions either create a new bill or allow or disallow some form of statutory executive action.

An example from the Australian Senate:

> That the Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021, made under the *Industry Research and Development Act 1986*, be disallowed [F2021L00567].[46]

An example from the US Senate:

> …That Congress disapproves the rule submitted by the Department of Labor relating to 'COVID-19 Vaccination and Testing; Emergency

[44] *Journals of the Senate,* No. 101, Wednesday, 16 June 2021, pp. 3571-3572.

[45] Senate Resolution No. 453, 117th Congress.

[46] *Journals of the Senate,* No. 101, 16 June 2021, p. 3562.

> Temporary Standard' (86 Fed. Reg. 61402 (November 5, 2021)), and such rule shall have no force or effect.[47]

These categories provide a basis for comparison, however, in any typology, questions naturally arise about the extent to which the measures can neatly fit into one category or if the categories are appropriate. Resolutions may also serve more than one 'purpose' such as serving the accountability, political or legislative functions that have been studied in the existing literature. For example, resolutions that fall into the 'procedural' category, such as establishing a new inquiry, may serve all three purposes. The terms of reference of a committee may seek to scrutinise executive action, however politically motivated this may be, and the end goal of the committee may be to propose new legislation in order fix a policy problem. Similarly, a statutory resolution, such as one disallowing executive action, could be viewed through a lens of its legislative and accountability objectives. These issues are beyond the scope of this article. Below I apply this typology to the Australian and US Senate.

ANALYSING RESOLUTIONS IN THE AUSTRALIAN AND US SENATES

While many measures in Parliament and Congress can result in a resolution, I have limited the scope of my analysis to those resolutions lodged as notices in the Australian Senate and resolutions lodged in the US Senate, to analyse resolutions that are the most analogous between the two institutions. In the application of the typology, as discussed above, there are difficulties in classifying resolutions into one category. It is common in both jurisdictions for resolutions to contain a preamble which is an opinion but also contain a procedural effect such as changing a standing order or requiring the production of documents. Similarly, resolutions that are opinion in nature can contain a procedural element such as requiring transmission to the lower house. In these instances, I have applied the categorisation based on the substantive effect of the resolution. For example, orders for production of documents in the Australian Senate with an 'opinion' preamble have been classified as procedural.

Using the US Federal legislation database and the Australian *Journals of the Senate,* I have examined notices of motions lodged in the Australian Senate and resolutions

[47] Senate Joint Resolution No. 29, 117th Congress.

lodged in the US Senate for the period 1 January 2021 to 31 December 2021 and their subsequent outcomes. In this period, 540 and 544 were considered in the US Senate and the Australian Senate respectively. I summarise my findings in Table 2 and 3 below.

Table 2. Resolutions by category in US Senate (1 January 2021 to 31 December 2021)[48]

	Category		
Outcome	Procedural	Opinion	Statutory
On the Legislative Calendar	2	6	2
With a committee	32	198	26
Agreed to	53	215	N/A
Became Law	N/A	N/A	4
With the House of Representatives	1	0	1
Total	**88**	**419**	**33**

Table 3. Resolutions by category in the Australian Senate (1 January 2021 to 31 December 2021)[49]

	Category		
Outcome	Procedural	Opinion	Statutory
On the *Notice Paper*	11	59	8
Agreed to	156	112	5
Agreed to by the House of Representatives	3*	3*	N/A
With the House of Representatives	N/A	1*	N/A

[48] Figures for Tables 2 and 3 current as of 14 January 2022.

[49] Total does not equal 544 as notices can be split. Where a notice has been split and the outcome differs for each section, I have recorded these as separate outcomes. If the question was split and all sections were agreed to, I have recorded this as a single outcome. *These numbers are a subset of the total resolutions considered.

Negatived	45	48	12
Withdrawn	15	3	74
Ruled out of order	1	N/A	N/A
Did not proceed	1	N/A	N/A
Total	**229**	**222**	**99**

As shown in Table 2 and 3, procedural and opinion resolutions are the most common form of resolutions in both jurisdictions. Statutory resolutions are the least used form. Opinion resolutions greatly outnumber procedural resolutions in the US Senate, whereas in the Australian Senate there were only seven more procedural than opinion resolutions. This is most likely due to recent changes in the discovery of formal business which limits general business and makes up the majority of the opinion category.

Procedural and opinion resolutions are used in similar ways in both institutions although differences emerge in the number of resolutions that reach floor consideration. As noted above, in the Australian Senate there is a set time to consider resolutions, and this is why the majority of resolution reach some form an outcome. For example, a total of 105 resolutions were negatived. In contrast, in the US resolutions are referred to committees before being eligible for Senate consideration. For opinion resolutions 198 (47%) are currently with a committee. The rate is slightly lower for procedural resolutions, with 36% remaining in a committee. None of the studied resolutions have been 'negatived'. One reason for this occurrence reflects the design of the US Senate being a deliberately slow-moving institution.

Another difference is in the classification of resolutions relates to use of resolutions to request documents (generally from the executive). In the Australian Senate, these are known as orders for production of documents. As such resolutions are binding given the powers of the Senate and its relationship with the executive, they have been classified as procedural. The US Senate operates differently in that the Senate and its committees have been given the power to subpoena persons and information.[50] Requests for documents in resolutions are therefore 'opinion' as they are not binding

[50] Jane Hudiburg, *A Survey of House and Senate Committee Rules on Subpoenas*, Congressional Research Service Report R44247, 12 November 2021; Todd Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, Congressional Research Service Report R45653, 27 March 2019.

in the same manner as a subpoena. This could be seen as a reflection of the different institutional design where in the Australian Senate the government is accountable to the parliament in a manner that is different to the US Senate where the executive (namely the president) is accountable to the public. Resolutions can be used as enforcement mechanisms for subpoenas, for example resolutions are used to find persons in contempt of the Senate and/or Congress.[51] It is the subpoena that has the power to order the information and the Senate the power to enforce and resolve compliance.

The core difference between the Australian and US Senate emerges in the use statutory resolutions. While both use statutory resolutions as an oversight mechanism of executive action, there are substantial differences in the numbers of these resolutions. As indicated in Table 2 and 3, the US Senate introduced 33 statutory resolutions compared with 99 in the Australian Senate. For the US, 26 of these are with a committee, 4 have become law, 2 are on the legislative calendar and 1 is with the House of Representatives for consideration. This is a stark contrast to the Australian Senate where 74 of the resolutions were withdrawn, 5 agreed, 12 negatived and 8 remain on the *Notice Paper*.

One reason for the abundance of withdrawn statutory resolutions is that many disallowance notices are lodged as 'protective' notices. This occurs due to procedures prescribed in the *Legislation Act 2003* which states if a disallowance notice is not lodged within 15 sitting days of the instrument being tabled, the Senate is not able to take any other action. Protective notices, particularly from the Chair of the Scrutiny of Delegated Legislation Committee (SDLC), provide time for the SDLC and the Senate to consider the subordinate legislation in detail. It is common that through the SDLC's consultation with ministers and executive agencies that concerns about subordinate legislation are allayed and the notice can be withdrawn.[52]

The US Senate does not have a similar committee. A joint resolution will be lodged to disallow statutory action and then it is referred to a subject matter committee for consideration. Examining this through an institutional perspective reveals differences in the presidential and parliamentary systems. In the US, the President does have some law-making authority, but the legislative powers rest with the Congress, whereas in

[51] Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*.

[52] Evans and Laing, *Odgers' Australian Senate Practice,* p. 440.

Australia's parliamentary system, the executive controls the legislative agenda and has greater powers to make delegated legislation.

There are also different requirements for the approval of statutory resolutions in the two jurisdictions. First, the US Congress has the power to make legislation via joint resolution. Second, prior to the finding of the Supreme Court in the case of *INS v Chada,* executive oversight was enriched in individual pieces of legislation through simple or concurrent resolution.[53] *INS v Chada* invalidated this method and now joint resolutions must be used to disapprove executive action undertaken according to statute. In contrast, the Australian Senate does not use resolutions as a law-making vehicle but rather as an accountability mechanism through the disallowance process, in which action of only one House of Parliament is required. This process is governed by the *Legislation Act 2003* (and its predecessors since 1904). The rationale for a one house veto is that legislation requires majority support in the two houses. If one house disagrees to a proposal it therefore does not have the required 'double' majority. This reflects the broader institutional design of the Senate.[54]

The *INS v Chada* ruling provides a different interpretation of bicameralism within the context of a presidential system. For example, Tribe, wrote:

…[the] Constitution's rejection of parliamentary government, is to ensure that federal executive power is located under the ultimate direction of a single President chosen by and responsive to a national electorate. Such power is not to be dispersed among a series of ministries selected from the National Legislature, each headed by a congressman answerable only to a local constituency.[55]

This argument reveals the different conceptions of the 'separation of powers' and the institutional design of the executive and legislature in parliamentary and presidential systems of government. In contrast, Fisher argued that the legislative character of simple and concurrent resolutions could be in order if the President had 'consented to the coerciveness' of the resolution by signing into law a bill which contained this mechanism.[56] In examining whether a similar situation could arise in Australia's

[53] Oleszek, *Congressional Procedures and the Policy Process*, pp. 345-346

[54] Evans and Laing, *Odgers' Australian Senate Practice,* pp. 429-431

[55] Tribe, 'The Legislative Veto Decision: A Law By Any Other Name'. 1984, p. 9.

[56] Fisher, *The Legislative Veto: Invalidated, It Survives*, p. 277.

parliamentary system, Gibbs argued that a similar case would be unlikely to come before the Australian courts, given '…the theoretical dominance of the legislature in Australia - theoretical because in fact the executive often controls it - that it has never even been suggested that legislation might infringe the executive power'.[57] This example highlights one element of the different relationship between the legislature and the executive in presidential and parliamentary systems through an examination of resolutions.

CONCLUSION

Resolutions are a common item of debate in the Australian and the US Senate however they have been understudied. I have examined resolutions in the Senate of both jurisdictions and have proposed a new typology of resolutions based on the nature of the resolution and the extent to which and who the resolution binds. The typology consists of procedural, opinion, and statutory resolutions. All three forms are present in the Australian and US Senate. Procedural and opinion resolutions are the most common resolutions in both institutions; however, more resolutions reach an outcome in the Australian Senate given the expedited procedures for their consideration. Statutory resolutions are the least common resolution in both jurisdictions. Analysis of these resolutions has revealed interesting dynamics and interpretations of bicameralism and concepts relating to the separation of powers and accountability that warrant further study of resolutions in presidential and parliamentary systems.

[57] Sir Harry Gibbs, 'The Separation of Powers – A Comparison'. *Federal Law Review* 17 1987, pp. 151-161.

Integrity Agency Funding: The case of Australasian Auditors General*

Peter Wilkins [1]

Adjunct Professor, John Curtin Institute of Public Policy, Curtin University

* Double-blind reviewed article.

Abstract: There have been calls for greater financial independence for integrity agencies, and this paper seeks to advance understanding of the options available to achieve this by assessing the legislation and issues for Australasian Auditors General. Audit offices are the oldest form of integrity agency and have the most detailed previous consideration of their financial independence. The paper identifies four characteristics: control, transparency, adequacy and certainty and key features for each. Analysis indicates that in four jurisdictions the Executive keeps a tight rein, in three there is a recognition for a significant role for the Parliament and in the remaining two this role is dominant. As there isn't a consistent approach to funding and there are many differences of detail, the paper develops a checklist of key provisions to inform decisions regarding the funding of audit offices and integrity agencies more generally. The paper observes that an increased role for Parliament in funding can raise new challenges for independence including the tensions between the interests of Government and Opposition MPs and the ability of committees to function effectively.

[1] Peter Wilkins was an Assistant Auditor General at the Western Australian Office of the Auditor General until early 2009, after which he served as Western Australian Deputy Ombudsman until early 2014.

INTRODUCTION

There have been recent expressions of concern regarding the resourcing of integrity agencies. For instance, an assessment of the resourcing of integrity agencies resulted in a call for '[g]reater financial independence for all core integrity agencies'.[2]

The funding of integrity agencies has also been the subject of a recent New South Wales (NSW) Public Accountability Committee (PAC) inquiry which observed that 'the independent oversight bodies are responsible to Parliament, not the government, and require independence from the government to carry out their functions'.[3] The Committee identified two important considerations: transparency to Parliament and the relevant agency for decisions made about funding for the integrity agencies; and structured oversight by Parliament of the performance and financial management of the integrity agencies.[4]

In Victoria, individual integrity agencies have campaigned for additional funding. In late 2020 the Ombudsman was reported as stating that the office had gone into a $5 million deficit the previous year and that the recent State Budget allocation fell about $2 million short of the $21 million spent last year, which would mean it would likely need to run a deficit again to do the 'core minimum'.[5] By mid 2021 the Ombudsman reported that the office had received a modest increase but that '… the increase falls short of what I requested, not allowing me to both implement my new legislative mandate and

[2] A. J. Brown et al, 'Australia's National Integrity System: The Blueprint for Action', Transparency International Australia & Griffith University, 2020, p. A-03. https://transparency.org.au/wp-content/uploads/2020/11/NIS_FULL_REPORT_Web.pdf.

[3] Public Accountability Committee, *Budget process for independent oversight bodies and the Parliament of New South Wales: Final report*, 2021, p. 4. https://www.parliament.nsw.gov.au/lcdocs/inquiries/2558/Report%20No%207%20-%20Final%20Report%20-%20PAC%20-%20Budget%20Process.pdf.

[4] PAC NSW, *Budget process for independent oversight bodies* p. 7.

[5] J. Dunstan, 'Daniel Andrews says fears Victorian Ombudsman's budget politically motivated 'simply wrong''. *ABC News Online,* 2 December 2020, Accessed at: https://www.abc.net.au/news/2020-12-02/victorian-ombudsman-funding-call-rejected-by-daniel-andrews/12942052.

continue with the existing work'.[6] A few months later the Ombudsman reported that the Treasurer had given a commitment to make up the shortfall.[7]

The (IBAC) Commissioner reported in mid 2021 welcomed additional funding of $20 million over four years but noted that '… additional funding will be required in coming years'.[8]

This paper focuses on the legislative provisions and issues for audit offices and Auditors General as the integrity agencies with the longest history and the most detailed previous consideration of this aspect of their independence. It provides a checklist of key provisions to ensure that resourcing is independent of the Executive and adequate to meet the needs of the Parliament and the community. The checklist has four categories: control and influence on the level of funding; transparency; adequacy of funding; and certainty.

BACKGROUND

A review of the independence provisions in the enabling legislation of Australian Auditors General published in 2003 assessed whether Parliament determined appropriations or whether the legislation was silent on the matter. It also identified whether fees for financial statement audits were determined by the Auditor General or by the Treasurer, or whether the legislation was silent.[9] However there has been considerable change to legislation since then.[10]

A comparative assessment of independence of Australasian Auditors General has been funded by the Australasian Council of Auditors General (ACAG) in 2009, 2013 and most

[6] Victorian Ombudsman, *Annual Plan 2021-22*, 2021, p.3. Accessed at: https://assets.ombudsman.vic.gov.au/assets/Victorian-Ombudsman-Annual-Plan-2021-22.pdf.

[7] Victorian Ombudsman, *Annual Report 2021*, p. 7. Accessed at:

https://assets.ombudsman.vic.gov.au/assets/VO-ANNUAL-REPORT-2021.pdf.

[8] R. Redlich, Message from the Commissioner - June 2021, https://www.ibac.vic.gov.au/publications-and-resources/ibac-insights/issue-28/message-from-the-commissioner---june-2021.

[9] M. de Martinis and C. Clark, 'The accountability and independence of the auditors-general of Australia: A comparison of their enabling legislation', *Australian Accounting Review* 13(3), 2003, pp. 30–31.

[10] G. Robertson, 'Independence of Auditors General: A 2020 update of a survey of Australian and New Zealand legislation'. Australasian Council of Australian Auditors, 2020. Accessed at: https://www.acag.org.au/files/Final%20Report%20on%20Independence%20of%20Auditors%20General.pdf.

recently in 2020.[11] Key legislative components identified as contributing to managerial and resourcing independence are 'Financial autonomy or the independence of the process for establishing the budget for the Auditor General from the Executive' and 'Drawing rights on appropriated resources and to whom resources are appropriated and its independence from the Executive'.[12]

As the level of resourcing is a key determinant of the ability of the audit institution to fulfil its mandate it is important that decisions on this are not made or significantly shaped by the Executive. This is captured by Robertson as '… leaving the budget for the Auditor General in the hands of the Executive could enable the Executive to starve the Auditor General of financial resources, thereby rendering him or her ineffectual'.[13] Where the Executive loses control of the audit office budget the Government may feel uncomfortable about its accountability for public finances. Some relief is provided for this discomfort if the committee and Parliament are required to take account of the Government's financial strategy and circumstances.

Independence is a fundamental feature of audit and it is recognised internationally that to be effective the external public sector function needs to be independent of the Executive. A United Nations' General Assembly resolution *Promoting the efficiency, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions* in 2012 recognised that '… supreme audit institutions can accomplish their tasks objectively and effectively only if they are independent of the audited entity and are protected against outside influence'.[14] Closer to home, the Commonwealth Auditor-General has said that '[i]ndependence is the foundation on which the value of an audit is built'.[15]

While these statements suggest a binary situation — independent or not — it is important in the analysis here to recognise that there are degrees of independence. It

[11] Robertson, *Independence of Auditors General*.

[12] Robertson, *Independence of Auditors General*, pp. 45-46.

[13] Robertson, *Independence of Auditors General*, p. 47.

[14] Australian National Audit Office, Submission #2, Joint Committee on Parliamentary Accounts and Audit, *Review of the Auditor-General Act 1997*, Parliament of Australia. 2020, p. 69. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/Auditor-GeneralAct1997/Submissions.

[15] Australian National Audit Office, *Auditor-General's mid-term report,* 2020, p. 10. Accessed at: https://www.anao.gov.au/work/speeches-and-papers/auditor-general-mid-term-report.

has been suggested in this regard that there have been '… multiple and often conflicting beliefs about what is and what ought to be the nature of independence in public sector audit', pointing in particular at '… executive controls over the financial and human resource levels of the auditor-general's office'.[16] It is therefore relevant to consider here the variety of legislative provisions for financial independence across Australasia, 'Australasia' in this context including all eight Australian States and Territories and New Zealand. The extent of audit independence can be considered as a spectrum, this illustrated by ten Executive Influence levels used in the ACAG project to score key legislative factors, these including Silent or Executive decides, Parliament consulted, Parliament veto, Parliament recommends, Parliament decides, Independent body decides, Parliament decides, Auditor General decides, Legislation mandates and Constitution mandates.[17]

Distilled from these sources and further analysis are four resourcing-related characteristics for the independence and effectiveness of Auditors General. These are:

1. Control and influence on the level of funding
2. Transparency, including about how the funding level is set
3. Adequacy of funding
4. Certainty, both for the year and years ahead

Following the assessment of Australasian practices in relation to these four characteristics the paper identifies the key features for each to ensure that Auditors General can be effective in fulfilling their role providing independent information, analysis and recommendations to Parliament and the community. In a concluding section the paper considers the applicability of these findings for the wider community of integrity agencies.

[16] W. Funnell, Executive Encroachments on the Independence of the Commonwealth Auditor-General. *Australian Journal of Public Administration* 55(4), 1996, pp. 109-10.

[17] Robertson, *Independence of Auditors General*, p. 5.

CONTROL AND INFLUENCE ON THE LEVEL OF FUNDING

Traditionally budgets for audit office work other than financial statement audits are set by the Executive through the normal budget processes. The Auditor General is required to complete standard budget documentation and for this to be processed by the Treasury and Cabinet processes to be a part of the budget Bills submitted to Parliament. While the audit component of the Bills can be debated the Bills are voted on as a whole.

The most detailed consideration of the issues surrounding the resourcing of an audit office was undertaken by the Western Australian Commission on Government (COG). It formed the view that it was not appropriate for the Executive to determine the relative priority of the state audit function in light of its other policy priorities and recommended that the budget of the audit office be determined by a joint Parliamentary Committee which had to give consideration to any advice from the Treasurer. COG specifically considered arguments raised that the Government would lose control of the budget if a Parliamentary Committee was to determine the resources to be allocated to the audit office. After detailed review of the arrangements it recommended that the office budget should be provided through permanent appropriation. It also recommended that the joint Parliamentary Committee could consider requests for additional funding to complete the office's work program and if it determined that the additional funding was warranted the request for additional funds would be submitted to the Treasurer to draw the funds from the Treasurer's Advance Account.[18] In its analysis COG noted that a Parliamentary Committee had emphasised the importance of providing the Auditor General with sufficient flexibility and discretion with regard to the Office's budgetary and expenditure controls and financial autonomy.[19]

In terms of current arrangements, the NSW, Northern Territory (NT), South Australian (SA) and Tasmanian (Tas) legislation is silent regarding the budget for the audit office so it is subject to processes set by and decisions made by the Executive, with the

[18] Commission on Government, Report 1, State Law Publisher, Western Australia, 1995, p. 241,. Accessed at: https://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/5F56D2C4E29C477B48256983000CA043/$file/report1.pdf

[19] Commission on Government, *Report 1*, p. 238.

Parliament being presented with appropriation bills and only then, through estimates hearings, is it possible to ask questions about the funding.

Broadly similar levels of consultation with a Parliamentary committee exist for Queensland, Victoria, WA, the Commonwealth and the Australian Capital Territory (ACT), but each has unique features. For instance, the Queensland legislation requires that the Treasurer must consult the Parliamentary Committee in developing the proposed budget, the Treasurer having received estimates prepared by the Auditor-General.

Where committees are involved, in addition to the ACT provisions requiring a statement of reasons, only in WA is there an onus on the Government to consider recommendations of the committee, this not being included in the ACT, Queensland, Victorian and Commonwealth legislation.

The New Zealand (NZ) Auditor-General submits estimates that include expenses and revenue to the Officers of Parliament Committee which is chaired by the Speaker. The Committee 'approves and recommends' the budget and the Parliament may then commend this to the Governor-General. Any alteration to the vote during the year is subject to the same provisions and the Speaker has the status of a responsible Minister.

To the extent that Ministers or the Parliament have the power to direct an Auditor General to undertake any kind of work it is essential that additional funding is available for this purpose. This is catered for in the NSW legislation which provides that the the costs and expenses for such work are '… out of funds available for the expenditure of Parliament or of the Minister (as the case requires), such amounts at such times as the Treasurer decides.

