

## MEMBERS MAKING THEIR MARK

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### **Romance and modest dreams**

Don Quixote is a romantic figure because he dreamed that a bygone age was still current and that he could live in a way that vindicated the best of it. He tilted against what he saw as the forces of darkness and hoped thereby "to right the unrightable wrong".

Romance can engender noble aspirations though there is sometimes a risk that these will end in disillusion. Still it may lead on to great change. The great romantics, the great dreamers have achieved much. Is it feasible to have dreams of the modest kind and thereby capture a modest goal?

### **The executive, parliament and the courts**

The following are propositions sometimes seen as romantic and built upon dreams of a former golden age. First, that Parliament is in command of the initiation and passage of the bulk of the legislation enacted through its chambers; secondly that it exerts effective quality control over the Executive's actions; and, thirdly that it is just as energetic in doing so as are the Courts. Still "to dream the impossible dream" can be rewarding. In any event given the political composition of the Senate, Parliament is now more about its constitutional task than might once have been the case.

### ***Insights into parliament***

High Court judge, Sir Gerard Brennan, and Clerk of the Senate, Mr. Harry Evans, are two people with a fundamental understanding of the Legislature and its relationship with other institutions. I quote from them both to bring out varying insights about Parliament. They both deal in their analyses with the control of legislation and the scrutiny of the Executive's administration.

On 7 August 1990 the then Justice Gerard Brennan gave the Blackburn Lecture to the Law Society of the Australian Capital Territory entitled "Courts, Democracy and the Law". During it he said:

The theory of responsible government, which made the fate of an Executive Government dependent upon the confidence of the Parliament was, so to speak, turned on its head by the political dependence of the majority members of the Parliament on the Executive Government. Policy formulation became primarily an executive function. As the pressure on legislative time intensified a

virtual monopoly over initiatives for legislation passed to the Executive Government. The influence of Ministers in debate, whether in the party room or in Parliament, was enhanced by the support they could command from the public service.

Later Sir Gerard stated:

As the wind of political expediency now chills Parliament's willingness to import checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.

The following words of Harry Evans appear in the *Australian Journal of Public Administration* for March 1999 under the heading "Parliament and Extra – Parliamentary Accountability Institutions".

Parliament generates the political noise and political heat that has to arise from the public exposures by the accountability institutions for their work to have any effect.

A little later this passage appears:

In short, accountability is essentially a political process. It operates not in the stratosphere to which extra – parliamentary bodies are sometimes thought to be elevated, but in the swamp of politics, where the fermentation generates the volatile substances to keep them aloft.

The final paragraph concludes:

In spite of its debilitation, then, parliament is the key to maintaining accountability, even through extra- parliamentary bodies, because it is the principal forum of the political process and because accountability relies ultimately on the political process. Those bodies depend on that process for both their existence and their work.

### **The infrastructure of the political process**

The structures within which the political process works include the Senate, the House of Representatives, the Cabinet, the ministry, the party rooms, the subgroups or factions, and the committees. I want first of all to deal with the party room. The work it carries out is crucial to the political health of Australia. The way it does that work is typical of what happens in the other structures.

#### ***The backbencher in the party room***

Sir Gerard Brennan talks of the government party room and the crucial influence therein of the ministers. This is an acute observation. I would describe the influence of the shadow ministers in Caucus in the same way. But that is not the end of the matter. Members of the backbench can do much in the party room and in the party committees. Recently they have led the Government to make major changes to its terrorist

legislation. People like Marise Payne, Bruce Baird, Christopher Pyne, Julie Bishop and Petro Georgiou are considerable political figures.

For the party room to work at its best there needs to be trust between all its members. This requires them to be open and candid with each other. There have been times in the history of the party room where this has not been the case.

My experience is with the Labor Party but I am confident that the situation is the same in all parties, or at least in the major ones.

I remember being told early in my parliamentary career that the problem with giving Caucus a full and frank account of things was that one or more of its members would almost certainly pass the information on to the media. There may well have been some truth in this; but preventing the back bench from doing so meant that leaking became the prerogative of the Cabinet and perhaps the Ministry. There was then need to create a climate and culture where each person could have confidence in all others and they in him or her. That need will forever persist.

What happens in the party room is crucial to what happens later. It is there that the members of the back bench have the opportunity of influencing decisions which, once made, they are bound to support. They cannot realistically expect to gain changes to those decisions in the Chambers of the Parliament. That is why it is reasonable for them to expect a full and frank briefing on matters when their party meets in formal session in the party room.

