

## *REPRESENTATIVE DEMOCRACY AND RESPONSIBLE GOVERNMENT – TWO AUSTRALIAN CONSTITUTIONAL MYTHS*

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### **ABSTRACT**

*Two fundamental assumptions about the Australian Constitution are that it embodies a system of representative democracy, and that the executive is subject to oversight by the legislature in accordance with the doctrine of responsible government. Such statements have become truisms, but they conceal the fact that concepts such as democracy and legislative control over the executive are matters of degree. The argument presented in this paper is that an analysis of our constitutional arrangements reveals that we live in a duopoly, rather than a democracy, and that legislative control over the executive has become so attenuated as to become almost meaningless. The paper argues that Australia should adopt proportional representation in the form of the Single Transferrable Vote system for electing the House of Representatives, and that members of parliamentary committees should be able to approach the courts to obtain a remedy for contempt where members of the executive refuse to give information to legislative committees, subject to a public immunity defence. The article concludes by arguing that despite the view that voters are unreceptive to constitutional change, the unfairness of the electoral system and the contempt with which ministers treat parliamentary committees would, if adequately ventilated in public debate, create sufficient voter outrage as to create an opportunity for reform.*

### **I INTRODUCTION**

Although as teachers of constitutional law we are accustomed to tell our students that we live in a representative democracy and that the executive operates subject to the restraints inherent in the doctrine of responsible government, an analysis of our electoral system and of the level of control which parliament has over the executive in practice, rather than in theory, reveals that our electoral system does not accurately represent the political views of the country as a whole and that the executive refuses to provide information to the legislature frequently and with impunity. Part II of this paper examines the distortions to which our current electoral system gives rise and argues for the adoption of a system of proportional representation in order to ensure that election results accurately reflect the will of the people. This Part also

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counters arguments that proportional representation systems lead to instability in government and recommends the adoption of the Single Transferrable Vote electoral system, which is already used in the chambers in which governments are formed in the ACT and Tasmania. Part III discusses how the mechanisms that are available to the legislature to ensure accountability of the executive, which rely on respect for the conventions of parliamentary government, have become so weak in Australia as to be of little effect. The paper then suggests a legislative solution to this problem which would allow members of parliamentary committees to approach the courts to secure co-operation from ministers who refuse to answer questions put to them. The way in which the courts in the United States successfully use the concept of public interest immunity to balance the competing interests of the legislature to obtain information and of the executive to withhold it is also examined. Part IV of the paper concludes by arguing that the shortcomings in the current electoral system and the lack of ministerial responsibility to Parliament could, if sufficiently ventilated among voters, inspire public support for constitutional reform.

## II DEMOCRACY

If the purpose of that system is the election of a legislature which accurately reflects the will of the voters, then it is clear that the current electoral system embodied in the *Commonwealth Electoral Act 1918* (Cth) falls far short of achieving that objective. As is well-known, single-member electorate systems such as ours inevitably lead to dominance by two parties and fail to give representation to voters who vote for candidates from other parties. The distortions produced by this system, and the manifest unfairness to smaller parties and to the voters which support them, are striking:

In the 1990 federal election,<sup>1</sup> the Australian Democrats won 11.4% of first preference votes but no seats – yet the 8.4% of votes cast for the Nationals in that election yielded 9.5% of the seats in the House of Representatives. In 2004 and 2007 the Greens won over 7% of the vote but no representation, and when they won a single seat 2010, that was after winning 11.7% of first preference votes nationwide.

Even more disturbing is the fact that the system not infrequently delivers power to a government which has fewer votes nationwide than does its opposition – this happened in 1990 when Labor won only 39.4% of first preference votes nationwide and yet won 52.7% of the seats, and again in 1998 when the Coalition won 39.1% of the popular vote and 54% of the seats. And this is by no means rare: Federal governments came to power with fewer votes than the opposition in 1954, 1961, 1969 and 1987. Surely it is a fundamental principle of democracy that the legislature should accurately reflect the view of voters, that each vote should have equal impact no matter where it is cast? Yet these results reflect a system which seems almost purpose-built to deny fair representation.