In a submission to the Joint Committee of Public Accounts and Audit (JCPAA) review of the audit legislation the ANAO proposed that it receive appropriations in the same way as other Parliamentary Departments. It drew parallels with the recently established Parliamentary Budget Office.[20]

[20] Australian National Audit Office, Supplementary Submission #2.2, Joint Committee on Parliamentary Accounts and Audit, *Review of the Auditor-General Act 1997*, 2020, p. 22, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/Auditor-GeneralAct1997/Submissions.

The Treasurer determines the fees for financial statement audits in four states (NSW, SA, Tas and Qld) and the NT legislation silent on the issue other than for certain request audits. The Auditor General sets the fees in five jurisdictions (ACT, Commonwealth, NZ, Vic and WA), however, this may still be subject to broader control by the Executive. For instance, the WA audit office is subject to an overall expense limit. Whether financial and similar audits should be funded by the Parliament warrants careful consideration. It clarifies that the work is being conducted for the Parliament rather than for the Government but does not provide a direct financial incentive to audit entities to be well prepared for the audit. Where fees are charged, resourcing independence indicates that the fees should be set by the auditor general and not the executive.

Whether a role for the Parliament and/or its committees is beneficial will depend on the circumstances at the time, including whether the Government has the majority in both Houses and on the committee, and even whether the chair of the committee is a member of the Government and potentially an aspiring Minister. There can be problems with a reliance on joint committees. For instance, a WA joint committee took six years to establish after the legislation was passed and has not been particularly active since. The committee recommended after three years of operation that the Act be amended to abolish the joint committee and re-allocate responsibility for making recommendations on the audit budget to the pre-existing upper house committee.[21]

TRANSPARENCY

If the audit office is treated as a consolidated fund department there would not be any requirement for disclosure of differences in view between the Auditor General and the parties in government involved in setting the funding levels in the Budget Bills presented to Parliament. Exceptions to this may be responses to questions raised during estimates hearings or, if the legislation permits, the Auditor General may table a report in Parliament that sets out the case for a certain level of funding.

[21] Joint Standing Committee on Audit, *Review of the operation and effectiveness of the Auditor General Act 2006*, Parliament of Western Australia, 2016, p. 44. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/990219A1B6E07E0B4825801A000DD7AB?opendocument.

The work of the New Zealand the Officers of Parliament Committee in relation to the 2020 budget illustrates the transparency benefits of its role. Public access is provided to a detailed submission by the Auditor-General setting out the case for the funding requested, including key assumptions and risks; the Treasury assessment of this submission; and a report by the Committee which has assessed the submissions.[22]

A different transparency provision exists in the ACT where the legislation requires that the Treasurer present a statement on the reasons when the appropriation amount is less than the amount recommended by the Speaker.

The Western Australian COG identified that it is important that the Auditor General has the ability to report to the Parliament on any matter, including the adequacy of the resources allocated to the audit office.[23] and the WA legislation provides a broad power to report on any 'matter of significance' at any time.

Commonwealth legislation requires that the Minister must report to the JCPAA as soon as practicable any requirement made by a Minister for the Auditor-General to provide reports, documents or information to the Minister and that the reasons for requiring the information must be provided and disclosed in the annual report prepared by the Auditor-General. However, the ANAO highlighted the extent of Ministerial control of the budget process and the effects on transparency when there have been late budget changes such as in 2018 when the Auditor-General was advised by the Treasurer that he was not able to inform the JCPAA directly of the changes made to the ANAO's budget.[24]

Independence can be maintained while keeping the Executive informed but care is needed to ensure that such provisions do not impinge on independence by creating requirements regarding the content or structure of the information. For instance, the NSW audit office is subject to other aspects of the budget process, including that it is expected to report to the Department of Premier and Cabinet on budget and performance outcomes.[25]

---

[22] Officers of Parliament Committee, *Alterations to the 2019/20 appropriations for Vote Audit: Report of the Officers of Parliament Committee*, Parliament of New Zealand, 2020. Accessed at: https://www.parliament.nz/resource/en-NZ/SCR_97587/6f12d5e426f4ee2ae7b090392d9424999d158202.

[23] Commission on Government, *Report 1,* p. 239.

[24] ANAO, *Submission 2*, p.8.

[25] Public Accountability Committee, *Budget process*, p. 30.

To protect independence financial reporting and disclosure requirements could more appropriately be set by a Parliamentary committee with it having considered submissions from the Executive and other stakeholders what and how an audit office should report on its performance and operations.

The New Zealand legislation requires that the budget Minister consult the Speaker over proposed significant changes to the format or content of information presented with Appropriation Bills and consider any comments received, this giving some protection to the information requirements that may be required of the Auditor-General.

ADEQUACY OF FUNDING

The level of funding should be linked to the workload imposed by the legislation and the priorities of the Parliament. However, how it is not straightforward to establish in advance whether the funding provided is adequate.

A commonly aired concern is the number of performance audits that can be conducted each year. This has been a significant issue in discussion of the adequacy of the funding of the ANAO. However, the number of audits in isolation is a relatively weak guide to the adequacy of the resourcing as the scale and cost of a group of performance audits can vary by a substantial amount.

Audit office resources as a share of all government expenditure has been used to identify the resourcing of the ANAO over a 30 year period[26] and government expenditure could reasonably be extended to consider government revenue and assets.

While the Auditor-General has sought an exemption from efficiency dividends from 2020-21 onwards, the JCPAA's majority recommendation was that the ANAO not be exempt from the efficiency dividend as the majority was of the view that the measure continues to serve an important role in ensuring efficiencies are generated across a broad range of agencies.

It is important that a range of indicators are used and that it is recognised that they require interpretation and consideration of changing contexts when assessing changes

[26] Brown et al, *Australia's National Integrity System*, p. A-09.

over time. However, most legislation does not specify the types of workload information that would be required to support the budget bids by the audit office. An exception is Victoria where the Auditor-General must provide to the Committee a draft annual plan describing the proposed work program and the legislation specifies that '… the budget for each financial year is to be determined in consultation with the Parliamentary Committee concurrently with the annual plan'.

In addition to assessing the adequacy of resourcing by linking it to workload, another perspective is the value generated. While this is illustrated in the content of annual reports and similar presentations, there is potential that modelling based on the return on investment could be helpful. An assessment of the resourcing of integrity agencies resulted in a call for guaranteed sustainable funding and suggesting a 'more detailed analysis such as a Productivity Commission inquiry would shed light on the full return on investment (ROI) and investment needs of Australia's integrity agencies'.[27]

CERTAINTY FOR THE YEAR AND YEARS AHEAD

The funds appropriated to an audit institution need to be ring fenced so that they cannot be transferred to other purposes. It should be possible for additional funding to be provided during the year if it is needed to meet unforeseen circumstances. Drawing rights should not be subject to the control of the Executive, and for this reason, the appropriation should be to the audit institution and not as part of a larger grouping or subject to transfers under decisions by a Minister.

Within the budget year, the Commonwealth legislation guarantees availability of the full amount of the Parliamentary appropriations, although the Finance Minister can issue directions that control the timing of when funds will be released. In Victoria, the Auditor General is empowered to incur expenditure up to the appropriated amount.

The New Zealand Speaker is the 'Vote Minster' responsible for the audit appropriation, ensuring that the Executive is not able to constrain the use of the appropriation. Furthermore, as the vote is specifically for audit the Speaker can't shift funds from audit to other areas during a budget year.

[27] Brown et al, *Australia's National Integrity System*, p. A-03 and A-09.

More generally, most other jurisdictions do not protect the Auditor General's drawing rights up to the appropriated amounts leaving the potential for this in effect being reduced by the Executive. The NSW audit office is exceptionally vulnerable to government influence, for example as the appropriation is in effect to the Premier, the Auditor-General having commented that the arrangement threatens independence.[28]

All jurisdictions operate on a single year appropriation with forward estimates so like other entities coming under the budget it is difficult to schedule work and implement longer term initiatives. Audit institutions like many other agencies would benefit from greater certainty than a single year's appropriation. An assessment of the resourcing of integrity agencies resulted in a call for '4-year, direct budget allocations by parliament'.[29]

DISCUSSION AND CONCLUSION

It is evident from the assessment of the four categories above that, on a spectrum between the Executive or the Parliament having a dominant role, the legislation in NSW, NT, SA and Tasmania indicates a tight rein is maintained over the resourcing of audit. The legislation in Qld, Vic, WA and the Commonwealth shows a recognition for a significant role for the Parliament whereas in the ACT this role is dominant and in NZ it provides a high degree of financial independence.

The NSW ICAC identified that '… it would be to the substantial benefit of the Parliament to have an independent and objective assessment undertaken for it by a person who possesses a requisite degree of financial and budgetary experience.[30] It went on to propose a central role for an eminent person as an option which could eliminate the roles of both the Executive and the Parliament in determining its appropriation. It indicated that the eminent person would assess ICAC's funding requirements and also have the role of '… approving the need for any additional funding during the course of

[28] Public Accountability Committee, *Budget process*, p. 32.

[29] Brown et al, *Australia's National Integrity System*, p. A-03.

[30] Independent Commission Against Corruption, *Special Report: The need for a new independent funding model for the ICAC*, New South Wales, 2020, p. 32. Accessed at: https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/nsw-icac-corporate-publications/section--75-reports.

the financial year to cover unexpected demands'.[31] It argued that this model can provide both certainty and flexibility and explored in detail how the eminent person would be appointed and how the funds would be appropriated. A variant is the proposal for an Independent Funding Tribunal.[32] These approaches have not been adopted in any Australasian jurisdiction, but given concerns expressed about potential conflicts of interest for the Executive and for Parliamentary committee members the idea is worthy of consideration.

There are many differences of detail in the provisions and there isn't a coherent framework to assess current legislation and guide discussion about potential changes. For this reason the information above has been used to develop a checklist of key provisions to achieve the purpose of ensuring resourcing of audit offices is independent of the Executive and adequate to enable it to meet the needs of the Parliament and the community (Table 1).

Table 1. Checklist of key provisions

Control and influence on the level of funding
Eliminate control by the Executive but ensure it is consulted Consider if financial and similar audits should be funded by the Parliament.
After receiving information from the Auditor General and the Government enable a Parliamentary committee to recommend to the Parliament (1) the budget amounts as a direct appropriation; and (2) the form and content of the budget information. Adopt measures to ensure the committee is not dominated by Government or Opposition members.
Consider a role for an independent budget assessor or tribunal
To the extent that Ministers or the Parliament have the power to direct an Auditor General to undertake any kind of work ensure that additional funding is made available for this purpose
Transparency
Have the advice provided by the Auditor General and the Government to the committee made public as soon as possible

[31] Independent Commission Against Corruption, *Special Report*, 2020, p. 34.

[32] Centre for Public Integrity, 'Protecting the integrity of accountability institutions: an independent funding model', 2021. Accessed at: https://publicintegrity.org.au/wp-content/uploads/2021/05/Briefing-paper-Independent-Funding-Tribunal.pdf.

To the extent the Government has some control over setting the office's budget, ensure that it must take account of the committee's recommendations and makes public reasons for any variation as soon as possible
Empower the committee to vary any reporting requirements imposed on the audit office by the Executive
Ensure that the Auditor General has a broad power to report on any matter of significance at any time
Adequacy of funding
Level of funding to be linked to the workload imposed by the legislation and the priorities of the Parliament. Include a work plan, a range of indicators, qualitative information, and modelling of the return on investment.
Certainty
Prevent (1) transfer of appropriated funds to purposes other than audit; and (2) any restrictions on when the funds can be accessed through the year. Any changes during the year to require the same process as setting the appropriation.
Have budgeting set on a four-year rolling cycle.

The four resourcing-related characteristics for independence and effectiveness warrant detailed consideration in relation to the legislation of any independent agency. How Parliaments view the resourcing arrangements for their integrity agencies may be influenced by how they are themselves resourced, although differences can be accommodated. For instance, the New Zealand Auditor-General has greater resourcing independence from the Executive than the Parliament, the Parliament being treated largely as if it is a department for resourcing purposes.

An increasing dependence on Parliament for funding can raise new challenges for independence including the tensions between the interests of Government and Opposition MPs, potential conflicts of interest for MPs and the ability of committees to function effectively. It has been argued that integrity agencies should be conceived of as satellites, dependent on the Parliament but being neither too close or too distant.[33] This creates an onus on both the Parliament and the integrity agency to monitor and respond to any situations where resourcing issues are creating tensions regarding independence or effectiveness.

[33] P. Wilkins, 'Watchdogs As Satellites Of Parliament'. *Australian Journal of Public Administration* 75(1), 2015, pp. 8-27.

Further research and the application of characteristics relating to the resourcing of integrity agencies would assist in advancing understanding and potentially strengthening the independence and effectiveness of the agencies involved. This research could build on existing research and reports and assist Parliaments to decide on integrity agency funding arrangements suited to the context. Consideration could also be given to the oversight and accountability of the the integrity agency's performance and financial management as an important complement to any funding system.

Withdrawal of Strangers*

Aleshia Westgate

Acting Committee Secretary, House of Representatives, Parliament of Australia.

* Double-blind reviewed article.

Abstract: Transparency and accountability are at the core of our democratic system. The publication of Commonwealth Parliamentary debate is something taken for granted by citizens of our modern democracy—the publication of parliamentary debates through chamber documents and Hansard transcripts, the broadcast of proceedings and plethora of media coverage has brought visible decision making into the everyday. In time of crisis, however, the Parliament's appetite for public decision making may be tested, and during the Second World War, 'strangers' were ordered to withdraw from the House of Representatives chamber on three occasions. Joint secret meetings of members and senators were held in the House chamber, with certain others present. This article will delve into the context of these orders, the definition of 'strangers', any public reaction, and the philosophical dichotomy of transparency and necessary opacity

INTRODUCTION

> There are various aspects of the matters to which I have referred which honorable members may think can be discussed more freely

> in a private meeting. I, therefore, direct attention to the presence of strangers in the House.[34]

On 20 August 1941, the Right Honorable Robert Gordon Menzies, K.C., Prime Minister and Minister for Defence Co-ordination, drew the attention of the House to the presence of strangers. The order for the withdrawal of strangers from the House of Representatives has only been used in wartime, on three occasions during the Second World War. There is an expectation in our modern representative democracy that debate will be public, as transparency and accountability are at the core of our democratic system. Holding power to account was set out in Magna Carta, and has informed the development and guided the evolution of our own representative democracy. Debates are published, for the benefit of parliamentarians and the public, through chamber documents and Hansard transcripts, the broadcast of proceedings and plethora of media coverage. In time of crisis, however, the Parliament's appetite for public decision making may be tested, and on three occasions the 'strangers' present were ordered to withdraw. The context of these orders, the public reaction to being identified as a stranger, and the philosophical dichotomy of transparency and necessary opacity are worth examination, particularly in light of current events such as COVID.

PROCEDURAL FOUNDATIONS OF PRIVATE DECISION MAKING

The concept of decision making in secret is not unfamiliar to a modern democratic citizen, and is best seen in the operation of the Cabinet, the 'apex of executive government' in which ministers are summoned by the Prime Minister to debate, but ultimately arrive at, a shared policy position.[35] Public *parliamentary* debates, however, in which representatives are able to put forward a view or argument and hear those of other members, are an important part of our representative democracy and there is an expectation that debate will be public. In other words, Cabinet is the secret internal debate to reach a publicly-stated policy direction; Parliament is the public forum for consensus-based decision making, and it is assumed it will sit publicly and openly.

[34] R. Menzies, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 11.

[35] Mark Rodrigues, 'Cabinet confidentiality', *Parliamentary Library Background Note*, 28 May 2010, p. 1.

As with so much of our parliamentary procedural foundation, we share this with Westminster. The *Australian Constitution* provides that, until such time as the powers, privileges and immunities of each House are declared, they shall be those of the House of Commons.[36] The Australian Parliament declared these powers, privileges, and immunities in the *Parliamentary Privileges Act 1987* (PPA). The application of privilege during the period discussed here would be that afforded to the House of Commons, but the particular circumstances for each private session are very different and would need to be considered when assessing whether privilege attached to the decision making undertaken during private session. The PPA is clear that 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House' are covered by parliamentary privilege.

The UK Parliament introduced the Standing Order to allow the withdrawal of strangers in 1875—prior to this, the public could be excluded from the galleries at any time on a member taking note of their presence and the Speaker would be obliged to order their withdrawal, without putting a question.[37] The word 'stranger' was removed from the motion in 1998.The House of Commons Standing Order 163 provides that at any sitting of the House, any member may move that the House sit in private, and the question shall be put. If agreed to, the galleries are cleared, reporting staff must withdraw, broadcasting ceases and the Chair may authorise a short suspension for this to happen. Erskine May notes that this is a rare occurrence in peacetime.[38] The UK Houses sat in private during the First and Second World Wars. On these occasions, a two-stage process was followed: first to agree to sit in private; and then to agree to go into secret session, with the divulgence of proceedings of a 'secret session' being a more serious matter and engaging the provisions of wartime security legislation. Sitting in secret was reported in 1 January 1940 edition of Lismore, NSW's newspaper *The Northern Star*, in its London Letters correspondent column. The column noted that the House of Commons had sat in secret to discuss problems of war supplies, and explained that:

[36] *Australian Constitution 1901* (Cth) s49.

[37] Erskine May, *Proceedings in private and secret sessions*, para 17.22.

[38] May, *Proceedings in private and secret sessions*, para 17.22

> The right to sit behind closed doors goes back to the days when Parliament was fighting for its privileges, and wished to be able to keep its debates secret from the King and the Royal Family.
>
> Now, of course, the motive of a secret session is quite different, and the King was fully informed of what took place.[39]

The article points out that with 1,400 people attending the secret session, it is inevitable that information would leak out (to a waiting press, no doubt) and so the utility of such a session is in doubt, as 'any really vital secret…would eventually leak out—which is a sound reason why no such secrets are likely to be divulged by Ministers, even behind closed doors'. The remainder of the column does in fact highlight the difficulties of supply of petrol and mistletoe, but reassures that there is still plenty of whisky. In December 1945, the UK Parliament resolved that proceedings from secret sessions of the last Parliament need not be kept secret.[40]

STRANGERS AND VISITORS

The traditional parliamentary term 'stranger' has been noted as 'yet another symbol of the ancient privileges of Parliament', reinforcing the divide between member and non-member and 'the fact that an outsider is permitted within the confines of the [parliament] on tolerance only and not by right'.[41] In the House of Representatives, a stranger was:

> …any person present in the Chamber (including the galleries) who was neither a Member nor an employee of the House of Representatives performing official duties. Parliamentary reporting

[39] 'London Letter: British Parliament's Secret Session', *The Northern Star*, 1 January 1940, p. 10.

[40] May, *Proceedings in private and secret sessions*, para 17.22.

[41] Norman Wilding and Philip Laundy, *An encyclopaedia of Parliament*. London: Cassell, 1972, p. 729.

> staff, as employees of the Parliament, were not normally regarded as strangers.[42]

Renamed 'visitor' in 2004, the definition was changed to be 'a person other than a Member or parliamentary official' and broadened in 2016 to provide that an infant cared for by a member was not a visitor. Visitors may be admitted by the Speaker into the lower galleries, and distinguished visitors admitted to a seat on the floor of the chamber.[43] The House deliberated in private in wartime, however in peacetime, strangers were refused access to the galleries in 1920 to prevent the interruption of proceedings, when the Deputy Speaker issued an instruction that all strangers should be excluded from the Chamber galleries due to a large gathering outside Parliament House in Melbourne.[44] *House of Representatives Practice* notes the use of the motion 'That strangers be ordered to withdraw' without the expectation that the motion would be agreed to was used as a delaying or disruptive tactic. Former House Standing Orders provided for any Member to put the question, to be decided without debate.[45] This motion was deployed, unsuccessfully, on a number of occasions and in 1963 appears to have been a tactic of last resort after a series of divisions and a closure motion during the second reading debate on Appropriation Bill (No. 2) 1962-63.[46] The current House Standing Orders do not have an explicit provision for such a motion, but Standing Order 66(d) does provide for a Member to interrupt another Member to 'call attention to the unwanted presence of visitors'.[47]

[42] David Elder (ed.), *House of Representatives Practice*. Canberra: Department of the House of Representatives, 2018, p. 115.

[43] Elder, *House of Representatives Practice*, p. 115. House of Representatives Standing Order 257(a).

[44] Commonwealth, *Parliamentary Debates,* House of Representatives, 29 July 1920, pp 3078–9.

[45] See, for example, former House of Representatives Standing Order 314. 'If at any sitting of the House, or the Main Committee, any Member takes notice that strangers are present, the Speaker or the Chair, as the case may be, shall forthwith put the question 'That strangers be ordered to withdraw', which shall be decided without debate: Provided that the Speaker or the Chair may, whenever he or she thinks fit, order the withdrawal of strangers from any part of the Chamber or room in which the Main Committee is meeting.

[46] Votes and Proceedings (VP) 1962-62/80 (2.5.1963).

[47] House of Representatives Standing Order 66(d).

PARLIAMENT'S RESPONSE TO THE OUTBREAK OF WAR

The announcement of Australia's involvement with the Second World War was made publicly by Prime Minister Menzies on 3 September 1939, on every national and commercial radio station in Australia.[48] Menzies had been Prime Minister for just under six months, and led a minority United Australia Party Government after the death of sitting Prime Minister Joseph Lyons. Two weeks later after the announcement of war, Menzies also publicly announced the formation of the War Cabinet to be the main decision-making body on the conduct of the war, and which was originally a standing committee of the full Cabinet. The War Cabinet, made up of Ministers as directed by the Prime Minister and other ministers as required, would 'deal with all matters in relation to the conduct of the war other than matters of major policy',49 with matters of major policy determined by the full Cabinet. The War Cabinet and full Cabinet reversed these roles over the next year, with the War Cabinet rising in prominence.50 Meetings were held at Victoria Barracks, Melbourne, and in the Cabinet room at Parliament House, Canberra.