***The principle explained by Gordon Bryant***

On 20 October 1974 the then Minister for the Capital Territory the Honorable Gordon Bryant put out a paper entitled "The Backbencher and his Role in Government" in which he said:

The Caucus is therefore 95 in number. It is a large meeting but its leadership is closely knit and vigorously minded in the pursuit of its point of view. In its deliberations, every member is equal. The Prime Minister has one vote, I have one vote and the last arrived member has one vote and the majority prevails. When the Caucus reverses a Cabinet Decision, that is not a rebuff but an exercise in democratic government. Every constituent of a Labor held electorate should be gratified that the person they elected is not a cipher or a vote in a numbers game managed by an executive but a significant contributor to the decision making.

***The backbench needs to be vigilant***

There are those who would see Gordon Bryant's words as touched with romance. Yet he described the way Caucus is structured to work. Still, it is a place where the Executive can gain great advantages for itself, and, not always in the most candid of ways. It is therefore incumbent on the backbench to remain firm and forever vigilant.

Neal Blewett is the author of "A Cabinet Diary" published in 1999. It gives an excellent sense of how a governing party carries out its task. The following paragraph dealing with

Caucus and discussing events which occurred on Tuesday 28 April 1992 appears on page 103 of the book.

A caucus explosion followed questions from Langmore about the Fairfax float. It turns out that while the float purchasers are all Australians, shares could then be sold to foreigners, with an individual entitlement of up to five per cent as long as such foreigners have no controlling interest or any links with the dominant Conrad Black group. Thus we could have a foreign non-controlling ownership of forty per cent or fifty per cent or more. Schacht was his furious self, denouncing this as contrary to the caucus resolutions; it was an abrogation of a decision fought over for five months. Dawkins bluntly told him caucus had been wrong. The goals of the resolution simply could not be achieved under the existing foreign investment powers. Barney Cooney, ever suspicious of executive behaviour, then attacked the cabinet for misleading caucus on the issue by not giving them this information. With growing signs of an unseemly revolt, the question was referred to the caucus economics committee.

***The Executive is able to cooperate***

The party room and the party committees can have a crucial effect on the Executive whether in government or in opposition. As chair of the Caucus Legal and Administrative Committee on the 31<sup>st</sup> March 1995 I received a document from the Honorable Duncan Kerr, then Minister for Justice, entitled "The Government's Record on Civil Liberties Concerns". This addressed "the suggestion that the Government, and in particular the Attorney-General's portfolio, does not give sufficient weight to civil liberties concerns". The suggestion had been made at the Committee and the Minister responded. The document went through a number of pieces of legislation to demonstrate how they had all struck "a balance between the civil liberties of members of the community and the need for effective and accountable law enforcement procedures". This position had been reached after considerable input from the Caucus Committee. The legislation referred to in the document included the Evidence Bill 1994, the Crimes (Search Warrant and Powers of Arrest) Amendment Act 1994, the Crimes (Forensic Procedures) Amendment Bill 1995, and the Model Criminal Code Bill 1994. Members of Caucus achieved changes to them through the party committees which, given party protocols, they would have been unable to do in the Parliament.

***The process of decision making in the party room: the public mood and conscience***

In dealing with legislation the party room is not bound by precedent or by legal logic. Consequently there will not necessarily be the consistency in decision making to be expected where that is done in accordance with set laws. Caucus is much influenced by the thinking of the electorate. But a powerful determinant is the sense of what is right and what is wrong held by the members, both as truly motivated individuals and as part of a group, with a proud history of having participated in reform for over a hundred years.

***Democracy and the rule of law***

The public mood is a powerful factor in the party room. A democratic system is founded on the proposition that the majority of electors will determine the colour of the Government. That factor is a chief determinate in guiding an elected politician to his or

her decision about a matter. Yet Australia is a civil society living under the rule of law. It needs to reflect that in the life of its community. It requires an exercise of judgement, either by parliamentarian or judges, to say when legislation has exceeded the rule of law. True conscience is a reliable guide in reaching the right conclusion. It is a powerful force in the party room even on those rare occasions it does not triumph.

### **Political reasoning and judicial reasoning in decision making**

The laws under which we live come chiefly from decisions of judges and parliamentarians. The High Court interprets the Constitution and declares when Commonwealth statutes are invalid. There is curial examination of the lawfulness of the actions of the Executive. Tribunals review administrative decisions on their merits. All this tends to create the impression that judicial reasoning and political reasoning are quite similar. This though is not so.

Judges deal with the problems of individuals whether of people, corporations, institutions, or government. Parliamentarians must meet the challenges confronting the nation, and various communities within it, as well as particular men women and children who seek their help.

Courts are guided by set principles, as to procedure, as to evidence, and, as to substantive law, in reaching their decisions in a way a politician is not.

The curial task involves a particular process of thinking through to a decision in the light of these factors and this is not akin to the political one; nor should it be.