In light of this it is puzzling that so much attention is paid during elections to national opinion polls, as they are largely irrelevant to the outcome which is determined in a handful of marginal seats. The decisiveness of the marginals - and the comparative irrelevance of votes cast elsewhere - is shown by the fact that while 12 930 814 votes were cast in the 2007

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<sup>1</sup> All results cited in this paper are taken from the Australian Electoral Commission website at <[www.aec.gov.au](http://www.aec.gov.au)>.

election, the outcome was effectively decided by 8 772 voters in 11 electorates<sup>2</sup> who, if they had given their first preferences to the Coalition instead of to Labor, would have handed victory to the former – and this in an election which, the allocation of seats in Parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer - 13 131 667 votes were cast, but had just 2 175 voters in two electorates<sup>3</sup> voted for the Coalition instead of Labor (and had the Greens and Independents made the same decisions as to who to support in government), the Coalition would have won power. How can an electoral system under which the formation of government depends upon the geographical location of a tiny number of voters be considered fair?

The current system encourages blandness and lack of differentiation between the two major parties, both of which find it in their interests to be as unspecific as possible about their policies and to avoid staking out definite positions which might alienate voters. The lack of viable alternatives to the two main political blocs, and the fact that it is in their interests to maintain that situation, also means that, when in opposition, neither of the parties use the mechanisms of parliamentary scrutiny to their fullest extent against the other, as is discussed in Part III of this article.

Despite this, the suggestion that we should adopt a system of proportional representation – as our trans-Tasman cousins in New Zealand did in 1996 - meets with vigorous opposition, based on the erroneous argument that it leads to governmental instability. Since it is rare for a single party to obtain more than 50% of the vote nationwide under proportional representation, such systems almost inevitably lead to coalition government. Fear of governmental instability is easy to instil in a population unused to radical thinking. Yet that argument is flawed on two counts: First, its implicit requirement that one should put pragmatism over principle and accept unfairness as the price of stability is fundamentally unjust. The electoral results discussed at the start of this article illustrate how distorted are the results delivered by the electoral system and how unfair they are to voters. But even leaving aside matters of principle, the second reason why the argument is flawed is that its own hypothesis – that coalition government is inevitably unstable – is incorrect.

The most comprehensive study conducted by University College Dublin academic David Farrell,<sup>4</sup> indicated that whereas some countries (for example, the UK and Jamaica) using disproportionate single-member constituency systems produce long-lived governments, other countries using the same system (such as India and PNG) are afflicted with severe governmental instability. Conversely, while some countries using proportional representation (such as Italy and Israel) are prone to instability, others (such as Switzerland and Austria) have governments that are more stable than those in the UK. In other words, the data does not support a causative relationship between proportional electoral systems and governmental instability. This is not surprising. It reflects the fact that a range of factors - economic prosperity, ethnic homogeneity and national character - affect politics in a country, and thus how stable its governments are. Contrary to the idea that internal disputes are likely to cause coalition governments to fracture, coalitions have a powerful incentive to ensure that they endure, as voters are likely to punish parties which undermine governmental stability. In other words, there are both centrifugal and centripetal forces at work in a coalition, and it is wrong to assume that simply because coalition governments contain two or more partners

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<sup>2</sup> These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Robertson, Swan and Solomon.

<sup>3</sup> The electorates of La Trobe and McEwen.

<sup>4</sup> David Farrell, *Electoral Systems – A Comparative Introduction* (Palgrave Macmillan, New York, 2001) 194-6.

they are inevitably unstable – as witness the fact that the Liberal / National Coalition has endured over the 43 years it has governed since federation. Why would coalitions between parties which were elected to a Parliament under a system which accurately and fairly reflected voter sentiment be any less stable?

The next major criticism levelled against proportional representation systems is that because they almost never lead to a single party being able to win power and form government on its own, voters have no control over who forms government, as governments are formed as the result of back-room post-election negotiations between political parties. There are a number of difficulties with this argument.