After the September 1940 general election, Menzies retained power but relied on the support of two independents. Menzies offered to form a 'national government' with opposition leader John Curtin, which was declined and instead the joint-party War Council was formed. By the end of 1940, the question of whether Menzies would travel to London during the parliamentary recess was a hot topic in the press, with Menzies stating that any trip would rely on stronger political stability at home.[51] By February 1941, Menzies was travelling to meet Australian troops in North Africa, and participating in the British War Cabinet in London. Menzies also undertook an unpublicised trip to Ireland with the hope of ending Irish neutrality, which antagonized Winston Churchill.[52] Menzies returned to Australia in May 1941 to find internal party

[48] Australian War Memorial, 'Second World War, 1939-1945'. Accessed at: https://www.awm.gov.au/articles/second-world-war.

[49] Minutes of the full Cabinet meeting, Melbourne, 26 September 1939. National Archives of Australia: A2697/XR1, Vol 2.

[50] John Curtin University, 'The War Cabinet and Advisory Council'. Accessed at: http://john.curtin.edu.au/behindthescenes/cabinet/index.html.

[51] 'Menzies May Visit London', *The Sun*, 12 December 1940, p. 3.

[52] A. W. Martin, 'Menzies, Sir Robert Gordon (Bob) (1894–1978)', *Australian Dictionary of Biography*. Accessed at: https://adb.anu.edu.au/biography/menzies-sir-robert-gordon-bob-11111, 2006.

support waning after open plotting against him during his absence.[53] Menzies again offered suggestions for a 'national government'; again declined. After an emergency cabinet meeting, at which a majority of ministers agreed that a new leader was needed, Menzies resigned the Prime Ministership on 29 August 1941. In October, the two independents Menzies had relied on crossed the floor, and the coalition government (then led by the Right Honourable Sir Arthur Fadden) was brought down.[54] John Curtin became the Prime Minister, and went on to lead the Labor Party to a large majority in the 1943 general election.

The instability of a minority government at a time of crisis, deep political divisions within the governing coalition, and the need for the Prime Minister to be absent for months were played out in the papers. The political turmoil of the time was very public, with news articles reporting on major and minor political machinations and gossip amidst the backdrop of world war. The extraordinary offer of a joint-party government and efforts to increase political stability (however unsuccessful) were part of unusual decisions being made during a time of crisis.

> 'I, therefore, direct attention to the presence of strangers in the House'

December 1940

During debate on Defence Estimates on 12-13 December 1940, the Member for Bourke suggested that 12.30am may not be the time for 'tired men, excited by the statements we have heard' to be considering the matter, and requested that debate be adjourned to the next week 'when they can be disposed of in calm discussion'.[55] The Prime Minister noted a suggestion made by Leader of the Opposition John Curtin to discuss the matters in private. Prime Minister Menzies then directed the attention of the Chair

[53] Martin, 'Menzies, Sir Robert Gordon (Bob) (1894–1978)', *Australian Dictionary of Biography*.

[54] On 2 October 1941, the House resolved itself into the Committee of Supply and debated the amendment moved by Mr Curtin that salaries and allowances to the Senate be reduced by £1. After debate the next day, the question was resolved in the affirmative, indicating a lack of support for the Government. Prime Minister Fadden submitted the resignation of his Government, and Mr Curtin was commissioned by the Governor-General to form government. The Curtin Government was sworn in on 7 October 1941. This was the last time an Australian government resigned after being defeated in the House.

[55] M. Blackburn, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 1940, p. 1054.

to the presence of strangers. The Chairman (the House was sitting as the Committee of Supply), then put the question that the strangers be ordered to withdraw. The motion was agreed to on the voices, and recording of debates was suspended from 12.32am to 3.30am. Upon resumption of recording of debates, the proposed vote of £3,112,500 for the Department of the Navy was agreed to. Debate then moved to the Department of the Army. Notable in this, the first time the House met to debate in private, is the absence of any dissent from the motion, discussion on the parameters of the meeting, and the fact that the *House* is not suspended—the *recording* of the debates is. Notable also, is that the vote is agreed to once the recording of the debates is resumed. Debate may have been in private, but the outcome of the decision is reported publicly, and the amount disclosed.

The Votes and Proceedings, the official record of the proceedings of the House, continued to record the proceedings in the private meeting:

> Debate continued. *Withdrawal of Strangers.—M*r. Menzies having taken notice that strangers were present-- Question—That strangers be ordered to withdraw—put and passed. *Chairman's Ruling*.—The Chairman stated that he did not regard Honorable Senators as strangers. Debate continued. Ordered—That Mr. Cameron be granted a further extension of time. Debate continued. Ordered—That strangers be admitted.[56]

Later in the all-night sitting, the Member for Barker and the Member for Darling Downs had an argument about the role of the Advisory War Council. The Member for Barker accused the Government of sheltering behind 'a body like that' and questioned its constitutionality, saying that: 'The council is not composed of a pack of strangers. They are members of this Parliament…'.[57] The pejorative use of the word 'strangers' is interesting, coming hours after the first successful order for the withdrawal of strangers, meaning the public and reporting staff. In this instance, the Member for Barker seems to be drawing on the deep divide between parliamentarians and the

[56] VP 1940/13 (13.12.1940).

[57] A. Cameron, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 1940, pp 1073-74.

public to say that the Advisory War Council should be held to account as they are members of the Parliament.

May 1941

On 29 May 1941, the House again agreed to the withdrawal of strangers. Prime Minister Menzies stated that members may wish to be 'given some opportunity to discuss certain matters privately', and again directs the attention of the Speaker to the presence of strangers. The Speaker put the question, and it was resolved in the affirmative on the voices. This time, however, sitting was suspended from 3.15pm to 11.21pm. The Votes and Proceedings record that the Speaker left the Chair, and then resumed it prior to the order that strangers be admitted.[58] Sitting resumed on the motion that strangers be admitted, and business continues. Three minutes after the resumption, the House adjourned until the next day. The Votes and Proceedings do not record what happened after suspension. The *Hansard* records the topic of discussion as 'Secret Meeting of Senators and Members'.[59]

August 1941

The last time the House sat in secret was 20 August 1941, nine days before the resignation of the Prime Minister. In the Votes and Proceedings, the order is swiftly put and passed, and proceedings were suspended from 3.55pm when the Speaker left the Chair, resuming at 10pm. The House again permitted the presence of Senators (although noted that they are strangers), agreed to the withdrawal of reporting staff and suspended. Unlike the other two instances, the *Hansard* record of the lead up to this event illustrates the weight of the decision to deliberate in private and records the Members setting out their concerns with this question.

After Prime Minister Menzies delivered a lengthy speech on International Affairs (Ministerial Representation in London), a paper on 'Recent Developments in International Affairs and proposal that Prime Minister should visit London' was tabled and ordered to be printed 'in order that there may later be public discussion of this matter'. It is perhaps ironic that the importance of public debate on this matter was

[58] VP 1940-41/25 (29.5.1941)

[59] R. Menzies, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1941, p. 55.

acknowledged immediately before the attention of the House was drawn to the presence of strangers. The debate in the chamber then moved to the nature of meeting in private, and the concerns of Members, although the question was resolved on the voices very quickly. On the question of whether reporting staff should remain, the Speaker stated that:

> By a very old ruling of this House, members of the official reporting staff are officers of this House, and they are not covered by the resolution excluding strangers. That rule, of course, was passed in times very much different from the present; there was no war then. If I interpret the wish of the House correctly, there is no desire that the ensuing proceedings be reported, and, therefore, members of the Hansard staff need not remain in the chamber.[60]

The Speaker's observation that conditions had changed significantly since the conventions were agreed, as 'there was no war then', highlights the tension of the time—a nod to the need to adapt, even if it leads to actions which are inconsistent with expectation and long-held convention. It may also raise some metaphorical eyebrows that propriety is something to be evaluated on an as-needs basis rather than considering the principles at stake.

A half hour debate was then had on the question that 'Officers of the Parliamentary Reporting Staff withdraw', and before the sitting is suspended, Members discuss the sort of meeting they are about to have in private. The Member for Dalley asks whether the discussion will be 'a glorified question time' or an *in camera* discussion of the Prime Minister's statement, stating that the decision to remove the reporting staff will depend on the answer.[61] Prime Minister Menzies clarifies that the discussion will be on his statement, but notes that the House may agree to the printing of the paper upon public resumption:

> What I propose is that Mr. Speaker shall suspend the sitting of the House of Representatives by leaving the Chair. Then we may have a private meeting of the kind that we have had before, at which

[60] W. Nairn, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 12.

[61] S. Rosevear, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 12.

> senators may be present and members and senators may discuss any of the matters covered by my statement. A joint private meeting would save time because I have made a proposal which involves consideration by the parties. Subsequently, when the House resumes its sitting, if a public debate is desired, it will be facilitated by the motion for the printing of the paper.[62]

The Member for East Sydney notes that no records were kept of past private joint meetings, and that after these meetings, references were made in the House to certain statements made during the unrecorded time. The Member for East Sydney stated that, without an official record, no one could establish what had been said.[63] Given the uncertain application of privilege to words spoken during a suspension of the sitting, the Clerks at the Table may have been grateful that this matter does not appear to have been pursued as a breach of privilege.

The Member for East Sydney asked whether members and senators would have access to the full supporting evidence in order to make their decisions:

> I want to know as much as possible of the evidence which is before the Government and the Advisory War Council. Having excluded strangers in order that momentous questions may be discussed and confidential matters mentioned, every member of Parliament should be in a position to examine the evidence that the Government possesses.[64]

The Prime Minister stated that the secret cables between governments would not be circulated, and discussion moved to the utility of Hansard for members and the importance of records. There was no dissent raised to the private meeting, but concerns were noted over members' access to the official records and recordings of the debates for their own reference. Mr Curtin highlighted that ordinary proceedings are one thing, but this is a time of war:

[62] R. Menzies, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 11.

[63] E. Ward, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 12.

[64] E. Ward, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 12.

> I, therefore, believe that Ministers and all honorable members who have information to impart owe it to their fellow counsellors to impart it to them. But this is a time of war, and the subjects that will be under discussion relate to the safety of the country and the relationship of this Government to other governments. In the very nature of things, it is impossible to state these matters in this place if they are to be subsequently quotable to the public at large.[65]

Members discussed whether they would be able to discuss the matters debated in private, with the following exchange between Mr Curtin and the Member for East Sydney, with Mr Curtin stating:

> …I see no occasion for Hansard to be present except for the purpose of taking such records of what is said in this place as are to be used by the people of Australia at large in judging us.
>
> Mr. ROSEVEAR.—How much of what is said here to-day will limit the right of honorable members to discuss the proposal publicly?
>
> Mr. CURTIN.—There will be no limitation except so far as an honorable member may say, 'I do not think I ought to use that as a reason for what I did'.
>
> Mr. ROSEVEAR.—It is a method of 'gagging' Parliament.
>
> Mr. CURTIN.— I have put up with it for some time, and while this country is in danger, I shall still put up with it.
>
> GOVERNMENT MEMBERS.—Hear , hear![66]

Mr Curtin's statement that Hansard provides the people of Australia with the opportunity to judge the conduct of members is an interesting admission. He further notes that not only is meeting in private a form of gagging debate, but one that Mr

[65] J. Curtin, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 13.

[66] Commonwealth, *Parliamentary Debates,* House of Representatives, 20 August 1941, p. 14.

Curtin will 'put up with'. Mr Curtin refers to his 'responsibility' to make decisions, and his own weighing up of what should be made known publicly to others. Drawing on the distinction between the Parliament and the people inherent in the discussion of the withdrawal of strangers, Mr Curtin said that: 'We, not the people, are charged with the government and safety of this country.'[67]

In the minutes before the House ordered the withdrawal of strangers for the last time, the Member for Barker seems to have had the last word:

> I am still very doubtful of the usefulness of secret meetings. They begin nowhere, go nowhere and end nowhere, and the decisions which this country so badly needs will not be arrived at by these methods.[68]

CONCLUSION

The extraordinary resolution, on three occasions, to remove strangers from the House of Representatives so that *'momentous questions'* might be discussed in private has only been agreed to in times of war. By the members' own statements, the decisions made in wartime are different from those made in times of peace. The members' trepidation to order the withdrawal of strangers appears to grow over time, perhaps coinciding with the increased secrecy over the three uses of the order. The first time the order is used, the House does not suspend and the Votes and Proceedings continue to record the proceedings of the House. The second time, the House is suspended. The third time, there is a lengthy debate on the nature of the debate and the need for a private meeting, before it is ultimately resolved in the affirmative.[69]

[67] J. Curtin, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 14.

[68] A. Cameron, Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1941, p. 14.

[69] The House continued to meet privately, as agreed in the House on 8 October 1942. In this instance, the House agreed in the morning to meet privately at 8pm that night, and adjourned to the next morning. Strangers were not ordered to withdraw, and no discussion appears to have taken place regarding the meeting. The motion was agreed to by leave: That a joint meeting of members of the Senate and of the House of Representatives be convened for 8 p.m. this day, for the purpose of discussing in secret the present war, and hearing confidential reports in relation thereto.' Commonwealth, *Parliamentary Debates,* House of Representatives, 8 October 1942, p. 1514.

Although the tradition of public parliamentary debate was subverted during this time of crisis, the public could know that even if decisions were being made in secret based on information not accessible to the public, that at least the parameters of the decision making would be made known. Public trust could be maintained in the institution during this time of crisis. The media refers to the secret sittings, reports that they may occur in advance of their moving in the House, and there are numerous references to the House of Commons sitting in secret. There is a perhaps surprising lack of criticism for the occurrences, which may be attributable to the distinction between peace and wartime being drawn by members and the media. One news article from the time referred to the secret sessions of the British Parliament, and noted that:

> …it must always be remembered that in time of war it is quite impossible for the public to be fully informed. There are many matters that have to be concealed from the enemy, and this can be done only by keeping them as secret as possible. For this reason public opinion is occasionally wrong.'[70]

Strangers, visitors, enemies—sometimes there is a need for things to be kept behind closed doors.

[70] 'British Cabinet Turmoil', *The Northam Advertiser*, 13 January 1940, p. 2.

Confidentiality and executive accountability: the case of National Cabinet *

Emma Wannell[1]

Acting Senior Researcher, Department of the Senate, Parliament House of Australia

* Double-blind reviewed article.

Abstract This article questions the compatibility of cabinet confidentiality and the accountability of the executive through an exploration of the use of cabinet-in-confidence as a claim to public interest immunity in response to a Senate order for production of documents. Specifically, this article analyses the Australian Government's attempts to expand this claim to include deliberations and documents relating to National Cabinet. There has been significant contestation as to whether National Cabinet is a committee of Federal Cabinet which would extend the protections of cabinet-in-confidence to that entity, or whether National Cabinet is related to Cabinet only by name and that, rather, it is simply an intergovernmental forum. The implications of this determination are significant and have the potential to influence whether a public interest immunity claim on such a basis is acceptable to the Senate.

[1] The author is a Senior Research Officer with the Department of the Senate. The views expressed in this article represents her personal views and not the views of the department. This article is an abridged and updated version of a paper submitted towards the completion of the Graduate Certificate in Parliamentary Law, Practice and Procedure at the University of Tasmania, awarded in 2022.

INTRODUCTION

Australia's parliamentary democracy was designed as a system of two houses with the Senate importantly acting as a house of scrutiny and review,[2] holding the executive government to account. One of the key ways in which the Senate can do this is through its power to require the production of documents and its authority to determine the validity of public interest immunity (PII) claims. However, as this article will demonstrate, the executive continues to resist these powers.

The article will provide a brief introduction to the Senate's powers relating to orders for production of documents (OPD) and PII before providing some background to the establishment of National Cabinet. The distinctions between National Cabinet and Federal Cabinet (Cabinet) will be unpacked to provide a basis for determining whether cabinet confidentiality should apply to its deliberations and/or documents. The article explores independent Senator Rex Patrick's attempts to hold the executive accountable by pursuing the issue of National Cabinet and cabinet confidentiality. Through this analysis it will be argued that attempts to subvert the Senate's accountability mechanisms under the guise of cabinet-in-confidence only works to undermine the strength of Australia's parliamentary democracy and principles of responsible government—calling into question the compatibility of cabinet confidentiality and the accountability of the executive. It will be demonstrated that the Senate retains the power to order the production of documents as an important component of its role in the scrutiny of the executive despite significant resistance and political manoeuvring.

ORDER OF PRODUCTION OF DOCUMENTS AND PUBLIC INTEREST IMMUNITY CLAIMS

The Senate has the power to compel evidence which includes requiring the attendance of witnesses, answering of questions, the production of documents, as well as the ability to apply penalties to those who obstruct the Senate.[3] This power is derived from Section 49 of the Australian Constitution which aligns the powers of each House of the

[2] See, for example: R. Mulgan, 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science,* 31(2), 1996, pp. 191–204.

[3] H. Evans, 'The Senate's power to obtain evidence', *Papers on Parliament*, no. 50, 2010, p. 1.

Australian Parliament to those of the United Kingdom's House of Commons. However, the Parliament also has the ability to change its powers by legislation.[4] Harry Evans, former Clerk of the Australian Senate, explained that there are no limitations in law to this power as there have been no legislative changes by parliament—with one exception—nor have there been any authoritative court judgements establishing any such limitations.[5]

With regard to OPD, there is no category of documents that the Senate cannot insist on being produced. However, the matter of executive privilege is particularly important here. Whilst executive governments often attempt to claim the right to withhold information from the Senate on the basis that the disclosure of the information would be contrary to the public interest—known as a PII claim—the Senate has never conceded that any such right or privilege exists.[6] Furthermore, by resolution in 1975, the Senate affirmed that it possesses the power to summon persons to answer questions and produce documents, files and papers, as well as the ability to determine whether or not PII claims are acceptable or not on a case-by-case basis.[7]

Also noteworthy are two landmark court decisions made in 1998 and 1999 which upheld the powers of upper houses to hold the executive to account and to access the documents it requires, underlining the parliament's scrutiny function within the context of the doctrine of responsible government. These were the decisions of the High Court in *Egan v.Willis*[8] and the New South Wales Court of Appeal in *Egan v. Chadwick.*[9] A key part of the parliament's power to require documents involves weighing up the need for the parliament to be informed against confidentiality in the public interest. In *Egan v Chadwick*, Priestley JA stated:

> … no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and

[4] *Commonwealth of Australia Constitution Act 1900*, s. 49.

[5] Evans, 'The Senate's power to obtain evidence', p. 1. Note: The one exception to legislative changes was the limitation of penalties which may be imposed, see: *Parliamentary Privileges Act 1987*, s. 7.

[6] Evans, 'The Senate's power to obtain evidence', p. 5; J. R. Odgers, *Odgers' Australian Senate Practice*, 14th ed., edited by Rosemary Laing and revised by H. Evans. Canberra: Department of the Senate. 2016, pp. 601–676.

[7] *Journals of the Senate*, No. 87, 16 July 1975, p. 831.

[8] *Egan v. Willis* [1998] HCA 71; 158 ALR 527.

[9] *Egan v. Chadwick* [1999] NSWCA 176.

> this can only be to the benefit of the people of a truly representative democracy.[10]

In the years following the Egan cases, which confirmed the power of upper houses to order the production of documents, the NSW Legislative Council appointed an independent arbiter to assess claims of PII which proved quite effective with most orders complied with.[11] However, Beverly Duffy explained that by mid-2005 it appeared that 'the post *Egan v Chadwick* 'honeymoon' was over' and the Clerk at the time noted the increasing frequency of claims of privilege.[12] Nonetheless, these cases canvassed important issues relating to the powers and privileges of both State and Commonwealth houses of parliament and conveyed the necessity of reasonable clarity for the resolution of claims by the executive for PII.

Returning to a Commonwealth context, following a period of frustration with the executive declining to answer questions or produce documents without adequate explanation, on 13 May 2009, the Senate reemphasised its power through an order of continuing effect and clarified the process for making PII claims. This process outlined that a minister should provide an explanation for the PII claim which includes a recognised ground[13] upon which the claim is being made, as well as a statement explaining the harm to the public interest that could result from the production of the information.[14] Former Clerk of the Australian Senate, Dr Rosemary Laing explained the process as:

> ... a means to balance competing public interest claims by governments on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament's claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform its proper

[10] *Egan v. Chadwick* [1999] NSWCA 176, [129] citing *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52 (Mason J).

[11] Odgers, *Odgers' Australian Senate Practice*, p. 675.

[12] B. Duffy, 'Orders for papers and cabinet confidentiality post *Egan v Chadwick*', *Australasian Parliamentary Review*, vol. 21(2), 2006, pp. 93–94.

[13] Note: Odgers lists a number of potentially acceptable and unacceptable grounds for claims of public interest immunity based on cases in the Senate, see pp. 662–670

[14] Odgers, *Odgers' Australian Senate Practice*, p. 653.

function of scrutinising and ensuring accountability for expenditure and administration of government programs.[15]

Nonetheless, the executive has continued to resist and, at times, refused to provide information to the Senate. Evans noted that it is the executive that is most likely to refuse to provide information to the Senate and to seek to conceal information from the legislature and the public.[16] At the same time, given the extensive resources at its disposal, the executive is also well equipped to resist the powers of the legislature.[17] On the other hand, the Senate does have various remedies at its disposal for such situations including, for example:

- procedural penalties, such as censuring a minister or declining to pass legislation until the information is produced;
- referral of the matter to a committee for inquiry;
- questioning through the Senate Estimates process; and
- imprisonment or fines for contempt (although use of this remedy is unlikely due to the practical difficulties of utilising this power, particularly if used against a Minister in the House of Representatives).[18]

CABINET AND PUBLIC INTEREST IMMUNITY CLAIMS

It is commonly accepted that government holds certain information that, in the public interest, would be best kept undisclosed.[19] Whilst there are no specific grounds that the Senate has conceded to the executive to withhold information, there are a number of potentially accepted grounds that have been recognised by the Senate on numerous occasions. Odgers outlines these potentially acceptable grounds in detail and with

[15] R. Laing, 'Senate Legal and Constitutional Affairs References Committee: Public interest immunity claim', *Official Committee Hansard*, Commonwealth of Australia: Canberra, 31 January 2014, p. 4.

[16] Evans, 'The Senate's power to obtain evidence', p. 8.

[17] Note: this issue, particularly in relation to the ability of parliamentary committees to hold the executive to account, is also raised in L. Grenfell and S. Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia', *UNSW Law Journal*, 41(1), 2018, p. 41.

[18] Evans, 'The Senate's power to obtain evidence', pp. 5–6; Odgers, *Odgers' Australian Senate Practice*, pp. 672–673.