### ***Different processes: sometimes there is tension***

Political decision making is unstructured and differs from that pursued by courts which are bound by defined principles and procedures. Accordingly a jurisprudence-like learning has not developed around it. This has lead to a certain unease in the analysis of political decision making by lawyers and a similar unease in the analysis of legal decision making by parliamentarians. Yet a good society depends on both working in an appropriate harmony. There has in recent times been some unhappy tension between judges and members and this has been given public expression. The *Wik*<sup>1</sup> decision led to a vociferous reaction to the High Court in the Senate. Asylum seeker matters have been the occasion of public discord between federal judicial and political officers.

### ***Political reasoning closer to that of journalists***

Learned and experienced journalists with a commitment to the truth provide a better model to good political thinking than do the courts. Alan Ramsay writes in *The Sydney Morning Herald*. He has a profound understanding of the political system and what moves members of Parliament to action. He has a thorough knowledge of history. He has a deep experience of the vicissitudes of life. He is forever conscious of the need for any viable party to have a purchase on wide support in the electorate. At the same time he is fully committed to seeing things done according to conscience. These are the things which underpin the best of political reasoning.

***Courtesy and grace in debate***

Courtesy and grace are forever needed in debate. A civil society cannot be at its best unless its constituents treat each other civilly. Louis H. Pollok as a senior judge of United States District Court for the Eastern District of Pennsylvania had an article printed in the American Bar Journal for May 1998. It was reprinted in the Australian Bar Gazette for December 1998. Previously Louis Pollak had been Dean of the law schools at Yale and the University of Pennsylvania. He said:

Problem-solving and consensus-building are exercises in civility - steps in the creation of the civitas, the civil state of our ideals. In recent years we seem to have taken fewer such steps. Apparently preferring division to community, we shy away from joint purpose.

In seeking the best of societies we need to appreciate the good offered and done by its different institutions and the call for courtesy and respect between them.

**Need for wider understanding**

There is need for a wider knowledge and understanding of how decisions are made, who by, and through what processes. This is necessary in a vibrant and participatory democracy. In his paper of October 1974, Gordon Bryant said:

Modern society needs effective decision making apparatus, close parliamentary scrutiny and participation in Government and more participation in decision making, not less of it.

To this end it would be interesting to hold a conference on political, legal and journalistic decision making and the relationship between them. It may lead to a wholesome enlightenment. A topic might be: "The processes of fact finding by courts, administrative tribunals, royal commissions, and estimate committees". Another that would be absorbing is: "The way matters to do with the Royal Commission into the building industry have been dealt with by the Courts, and the Senate Committee".

***Need to see processes as complementary***

In addressing the decision making processes which sustain a good civil society both those legal in nature and those political should be seen as complementary to each other. They affect the rule of law upon which the quality of our community depends. The Constitution, the Parliament and the Courts are the principal sources of our laws. They are particularly important in Australia which lacks a Bill of Rights of any sort.

**Parliamentary committees: The Scrutiny of Bills Committee**

There is a mixture of factors including a sense of what is right and decent used by parliamentary committees reasoning through to their conclusions. Take for example the Senate Scrutiny of Bills Committee in which I take great pride, because of its work, and because of its membership. I have the utmost respect for my colleagues on that Committee. I say the same about those people who have formed the secretariat, and those who have provided its legal advice, over the years.

The process it uses to draw its conclusions is a political one though not in a partisan sense. Its members would agree with Sir Anthony Mason then Chief Justice of the High Court who in an article in *The Financial Review* of 1 October 1993 said:

The protection of fundamental rights is essential to the preservation of the dignity of the individual and to the modern concept of democracy.  
Sir Anthony went on to say:

Once that is accepted it is inescapable that the courts have a central role in enforcing fundamental rights whether those rights have a constitutional or statutory source or look to the general law for protection.

Given the premise upon which Sir Anthony relies, Parliament has a basic responsibility to see to it that everyone in Australia lives under the safeguard of the rule of law. The first of the criteria against which the Scrutiny of Bills tests legislation is whether Bills or Acts of Parliament “trespass unduly on personal rights and liberties”. This gives the members of the Committee wide and adequate scope to measure legislation against what is fair and decent. They use their sense of what is right and proper and according to good conscience to reach their conclusions. They do not think in a formal legal way but their reasoning is truly effective.

With this test the Committee is at large in assessing legislation. It allows comment on bills dealing with such issues as due process, with the creation of offences and their penalties, with economic measures, with migration, with asylum seekers, with terrorism, with the imposition of levies, with bankruptcy, with insurance and with data – matching.

### **Parliament courts and civil live**

Parliament and the Courts need pursue the great human objectives. This is particularly so where Australia has no Bill of Rights. It is in this context members can and do make their mark.

### **Endnote**

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<sup>1</sup> *Wik Peoples v Queensland* (1996) 141 ALR 129.