First, it is fundamentally erroneous, in a system of parliamentary government such as ours, to say that the voters ‘elect a government’. They do not. The voters elect a Parliament, and Parliament elects a government. This rule of the Constitution has been lost sight of precisely because, in a two party system, voters know that one or other of the main parties will win a majority in Parliament and will therefore form government. They therefore erroneously believe that the purpose of the election is to choose a government. However, it is vital to grasp that the two processes - election of the legislature, and formation of the executive government - are separate and distinct.

This distinction would be quite obvious to us if we were to travel back in time to 17<sup>th</sup> or 18<sup>th</sup>-century Britain, when the system of parliamentary government was developed, long before the era when politics was dominated by two major parties. The critical constitutional outcome of the victory of Parliament over the monarchy during two wars in 17<sup>th</sup> century England (the Civil War between Parliament and Charles I from 1642-51, and the Glorious Revolution against James II in 1688) was that the monarch would govern with the consent of Parliament. The practical implication of this, which gradually became established during the 18<sup>th</sup> century, was that after Parliament had assembled, the monarch would choose as leader of the government (formally the First Lord of the Treasury, an office which became known as that of Prime Minister in 1721) whoever could command the support of Parliament, rather than simply whoever he or she favoured. However, no-one knew, until Parliament assembled, where the balance of power between members of the loose, nascent political parties (Whigs and Tories) and the large number of non-aligned MPs. No-one voting in elections in the 18<sup>th</sup> century believed that they were ‘electing a government’. The government emerged from the interplay of factions in Parliament. It was only well into the second half of the 19<sup>th</sup> century, when party discipline had hardened to the extent that, as is still true in both the United Kingdom and Australia, where there is no role for small groupings of MPs or independents, that one could predict who would win government by observing which of the two main political parties had won the election.

The consequences of that two-party dominance has been that voters no longer see elections and government-formation as the discrete events that they are - everyone simply assumes that the purpose of elections is to choose a government, whereas adherence to the system of parliamentary government as it truly is requires an acceptance that it is Parliament, not the voters, who choose the government. Confusion over this issue became particularly evident in the aftermath of the 2010 federal election, which produced a result in which neither the Coalition nor Labor had an absolute majority. During the days that followed, each of the major parties claimed on various grounds (having a greater number of seats than the other or having a larger share of the popular vote than the other) that they should be regarded as having been ‘elected as government’ by the voters. From a legal point of view, the ultimate

determination of who would form government depended on who could demonstrate that a majority of MPs was willing to support one or other party - that is, choose someone who had the confidence of the House. The role of the voters in the process had long since expired and was, from a constitutional perspective, irrelevant.

Once one understands how the parliamentary system of responsible government works, it becomes apparent that there would be nothing odd at all about having a multiplicity of parties negotiate to determine who should form government. In fact, that was the norm when the system originated - and one would be hard pressed to say that Britain, at the height of its international military and economic dominance was badly governed because of it. Such a process is also the norm in other democracies which have parliamentary government in combination with proportional representation: The voters elect the legislature and then the parties in the legislature determine who will govern.

Given that, under our system, voters do not 'elect a government', one could end the argument about government being formed by deals between parties by saying that that is what the system anticipates, and that it is only the fact that the electoral system produces distorted results, and a resultant dominance by two major parties, that gives the illusion that voters are electing the government. Such a response would be correct as a matter of law, but it would be unlikely to defuse the suspicion that opponents of proportional representation would be able to engender among voters who are unaware of these constitutional rules. Therefore, one also has to address the argument on political, and not just legal, grounds. So, does the process of government-formation by political parties after an election conducted under proportional representation mean that the voters do not have control over who forms government and cannot hold it accountable?

The answer to these questions is 'No', for the following reasons: It is very common for voters to know which parties will go into coalition, and with whom, long before election day in countries using proportional representation - in other words, the inter-party negotiation is as likely to occur before the election as after. Indeed, it is in the interest of political parties to be open about their intentions regarding possible coalition partners, precisely to avoid losing voters because voters mistrust them on that issue. Thus in many elections, voters will know ahead of time which parties are likely to go into coalition with which, and to factor that into their choice as to whom to vote for. Most importantly however, the reason why it is untrue to say that proportional representation and resultant coalitions do not give voters control over who governs them is that, unlike in the case of the current system, a government formed after a proportional representation election will have the support of a majority of voters - because the parties forming the coalition must, in combination, represent more than 50% of the voters - yet as the election results discussed at the start of this chapter demonstrate, it is a not uncommon, and obviously unjust, occurrence under electorate-based systems for governments to come to power with the support of less than 50% of the voters.