[19] R. Macreadie and G. Gardiner, 'An introduction to parliamentary privilege', *Victorian Parliamentary Research Service*, research paper no. 2, 2010, p. 23; Odgers, *Odgers' Australian Senate Practice*, p. 664.

examples.[20] However, for the purposes of this article the potentially acceptable ground in the context of the dispute surrounding the National Cabinet relates to the disclosure of cabinet deliberations.[21]

The Cabinet is 'a key institution of the Westminster tradition of parliamentary practice'[22] whose membership consists of the Prime Minister and the Government's senior ministers, as determined by the Prime Minister. The Cabinet is established by convention rather than by constitution, therefore its establishment and procedures are not the subject of any legislation. Instead, the Cabinet's structure and operation is determined by the Prime Minister and is guided by the principles of collective responsibility and solidarity—underpinned by strict confidentiality conventions—which are outlined in the *Cabinet Handbook* published by the Department of the Prime Minister and Cabinet (PM&C).[23] The process of the Cabinet is designed to achieve 'policy coherence and political support at the apex of executive government'.[24] The *Cabinet Handbook* states that the convention of confidentiality provides for the 'opportunity to contest policy ideas in a highly confidential manner in order to ensure that the collective decision that ultimately arises from the Cabinet's deliberations is the best possible policy decision for the administration of the Government'.[25] Nonetheless, a key issue rests on finding the balance in weighing up the value of cabinet as a forum for confidential and candid government deliberations and decision making on the one hand and, on the other, the value of public and parliamentary scrutiny.[26] Cabinet confidentiality remains a contested concept[27] and continues to have an impact on the

[20] Odgers, *Odgers' Australian Senate Practice*, pp. 662–667.

[21] A second potentially acceptable ground that is also relevant in the context of this article is the potential to prejudice relations between the Commonwealth and the states, however a detailed analysis of this ground is not within the scope of this article. For further information, see: Odgers, *Odgers' Australian Senate Practice*, p. 666.

[22] M. Rodrigues, 'Cabinet confidentiality', *Parliamentary Library Publication – Politics and Public Administration Section*, Parliamentary Library: Parliament of Australia, Department of Parliamentary Services, 2020, p. 1.

[23] Department of the Prime Minister and Cabinet (PM&C), *Cabinet Handbook – 14th edition*, 19 October 2020. Accessed at: www.pmc.gov.au/resource-centre/government/cabinet-handbook.

[24] Rodrigues, 'Cabinet confidentiality', p. 1.

[25] PM&C, *Cabinet Handbook – 14th edition*, p. 10.

[26] Rodrigues, 'Cabinet confidentiality', p. 11.

[27] J. Evans, 'Orders for papers and executive privilege: committee inquiries and statutory secrecy provisions', *Australasian Parliamentary Review*, 17(2), 2002, p. 198.

ability of parliament to access certain information which raises questions about the compatibility of cabinet confidentiality and the accountability of the executive.

The Senate tends to accept the confidentiality of cabinet deliberations as a reasonable ground for the executive to withhold information. However, Odgers makes it clear that this ground is not to be mistaken with confidentiality of *any* information or documents relating to the Cabinet, rather it is quite specifically applicable to cabinet *deliberations*.[28] This is because the acceptance of the confidentiality of cabinet deliberations rests on the rationale that senior ministers should be able to engage in free and frank discussion and, therefore, information or documents that do not reveal the specifics of deliberations should not necessarily receive the same protection. Odgers states a claim that a document is a cabinet document should not just be accepted on face value, rather:

> it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word 'cabinet' in or on it.[29]

Nonetheless, this has not prevented the executive from attempting to claim that anything with a connection to the Cabinet is confidential. This issue will be explored in relation to information and documents relating to National Cabinet, but first a brief history of National Cabinet will be provided to establish the basis for the analysis.

A BRIEF HISTORY OF NATIONAL CABINET

National Cabinet was established on 13 March 2020 in response to the COVID-19 pandemic and addressed the need for cooperation between state and federal governments in providing leadership and critical decision-making during the public health crisis.[30] Saunders has described the establishment of National Cabinet as 'a

[28] Odgers, *Odgers' Australian Senate Practice*, p. 665.

[29] Odgers, *Odgers' Australian Senate Practice*, p. 665.

[30] Prime Minister the Hon Scott Morrison MP, 'Advice on coronavirus – media release', 13 March 2020. Accessed at: www.pm.gov.au/media/advice-coronavirus. Note: the remit of the National Cabinet has since expanded, see: Prime Minister the Hon Scott Morrison MP, 'Press conference – Australian Parliament House, ACT – transcript', 29 May 2020. Accessed at: www.pm.gov.au/media/press-conference-australian-parliament-house-act-29may20.

response to an urgent public health crisis that could not be effectively met without drawing on the powers, knowledge and capacities of both the Commonwealth and the States and territories'.[31] Menzies adds that crises present challenges for democratic leaders given the need for critical and rapid decision-making in contexts often characterised by uncertainty, whereby finding the right balance between accountability and rapid decision-making may be difficult, particularly 'during an era of reduced trust in political leaders'.[32] Importantly, transparency of decision-making in such a situation goes a long way to promote public understanding and trust.

National Cabinet is an intergovernmental forum with a structure which reflects a model of executive federalism whereby its membership—consisting of the Prime Minister and all state and territory premiers and chief ministers—share information, discuss and negotiate on behalf of their respective jurisdictions with the intention of coordinating decision-making and policy implementation, where agreeable.[33] Importantly, each head of government remains responsible to their own cabinet and parliament' and 'each government is responsible for implementing the decisions taken within their sphere of competence, for their own jurisdiction, often adapting them to local realities'.[34] This scenario played out many times in response to the COVID-19 pandemic, with certain states and territories making decisions that differed to other jurisdictions based on their own jurisdictional circumstances and needs. This will be discussed in further detail later in the analysis.

In a media release on 29 May 2020, Prime Minister the Hon Scott Morrison announced that the National Federation Reform Council (NFRC), with National Cabinet at its centre, would permanently replace the existing intergovernmental architecture of COAG, stating: 'National Cabinet has proven to be a much more effective body for taking decisions in the national interest than the COAG structure'.[35] However, the

[31] C. Saunders, 'A new federalism? The role and future of the National Cabinet', *Governing during crises – Policy Brief No. 2*, University of Melbourne in collaboration with COVID-DEM, 2020, p. 3; P. de Biase and S. Dougherty, 'Federalism and public health decentralisation in the time of COVID-19', *OECD Working Papers on Fiscal Federalism*, No. 33, 2021, pp. 25–26.

[32] J. Menzies, 'Explainer: what is the national cabinet and is it democratic?', *The Conversation*, 31 March 2020. Accessed at: https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036.

[33] Menzies, 'Explainer: what is the national cabinet and is it democratic?'.

[34] Saunders, 'A new federalism? The role and future of the National Cabinet', p. 3.

[35] Prime Minister the Hon Scott Morrison MP, 'Update following national cabinet meeting – media release', 29 May 2020. Accessed at: www.pm.gov.au/media/update-following-national-cabinet-meeting.

structure, membership and processes of National Cabinet are particularly important because they are distinct in meaningful ways to the structure, membership and processes of the Cabinet, which has implications for the way they each relate to parliament. These key distinctions are outlined below.

DISTINCTIONS BETWEEN FEDERAL CABINET AND NATIONAL CABINET

There has been significant debate about whether or not the National Cabinet is a committee of the Cabinet. The Government's position is that National Cabinet is a committee of Cabinet[36] whereas others—including a Federal Court judge and a number of senators and academics—have argued that it is not a committee of Cabinet.[37] If National Cabinet is a committee of Cabinet, then the same rules apply to National Cabinet as they do the Cabinet which includes the confidentiality of cabinet deliberations. As the Senate generally accepts the rationale of cabinet confidentiality when it comes to deliberations of cabinet, this has significant implications for OPD and the acceptability of PII claims in this context.

The doctrines of collective responsibility and cabinet solidarity are fundamental to any analysis of the relationship between the executive and legislature.[38] The *Cabinet Handbook* states a 'Westminster-style Cabinet is defined by adherence to the principles of collective responsibility and Cabinet solidarity. These principles are the binding devices that ensure the unity of purpose of the Government and underpin the formulation of consistent policy advice'.[39] Collective responsibility ensures that the Government is collectively accountable and responsible to the parliament and the public for its decisions. Cabinet solidarity works in tandem to ensure that ministers cannot absolve themselves of responsibility by stating that they did not support a

[36] J. Reid, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, Official Committee Hansard, Commonwealth of Australia, Canberra, 25 October 2021, p. 70.

[37] Menzies, 'Explainer: what is the national cabinet and is it democratic?'; *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*; Senator Rex Patrick, *Journals of the Senate,* No. 127, 23 November 2021, p. 4279; Senator Malcolm Roberts, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 23 November 2021, p. 18; A. Twomey, Senate Finance and Public Administration Legislation Committee, COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, pp. 31–33.

[38] P. Weller, 'Cabinet government: an elusive ideal?', *Public Administration*, vol. 18 (4), 2003, p. 704.

[39] PM&C, *Cabinet Handbook – 14th edition*, p. 9.

decision of government. This is because, as members of Cabinet, ministers must publicly support all government decisions made in Cabinet, even if they do not agree with them. If this does happen, Cabinet ministers are obliged to resign or the Prime Minister, as Chair of Cabinet, may enforce cabinet solidarity.[40]

It is clear that neither of these core cabinet principles apply to National Cabinet. For instance, it has been noted that there have been numerous occasions where premiers and chief ministers acted independently of the decisions of National Cabinet including on mask mandates, lockdowns, definitions of close and casual contacts, quarantine arrangements, face-to-face schooling, and the timing of reopening of state and international borders.[41] Menzies explained 'the search for unity can be overborne by local circumstances [whereby, at times,] [s]ome states moved earlier to introduce restrictions and shutdowns outside of the national cabinet … [In these situations,] the premiers were reacting to the different circumstances and anxiety within their jurisdiction'.[42] Prominent constitutional academic and lawyer, Professor Anne Twomey noted that, largely, the principles of federalism have been respected with regard to how National Cabinet has operated.[43] These examples indicate that National Cabinet does indeed operate differently than Cabinet with respect to the principles of collective responsibility and cabinet solidarity. Within Cabinet, ministers are expected to publicly support and act in alignment with decisions of Cabinet. As demonstrated, that same expectation is not the case for National Cabinet despite efforts to find agreement and consensus where possible. Indeed, the 2020 *Review of COAG Councils and Ministerial Forums: report to National Cabinet* stated: 'It is important to recognise the diversity between and within jurisdictions and the disparate nature of the challenges faced across the federation – where appropriate, decisions should be principles-based and

[40] PM&C, *Cabinet Handbook – 14th edition*, p. 9; *Egan v Chadwick 1999 46 NSWLR 563*; A. Twomey, 'Nowhere to hide: the significance of national cabinet not being a cabinet', *The Conversation*, 2021. Accessed at: https://theconversation.com/nowhere-to-hide-the-significance-of-national-cabinet-not-being-a-cabinet-165671.

[41] Menzies, 'Explainer: what is the national cabinet and is it democratic?'; Saunders, 'A new federalism? The role and future of the National Cabinet', p. 4; A. Twomey, 'Multi-Level government and COVID-19: Australia as a case study', Melbourne Forum on Constitution-Building, *Constitutional Transformation Network*, 2021, p. 3. Accessed at: https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3473832/MF20-Web3-Aust-ATwomey-FINAL.pdf.

[42] Menzies, 'Explainer: what is the national cabinet and is it democratic?'.

[43] Twomey, 'Multi-Level government and COVID-19: Australia as a case study', p. 3.

allow individual jurisdictions to determine the best way to achieve agreed outcomes'.[44] Furthermore, the Secretary of PM&C made public statements in May 2020 to the effect of that whilst, in his view, deliberations of National Cabinet are protected from disclosure, what premiers and prime ministers say after a meeting is a matter for them because each is sovereign in their own right.[45] Indeed, the Prime Minister stated in a press conference on 5 May 2020: 'as we've seen already and as has been the case, states and territories have operated on different timetables, there have been different nuances … ultimately, each state and territory are the arbiters of their own position'.[46] Even if premiers and chief ministers agreed a position at National Cabinet, they would still, in most cases, need to pass it through their respective parliaments in order to implement it in their jurisdiction.[47] Therefore, it is clear that the principles of collective responsibility and solidarity do not apply in the context of National Cabinet given that premiers and chief ministers are accountable to their own parliaments, cabinets and voters rather than to the Commonwealth parliament or Cabinet. Despite this, the Government has continued to argue that National Cabinet deliberations and documents are cabinet-in-confidence.

Interestingly, in October 2020, PM&C published an updated *Cabinet Handbook* (14th edition) which added in a new section specifically on National Cabinet. It states that 'maintaining the confidentiality of all National Cabinet documents … is essential to enable full and frank discussions' and that the Council on Federal Financial Relations

[44] P. Conran AM, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet*, 2020, p. 3. Accessed at: www.pmc.gov.au/sites/default/files/final-report-review-coag-councils-ministerial-forums.pdf.

[45] See, for example: P. Gaetjens, Senate Select Committee on COVID-19, Australian Government's response to the COVID-19 pandemic, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 9 March 2021, p. 3.

[46] Prime Minister the Hon Scott Morrison, *Press conference – Australian Parliament House, ACT – transcript*, 5 May 2020. Accessed at: www.pm.gov.au/media/press-conference-australian-parliament-house-act-05may20.

[47] Each jurisdiction has its own emergency powers which suspend certain normal functions of government. For more information, see: https://justiceconnect.org.au/resources/how-do-emergency-powers-work-across-australia/.

(CFFR)[48] and the National Cabinet Reform Committees (NCRCs)[49] are bodies or committees of cabinet.[50] However, it does not explicitly state that *National Cabinet* itself is a committee of cabinet. Nonetheless, the handbook does outline that National Cabinet 'operates according to the longstanding Westminster principles of collective responsibility and solidarity', although the 'precise structure, shape and operation of the National Cabinet are matters for its members' including the determination of meeting schedules.[51] Additionally, National Cabinet 'does not derogate from the sovereign authority and powers of the Commonwealth or any State or Territory'.[52] The handbook also states that confidentiality of all National Cabinet documents is central to securing an environment where full and frank discussion can take place.[53] These additions to the *Cabinet Handbook* appear to be an attempt to further support the Government's position that National Cabinet is a committee of cabinet.

Furthermore, on 17 September 2021, the Prime Minister, Premiers and Chief Ministers released a statement titled 'the Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories' which explained that:

> Since its establishment on 13 March 2020, all members of National Cabinet have participated on the clear understanding that these meetings were conducted according to longstanding Cabinet conventions – most importantly, the confidentiality applied to discussions, papers and records of meetings. Consistent with this, meetings and operations of National Cabinet have been conducted in line with the process outlined in the Commonwealth Government's Cabinet Handbook.

[48] The CFFR consists of the Commonwealth and state and territory Treasurers and reports to the National Cabinet under the Australian Federal Relations Architecture. CFFR is responsible for overseeing the financial relationship between the Commonwealth and the states and territories. It is also responsible for broad economic and fiscal issues, such as deregulation, and legislative oversight of GST operations. See: Conran AM, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet*, p. 19.

[49] The NFRC was established by agreement of the National Cabinet on 29 May 2020 following the cessation of the COAG. The NFRC comprises National Cabinet (First Ministers), CFFR (all Treasurers), and the Australian Local Government Association (ALGA). See: Conran, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet*, p. 20.

[50] PM&C, *Cabinet Handbook – 14th edition*, pp. 30–32.

[51] PM&C, *Cabinet Handbook – 14th edition*, p. 30.

[52] PM&C, *Cabinet Handbook – 14th edition*, p. 30.

[53] PM&C, *Cabinet Handbook – 14th edition*, p. 31.

> …
>
> The principles of Cabinet confidentiality which underpin National Cabinet deliberations have not prevented appropriate disclosure of outcomes. By agreement of National Cabinet members, meetings are, and will continue to be, followed by public statements that articulate decisions made by the National Cabinet. This approach is consistent with the conventions and operations of Cabinet and has been critical to building and maintaining public confidence in the National Cabinet without undermining the important principles of Cabinet confidentiality or the sensitivity of the content of the deliberations.[54]

Attempts to apply the principles of Cabinet to National Cabinet raise concerns about the appropriateness of its institutional architecture. Saunders suggests that whilst it is arguable there is a need for some level of solidarity and respect for confidentiality within an intergovernmental body such as National Cabinet, it should be implemented through a framework designed specifically for its own needs rather than 'imported from a conceptually different source that leads to confusion regarding the true nature and powers of the National Cabinet'.[55] Similarly, Twomey has argued that as an inter-governmental body comprised of equals, it is not an appropriate basis to build National Cabinet upon.[56] Nonetheless, it is important to note that the *Cabinet Handbook* does not have the force of legislation and is rather a guide to principles and practice. Therefore, merely claiming that National Cabinet documents and deliberations are confidential and that the CFFR and NCRC are bodies or committees of cabinet does not necessarily make it so.

A number of questions have been raised about the appropriateness of the use of the label of 'cabinet' for National Cabinet. From Menzies' perspective, although called a 'cabinet', 'the national cabinet is technically an intergovernmental forum' and therefore, the 'conventions and rules of cabinet, such as cabinet solidarity and the secrecy provisions, do not apply'.[57] Timmins, an FOI lawyer, agrees stating that 'the

[54] Statement from the Prime Minister, Premiers, and Chief Ministers, 'The Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories', 17 September 2021, pp. 1–2. Accessed at: www.pm.gov.au/sites/default/files/media/national-cabinet-statement-the-importance-of-confidentiality-to-relationships.pdf.

[55] Saunders, *A new federalism? The role and future of the National Cabinet,* p. 6.

[56] Twomey, *Multi-Level government and COVID-19: Australia as a case study*, pp. 3–4.

[57] Menzies, *Explainer: what is the national cabinet and is it democratic?*.

national cabinet does not have the essential attributes of a cabinet or a cabinet committee'.[58] Furthermore, Saunders discusses the issue of using the terminology of 'cabinet' in relation to the naming of the National Cabinet, highlighting the motive for confidentiality:

> On no view … is this body a 'cabinet' as the term is used elsewhere in parliamentary government. A Cabinet typically is a group of Ministers drawn from and collectively accountable to the same Parliament.
>
> What presently is called the 'National Cabinet' is a group of government leaders, heading different cabinets, through which they are individually and collectively accountable to different Parliaments and different configurations of the people for the exercise of different powers. That, indeed, is the whole point.
>
> Use of the terminology of cabinet is misleading. If it were to cause the superimposition of ideas about decision-making drawn from the more familiar kind of cabinet, the chance to make this important initiative work would be lost.
>
> The problem is compounded by the suggestion that, somehow the National Cabinet fits within the Commonwealth cabinet structure. This is a logical impossibility, apparently driven by a desire to keep proceedings confidential.[59]

In line with this view, Twomey has stated that 'cabinet confidentiality exists only to collective ministerial responsibility to parliament' and that the National Cabinet 'is not collectively responsible to the Commonwealth parliament'.[60] As discussed above, premiers and chief ministers are responsible to their own jurisdictional parliaments. Therefore, 'the principle of cabinet confidentiality cannot apply in this circumstance as a qualification on the broader principle of responsible government'.[61] From this perspective, the rationale of cabinet confidentiality cannot be applied to conceal documents or deliberations of National Cabinet when claiming PII on an OPD from the Senate. It is clear that there is a distinction between Cabinet and National Cabinet when

[58] P. Timmins, Senate Finance and Public Administration Legislation Committee, COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, p. 24.

[59] Saunders, *A new federalism? The role and future of the National Cabinet*, p. 6.

[60] Twomey, *Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 202*1, p. 30.

[61] Twomey, *Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 2021*, p. 30.

the structure, membership and processes of each body are compared. At the same time, it is also apparent that there is significant contestation over the conventions that apply to the new body which has important implications for its relationship with parliament. The case of Senator Patrick's pursuit of this issue exemplifies this point.

NATIONAL CABINET AND THE TREATMENT OF PUBLIC INTEREST IMMUNITY CLAIMS: SENATOR REX PATRICK'S CASE

Senator Patrick has initiated actions to maintain the accountability of the executive in relation to National Cabinet since the rationale of cabinet-in-confidence was used as the justification for the refusal to provide documents of National Cabinet, exempting it from freedom of information laws. In pursuing this issue, Senator Patrick referred a refused FOI application to the Administrative Appeals Tribunal (AAT). Senator Patrick's FOI request sought access to all the meeting notes and minutes taken at the National Cabinet meeting held on 29 May 2020, as well as a range of documents relating to the formation and functioning of the National Cabinet.[62]

The decision of the AAT was handed down on 5 August 2021 by Justice Richard White in the case *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*. It was determined that National Cabinet was not a committee of Cabinet for the purposes of the *Freedom of Information Act 1982* (Cth) (Austl.) (FOI Act).[63] Justice White found that the evidence 'point[ed] persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression'.[64] Whilst an AAT decision or use of determinations relating to the FOI Act is 'not a

[62] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AAT 2719, pp. 8–9.

[63] The FOI Act exempts Cabinet documents as a general category from a statutory duty to release upon request. Section 34 of the FOI Act stipulates: (1) A document is an exempt document if: (a) both of the following are satisfied: (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted; (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or (b) it is an official record of the Cabinet; or (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or (d) it is a draft of a document to which paragraph (a), (b) or (c) applies. (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies. (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

[64] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AAT 2719, p. 64.

legitimate basis for a claim of public interest immunity in a parliamentary forum',[65] and it is rather a matter for the Senate to determine the validity of PII claims, its findings nonetheless have broader implications for understanding how National Cabinet relates to parliament. The case provides important analysis in unpacking whether or not National Cabinet is a committee of Cabinet and determines that this notion is inconsistent with the nature and membership of the intergovernmental body.

Justice White determined that 'mere use of the name 'National Cabinet' does not, of itself, have the effect of making a group of persons using the name a 'committee of the Cabinet'. Nor does the mere labelling of a committee as a 'Cabinet committee' have that effect'.[66] Justice White considered a range of factors in determining whether or not National Cabinet was a committee of Cabinet, including: the manner by which it was established, its composition, its relationship with Cabinet and the manner of its operation, as well as its place in the system of responsible and representative government established under the Constitution. It was determined that a committee of cabinet would need to be a subgroup of Cabinet, be comprised of ministers who are members of parliament and the ruling party or parties, as well as established by either the Prime Minister or Cabinet. Justice White considered that the evidence did not support a conclusion that National Cabinet's role was to assist Cabinet, nor is it subordinate to it, and importantly National Cabinet does not need to take its decisions to Cabinet for endorsement. Furthermore, it was also noted that the Prime Minister does not determine the shape, structure, membership and operation of National Cabinet.[67]

With regard to membership, White J stated that, unlike other Cabinet committees, National Cabinet's membership was not comprised of ministers of the Federal Government (other than the Prime Minister), nor comprised of persons belonging to the same government or even political party.[68] Therefore, His Honour concluded that 'the composition and membership of the National Cabinet points against it being a committee of the Cabinet'.[69] Justice White also concluded that National Cabinet was

[65] Odgers, *Odgers' Australian Senate Practice*, p. 669.

[66] *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 17.

[67] *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, pp. 38–46.

[68] *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 30.

[69] *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 38.

established by a resolution of COAG on 13 March 2020 rather than by the Prime Minister or Cabinet.[70]

Whilst the Government provided the requested documents and did not appeal the decision, it continued to make further claims of cabinet confidentiality in relation to National Cabinet proceedings. During a late 2021 estimates hearing, Senator Patrick asked why requests for information and documents in relation to National Cabinet were still being met with the justification of cabinet-in-confidence even after the determination by White J in the AAT case which made it 'absolutely clear that the national cabinet is not a committee of the federal cabinet; it is an intergovernmental body'.[71] He referred to a letter received by the Chair of the Senate Select Committee on COVID-19, Senator Katy Gallagher, from the Prime Minister's Office (after White J's decision) making a PII claim on the basis of the cabinet exemption in relation to National Cabinet. A PM&C department official responded that 'the government's position remains that national cabinet was established and intended to be established as a committee of the federal cabinet'.[72] Furthermore, PM&C stated in a submission to a Senate inquiry '[t]he decision of the AAT is not considered to have precedential force beyond the fact and documents before it'.[73] Therefore, despite the outcome of the of the AAT case, the Government has continued to operate on the premise that it is able to claim cabinet-in-confidence in relation to documents pertaining to National Cabinet.

This position was further demonstrated by the Government's introduction of a bill to the House of Representatives on 2 September 2021 which would legislate that National Cabinet is a committee of cabinet and, as such, afford it the same confidentiality provisions in legislation such as the FOI Act.[74] The Senate referred the bill to the Senate Finance and Public Administration Legislation Committee. Most of the submissions

[70] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AAT 2719, pp. 24–29.

[71] Senator Rex Patrick, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 25 October 2021, p. 69.

[72] J. Reid, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, Official Committee Hansard, Commonwealth of Australia, Canberra, 25 October 2021, p. 70.

[73] Department of the Prime Minister and Cabinet, Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021 – Submission, Senate Finance and Public Administration Legislation Committee, 2021, p. 5. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

[74] See *COAG Legislation Amendment Bill 2021* (Cth) Schedule 3.

received by the committee raised concerns about the bill.[75] According to the Law Council of Australia, the proposed legislation would overrule the decision of the AAT and 'erect a legal fiction'.[76] Twomey explained that whilst the 'parliament can enact a law that asserts things that are not true, it is unwise to do so as it brings the law into disrepute and damages public confidence in the law'.[77] Geoffrey Watson, a barrister and former counsel assisting the Independent Commission Against Corruption (ICAC), argued that the proposed amendment disrupts the pre-existing legal and historical notions of what comprises a cabinet, undermines responsible government and transparency, as well as undermining federalism.[78] He asserted that '[w]e have ample protections in place, in appropriate places, to protect against the release of documents which should not be released'.[79] The Law Council of Australia argued that there was inadequate justification for applying an absolute exception based on a document's status rather than considering the substance of the information and the implications of public release.[80] Doing so would effectively undermine accountability and weaken transparency by enabling the executive to decide on an *ad hoc* basis whether or not to disclose information about the deliberations and decisions of National Cabinet.[81] The

[75] Including submissions from: Accountability Round Table; Australian Human Rights Commission; Australia's Right to Know; Governance Institute of Australia; Grata Fund; Law Council of Australia; Office of the Australian Information Commissioner; Office of the Victorian Information Commissioner; Podger; Senator Patrick; The Australia Institute; Twomey. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

[76] Law Council of Australia, Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021 – Submission, Senate Finance and Public Administration Legislation Committee, 2021, pp. 5 and 9. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

[77] Twomey, *Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021*, 2021, p. 2. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

[78] G. Watson, Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, p. 23.

[79] Watson, *Senate Finance and Public Administration Legislation Committee*, pp. 23–24.

[80] Law Council of Australia, *Senate Finance and Public Administration Legislation Committee*, p. 7.

[81] Law Council of Australia, *Senate Finance and Public Administration Legislation Committee*, pp. 8 and 10. NB Whilst the government-majority committee recommended the bill be passed, the committee's report also included dissenting reports from Labor and Greens senators as well as from Senator Patrick. Labor proposed that if

COAG Legislation Amendment Bill 2021 [Provisions] lapsed at prorogation of the 46th Parliament.

Due to ongoing concerns about the transparency and accountability of National Cabinet and the executive's persistence in claiming cabinet confidentiality, Senator Patrick initiated the following motion which was agreed to by the Senate on 23 November 2021:

> That the Senate—
>
> a) has rejected public interest immunity claims made on the grounds of cabinet confidentiality with respect to documents or information related to the 'National Cabinet';
> b) will not countenance public interest immunity claims made on the grounds that provision of a document or information related to the National Cabinet ordered by the Senate, or sought by a Senate committee or a senator, would reveal cabinet deliberations;
> c) directs the chairs of committees to draw this resolution to the attention of witnesses who seek to raise claims on this unacceptable ground;
> d) requires those witnesses to:
> i. provide the documents or information, or
> ii. articulate a public interest immunity claim on a ground which may be acceptable to the Senate and to specify the harm to the public interest that could result from the disclosure; and
> e) resolves that a response to a Senate order for the production of documents that relies on this unacceptable ground is not compliance with the order nor does it constitute a satisfactory explanation for why the order has not been complied with, including for the purposes of standing order 164(3).[82]

The following day, Senator Patrick initiated an OPD which was agreed to by the Senate for all 'documents required by any Senate order, committee resolution or question on notice to which a claim of public interest immunity was made on the unacceptable

Schedule 3, which would extend cabinet exemptions to National Cabinet, was omitted, the bill would not be opposed. Similarly, both the Greens and Senator Patrick recommended that Schedule 3 of the bill not be passed. At this point in time, the Government has been unable to proceed with the bill due to insufficient support in the Senate for the bill in its current form.

[82] *Journals of the Senate*, No. 127, 23 November 2021, p. 4279.

ground that material related to the National Cabinet is subject to Cabinet confidentiality' by 30 November 2021.[83] In response, the duty minister, Senator Duniam reiterated that the Government was of the view that National Cabinet was a committee of cabinet and therefore its documents and deliberations should remain confidential.[84] Senator Patrick argued that the actions of the executive in continuing to claim PII on the basis of cabinet-in-confidence despite the Senate's rejection of them were disrespectful. He stated the claims are:

> not just in defiance of Justice White's decision that national cabinet is not a cabinet but are also in defiance of a Senate resolution that says that particular public interest immunity in relation to national cabinet is not to be advanced.[85]

On the first sitting day of Parliament in 2022, on 8 February, Senator Patrick again moved a motion in the Senate rejecting the Government's PII claim and requiring the ministers to produce the documents, which was agreed to. Additionally, in an uncommon move, Senator Patrick's motion also proposed to apply a number of procedural restrictions on three ministers to put pressure on the Government to comply with the order. These procedural restrictions attempted to prevent the ministers from exercising the following procedural rights provided to executive senators by the standing orders to:

a) move a motion connected with the conduct of the business of the Senate at any time without notice;
b) move that a bill be declared urgent and, if the motion is agreed to, move further motions concerning the time allocated for consideration of the bill;
c) move at any time that the Senate adjourn;
d) move for the adjournment of debate, having spoken in the debate;
e) move that the question be now put on more than one occasion, and after having spoken in the debate;
f) receive precedence in debate over other senators when they seek the call; and

[83] *Journals of the Senate*, No. 128, 24 November 2021, p. 4302.

[84] Senator the Hon Jonathon Duniam, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 24 November 2021, p. 6646.

[85] Senator Patrick, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 2 December 2021, p. 7123.

g) present documents.[86]

This part of the motion was negatived in a vote of 27 to 30.[87] Nonetheless, it appears Senator Patrick's motion had no impact on the Government's position in relation to this matter. In a report on outstanding orders for documents as at March 2022 tabled in the Senate on 21 March, the Government reiterated its position that it believed the cabinet-in-confidence PII claim in relation to National Cabinet to be valid.[88] It is clear that the executive will continue to resist these orders of the Senate and evade its scrutiny until such a time as the Senate feels it appropriate to apply a penalty for the refusal to comply (which is has the power to do if it chooses).

CONCLUSION: IMPLICATIONS FOR THE SENATE

Cabinet confidentiality remains a contested concept and continues to have an impact on the Parliament's ability to access certain information, raising questions about the compatibility of cabinet confidentiality and the accountability of the executive. The contestation reflects the differing interests of Cabinet whose aim is to ensure confidential deliberation, the interests of the Parliament in holding the executive to account, and the public's interest in access to information which, through transparency, leads to confidence in the democratic system of responsible government. Therefore, any attempt to expand executive power should be closely scrutinised as it has the potential to undermine the strength of Australia's parliamentary democracy and principles of responsible government.

Ultimately, it is for the Senate to determine the validity of claims to withhold documents in the public interest, not the Government. Through its core role in parliamentary oversight of executive power, there is no class of documents that the Senate cannot order to be produced. Whilst the Senate recognises that there are instances where documents should be kept confidential, the ability to make claims of PII should not be misused to obfuscate, deny relevant information from parliamentary or public view, or subvert the work of the Senate. However, the Senate appears to be

[86] *Senate Official Hansard*, 8 February 2022, p. 58.

[87] *Senate Official Hansard*, 8 February 2022, p. 60.

[88] Senator the Hon Simon Birmingham, Leader of the Government in the Senate*, Orders for the Production of Documents Report – March 2022*, 21 March 2022, p. 6.

particularly cautious in relation to applying a penalty for such actions by the executive.[89]

The crux of the issue lies within the notion that the foundation of Westminster democratic governance is built upon responsible and accountable government. Whilst there may be some limited exceptions, as a general principle the Government must be accountable to parliament and, by extension, to the public. When it comes to claiming PII, it must genuinely and legitimately be made in the public interest and not as a means to unnecessarily conceal government decision-making. Indeed, as Odgers states:

> While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny.[90]

This concern is clearly reflected in the attempts of the executive to broaden the scope of cabinet-in-confidence and refusal to comply with Senate orders on the matter of National Cabinet.

In the case explored in this article, extending the conventions of Cabinet to National Cabinet seems inappropriate given the nature and purpose of the intergovernmental body. This is a sentiment which has been shared by many academics and legal experts. The notion that National Cabinet is a committee of Cabinet simply does not pass the proverbial pub test—in other words, it does not meet public expectations of responsible government and reasonable transparency. National Cabinet lacks the core principles upon which a cabinet justifies confidentiality which are collective responsibility and solidarity. Furthermore, premiers and chief ministers are accountable to their own parliaments, cabinets and voters as opposed to being accountable to the Prime Minister or Cabinet. Appropriately, however, there remain avenues to request that documents remain confidential under PII on a case-by-case basis without the need for attempts to apply blanket confidentiality provisions.[91]

---

[89] Note: an explanation of some of the practical difficulties in the use of this power can be found in Odgers, *Odgers' Australian Senate Practice*, pp. 672–675.

[90] Odgers, *Odgers' Australian Senate Practice*, p. 676.

[91] For example, as previously mentioned: An alternative potentially acceptable ground for claiming PII that may be applicable in the context of National Cabinet deliberations and documents is the potential to prejudice relations

Providing a reasonable explanation that states the ground and details the harm of releasing the document(s) goes a long way in seeking the consideration of the Senate, as per its order of continuing effect of 13 May 2009.

The controversy surrounding the treatment of National Cabinet and its relationship to the executive and legislature has yet to be concluded. There will no doubt be continued debate around accountability and parliamentary scrutiny, not only of the intergovernmental body, but also of the actions of the executive in its attempts to extend cabinet confidentiality to National Cabinet and its resistance of OPD. The Senate's decision to reject PII claims that use cabinet confidentiality in relation to the deliberations of National Cabinet demonstrates a rejection of inadequately justified attempts to conceal information and reinforces the power of the Senate to make decisions to determine the validity of refusals to produce documents. How far the Senate is willing to go in backing its decisions and commitment to executive accountability will be something to watch as it still holds a number of procedural cards to play if the executive continues to challenge the Senate's Constitutional role to scrutinise the executive.

between the Commonwealth and the states. For further information, see: Odgers, Odgers' Australian Senate Practice, p. 666. Whilst an in-depth analysis of this ground was outside the scope of this article, it would be an interesting avenue to consider in a future article.

Japanese Delegated Legislation: The Local Autonomy Law*

Dr Kelvin Matthews[1]

PhD Notre Dame University and currently Chief Executive Officer in WA Local Government.

* Double-blind reviewed article.

Abstract: This article provides a comparative (and historical) analysis between the Japanese Local Autonomy Law and the Western Australian (WA) local government legislation. In doing so, data from several case studies of selected Japanese local governments will be referenced in regard to how the system of delegated legislation (the Local Autonomy Law) impacts on Japanese local government. Selected literature will also be referenced where applicable, and especially where relevant to the application of the Local Autonomy Law to WA local government legislation and governance systems. In doing so, the article will not only provide an historical account of the Local Autonomy Law but also place this narrative in a comparative context with the WA local government legislation – notably the *Local Government Act 1995* (WA) and subsidiary legislation.

[1] I acknowledge and appreciate the assistance provided by various people and organizations that allowed me to study selected Japanese local governments. The Hyogo Prefectural Government Cultural Centre in Perth WA, and particularly Mr Onishi and Ms Melissa Luyke who provided valuable assistance to me in contacting several local governments in the Hyogo Prefecture such as Kobe, Ako and Toyooka Councils as well as the Hyogo Prefecture Government itself. My appreciation is also extended to Ms Noriko Hirata – Regional Director – Government of WA Japan (Kobe Office) who meticulously arranged my meetings despite the extraordinary COVID 19 circumstances in 2020 that had some adverse effects in attending these meetings. Mr Koichi Ueta from the San'in Kaigan Geo Park organization provided valuable support to me when I visited the Toyooka local government area. I extend my thanks to you all.

INTRODUCTION

This article provides a comparative (and historical) analysis between the Japanese Local Autonomy Law and the WA local government legislation. It aims to provide an historical account of the Japanese Local Autonomy Law but also place this in a comparative context with the Western Australian (WA) local government legislation, with a view to offering insights into possible lessons for both jurisdictions, relating to accountability when it comes to delegated law making. Before undertaking this comparison, it is useful to explore the meaning of the term 'delegated legislation' from the Australian and Japanese perspective.

Meaning of Delegated Legislation

Delegated legislation refers to laws made by persons or bodies to whom parliament has delegated law-making authority. Where Acts are made by parliament, the principal Act can make provision for subsidiary legislation such as regulations to be made and will normally specify who has the power to make these. Accordingly, delegated legislation can only exist in relation to an enabling or principal Act. Comparative overseas experience also makes it clear that the democratic legitimization of secondary delegated legislation can also be secured by involving the public in its approval, at least indirectly through elected representatives.[2]

The term delegated legislation in its broad sense is the term usually referred to as those laws made by persons or bodies to whom parliament has delegated law-making authority. Further, where Acts are made by parliament, each principal Act makes provision for subsidiary legislation (such as Regulations) to be made and will normally specify who has the power to do so under that Act. Therefore, delegated legislation can only exist in this context in relation to an enabling or principal Act that allows for the delegated process. According to Hotop, the expression delegated legislation (or subordinate legislation) is the name given to legislative instruments made by a body (usually within the administration) expressly authorised so to do by an Act of Parliament.[3] Uncertainty will invalidate delegated legislation only where it is such that

[2] H. Pünder, 'Democratic Legitimization of Delegated Legislation—A Comparative View on the American, British and German Law', *International and Comparative Law Quarterly*, 58(2), 2009, p. 353

[3] Stanely D Hotop, *Principles of Australian Administrative Law,* 6th Edition, (Sydney: The Law Book Company Limited, 1985), p. 115.

the delegated legislation does not constitute a proper exercise of the power conferred by the enabling Act.[4] Notwithstanding that, delegated legislation may be invalid if it is inconsistent with the 'general law' where the general law comprises fundamental constitutional principles embodied in the common law.[5] As Meagher and Groves note, secondary (delegated) legislation must be read down to protect the rights, freedom or principle in play or it is ultra vires as law-making if that is not interpretively possible. [6] Further, governments have long used secondary or delegated legislation, but the concept of legislation made by a body other than parliament does not sit easily with the notions of parliamentary sovereignty or democratic accountability.[7]

The above definitions of delegated legislation are not finite and are noted for the purpose of this article as they apply to Japanese and WA local governments that are made under the authority of an 'Act' or 'parent' legislative instrument that enables it to do so. For example, Chapter VIII of the Japanese Constitution or the *Local Government Act 1995* (WA) (that is currently under review). The *Constitution Act 1889* (WA) prescribes that the legislature shall maintain a system of local governing bodies elected and constituted in such a manner as the legislature may from time to time provide and each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the legislature considers necessary for the better government of the area in respect of which the body is constituted.[8]

JAPANESE LOCAL GOVERNMENT SYSTEM AND THE LOCAL AUTONOMY LAW

In 1868, the feudal military dictatorship that had been in power in Japan for nearly seven centuries, the shogunate, came to an end in a swift political coup. The country returned to imperial rule, at least nominally. After the restoration came the Meiji period, which lasted until 1912 - an era of sweeping social, economic and political

[4] Hotop, *Principles of Administrative Law,* p. 159.

[5] Hotop, *Principles of Administrative Law,* p. 146.

[6] Dan Meagher and Matthew Groves. 'The Common Law Principle of Legality and Secondary Legislation.' *UNSW Journal* 39, No. 2 (2016), pp. 453 and 486.

[7] Meagher and Groves, *The Common Law Principle of Legality*, pp. 453 and 486.

[8] *Constitution Act 1889* (WA) Part IIIB – Local Government – s52 (1) and (2).

changes that modernised the once-isolated country and encouraged a fusion of traditional Japanese values with Western influences. The feudal system and four-tier class structure that had defined Japanese society, economy and government for centuries was removed.[9] In 1889, the Meiji Constitution created a parliament, or diet, with an elected lower house and a prime minister and cabinet to be appointed by the emperor. The governments of the Meiji period introduced policies to unify monetary and tax systems and compulsory education was brought in based on Western models. Indeed, the beginnings of Japanese local government can be traced to the Meiji period that have progressed to what is recognisable in modern Japan today, especially since the Japanese Constitution in 1946 which recognises local government as essential to democracy and establishes it as part of the nation's system of governance.[10]

Japanese central government and local governments have different jurisdictional structural roles. The structure of local autonomy and the relation between the central government and local governments are detailed in the Local Autonomy Law, based on Chapter VIII of the Japanese Constitution. Chapter VIII of the Japanese Constitution – Local Self Government - prescribes that regulations concerning the organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy (Article 92), the local public entities shall establish assemblies as their deliberative organs in accordance with the law, the chief executive officer of all public entities, the members of their assemblies and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities (Article 93), local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within the law (Article 94), and a special law applicable only to one local public entity cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned and obtained in accordance with the law (Article 95).[11] The regulations prescribed as Article's derive from the Chapters of the Japanese Constitution and as such are delegated instruments themselves. Hiroshi Ikawa notes

[9] Andrew Gordon, *A Modern History of Japan: from Tokugawa to the Present*, (4th ed, London: Oxford University Press, 2019), pp. 117 – 129.

[10] Japan Local Government Centre, 'An Outline of Local Government in Japan' (London: Council of Local Authorities for International Relations, 2004), p. 1-2.

[11] The Constitution of Japan - 'Chapter VIII – Local Self Government – Article 92 to 95' (Tokyo: Prime Minister & Cabinet of Japan), p. 10.

that Chapter VIII of the Constitution of Japan that deals with local government, was newly added. Under the Meiji Constitution, there had been no Articles dealing with local government, so as a result of the establishment of the new post World War Two Constitution, Japanese local government was directly guaranteed by Articles 92 through to 95.[12] Furthermore, Yuichiro Tsuji notes that Article 92 of the Japanese Constitution provides only for the 'principle of local autonomy', and regulations concerning the organization and operations of local entities are fixed by law. Accordingly, the meaning of the 'principle of local autonomy' is subject to interpretation.[13]

The local government system in Japan consists of two tiers: prefectures and the municipalities that make up the prefectures. Municipalities are local public entities that have a strong and direct relationship with local residents and deal with affairs directly related to the residents. These tiers are founded on two principles. Firstly, the right to establish autonomous local public entities that are, to a certain extent, independent of the national government and secondly, it embraces the idea of 'citizens self-government,' by which residents of these local areas participate in and deal with to a certain extent, the activities of the local public entities. Atsuro Saski notes in *Local Self-Government in Japan* the organs and organization of local governments and the relationship between the Assembly and the Chief Executive as follows:

> **Assembly: Legislative organ**
>
> The number of local assembly members is determined by ordinance (The 2011 revision of the Local Autonomy Act eliminates limits by population size.)
>
> The term of office of local assembly members is 4 years
>
> Candidates for election of assembly members must be residents and at least 25 years old

[12] Ikawa Hiroshi, '15 Years of Decentralization Reform in Japan', *National Graduate Institute for Policy Studies*, 2008 p. 6.

[13] Yuichiro Tsuji 'Local Autonomy and the Japanese Constitution – David and Goliath'*, KLRI Journal of Law and Legislation*, 8 (2), 2018, p. 2.

Voters for election of assembly members must be residents and at least 18 years old (as amended in 2016)

The major authorities of the local assembly are creating, amending, and repealing ordinances, approving budgets, authorizing the settlement accounts, making motions of no confidence against the chief executive, etc.