The final argument that needs to be addressed is that voters cannot hold coalition governments accountable in the same way as they can single-party governments, because coalition parties can blame the compromises they have had to make in order to secure a coalition agreement and the shortcomings of their coalition partners, for failures of government performance. This is spurious for a number of reasons: First, it ignores the fact that Australia voters historically appear to have no difficulty in determining accountability between coalition partners, given the compromises that are made between the Liberal and National partners of the Coalition over issues as diverse as voluntary student unionism,

emissions trading and the National Broadband Network, to name only the most recent. Second, it must be recognised that parties in a coalition government are judged *on the compromises they make*. In other words, it is a myth to say that parties are able to deflect responsibility to coalition partners for compromises, because the very fact of having compromised on a key policy carries the substantial risk of punishment at the next election. Parties therefore do not have *carte blanche* to betray voters, nor does the fact that they are in a coalition provide them with immunity from the need to be accountable to voters – the deals they make become part and parcel of their record, and voters can and do hold them accountable accordingly.

Australia is not a true democracy – it is a Coalition/Labor duopoly, with the electorate performing the role of a hapless tennis ball hit between them every three years. Is it any wonder that Australians feel increasingly disengaged from, and disenchanted with, the political system? A reflection of this is the fact that an ever-increasing number of voters are venting frustration with the major parties by directing their support to parties other than Labor or the Coalition: In the 2007 election 14.5% of first preference votes went to minor parties or independents.<sup>5</sup> This increased to 18.2% in 2010 and to 21% in 2013 – and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances, to no more than a gesture to be made before having to make a reluctant choice between parties that can actually win a seat.

The manifest unfairness of the current system if sufficiently emphasised to the public, could lead to sufficient outrage to lead to a successful campaign to adopt proportional representation. There are of course a multitude of proportional representation systems. One already familiar to Australians is the multi-member seat Single Transferrable Vote system, already used in houses that provide government in the ACT and Tasmania, as well as in the Senate and all State upper houses, barring Tasmania.<sup>6</sup> The system is also used in the house that forms government in the Republic of Ireland, to name but one example from many other jurisdictions.

Under STV, country or State is divided into a number of large electorates, each returning more than one member. Parties may nominate as many candidates for each electorate as there are seats to be filled. Voters receive a ballot paper on which all the parties' candidates are listed. In the system used in Tasmania and the ACT candidates are listed randomly, and voters must indicate their preferences for individual candidates.

The number of votes required for a candidate to be elected in an STV system (referred to as the 'threshold') is one vote plus the number of votes cast in the electorate, divided by the number of seats plus one. If a candidate reaches the threshold after the first count of votes, he or she is declared elected. Any votes a candidate receives in excess of what they required to be elected are redistributed among the remaining candidates – the calculation is somewhat complex, but the objective is to ensure that if, for example, candidate A needed 14 000 votes to be elected and obtained 15 000, the 1 000 excess votes are distributed among the remaining candidates in the same proportions that *all* voters for candidate A indicated their preferences. The process of distributing preferences goes on in successive rounds of

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<sup>5</sup> That is to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes. Data are derived from the Australian Electoral Commission website at <[www.aec.gov.au](http://www.aec.gov.au)>.

<sup>6</sup> For a survey of Australian electoral systems see Scott Bennett and Rob Lundie, 'Australian Electoral Systems' (Research Paper No 5, Parliamentary Library, Parliament of Australia, 2007).

counting. If no remaining candidate reaches the threshold after redistribution of the preferences of the most recently elected candidate, the candidate who received the fewest votes is eliminated and his or her second preferences are transferred to the remaining candidates. The process continues until all seats in the electorate are filled. There is range of STV systems, differing in the way in which votes are transferred, but all have in common the feature of multi-member electorates and transferrable preferences. The advantage of STV is that as well as leading to highly proportionate results,<sup>7</sup> all members of the legislature are identifiable with a specific electorate, and voters, rather than parties, have ultimate control over whether each candidate succeeds in being elected.