Regular sessions are held 4 times a year. Ad-hoc sessions take place as necessary.

Chief Executive: Executive organ

The term of office is 4 years

Candidates for election of chief executives must be at least 30 years old for

prefectural governors, 25 years old for municipal mayors

Voters for election of chief executives must be residents and at least 20 years old

The major authorities of the chief executive are enacting regulations, submitting bills, implementing budgets, etc.[14]

Satoru Ohsugi supports the description by Sasaki where an assembly is established as a procedural organ of local government (Article 89 of the Local Autonomy Law) and composed of assembly members who are directly elected by residents of the area concerned. [15] Ohsugi provides a comprehensive analysis of the functions of Japanese local government assemblies to the extent where he advocates in his article by example that assemblies will seize the principles of residential autonomy and organizational autonomy and, while remaining focused on realizing the goal of true local autonomy and self-government, will adopt a standpoint of autonomy that is markedly different from the standpoint of the national government and of the political parties.[16] In this

[14] Atsuro Sasaki, 'Local Self-Government in Japan', Director General for Policy Coordination, Ministry of Internal Affairs and Communication, 2014, p. 8.

[15] Satoru Ohsugi, 'Local Assemblies in Japan', Graduate School of Social Science, Tokyo Metropolitan University, Tokyo, 2008, p.2.

[16] Ohsugi, *Local Assemblies in Japan,* p.26.

regard the organs and functions of Japanese local government assemblies and chief executive officers are somewhat similar to WA local government. However, the responsibility of (or for) functions is entirely different as noted in the next section.

The practical operation of the organs of Japanese local government in the context of the Japanese Local Autonomy Law was subject to a survey by the author of selected prefectures and municipalities in the Hyogo Prefecture of Japan.[17] These included the Kobe, Ako and Toyooka Councils as well as the Hyogo Prefecture Government itself. The survey questionnaire itself distributed to all participating Councils was generically based regarding the description and responsibilities of each of their organizations, as well as specific questions how the Local Autonomy Law impacted on their particular organization.[18] For example, the population of Kobe City Council is circa 1.5 million and where the City Council is responsible for providing services to its population varying from roads and streets, aged care, public transport, primary health care and hospitals, schools (primary and secondary), waste management and all aspects of cultural activities.[19] Ako City Council is equally responsible for the same services as Kobe City Council with a population of circa 48,000, while Toyooka Council has a population circa 82,000 and is also responsible for the above services.[20]

In comparison none of the WA local governments are responsible for providing the same level of services such as aged care, public transport, health and hospital services or education (schools). These services in WA are delivered by the WA State Government, similar to other Australian States and Territories. That is, the responsibility for aged care, education, hospitals and health, public transport and police etc are primarily the jurisdiction of the Australian relevant State and Territory, with some exceptions being the Brisbane City Council who have some responsibility for public transport (ie public bus transport) limited to within their local government boundary metropolitan jurisdiction and Victorian local governments who have some

[17] K J Matthews, 'Survey Questionnaire Response – Kobe, Ako and Toyooka Councils', Japan, March 2020, p. 2 - 3.

[18] Matthews, *Survey Questionnaire Response,* p. 2-3.

[19] Matthews, *Survey Questionnaire Response,* p. 2-3.

[20] Matthews, *Survey Questionnaire Response,* p. 2-3.

limited responsibility for the delivery of maternal child health and immunisation services.[21]

All participating Councils (Kobe, Ako and Toyooka) responded to the question 'How does the Local Autonomy Law effect your municipality?' stating that they follow the Japanese Local Autonomy Law, although they did cite some frustration in the application of the Local Autonomy Law, especially in the area of equal fiscal distribution to meet the future demands of an ageing population and increased reliance on the provision of services.[22] This is supported by the response from Kobe City Council where they are required to fulfil the capability of governance and finance by themselves in accordance with Article 252 of the Local Autonomy Law as an Ordinance Designated City.[23] From the survey questionnaire response provided by the Hyogo Prefectural Government, it appears that they perform more of an administrative overview function as designated by the Japanese Constitution and the Local Autonomy Law whereby the Prefectural Government provides a management role of the Councils within their region and:

> Liaises with cities and towns,
>
> Provides a management role where city/town government are not able to provide,
>
> Oversees fiscal and administrative compliance of each Council in the region,
>
> The Japanese national government gives prefectural government independent authority to exercise its management/services in the region,
>
> Advises the Japanese national government on the performance of each Council within its region, and

[21] 'Know Your Council: Guide to Councils', Victorian State Government Website, 2015 available at <https://www.brisbane.qld.gov.au/traffic-and-transport/public-transport>;-<https://knowyourcouncil.vic.gov.au/guide-to-councils/what-councils-do/health-services>.

[22] Matthews, *Survey Questionnaire Response,* p. 2-3.

[23] Matthews, *Survey Questionnaire Response,* p. 3.

> Ensures each Council in its region complies with regulations and legislation.[24]

As noted above, Japanese local government is a two-tiered system where prefectures serve wider geographical areas and municipalities provide more local type services in accordance with the Local Autonomy Law.[25] Further, the concept of citizens' self-government is incorporated in the Local Autonomy Law *(Chiho Jichi Ho),* which gives specific legal validity to the principle of local autonomy enshrined in Chapter VIII of the Constitution of Japan. The Local Autonomy Law specifies the types and organizational framework of local public entities, as well as guidelines for their administration. It also specifies the basic relationships between these local entities and the central government.

The principle of local autonomy is an important pillar of Japan's political system and took effect on the same day as the (post war) Japanese Constitution. Yuichiro Tsuji notes that the constitutional history of Japan has shown that the structure of local government was mainly regulated not by constitutional provisions but by statutes.[26] The Local Government Act was established, along with the current Constitution, in 1947. Article 92 of the current Constitution provides only the 'principle of local autonomy,' and regulations concerning the organization and operations of local public entities are fixed by law. In particular, the Local Autonomy Law was enacted to implement Article 92 of the Japanese Constitution as noted above, which stipulates the autonomy of local government. The Law empowers the local government to determine matters relating to its organization and operation. The Law also promotes democratic and efficient administrative system and guarantees sound development of local government. It further explains the division of local government such as education, public safety and law and order, election and audit committee, and matters related to the operation of local government, including formulation and dissolution of council, the duties of governor, and property management of local government. Of interest is Article 93 whereby the Chief Executive Officer of all public entities and such other local

[24] Japan Local Government Centre, *An Outline of Local Government in Japan*, p. 2.

[25] Tsuji, *Local Autonomy and the Japanese Constitution*, p. 2.

[26] Tsuji, *Local Autonomy and the Japanese Constitution*, p. 2.

officials as may be determined by law shall be elected by direct popular vote within their several communities.[27]

The meaning of the 'principle of local autonomy' is also subject to interpretation, and there are three conventional theories that provide such accounts. The first theory explains that local government has inherited inviolable fundamental powers, like central government. It asserts that local government may have sovereignty like central government does. The second claims that local government exists as long as the central government consents. According to this theory, parliament may abolish the autonomy of local government by statute. However, as Tsuji notes in his article 'Constitutional Law Court in Japan', any amendment to the Japanese Constitution is highly contentious in contemporary Japan and may cause controversies that are unnecessary.[28] Accordingly this theory has also not been supported by scholars. The third theory, called institutional protection, states that the Constitution guarantees the institution of local government, and the core autonomy of local government is not violable by statute.[29] Nobuyoshi Ashibe notes that the Japanese Constitution cites two principles: local residence self-governance and local autonomy.[30] Local residence self-governance means that the local government will be managed by local residents and requires their participation. Local government autonomy means that the local government may conduct its business independently, without central government interference.

Having said this, Yuichiro Tsuji's critique of Ashibe's article notes that it cannot explain why it is difficult to overturn central government decisions in the name of the principle of autonomy of local government even though they may violate local residence self-governance and local government autonomy.[31]

In 1993 the Japanese Diet adopted a resolution promoting local autonomy that promoted decentralization. A law that abolished administrative duties the state was supposed to fulfil but instead imposed on prefectures and municipalities was enforced in 2000. Subsequent reforms introduced from 2011 to 2014 transferred more power

[27] Tsuji, *Local Autonomy and the Japanese Constitution*, p.2.

[28] Yuichiro Tsuji 'Constitutional Law Court in Japan'. *University of Tsukuba Journal of Law and Politics,* 66, 2017, p. 65.

[29] Tsuji, *Local Autonomy and the Japanese Constitution*, p 3.

[30] Nobuuyoshi Ashibe *Kenpo (Constitution),* Iwanami Shoten Publishers, 6th Edition ed. 2015, p. 367.

[31] Tsuji, *Local Autonomy and the Japanese Constitution*, p 48.

from the national to local governments. It was introduced under the post war Constitution of Chapter VIII which deals with 'local self-government.' Following several rounds of further reforms, the national and local governments are equal partners de jure.

In practice, however, autonomous powers of prefectures and municipalities remain insufficient. As Hiroshi Ikawa notes the national government should continue efforts to continually assist the decentralization process so local governments can better serve the needs of local residents, communities and economies. That is, the National government's efforts from the perspective of strengthening the autonomy of local resident's, is still far from satisfactory. Problems continue to exist in terms of such matters as control of local government administrative and financial management by means of laws and government ordinances. In the area of local financial reform, it cannot be claimed that autonomy and independence in the local government financial sphere has been satisfactorily achieved, especially when there continues to be a reliance on the central government for financial support through grants and funding. In this kind of situation in Japan, it is fair to say that there is a need to continue the effort into constructing a decentralized local government system.[32] Again, in comparison to WA (and Australian) local governments there continues to be a reliance of WA (and Australian) local governments on the central governments (State and Commonwealth) for financial support through the Grants Commission(s) and the Federals Assistance Grants (FAGs) processes.

Held and Schott note in *Models of Democracy* that the principle of autonomy lays down the right of all citizens to participate in and deliberate on public affairs. What is at issue is the provision of a *rightful share* in the process of 'government'.[33] The idea of such a share was, of course, central to Athenian democrats, for whom political virtue was in part synonymous with the right to participate in the final decisions of city-state politics. The principle of autonomy preserves 'the ideal of the active citizen'; it requires that people be recognized as having the right and opportunity to act in public life. However, it is one thing to recognize a right, quite another to say it follows that everyone must, irrespective of choice, actually participate in public debate and activity. Participation is

[32] Ikawa Hiroshi '15 Years of Decentralization Reform in Japan', *National Graduate Institute for Policy Studies,* Toyko, 2008, p. 28.

[33] David Held and Gareth Schott, *'Models of Democracy,* Cambridge: Polity Press, 3rd ed, 2008, p. 281.

not a necessity.[34] This principle would most certainly appear relevant to both the Japanese Local Autonomy Law and the *Local Government Act 1995* (WA), whereby the right to participate in local government affairs is legislatively prescribed but not always enacted.

WEST AUSTRALIAN LOCAL GOVERNMENT SYSTEM

Local government in Japan is a national constitutional right where the functions of local self-government and the relationship between central and local governments are stipulated in the Local Autonomy Act. [35] That is, local government in Japan has its basis in the nation's Constitution which recognizes local government as essential to democracy and establishes it as part of the nation's system of governance.

In contrast local government in Australia is not recognized in the Federal Constitution. The local government system in Australia (and WA) owes its existence to the Constitution of each State, and in the case of WA, the WA local government system had its origins in Part IIIB, sections 52 and 53 of the *Constitution 1889* (WA) whereby the legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide and each elected local governing body shall have such powers as the legislature may from time to time provide being such powers as the legislature considers necessary for the better government of the area in respect of which the body is constituted.[36]

Local Governments (and WA local government) play a key role in the Australian Federation system and provide democratic representation and a range of services to their respective local communities. The local government system in Australia is the *third tier* of government in Australia and are administered by the States and Territories, who in turn are the *second tier* of government. Local government is not mentioned in the Federal Constitution of Australia although every State and Territory governments recognise local government in their respective constitutions. Fisher and Grant note that in the Australian context, local governments are overseen by other tiers of

[34] David Held and Gareth Schott, *Models of Democracy,* Cambridge: Polity Press, 3rd ed, 2008, p. 281.

[35] 'Local Autonomy in Japan – Current Situation and Future Shape', Ministry of Internal Affairs and Communications, Tokyo, 2009, p. 1.

[36] *Constitution 1889* (WA), Part IIIB – Local Government – s52 (1) and (2).

government and conceptualised as political/administrative entities, rather than 'local polities' overseeing 'local administrations' and that municipal governments are creatures of respective states and territories.[37]

Australian local government is therefore governed directly by State and Territory legislation which is prescriptive in regard to the (limited) autonomy that Australian local governments can exercise. For example, the process of making Local Laws by WA local government authorities (Councils) in accordance with section 3.18 of the WA Local Government Act 1995 is subject to scrutiny by the WA Joint Standing Committee on Delegated Legislation (JSCDL) who retain the power to disallow and/or amend the local law(s).[38] Indeed, a major role of the JSCDL is to review local government local laws and where the Committee may find that a local law could offend one or more terms of reference of the JSCDL, it will usually seek a written undertaking from the local government authority to amend or repeal the instrument in question. Where a local government does not comply with the Committee's request for an undertaking, the Committee may, as a last resort, resolve to report to the Parliament recommending the disallowance of the instrument in the Parliament.

Similar to the Japanese Local Autonomy Law, the *Local Government Act 1995* (WA) and subsidiary legislation prescribe the process for community participation and engagement in local government affairs. For example, section 5.56 of the *Local Government Act 1995* prescribes that a local government is to ensure that strategic community plans are made in accordance with any regulations about planning for the future of the district and the Local Government (Administration) Regulations 1996 and the detail whereby a local government is to ensure that the electors and ratepayers of its district are consulted during the development of a strategic community plan and when preparing modifications of a strategic community plan.[39] The WA Department of Local Government, Sport and Cultural Industries (DLGSCI) provides guidance how to strengthen the relationship between communities and local government, enabling stakeholders to become part of the process, while assisting to build a regulatory framework. A Fact Sheet for this participation and engagement is provided by the

[37] Josie Fisher and Bligh Grant, 'Public Value: Positive Ethics for Australian Local Government'. *Journal of Economic and Social Policy*, Volume 14, Issue 2, Special Edition on Local Government and Local Government Policy in Australia, Southern Cross University, 2011, p. 12.

[38] *Local Government Act 1995* (WA) Part 3 Division 2.

[39] *Local Government Act 1995* (WA) Part 5 Division 5 Annual Reports and Planning.

Department that describes how community engagement ensures that communities can participate in decisions that affect them, and at a level that meets their expectations. The community engagement strategy adopted by a local government aims to capture a community's vision, aspirations and service expectations for inclusion in the local governments Strategic Community Plan. This Plan is supported by other informing strategies such as asset management and long term financial plans to ensure the local government's resources are best placed to meet community needs.[40]

Accordingly, the principle of autonomy that Held and Schott refer to in their publication *Models of Democracy* would appear to have some parallel between Japanese local government and WA local government whereby community participation and engagement is evident, at least in both the Japanese and WA local government legislation. [41] As Held and Scott note however, public participation is not a necessity even thought the principle of autonomy should be regarded as an essential premiss of all traditions of modern democratic thought with the capability of persons to choose freely, to determine and justify their own actions, to enter into self-chosen obligations, and to enjoy the underlying conditions for political freedom and equality.[42]

Furthermore, unlike Japan, there is only one level of local government in each Australian State and Territory, with no 'statute' distinction between metropolitan and regional local governments, or municipalities. Accordingly, there appears to be a similar parallel in Japanese local government to that of WA local government where the concept of local autonomy could be applied. In this regard researching the effects of the local autonomy law on Japanese local government could provide positive benefits for further application to WA (and Australian) local government. As Fisher and Grant note, Australian local government has been subject to continual reform processes in the post World War Two period and therefore examining (overseas) structural change models would not be unusual.[43.]

[40] WA Department of Local Government, Sport and Cultural Industries, 'Strengthening Community Engagement', Department of Local Government, Sport and Cultural Industries, 2012, p.1.

[41] Held and Schott, *Models of Democracy,* p. 266.

[42] Held and Schott, *Models of Democracy,* p. 266.

[43] Fisher and Grant, *Public Value: Positive Ethics for Australian Local Government,* p. 1

COMPARATIVE LESSONS OF JAPANESE AND WA LOCAL GOVERNMENT SYSTEMS

While there are numerous similarities between the Japanese Local Autonomy Law and the *Local Government Act* (WA), there are also some striking differences. One of the most striking features as noted above is that Japanese local government is directly recognized in Chapter VIII of the Japanese Constitution that prescribe regulations concerning the organization and operations of local public entities which shall be fixed by law in accordance with the principle of local autonomy. Conversely there is no constitutional recognition (or mention) of local government in the Commonwealth Constitution and the Commonwealth government has generally been compelled to provide (financial) subsidies to local government indirectly: that is, through the States. At the time of Federation in 1901 and in the decades of debate leading to final Federation, the composition of the 'colonial' local governments were much different than today. Similarly, the roles and responsibilities of the colonial local governments (Road Boards in rural areas or Municipal Boards in urban areas) were also vastly different, being confined to mainly roads and streets, and health and sanitation functions. It could also be argued that at the time of the Federation debate, recognition of local government in the final constitution was simply not that important in comparison to working through the issues of formulating an acceptable Australian Constitution and federal system to all the colonies that eventually borrowed from the United States and worked on the principles of Westminster.[44]

As Megarrity notes there have been several attempts to recognize local government in the Australian Constitution.[45] An attempt by the Whitlam Government to enshrine a direct financial link between the Commonwealth and local government within the Australian Constitution failed when put to the people via referendum. A subsequent referendum proposal by the Hawke Government to provide constitutional recognition to local government also failed. [46] Both the Whitlam and Hawke Governments were unable to convince the electorate that the federal system required reform. [47] The latest

[44] John Hirst, 'Federation: Destiny and Identity', Papers on Parliament No. 37, November 2007, Parliamentary Library Services, Commonwealth of Australia, 2011, p. 162.

[45] Lyndon Megarrity, *'Local Government and the Commonwealth: an evolving relationship',* Research Paper No. 10, 2010-11, Parliamentary Library Services, Commonwealth of Australia, 2011, p. 1.

[46] Megarrity, *Local Government and the Commonwealth: an evolving relationship*, p. 1.

[47] Megarrity, *Local Government and the Commonwealth: an evolving relationship*, p. 1.

attempt by the local government sector for constitutional recognition was undertaken on behalf of all Australian local governments by the Australian Local Government Association (ALGA) in 2013 seeking a referendum to amend the Constitution to provide specifically for financial recognition of local government. In this regard a successful referendum would have had the potential to introduce increased scope for the Commonwealth to bypass the states in allocating funding directly to local governments.

In late 2012 the Commonwealth established a Joint Select Committee to inquire into and report on the findings of the Expert Panel on Constitutional Recognition of Local Government that recommended that a referendum on the financial recognition of local government be put to Australian voters at the 2013 federal election.[48] The referendum did not proceed due to early federal elections being called by the (then) Prime Minister in August 2012 that ended the possibility of a referendum in 2013 to coincide with the election. However, it could equally be argued that there was little appetite on behalf of the federal government to pursue the question of local government recognition by referendum, especially given little information was disseminated other than by the local government sector to the broader community.[49]

Another further difference is the requirement for chief executive officers of Japanese municipalities in the Japanese Local Autonomy Law to be selected and appointed by the community of the particular local government district. That is, where significant powers are allotted to local assemblies, which are elected by direct public vote, as are their chief executive officers. Satoru Ohsugi notes that the relationship between local assemblies and chief executives can be viewed as a dual representation system of local assemblies.[50] The term 'dual representation system' signifies a system whereby both the assembly and the chief executive officer of local governments are directly elected in a public election as representative organs by residents. [51] Among advanced democratic countries, examples of the political form of local governments which have

[48] Megarrity, *Local Government and the Commonwealth: an evolving relationship*, p. 1.

[49] Joint Select Committee on Constitutional Recognition of Local Government, *Final Report on the Majority Finding of the Expert Panel on Constitutional Recognition of Local Government: the Case for Financial Recognition, the Likelihood of Success and Lessons from the History of Constitutional Referenda*. Parliament of Australia, 2013, p. 24.

[50] Ohsugi, *Local Assemblies in Japan,* pp. 22 - 23.

[51] Ohsugi, *'Local Assemblies in Japan,* pp. 22-23.

belong to a minority, including about half of American cities in the USA, which adopted a dual representative system are comparatively few; such systems have adopted the system of a city assembly and a city mayor, and cities in Britain which have adopted the system of the direct public election of city mayors. Moreover, due to the fact that the chief executive officer is directly elected in a public election, likened to the election of the American president in the USA, the system is often termed a presidential-type system. However, with the mechanism available in Japanese Local Autonomy Law, the assembly has the right to pass a vote of no confidence in the chief executive officer, while as a counter to this, the chief executive officer has the right to dissolve the assembly.[52] A characteristic of this system is that there is a very clear mutual check built into the relationship between the chief executive officer and the assembly, very different from the relationship between the president and the federal Congress in the US Furthermore, on the basis of the characteristics of this dual representation system, mechanisms of control are built into the relationship between the assembly and the chief executive officer. These can be broadly characterized as follows:

- provisions concerning the position of the chief executive officer regarding resolutions and elections; reconsideration and re-election
- provisions concerning a resolution of no confidence in the chief executive officer and dissolution of the assembly, and
- exceptional action by the chief executive officer.[53]

Notwithstanding this, on the basis of any tension between the two sides (assemblies and chief executive officers) occurring, Ohsugi notes that a cooperative style of management of local governments has evolved. [54]

As Ohsugi further notes, matters concerned with the organization and management of local government rest on law on the basis of the principle of local autonomy, as determined in constitutional provisions (Article 92 of the Constitution of Japan), and central government's control over local government organization and management depends on legislative rules.[55] In Japanese local government at the present time, what

[52] Japan Local Government Centre, *An Outline of Local Government in Japan*, p. 1-2

[53] Joint Select Committee on Constitutional Recognition of Local Government, *Final Report*, p. 13.

[54] Ohsugi*, 'Local Assemblies in Japan,* p. 22.