If STV was adopted, the most important issue to determine would be the number of members returned by each multi-member electorate. The critical factor to remember here is that the greater the number of MPs returned by each electorate, the more proportional the outcome of elections, and the less likelihood there is that a government can be elected without securing a majority of votes nationwide. As we have seen, that is a scandalous, but by no means rare, occurrence under our current single-member electoral system. By contrast, in Ireland<sup>8</sup> this has occurred only twice<sup>9</sup> in the 18 elections held since the introduction of the system, which uses a mix of three, four and five member electorates. In Tasmania<sup>10</sup> governments have been able to win power with a minority of votes state-wide only twice<sup>11</sup> over a much longer period of history in which 26 elections were held under a system which uses seven-member electorates - which illustrates the point that the more members per seat, the less likely it is that an anomalous result will occur.

Another important factor to consider is how the number of seats per electorate affects the threshold for election: In a five-member electorate, the threshold is just over 16% of the vote plus 1. Thus a party that had, for example, 15% support nationwide, but no sufficient concentration of voters in any particular electorate, would not obtain representation in Parliament. Clearly, that is unsatisfactory. In a seven-member electorate, the threshold is 12.5% + 1 vote. If there were nine-member electorates, the threshold would be 10% + 1 vote. The critical question here is how to balance the representivity of the system against the degree of contact voters have with their representatives. A 10% threshold is probably the highest that one should permit for a system to be fair to smaller parties. If the House of Representatives was kept at approximately its current size, there would need to be 16 electorates each returning nine members (giving a total of 154). However, some multi-member electorates in rural areas would be vast, and this might therefore constitute grounds to increase the size of the House. Because under STV multi-member electorates would be

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<sup>7</sup> For an analysis of the proportionality of various voting systems see David Farrell and Ian McAllister, *Voter Satisfaction and Electoral Systems: Does Preferential Voting in Candidate-Centred Systems make a Difference?* (2004) Center for the Study of Democracy, UC Irvine

<<http://www.escholarship.org/uc/item/4c51z9mt?display=all#page-10>> and Helena Catt, Paul Harris and Nigel Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, 1992).

<sup>8</sup> Information on elections in Ireland is obtainable from the Department of Environment, Community and Local Government at <http://www.environ.ie/en/LocalGovernment/Voting/>. A convenient summary of election results since 1918 can be found at Nicholas Whyte, *Dail Elections* (3 June 2007)

<http://www.ark.ac.uk/elections/gdala.htm>.

<sup>9</sup> In 1965 and 1969.

<sup>10</sup> Information on elections in Tasmania can be obtained from the Tasmanian Electoral Commission at <http://www.tec.tas.gov.au/>. A summary of Tasmanian election results since 1909 can be found at Parliament of Tasmania, *House of Assembly Election Results 1909-2014* (3 April 2014)

<http://www.parliament.tas.gov.au/tpl/Elections/ahares.htm>.

<sup>11</sup> In 1982 and 1989.

delineated without reference to State boundaries in order to achieve nationwide proportionality, its adoption would necessitate the amendment of s 24 of the Constitution which assigns seats to States and s 29 which prohibits electoral boundaries from crossing State boundaries.

Proportional representation is right in principle as it gives equal weight to every vote, irrespective of location and ensures that governments would always represent a majority of voters. It would also have a positive practical impact on politics in Australia: It would enhance the quality of government by expanding the pool of political talent beyond those who are willing to join Labor, Liberals or Nationals - the only parties in which there is currently a realistic chance of a political career. Furthermore, since proportional representation would lead to more parties being represented in Parliament, those currently represented would be forced to improve their performance or lose power to new entrants.

### III RESPONSIBLE GOVERNMENT

Turning now to the concept of responsible government, the fact that executive accountability to the legislature is founded upon convention rather than law is a significant weakness of the Westminster system, because it means that the degree of accountability to which the executive is subject depends to an almost complete extent on ministers voluntarily submitting to Parliamentary oversight. The principal mechanism available to Parliament to call the government to account is the committee system. In theory, committees of either house have the power to call ministers and public servants to account and to punish them for contempt if they refuse to do so or to provide information,<sup>12</sup> although the practice is for an invitation to be sent to a person to attend and for them to attend voluntarily.<sup>13</sup>

However, in practice, the rigidity of party discipline in Australia means that committees of the House of Representatives, on which the government of course has a majority, will never pursue an unco-operative minister. That leaves the Senate, but in the case of that chamber too committees are likely to call ministers to account only in periods when opposition parties have a majority. Yet even under those circumstances ministers who refuse to answer questions are unlikely to face sanctions, because although such conduct is punishable as contempt, under the rules of parliamentary privilege the power to impose a sanction vests not in the committee, but rather in the chamber as a whole – and here again one encounters the nefarious effects of the Coalition / Labor duopoly, because neither side of politics will use its power when in control of the Senate to set a precedent that will come back to bite it when positions are reversed and it is in government rather than in opposition.

This was revealed most starkly in 2002, when a Senate committee was established to inquire into the Children Overboard affair.<sup>14</sup> As those who followed the events of that era will recall, the critical issue in contention was at what stage information from defence personnel to the effect that children had not been thrown overboard by asylum-seekers was communicated to ministers in the then Coalition government. Peter Reith, who had been Defence Minister at

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<sup>12</sup> In the case of the Senate see Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 11<sup>th</sup> ed, Canberra, 2004) 30, 57 and 377.

<sup>13</sup> *Ibid* 378.

<sup>14</sup> See the Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Inquiry into a Certain Maritime Incident* (2002) at

<[http://www.aph.gov.au/Senate/committee/maritime\\_incident\\_ctte/index.htm](http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/index.htm)>.



the time the events occurred, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee's requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the Senate to initiate contempt proceedings, against Reith. The reason that this did not occur was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers.<sup>15</sup> So the most that ever happens when ministers refuse to provide evidence to Senate committees is that a motion of censure (in other words, a formal slap on the wrist) is passed against them - a remedy which the major parties are happy to use when in opposition because it causes political embarrassment to the government, but which does not establish a precedent that would be used to impose significant penalties such as suspension from the house, a fine or imprisonment on them once they are back in power.<sup>16</sup>

The result of this is that ministers commonly refuse to answer questions put by parliamentary committees or instruct public servants not to do so. Examples of these include the ministerial prohibition of defence force personnel appearing before the inquiry into what knowledge the ADF had of torture of Iraqi prisoners at Abu Ghreib,<sup>17</sup> and the prohibition against public servants appearing before the inquiry into the AWB scandal.<sup>18</sup> The most striking recent example of ministerial defiance of legislative oversight occurred in 2014 when the then Minister for Migration, Scott Morrison, refused to answer questions posed by a Senate committee relating to how many asylum-seeker boats had been intercepted in Australian territorial waters, and also refused to provide the committee with documents it had requested. This is in line with an emerging trend on the part of the government to label virtually all information relating to border control as too sensitive for public discussion. The problem with this, of course, is that there is no test – other than the government's own assertion – for determining whether the public interest justifies non-disclosure of information, and thus nothing to prevent ministers adopting the same approach to matters as mundane as the number of vehicles on the roads in Australia or the number of paintings in the store-rooms of the National Gallery.

In light of this it is no wonder that the late Harry Evans, Clerk of the Senate, made the following comment in relation to the condition of responsible government in Australia:<sup>19</sup>

Responsible government was a system which existed from the mid-19<sup>th</sup> century to the early 20<sup>th</sup> century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been

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<sup>15</sup> See Megan Saunders, 'Truth is out there, somewhere', *The Australian*, 25 October 2002, 12.