[55] Ohsugi*, 'Local Assemblies in Japan,* p. 22.

is known as a dual representative system is adopted, whereby an assembly is established as a procedural institution, and the chief executive officer (hereafter: Chief) and the assembly members are separately chosen by direct election. A major characteristic of organizational regulations in the context of the Local Autonomy Law is that, with the exception of some differences in titles and minor exceptions, there is almost total uniformity, regardless of whether the local government in question covers a wide area like a prefecture or is a basic unit like a municipality and regardless too of differences in scale. Interestingly while Japanese mayors are directly elected for four-year terms with no term limits, most candidates prefer stand as independents and are then backed by local chapters of the main national parties, therefore not being seen as directly associated or linked to any national party that may also bring them into conflict with an elected CEO.[56] Conversely, Sasaki notes that that one of the major authorities of the local assembly are making motions of no confidence against the chief executive, etc.[57] This is further argued by Ohsugi where as an example of the check-and-balance system of control as a defining mechanism of the relationship between the chief executive officer and the assembly, the assembly is able to pass a resolution of no confidence in the chief executive officer, who is able for his part to dissolve the assembly (Article 178).[58]

As with any mature democracy (such as Japan and Australia) there is scope to evolve democratic systems through ongoing review. This article has attempted to explore the differences between the Japanese Local Autonomy Law and the West Australian local government systems that apply delegated legislation, highlighting where lessons can be learned and applied. Particularly fertile ground for such lessons relates to differences in the areas of autonomy, funding arrangements and the process of elected positions.

[56] Ohsugi, *'Local Assemblies in Japan,* p. 22-23.

[57] Sasaki, *Local Self-Government in Japan,* pp. 8- 9.

[58] Ohsugi, *Local Assemblies in Japan,* p. 24.

Comment

The South Australian Parliamentary Internship Program at the University of Adelaide, Flinders University, and the University of South Australia: An Example of Cooperation on Work Related Learning.

Cenz Lancione[1]

Lecturer, Justice and Society Unit, University of South Australia

The South Australian Parliamentary Internship Program (SAPI) is jointly supported by the Parliament of South Australia and by the three South Australian universities: The University of Adelaide, Flinders University and The University of South Australia. While each university remains responsible for the internal administration of its own students, responsibility for overall coordination of the scheme rotates among the academic staff of the three universities. The unique nature of this program is that it is one of the very few courses which all three universities undertake together and on 25 October 2019 in the House of Assembly the SAPI program celebrated 25 years in which the history and contributions to students' learning were acknowledged. The program offers undergraduate students an opportunity to undertake sustained research and present their reports to Members of Parliament, to their peers and academic staff. The program is very effective in understanding policy and is an excellent example of work-related learning undertaken in collegiate and cooperative way. This comment provides an overview of the SAPI structure and performance in recent years.

[1] I wish to acknowledge Emeritus Professor Clem Macintyre for the interview on SAPI on 29/1/2020 regarding the program and its history, the students who contributed their reviews of the program, and my SAPI colleagues Dr Priya Chacko and Professor Andrew Parkin for their support and involvement in the SAPI program.

SOUTH AUSTRALIAN PARLIAMENTARY INTERNSHIP PROGRAM STRUCTURE

The South Australian Parliamentary Internship Program (SAPI) program is like several others operating in other Australian Parliaments and in several overseas legislatures. It is a collaborative venture between the South Australian Parliament and the three South Australian Universities, and it enables students who are selected into it to work with a member of the South Australian Parliament for a semester. It was established to allow students to gain first-hand experience of the workings of the Parliament and to appreciate the daily activities of those who work within the Parliament. Students are drawn from all three universities and come from a range of discipline backgrounds, but all will have had an introduction to the role of Parliament in their studies. Most students will come from the disciplines of Politics, History, Law, Social Work and Social Science.

The South Australian scheme began in 1995 with the original organisers being Professor Clem Macintyre (now Emeritus Professor), late Professor Dean Jaensch and Dr Adrian Vicary (now Adjunct Associate Professor). The program was endorsed by the various University schools and departments that followed. The reports enabled students to undertake sustained research, to write for a specific purpose and audience. The involvement and support of MPs and their offices have been critical to its longevity and success. Further Professor Macintyre indicated that students have gained employment in various fields and SAPI was an integral part of their learning at the undergraduate level.

The assessment is mainly but not solely based on a research report produced by the student on a topic of interest to both the Member of Parliament and the student. The final research report is of up to 8000 words and the topics varying. Often, they are about topical social/political issues. These have included housing, homelessness, biodiversity, women and discrimination, Aboriginal and Torres Strait Islander issues, mental health, gambling, juvenile crime, suicide, and aged care.

The research report for the MP for the purposes of the Internship focuses on the topic negotiated for research and written according to the requirements of the contract between student and MP. What all students have in common is that they have all had an introduction to the role of Parliament in their studies.

Apart from the report students have teaching and learning experiences at Parliament House on a Friday afternoon. In previous years they have been combined but in 2020 and 2021 due to COVID-19 these sessions have been in 2 rotations. The sessions have included:

- Introduction to SAPI program and to the Parliament house

- Research Methodologies and Strategies
- Consultations over 2 weeks. Before 2020 these were in the Parliament House Library. In 2020 and 2021 these were held by separate arrangements at the respective universities
- Guest presentations over 2 weeks. Often these have included Members of Parliament
- Oral presentations again over two weeks.

The orals were of particular interest as it enabled students to present their research just before the reports are due to their peers and academic staff. Often Members of Parliament or their delegated staff would attend to and their question-and-answer sessions of the research and possible avenues of debate.

At the conclusion of the program a copy of the research report goes to the academic coordinator, one to the MP sponsoring the placement (Parliamentary Supervisor) and one to the Parliamentary Library.

SAPI STRUCTURE AT THE UNIVERSITY OF ADELAIDE[2]

At the University of Adelaide students undertake the program as a 6-unit course in which has requirements of a minimum of 6 units at a level 3 at an undergraduate study. The vacancies are based on placement availability and need to enrol by 30 April. The outcome of the program is for students to work in a political environment, manage research at a complex level meet professional standards and skill enhancement which will be of professional value. The assessment is the Research Report of 80% and the Research Proposal of 20%. Dr Priya Chacko is the Academic Supervisor at the University of Adelaide.

[2] University of Adelaide, 'Department of politics and International Relations', 2021. Accessed at: https://www.adelaide.edu.au/course-outlines/108143/1/sem-2/.

SAPI STRUCTURE AT FLINDERS UNIVERSITY[3]

For students at Flinders University through the College of business Government and Law, it is similar situation as selection is merit based with the Grade Point Average needing to be 5 and it is studied as a 9 Unit option. An option exists for students to participate at 4.5 Unit but at an Honours level. Interest in the program must be finalised by April and students tend to be in their later stages of their study. Professor Andrew Parkin is the Academic Supervisor at Flinders University and has been the SAPI Coordinator for the three universities since 2021.

SAPI STRUCTURE AT UNIVERSITY OF SOUTH AUSTRALIA[4]

The SAPI program at the University of South Australia is through the academic unit of Justice and Society and is available to a small number of Bachelor of Social Work, Bachelor of Social Science (Human Service) and double degree Bachelor of Social Science (Human Services) and Bachelor of Psychological Science and Bachelor of Social Science (Human Services) students in second semester of the study year as a final Field Education placement. Further all students who are in this program will need to meet the all the requirements of Field Placement.

Assessment consists of a final research report in addition to the Field Education Placement requirements. This includes requirements of the professional bodies – Australian Association of Social Work and the Australian Community Workers Association.

Social work and social science students have received an introduction to the role of Parliament in various courses in the degrees such as *Governance and Citizenship in Australia, Australian* Social Policy and Policy Practice as well as in other courses. In addition, they are experienced in interpersonal skills, working with groups, and

[3] Flinders University, 'South Australian Parliamentary Internship Program', 2021. Accessed at: https://www.flinders.edu.au/college-business-government-law/sa-parliamentary-internship ; Flinders University, 'College of Humanities, Arts and Social Sciences', 2021. Accessed at: https://handbook.flinders.edu.au/topics/2022/POLI3007.

[4] University of South Australia, 'Social Work & Human Services Welcome to Field Education Information Site for Students', 2021. Accessed at https://lo.unisa.edu.au/course/view.php?id=5522; University of South Australia 'Bachelor of Social Science (Human Services)', 2021. Accessed at: https://lo.unisa.edu.au/course/view.php?id=5522&sectionid=241416.

undertaking research. They will thus share a common background with students from other disciplines as well as bringing to the Internship their experience of disciplinary understandings which differ from other students. University of South Australia students enter the Internship with the opportunity of learning about the role of an institution which is of crucial importance to Australian society and to human service provision. During this experience, they, like other students in the Internship, they learn more about how politics works and how policy is made at this level. The understanding gained from this learning experience adds significantly to students' awareness of the political context of human service practice. But, in addition, students will have an opportunity to contribute to the work of the Parliament by presenting a report based on a research project.

Students who are interested in participating in the Internship Program need to have achieved a GPA of at least a credit in their previous studies. During April students who are interested are invited to contact SAPI Coordinator – who has sent email notices to all students. A final decision is made, and the names forwarded to the Field Placement Team and to the SAPI Coordinator. Students are asked to nominate political party of preference if they have one

The final decision will be made by responsible Academic staff and in recent years it has Associate Professor Deirdre Tedmanson and Dr Cenz Lancione.

VIEWS FROM STUDENTS

The following comments from past students identify the positive learning experiences the students achieved in the program.

> The South Australian Parliamentary Internship was a unique experience which I am grateful to have participated in as a final placement. One of the elements of the internship I enjoyed the most was meeting in parliament to listen to a panel of politicians. This was an eye opener and extremely interesting to delve into the lives of Politicians to advance my political science knowledge. The creation of my report was such a satisfying milestone of my university studies, this internship advanced my academic writing to the next level, along with my critical thinking skills. Working in partnership with a member of parliament was a fulfilling task and formulating recommendations to conclude my findings was exciting to show my advance understanding of my researched topic. This opportunity

was such a diverse final placement experience and I highly encourage anyone considering it to choose this option.[5]

The South Australian Parliamentary Internship has been the foundation of my career in politics. I finished a Bachelor of Social Science (Human Services) and Bachelor of Psychological Science at Uni SA in 2020. My SAPI research report examined the mental health crisis in the northern suburbs. I spent a day a week in the Member's office, where I conducted meetings with various mental health practitioners in the field and undertook an extensive literature review to examine my topic. The result was ten policy recommendations to address the northern mental health crisis. I found SAPI furthered my sense of social justice and solidified my interest in working in policy.[6]

The connections I made while undertaking my research helped me to secure a paid political internship after Uni, which then led to an administrative traineeship with the now Premier Peter Malinauskas. I moved into health policy in mid-2021 as a Junior Policy adviser for the Shadow Health Minister Chris Picton. Recently I have moved to full-time into Chris' electorate office. I have also had opportunities to present my findings to other Members of Parliament and advocate for my research topic in public platforms.

Importantly, the groundwork learned through my research topic has given me a great base understanding of the South Australian health system, which has contributed to my success in my professional career. [7]

I absolutely attribute the foundation with SAPI to my success. Immersing yourself in this placement is much more than the words on paper – it includes the development of soft skills and relationship building. Even if pursuing a career in politics specifically is not your goal (which it certainly wasn't mine when I began!), I found it beneficial to contextualise the roles

[5] South Australian Parliamentary Internship Program, 'Student Feedback: Talia', 2021.

[6] South Australian Parliamentary Internship Program, 'Student Feedback: Eloise', 2020.

[7] South Australian Parliamentary Internship Program, 'Student Feedback: Eloise', 2020.

> that MPs and their offices play in delivering systemic change. I developed skills in professional conduct/standing, learned a great deal about regulatory frameworks, and gained first-hand insight into how complex change-making can be. That hasn't stopped me from wanting to make change, either. I highly recommend the South Australian Parliamentary Internship program to any student who wants to gain insight into public policy from a unique perspective. [8]

> Participating in the S.A. Parliamentary Internship was the highlight of my years at Uni SA. Spending Friday afternoons in the Old Parliament Chamber, or in the House of Assembly, including access to the Parliament library, was a rare and valuable privilege. On those occasions political, guest speakers gave us greater insight to their party's, policy and procedure. The subject of my report as proposed by the MP Dana Wortley was 'The Transitional Impact of the NDIS on Providers Long-Term Viability'. Finding the human element to this issue gave me the impetus to undertake such a challenging assignment. The most interesting aspect of my research was meeting with Dana at Parliament House to listening to her concerns about the obstacles small providers faced as a consequence of the NDIS transition. Interviewing staff from struggling small disability organisations such as the Technology for Ageing and Disability S.A., helped me understand the difference a report could possibly make in giving these organisations or indeed individuals a political voice. [9]

In conclusion, SAPI offers selected undergraduate students a unique learning experience, in which can enhance their research skills, work in a different setting, and gain valuable knowledge of politics and policy. For the staff who have participated, either in leadership roles in coordinating and in teaching it has enabled them to teach and collaborate with colleagues from other universities. For the future SAPI remains an important example of cooperation of work-related learning.

[8] South Australian Parliamentary Internship Program, 'Student Feedback: Eloise', 2020.

[9] South Australian Parliamentary Internship Program, 'Student Feedback: Lindy', 2019.

Book Reviews

Bob Hawke: Demons and Destiny, by Troy Bramston. Viking Publishing, 2022, pp. 676, Paperback RRP $49.99 ISBN: 9780143788096.

David Clune

Honorary Associate, Department of Government and International Relations, University of Sydney.

Troy Bramston has emerged as one of Australia's leading political historians and biographers. He has edited important collections of essays on the Whitlam, Hawke and Wran Governments, co-authored with Paul Kelly definitive books on the dismissal of the Whitlam Government and the so-called 'Palace letters', and written well-regarded biographies of Paul Keating and Bob Menzies. Now comes a major challenge: a biography of Robert James Lee Hawke.

It is a challenge not only because of the scope – recording Hawke's stellar career in the arcane world of industrial relations and chronicling his action-packed nine Prime Ministerial years – but also because of the need to deal with his outrageous and destructive personal life.

Bramston has handled the last well. He frankly records Hawke's serial philandering, his alcoholism during his ACTU days, his obnoxious behaviour when drunk, and the damage all this and his obsessive pursuit of power caused to his family. It is an integral part of the story and Bramston does not indulge in unnecessary prurience or sensationalism. He perceptively sums Hawke up as 'exceptionally gifted but profoundly flawed'.[1]

In some ways more damaging to Hawke's reputation are Bramston's revelations about his relationship with powerful businessman Peter Abeles. During the 1970s, Abeles paid Hawke's childrens' school fees, mortgage, bill for a hotel suite in Sydney, gambling debts, and hired several of Hawke's ex-girlfriends. It was a major error of judgement on Hawke's part to make himself vulnerable to Abeles' influence. It is surprising Bramston does not make more of this.

[1] Troy Bramston, *Bob Hawke: Demons and Destiny*, Viking Publishing, 2022, p. 562.

A great strength of the book is Bramston's meticulous research and access to previously unavailable sources. From 2002 until just before Hawke's death, he had extensive interviews and conversations with Hawke. Bramston describes the book as an 'unauthorised biography' written with the subject's full co-operation. Hawke's personal papers were made available to him. Bramston also interviewed hundreds of others: family, lovers, friends, unionists, staffers, bureaucrats, ministerial and parliamentary colleagues.

Hawke's life emerges as a series of puzzling paradoxes. His father was a dedicated and conscientious Congregational clergyman and his mother a loyal partner and tireless community contributor. It was a close and functional family. Hawke, although intensely grateful to his parents, was a deeply flawed husband and parent. 'Bobby' had a secure and nurturing upbringing – perhaps too much so as his parents uncritically doted on him. Yet from his youth he exhibited a wilful, at times unpleasant, larrikin streak. During his university days, Hawke was an activist in Christian organisations but also a heavy drinker and womaniser. He could be abrasively rude and insensitive, yet often became emotionally over-wrought and cried in public. Although possessed of a giant ego and a strong sense of personal destiny, Hawke consistently advocated consultation, conciliation and consensus. A ruthless careerist and relentless self-promoter, he had a life-long commitment to 'principles of compassion and community, of helping those less fortunate, and of peace over conflict'. [2]

Hawke was Western Australia's Rhodes Scholar for 1953 which enabled him to take a Bachelor of Letters at Oxford. His thesis was on the role of the Australian Commonwealth Court of Conciliation and Arbitration. Returning to Australia, his interest in industrial relations led him into contact with the union movement. It was a milieu he found attractive and in 1958 Hawke was appointed the ACTU's Advocate. He excelled at the role, 'arguing the ACTU's case cogently and logically, and with passion and verve. He spoke loud and fast, displaying a nervous energy, while pacing the carpet in front of the bench. One thing was clear: Hawke knew what he was talking about'. [3]

Hawke's high profile as Advocate became a springboard to Presidency of the ACTU in September 1969. He was just short of 40. Unlike his bland predecessors, Hawke was dynamic, charismatic and newsworthy. By the late 1970s, his celebrity status was at its

[2] Bramston, *Bob Hawke: Demons and Destiny*, p. 38.

[3] Bramston, *Bob Hawke: Demons and Destiny*, p. 84-85.

zenith: 'Hawke engaged the public consciousness like no other national political or union figure. He had a connection with everyday Australians. He was at the epicentre of a great celebrity drama in which he was the dominant figure … He was original, authentic and compelling'.[4]

Speculation about Hawke entering politics was constant and in 1979 he decided to make his move. He was preselected as ALP candidate for the Melbourne seat of Wills and elected in 1980. Speculation now switched to when Hawke would challenge Opposition Leader Bill Hayden. By early 1983, a significant number of Labor MPs had serious doubts about Hayden's leadership and his ability to win the 1983 election. Pressure was applied to Hayden to step down in favour of Hawke in the Party's interest. A fundamentally decent person, Hayden took the gut-wrenching decision to acquiesce. Hawke became Opposition Leader on 3 February. As these events were taking place, Prime Minister Malcolm Fraser unsuccessfully tried to head off Hawke's ascension by calling an early election for 5 March. Labor won easily with 75 seats to the Coalition's 50. Under Hayden, a victory was a possibility, under Hawke it became more like a certainty.

Reading Bramston's account of Hawke's Prime Ministership, one cannot but be impressed. Hawke managed the machinery of government with great skill:

> He assembled a talented staff and welcomed frank and fearless advice from public servants. Ministers regarded him as a 'chairman of the board' who was a good manager of cabinet business and provided strategic direction for the government. He was an effective communicator and often a powerful persuader. He had a strong work ethic, energy and drive. While luck often ran his way - such as the facing a divided opposition - he also showed courage and took policy and political risks.[5]

Hawke fundamentally reshaped many areas of Australian life. The economic record is particularly impressive: 'floating the dollar, deregulating the financial system, slashing tariffs, overhauling the tax system (with big reductions in company and personal tax rates), and privatising government assets. These reforms were the foundation stones

[4] Bramston, *Bob Hawke: Demons and Destiny*, p. 196-97.

[5] Bramston, *Bob Hawke: Demons and Destiny*, p. 536.

of three decades of economic growth'.[6] The Prices and Incomes Accord with the unions brought remarkable harmony to industrial relations. Medicare was established and the welfare system reformed to make it more equitable. Hawke was a pioneer in environmental protection: the Gordon and Franklin Rivers, Kakadu National Park, Tasmania's old-growth forests, the Daintree rainforest. In foreign policy, Hawke played a prominent role in ending apartheid in South Africa, protecting Antarctica from mining and establishing APEC.

To achieve all this, Hawke had to bring along with him his Caucus colleagues, Ministers, the ALP, and, of course, the Australian people who bore the brunt of the short term pain necessary to achieve long term gain. It was no small achievement. Machiavelli warned: 'It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than a new system'. NSW Premier from 1988-92, Nick Greiner, transformed the State with his major reform agenda but failed to persuade the voters and paid the political price. Yet Hawke succeeded, winning four successive elections. It was a tribute to his powers of communication, persuasion, advocacy, and political acumen. Hawke's long-time commitment to and aptitude for negotiation and compromise underpinned his achievement. His astonishing popularity with the Australian people was also a key factor. When Hawke appeared in public, he had a mesmeric attraction that could induce a form of mass hysteria, with people surging forward, desperate to greet, even touch, the great man.

The achievements of the Hawke era owe a substantial debt to the efforts of Treasurer Paul Keating. Almost inevitably, the partnership of two such giant egos was destined to end badly. Keating saw himself as the heir apparent and became increasingly impatient when Hawke failed to step aside for him, in spite of promises to do so. Hawke obstinately rejected advice from his closest colleagues that Keating was closing in and that he should depart with dignity while he could. On 19 December 1991, Keating defeated Hawke for the Prime Ministership by 56 votes to 51. Bramston records that in later life the two were reconciled and became close friends again.

Bramston has produced a well-written, highly readable book that is also an authoritative account and analysis of Hawke's record. He perceptively captures the essence of Hawke's personality. The many quotes from Hawke's friends and enemies

[6] Bramston, *Bob Hawke: Demons and Destiny*, p. 302.

enliven the text and provide revealing insights. Bramston's book is described on the cover as 'the definitive biography'. Does this claim stand up to examination? The answer is a definite yes.

Sir William McKell, by David Clune. Connor Court Publishing, 2021, pp. 76, Paperback RRP $19.95 ISBN: 9781922449726.

Michael Easson

Chairman and Co-founder, EG Funds Management

This 73-page booklet by David Clune, one of a series commissioned and edited by Scott Prasser for the Connor Court Australian political biographical monographs, provides an excellent overview of the life of Sir William McKell KC KSG[1] who in 1939 won the leadership of a party in total disarray and then fashioned a winning combination and style known ever since as the McKell Model.

McKell's legacy includes:

> an enduring consciousness in the New South Wales Labor Party's parliamentary and extra-parliamentary wings of the importance of compromise, negotiation and co-operation in the interest of electoral success.[2]

Electoral success it was. Between 1901 to 1941, NSW Labor governed for 12-years; for the rest of the century for 41-years or 52 of the 70 years after McKell won in 1941 to NSW Labor's electoral annihilation in 2011.

Clune says: 'McKell was a pragmatist with a purpose.'[3] What this means and the positioning of that claim against rival theories is itself worth a book.

The historian Stuart Macintyre in his address to the ALP National Conference in 1994 on 'Who Are the True Believers?' was critical of the pragmatist, ameliorating tradition of NSW Labor:

[1] Sir William McKell KC KSG, 1891-1985; NSW Labor Leader, 1939-47; Premier of NSW, 1941-47; Governor-General of Australia, 1947-53.