<sup>16</sup> For discussion of this political dimension of this issue see Laurie Oakes, 'Hypocritical oath', *The Bulletin*, 13 March 2002, 17; Margo Kingston, 'Labor backdown opens black hole of accountability', *Sydney Morning Herald On-line*, 1 August 2002, <<http://www.smh.com.au/articles/2002/07/31/1027926912621.html>> ; Sarah Stephen, 'Refugee drownings: Labor sabotages inquiry', *Green Left Weekly*, 11 September 2002 <<http://www.greenleft.org.au/back/2002/508/508p24.htm>> and Margo Kingston, 'Labor's latest travesty', *Sydney Morning Herald On-line*, 23 October 2002, <<http://www.smh.com.au/articles/2002/10/23/1034561546910.html>> .

<sup>17</sup> Alexandra Kirk, ABC Television, *The World Today*, 1 June 2004 (Tanya Nolan) <<http://www.abc.net.au/worldtoday/content/2004/s1120461.htm>> .

<sup>18</sup> See Samantha Maiden, 'Gag in Senate illegal, clerk warns', *The Australian* (Sydney), 12 April 2006, 4; and Ross Peake, 'Cover-up claim as officials gagged', *Canberra Times* (Canberra), 14 February 2006, 2.

<sup>19</sup> Harry Evans 'The Australian Parliament: Time for Reform' (Speech delivered at the National Press Club, Canberra, 24 April 2002), at <<http://australianpolitics.com/2002/04/24/harry-evans-parliamentary-reform-speech.html>> .

replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and “rusted on” majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government’s control of the parliamentary processes means that it is never effectively called to account...

How then is this to be remedied? Clearly constitutional conventions have lost their binding force in Australia and thus it is no longer satisfactory to leave the workings of responsible government to the good-will of ministers. The answer is therefore to replace these conventional rules with statutory provisions, which compel executive subordination to legislative oversight with penalties for non-compliance.

Obviously provision would have to be made for genuine cases where the national interest militates against public disclosure – but this would not mean allowing the executive to claim immunity from providing information to parliamentary committees merely on its own assertion that the public interest requires that, or allowing blanket suppression of information where public interest immunity exists in relation only to part of it. Rather what is required is a set of rules under which (i) the default position is that there is a legal, not just political, duty on ministers to answer questions and provide such other evidence as is required by parliamentary committees, (ii) which allows proceedings to be taken in the courts in cases of non-compliance, with an appropriate regime of penalties and (iii) which allows ministers the opportunity to make out a defence of public interest, in *in camera* proceedings if necessary, in relation to such part of the information as is being requested ought not to be disclosed for objective reasons of national interest. It would be critical to the success of such a system that the right to initiate proceedings for non-compliance should vest not only in houses of Parliament and in committees as a whole, but should also extend to individual committee members. None of this would require a change to the Constitution – ordinary legislation, most suitably appropriate amendments to the *Parliamentary Privileges Act 1989* (Cth), would suffice.

Putting executive accountability to the legislature on a legal, rather than a conventional, footing, and making the application of penalties no longer subject to political majorities, would have dramatic consequences for the doctrine of responsible government.

First, in the vast majority of cases, ministers would simply acquiesce and answer questions, because in the vast majority of cases the reality is that public immunity would not apply. Then, in those cases where ministers do decline to provide information on grounds of public immunity, on many occasions agreement might be reached between the minister and committees as to measures which might be taken to limit publication of the information – for example, by holding closed-door hearings. It would in all likelihood be that only a small minority of cases would ever need to be taken to the courts for adjudication as to whether ministerial silence was contemptuous or was based on a genuine claim of immunity. This has certainly been the experience in the United States, where long-standing precedent gives Congress the right to obtain information from the executive,<sup>20</sup> and where the legislature has had recourse to the courts to enforce subpoenas against members of the administration, most famously during the Nixon era.<sup>21</sup> However, in most cases, the two branches reach a political compromise,<sup>22</sup> and it is a quite normal feature of the political process in the United States for

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<sup>20</sup> See *Anderson v Dunn* 19 US (6 Wheat.) 204 (1821) and *McGrain v Daugherty* 273 US 135 (1927).

<sup>21</sup> See *United States v Nixon* 418 US 683 (1974) and *Nixon v Administrator of General Services* 433 US 425 (1977).