[2] David Clune, *Sir William McKell*. Redland Bay: Connor Court Publishing, 2021, p. 11.

[3] Clune, *Sir William McKell*, p. 11.

> We can argue over ends and means, but without some larger awareness of the cause in whose name the compromises are made, without the energy of doctrinal zeal, the cause withers. Politics without principles becomes a mere exercise in the pursuit of power.[4]

This is the familiar argument of the doctrinaire left. At the time Macintyre presented his argument, he had broken free of Althusserian High Marxism, quit the quickly vanishing Communist Party of Australia, and had joined the ALP.

Clune's account is a brief rebuttal of the Marxist critique that 'reformism' is necessarily a story of mediocre compromises or politics without principle. Clune presents an exposition and discussion of McKell's experiences and thinking, including McKell's detailed plans for governing.

Clune's assessment invites attention to McKell's efforts to implement the Labor Program, the policy positions put to the electorate in 1941 and 1944, his reforming zeal and flaws. Clune says:

> McKell hoped to create an egalitarian society based on planning, conservation, scientific progress, and rational decision-making. Some of this would now be characterised as a rather naïve belief in the 'perfectibility of man'. It is also suggestive of the exaggerated respect of the autodidact for experts.[5]

Key to understanding McKell is that he emerged through a quarter of a century of NSW Labor turmoil, splits, expulsions, and confusion.

As an apprentice boilermaker, he stood up for better conditions, became active in the Boilermakers' Union, attended Labor Council meetings at Trades Hall, joined WEA classes, supported the radical 'industrial wing' of the ALP, was elected in 1916 to the NSW executive of the ALP, frustrated by the 'give and take' politics of the NSW Labor government first elected in 1913.

[4] S. Macintyre, 'Who Are the True Believers?', The Manning Clark Labor History Memorial Lecture delivered to the ALP National Conference, 28 September 1994, *Labour History*, No. 68, May 1995, pp. 155-167, this quote at p. 167.

[5] David Clune, *Sir William McKell*, p. 48.

With the first NSW Labor Premier and McKell's former Church of England Sunday School teacher, the former boiler maker, James 'Honest Jim' McGowen[6] 'ratting' over conscription, McKell won Labor preselection for Redfern and defeated his erstwhile mentor at the 1917 state election.

McKell presented in parliament as a thoughtful, conscientious, and well-prepared MP. He urged justice for the 'IWW twelve' and sought to educate himself to be more effective. Vere Gordon Childe, the Labor intellectual and private secretary to John Storey[7] coached McKell in logic, psychology, and Latin enabling him to pass the Barristers' Admission Board exams in 1925.

Storey appointed McKell Assistant Minister and then Minister for Justice, positions held 1920-22. In 1925, under Jack Lang[8] McKell was again Minister of Justice as well as Assistant Colonial Treasurer to the Premier. In May 1927, as the erratic, suspicious Lang dropped alleged detractors, McKell survived in the Cabinet, but was purged in June.

In 1930 when Lang returned to office, McKell briefly became Minister for Local Government and then, once more, Minister of Justice. Lang's demise came after heavy election defeats (in the three elections held between 1932 and 1938), and after the Bob Heffron[9] led breakaway Industrial Labor Party won by-elections in Waverley and Hurstville. The Federal party persuaded the warring factions and sub-parties to reunite. On 5 September 1939 McKell was elected NSW Labor Leader.

McKell quickly set out to modernise and invigorate his party. Famously, McKell paid particular attention to finding Labor candidates for many marginal, rural seats. Clune quotes an article in the *Sydney Morning Herald* which described those candidates as 'practical farmers, shire councillors, stock breeders and men from local families of long standing.'[10]

McKell's other instinct was to package Labor as united, worthy of support. In a masterstroke, NSW Labor called itself Official Labor to legitimise their credentials as the mainstream party. In contrast, Lang Labor remnants, and the Hughes-Evans

[6] James McGowen, 1855-1922; NSW Premier, 1910-13.

[7] John Storey 1869-1921; NSW Premier, 1920-21.

[8] Jack Lang 1876-1975; Premier, 1925-27 & 1930-32.

[9] Bob Heffron 1890-1978; NSW Premier, 1959-64.

[10] Clune, *Sir William McKell*, p. 24.

(communist aligned) Labor breakaway were rendered illegitimate. McKell also admired Roosevelt's New Deal and he talked about a master plan of co-ordinated reforms.

Coming into the 1941 election, Labor only held 30 of 90 seats. McKell promised to abolish payroll tax. 'Caution, rationality, and pragmatism were the hallmarks of McKell's approach to government' both in opposition and government.[11] He argued that in NSW there was an urgent need to change horses from the do-nothing, incompetent administration of conservative Premier Mair.[12]

McKell easily won election in 1941 and 1944, beginning and consolidating an era of NSW Labor rule. McKell was the first NSW Labor Premier to serve a second consecutive term.

A State's righter, McKell was marginalised within Labor as he opposed making permanent the war-time transfer of income tax powers to the Commonwealth. He saw that the power to tax was the power to govern. His governing style proved instructive:

> McKell insisted that all submissions for Cabinet be circulated well in advance and, with the assistance of [Wallace] Wurth, evaluated them carefully. The Budget Branch of Treasury, which McKell had strengthened by the appointment of a group of talented public servants, carefully scrutinised the financial aspects of Cabinet submissions. As a result, the Premier sometimes knew more about the submission than the minister proposing it.[13]

Wurth,[14] was one of McKell's most trusted bureaucrat confreres. But it was not all control from the centre. McKell wanted his Ministers to run their portfolios and to take major decisions, policy initiatives and major spending proposals for example, to Cabinet based on well-argued submissions. McKell wanted to raise standards of governance, in contrast to the Lang years.

Subsequent NSW Labor Premiers Neville Wran[15] and Bob Carr[16] professed to emulate McKell's style of governing. Though, in contrast to those successors, Clune notes that

[11] Clune, *Sir William McKell*, p. 33.

[12] 1889-1969; Premier, 1939-41.

[13] Clune, *Sir William McKell*, p. 37.

[14] 1896-1960, a member of the NSW Public Service Board from 1936; Chair, 1939-60.

[15] 1926-2014; Premier, 1976-86.

[16] 1947- ; Premier, 1995-2005.

McKell, 'a vigorous but not vindictive opponent who had friends on both sides of the chamber'[17] never gagged or guillotined debate in the NSW parliament.

This has since been described as the 'McKell Model', which has two key components: his magnanimous style of governing and his approach to balancing the various interests within the labour movement.

On the latter, Reg Downing,[18] played a crucial role as McKell's representative on the NSW ALP Executive, his emissary and conciliator of claims, disputes, and issues between the three parts of Labor's trinity – the Parliamentary Leadership, the unions (led by the Labor Council of NSW), and the ALP party office and political machine. In the years Downing was formative and prominent, the morass of Langism was a fresh memory. Many reforms, including the legislation in 1944 for an extra week of annual leave were thereby canvassed and decided.

Interestingly, in 2008 there was debate about how applicable the McKell experience and lessons on party governance was. The McKell governance model was meant to ensure a temperate balance between the various interests. This was forgotten. Ironically in 2008, when Premier Morris Iemma[19] went down in flames on electricity privatisation, the party machine and unions wanting to remove the Labor Leader, all sides invoked McKell's legacy. There was no Reg Downing at hand.

Clune is insightful about the 'wounded' McKell who '…was temperamentally unable to shrug off criticism he regarded as unfair.'[20] Sometimes, Clune admits, McKell saw himself as the prophet who knew best; arguably, he mostly did.

In February 1946, McKell announced he would not contest the next election (due in 1947) and he resigned a year later for vice regal duties, staying on as Premier to unsuccessfully support Heffron as his successor.

Clune ably draws on his lifetime's research of NSW and NSW Labor politics and modestly credits other scholars, particularly Chris Cunneen's McKell biography[21] for

[17] Clune, *Sir William McKell*, p. 18.

[18] 1904-1994; NSW MLC from 1940; Leader of the Labor Party in the Legislative Council, 1941-72.

[19] 1961- ; Premier, 2005-08.

[20] Clune, *Sir William McKell*, p. 55.

[21] C. Cunneen, *William John McKell, Boilermaker, Premier, Governor-General*. Kensington: University of New South Wales Press, 2000.

insights and judgement, including why McKell's reputation waned before revival in the late 1970s onwards. Amongst this important work, Clune offers a particularly useful summation of McKell's achievements, governing style, and legacy.[22] Clune writes clearly and well about one of the most influential and significant of all Australian State Premiers.

[22] Clune, *Sir William McKell*, p. 58-61.

The Party. The Communist Party of Australia from Heyday to Reckoning, by Stuart Macintyre. Allen & Unwin, 2022 pp. 512, Paperback RRP $49.99 ISBN:9781760875183.

Michael Easson

Chairman and Co-founder, EG Funds Management

This thoughtful, well-researched, yet sometimes frustratingly opinionated book, *The Party*, covers the history of the Communist Party of Australia (CPA) from 1940 to 1970. An earlier work by the same author, *The Reds*[1], traversed party history from formation to illegality in 1940. Sadly, the author died after correcting page proofs, and therefore the final few decades of the story will need someone new.

Macintyre argues that communism 'was a political movement like no other, unique in its scope and in the commitment' required and whose demands were 'utterly different from conventional parties.'[2] Although Macintyre does not put matters in these terms, communism in Australia as elsewhere was an eschatological movement, with its creation myth, holy books, villains, and redemption story. Party leaders pronounced on 'the dictatorship of the proletariat', 'bourgeois legality', espoused techniques of deception, and proposed hidden revelations through 'dialectical' reasoning.[3] Members were supposed to take such doctrine, ideological logic, and jabberwocky seriously.

In conducting his analysis, Macintyre issues an escape clause: 'My primary purpose… has been not to attempt a comprehensive account but to explain the breakdown of older certainties.'[4] Does he succeed? Despite, during the writing of this tome, ill-health

[1] Stuart Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality.* Sydney: Allen & Unwin, 1998.

[2] Stuart Macintyre, *The Party: The Communist Party of Australia from Heyday to Reckoning.* Sydney: Allen & Unwin, 2022, p. 1.

[3] Macintyre, *The Party*, pp. 4; 30; 82.

[4] Macintyre, *The Party,* p. 25.

and limited access during the Covid pandemic to original source material, in depth of analysis and in scholarship, he very nearly does.

The first 250-pages of Macintyre's narrative covers the decade 1940-50, which mostly coincided with the Australian Labor Party (ALP) in government under Prime Ministers John Curtin and Ben Chiefley. The period covers the CPA's illegality (1940-41) caused because the government with bi-partisan support decided that the CPA was a security risk. The Soviets and Nazis were in alliance – one-by-one European countries were conquered or invaded. The party expressed vacillating indifference to hostility to what the leadership called 'an imperialist war' – World War Two. Then there was the underground period (1940-42) when, interestingly, the Labor government hesitated before lifting the ban on the party until certain there would be full-support for the war-effort. Then the resurfacing as pro-war enthusiasts, immediately after Hitler's Operation Barbarossa, from mid-1941, the invasion of Soviet territories and 'mother Russia'. Also covered are changes in relations with the ALP, moving from friendly to aggressive offense which did so much damage (coal strikes led by party members in the mining unions in the winter of 1949, especially) to the survivability of the Chifley Labor government. He claims Chifley resisted the Cold War. If so, communist infiltration of the bureaucracy, particularly in External Affairs, put paid to that. Macintyre defends the weighting in the book to the 1940s as this was the 'decade in which communism exerted its greatest influence' in Australia. [5]

The final 150-pages begins with several chapters, 'Survival' and 'Revival', on the fierce fightback within and by the ALP against CPA influence in the unions, including the formation in the early 1940s then in 1955 the acrimonious dissolution of the organised ALP Industrial Groups (leading to the Democratic Labor Party). Catholic Action was part of that complex story. The defeat of Menzies' government's efforts by legislation and referendum to ban the CPA was another highlight of those times. Then there were new avenues after 1955 for 'partnership' and 'united front' activities with the left of the ALP. This is followed byseveral chapters, 'A House Divided' and 'Cannot Stand' on splits in the CPA[6] which, following expulsions, departures, resignations, and splits led to an independent CPA line, no longer in thrall to Moscow. Often in bitter rivalry, sprang the

[5] Macintyre, *The Party,* p. xi.

[6] This includes consideration of the Hungarian and other eastern European uprisings in 1956, the Sino-Soviet splits from the early 1960s, the Soviet invasion of Czechoslovakia in 1968, the 'Gramscian appeal' of the Italian Communist party.

pro-Beijing Communist Party of Australia (Marxist-Leninist) (CPA M-L) from 1964 and the Moscow-aligned Socialist Party of Australia (SPA) from 1971. During this period, various unions – the Metal Workers with the CPA, the building, maritime and seamen unions with the SPA, the Builders Labourers Federation with the Maoists – lined up with different parties, with the CPA dominating numerically compared to the other grouplets. The book's epilogue sketches directions post 1970. Additionally, there is a comprehensive bibliography and index.

There are some debatable points in the book. For example, Macintyre says of Lenin's followers that they styled 'themselves the Bolsheviks (or members of the majority),' missing the irony.[7] The so-called Bolsheviks split in 1912 from the Marxist Russian Social Democratic Labour Party because they were a minority. Mensheviks, the moderate non-Leninist wing of the party, were clearly ascendent prior to the 'October Revolution' or coup in 1917.

Macintyre comments that 'the party degenerated after Lenin's death into rule by a single person' a version of the good-man-Lenin compared to the bad-guy-Stalin interpretation.[8] But from the start, Leninism was ruthless, bloodthirsty, and dictatorial. The Bolsheviks violently seized power from the provisional government of Alexander Kerensky, the leader of the Mensheviks, and the coalition of social democrats, liberals, and reformers who predominated from July 1917 in the Duma, the Russian parliament.[9] From the beginning of the Soviet state,[10] dissenters, 'class enemies', and opponents – actual, and those deemed potential opposition (*kulaks*, for example) – were fed into the human meat-grinder of Soviet communism during Lenin's rule. He was no saint.

At the beginning of 1945, there were just over 22,000 members, the height of party membership. With the party's zig-zags in policy positions, notably the 1939 Ribbentrop-

[7] Macintyre, *The Party,* p. 2.

[8] Macintyre, *The Party,* p. 3.

[9] Boris Kolonitskii, *Comrade Kerensky*, translated by Arch Tait. Cambridge: Polity Press, 2021, pp. 249-260,

[10] To cite a few works in a vast literature, see: James Ryan's *Lenin's Terror. The Ideological Origins of Early Soviet State Violence*. London: Routledge, 2012; Stéphane Courtois et. al.'s *The Black Book of Communism: Crimes, Terror, Repression*. Cambridge: Harvard University Press, 1997, particularly Nicolas Werth's chapter: 'A State Against Its People: Violence, Repression, and Terror in the Soviet Union', especially pp. 33-81; and Robert Conquest's works, including *The Great Terror*. London: Macmillan and Co., 1968, pp. 3-26, *Reflections on a Ravaged Century*. New York and London: W. W. Norton Company, 2001.

Molotov Pack, and whether World War Two was just a fight between imperialists or a fight to the death to defeat fascism, Macintyre observes:

> Obedience required pliancy, and too many calls on pliancy resulted in cynicism. A further theme of this history is the debilitating effect of this habit of denial.[11]

This captures an aspect of what it meant to remain or leave, and why in the three decades covered by the book around 100,000 persons passed through the party in Australia,[12] most leaving in disillusion. Neal Wood's *Communism and British Intellectuals*[13] explores why members in that nation soldiered on despite radical shifts in policy directions, gulags, policy contortions, disappointments, and the unable-to-be-denied drab reality of what political theorist and economist Alec Nove,[14] son of Menshevik exiles, later called 'really existing socialism'.[15] Wood mused that 'not all communist intellectuals or even a majority are necessarily neurotic.'[16] Wonder about those loyally adhering to the shifting party 'line' surely applies to both workers and intellectuals, not just the latter. Wood went on to argue that members rationalised that nothing is perfect: 'Communist politics, like bourgeois politics, is fraught with tragic undertones.' [17]

Perhaps this is a reason why 'democratic centralism' was accepted:

> Once the Communist Party made a decision it had to be embraced by all members. Any lingering reservation, any failure to implement it unquestionably, was a breach of discipline.[18]

[11] Macintyre, *The Party,* p. 7.

[12] Macintyre, *The Party,* p. 79.

[13] N. Wood, *Communism and British Intellectuals*. London: Victor Gollancz Ltd., 1959.

[14] Cf. Archie Brown and Alec Cairncross, 'Alec Nove, 1915-1994: An Appreciation', *Europe-Asia Studies*, Vol. 49, No. 3, May 1997, pp. 487-497.

[15] A. Nove, *Marxism and 'Really Existing Socialism'*. Reading: Harwood Academic Publishers, 1986.

[16] Wood, *Communism and British Intellectuals,* p. 96.

[17] Wood, *Communism and British Intellectuals,* p. 223.

[18] Macintyre, *The Party,* p. 28.

This was the Leninist position on party discipline, what members had to comply with or face expulsion.

Given its record from 1939-41, it is ironic for Macintyre to title one chapter 'The Leading War Party, 1942-45'. But Macintyre intends no irony; he makes many declarations about and denotes the CPA as '*the leading* pro-war party' [19] (my emphasis). As the war was ending and thereafter later in the decade, industrial disputes escalated in mining, metal, manufacturing, and maritime industries, many led by communists in the unions in those industries. Macintyre refers to the 1949 coal strike as 'the last and most costly of these industrial confrontations.'

Macintyre's work complements and surpasses – in scholarship, access to records, analysis, and interpretation – other accounts of party history, including John Playford's 1962 doctoral thesis[20] and Alastair Davidson's history covering much of the same period.[21] Macintyre sees that 'communism charged the lives of its adherents with significance.' [22] Not only through party meetings, union 'fraction' meetings, and a vast infrastructure of satellite organisations or fronts – the Workers Art Club, the New Theatre, Left Book Club, Friends of the Soviet Union, and many more.

In the period covered, nearly all the leadership and leading functionaries were men. In the 1930s, in consequence of the Depression, the radicalisation of many workers looking for explanations and solutions, a small sect was transformed as communist leaders won control of many of the big unions. One of the more impressive, Jim Healey,[23] is described as a 'large, companionable man of deliberation, insight and integrity.' [24]

[19] Macintyre, *The Party,* pp. 74-110.

[20] J. Playford, Doctrinal and Strategic Problems of the Communist Party of Australia, 1945-1962. PhD thesis, Canberra: ANU, 1962.

[21] A. Davidson, *The Communist Party of Australia: A Short History*. Stanford: Hoover Institution Press, 1969.

[22] Macintyre, *The Party,* p. 23.

[23] 1998-1961; national secretary, Waterside Workers' Federation, 1937-61.

[24] Macintyre, *The Party,* p. 33.

As a sidelight, Macintyre confirms that Arthur Gietzelt[25] was a party member writing under the pseudonym 'Arthur James' in communist publications.[26] There were other double ticket holders, for example, Don Mountjoy.[27]

The CPA in the 1970s was Macintyre's party. He has affection, reflected in some parts of the book, for stories he heard. At times, however, this descends into the overly subjective. For example, he describes the Laurie Short[28] leadership of the Federated Ironworkers Association (FIA) as at least as ruthless as its predecessors.[29] Really? The communist leadership – thuggish, ballot-rigging, doctrinaire – of the FIA lost control in the early 1950s after the courts ruled on ballot fraud on a vast scale. Sometimes, Macintyre shows a tin-ear to the reasons communists were opposed. In passages, McIntyre risks romanticising their progressive role in the wider labour movement, which begs the question as to whether Macintyre ever understood moderate and right-wing Labor and the non-communist Labor Left, in combination, the traditional ALP 'true believers.'

There is an under-explored paradox of Australian hard-left dogmatists who made thoughtful, active contributions domestically for equal pay for women, Aboriginal rights, and other areas. The blight of Stalinism, it seems, did not blind cadres, the communist outsiders in their society from critiquing and advancing radical remedies for real, sometimes under-rated problems, that often found wider resonance, and induced reform. Outsiders can bring a creative scepticism and fresh perspective that helps decision-makers consider better and more options. This might seem surprising. At the end, Macintyre warmly refers to 'the meaning and purpose they found in carrying out their duties.'[30] Influence, impact, and success, however, turned on the

[25] 1920-2018; Labor Senator for NSW, 1971-89. Macintyre' discussion (p. 190) about Gietzelt, who was the ALP campaign manager for the 1952 by-election for Werriwa, requires correction. Gietzelt in the pre-selection supported H. Clifford 'Cliff' Mallam (1909-2006; NSW state Labor MP, 1953-68; 1971-81), not Whitlam. In June 1977 after Gietzelt was balloted out of the Shadow Ministry, Whitlam bragged at a press conference that the new line-up was 'infinitely better' than the near identical previous Shadow Ministry. The two were lifelong political antagonists.

[26] Macintyre, *The Party,* p. 439, footnote 26 to chapter 6.

[27] 1906-88; Federal MP for Swan, 1943-46; Macintyre, *The Party,* p. 67. In all likelihood, so was Senator William ('Bill') Murrow (1888-1980; Labor Senator, 1947-53) in Tasmania.

[28] 1915-2009; FIA national secretary, 1951-82.

[29] Macintyre, *The Party,* p. 287.

[30] Macintyre, *The Party,* p. 408.

underlying strength of Australian democracy. A weaker polity might have succumbed to insurrection. The more extreme and hostile the communists were to mainstream Labor, the greater the negative reaction; the more 'revolutionary' the party, the less successful. It was when the CPA ceased to be a Leninist party, neutered as its far-left critics would say, that some of the good ideas of its members seeped into the consciousness of the wider society. Though, usually, this was despite the organised presence of a party whose name no longer denoted its original meaning. Curiously, in pursuing an independent, democratic, 'Australian path' – neither 'Moscow's or Peking's – the CPA leadership's rhetoric sometimes invoked democratic centralist principles to command loyalty from recalcitrant members. Reflexes come naturally. By then, the breakdown of older certainties was complete; the CPA in the 1970s and onwards was nothing much like what it had been – a Leninist party.