<sup>22</sup> See Louis Fisher, ‘Congressional Access to Information: Using Legislative Will and Leverage’, (2002) 52 *Duke Law Journal* 323, 325.

members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees,<sup>23</sup> or for information to be provided in a confidential briefing to members of a committee.<sup>24</sup> Disputes are thus almost always settled by negotiation between Congress and the administration.<sup>25</sup> The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding without becoming involved in party-political disputes – there is sufficient case law for the courts to engage with in determining whether a claim of executive privilege is valid. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

The important consequence of implementing such a reform in Australia would be that no longer would it be the case – as it is at present – that ministers could refuse to provide information to the legislature without fear of sanction and without having to satisfy a test as to whether there are objective grounds justifying non-disclosure.

#### IV ACHIEVING REFORM

This paper has not yet addressed the practicalities of reform. As someone who has taught constitutional law in South Africa and in New Zealand during periods when both jurisdictions underwent profound constitutional change, I find the lack of debate about constitutional reform in Australia disheartening – all the more so given the many issues (apart from the ones canvassed here) that need to be addressed. It seems to me that the difficulty in achieving success at referendum deters people, academics included, from engaging in critique of the Constitution and from proposing constitutional change. The basis of the problem lies in the fact that the poor standard of civics education in Australia, which means that voters have little knowledge of how the Constitution works and are, therefore, understandably fearful of changing that which they do not understand. Add to this the ease with which politicians whose interests would be adversely affected by constitutional reform are able to play upon those fears, and one ends up with an environment in which it is extraordinarily difficult to achieve constitutional reform.

Yet I would argue that conditions are, in fact, more propitious for constitutional change than they have been in many years. The results of a 2014 public opinion survey of the attitude of a representative sample of voters to various questions on a wide range of constitutional reforms published by the author are instructive.<sup>26</sup> The answers to five of these questions are instructive for the purposes of this paper:

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<sup>23</sup> Ibid 394-401. Although an incumbent President has never been summonsed to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon - see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability*, Johns Hopkins Press, 1994, 90.

<sup>24</sup> Ibid, 150.

<sup>25</sup> William Marshall, 'The Limits on Congress's Authority to Investigate the President' (2004) *University of Illinois Law Review* 781, 806-08.

<sup>26</sup> Bede Harris 'A Survey of Voter Attitudes to Constitutional Reform' 2014 (12) *Canberra Law Review* 110.

Do you think that the electoral system should ensure that parties are allocated seats in Parliament in proportion to their percentage share of the votes they receive throughout Australia?

Yes 75%

No 25%

Under the current electoral system for the House of Representatives, MPs are elected in single-member electorates. A single party usually gets enough seats to form government, but parties do not get representation in proportion to their support nationwide. This can even lead to a government coming to power with fewer votes nationwide than were received by the opposition. By contrast, under a proportional representation system, parties always get seats in proportion to their share of the national vote. Governments are usually formed by a coalition of parties which, in combination, will always represent a majority of voters. In light of the above, which of these systems do you prefer:

The current electoral system 42%

Proportional representation 58%

In other words, even when advised of the fact that proportional representation usually leads to government by coalition, a significant majority of respondents remained in favour of it.

So far as responsible government is concerned, respondents were asked the following:

Parliamentary Committees scrutinise legislation, conduct public inquiries on matters referred to them by Parliament as a whole and hold the government to account by asking questions of Ministers and public servants. In your view, should Ministers and public servants be obliged to answer questions put to them by parliamentary committees?

Yes 96%

No 4%

Should Ministers who fail to answer questions put by parliamentary committees, or who instruct public servants not to do so, face penalties?

Yes 89%

No 11%

If a Minister says that they or public servants working for them should not answer questions put by a parliamentary committee because the answer might disclose matters which it is in the public interest to keep confidential (such as internal government deliberations or information relating to national security), then which of the following should happen:

The Minister's statement should be accepted without question. 15%

The courts should consider whether the Minister's claim is valid, in a closed (non-public) hearing if necessary. 85%

The answers given to these questions indicate that, provided that the issues are clearly delineated, and care is taken to explain to voters the shortcomings of the current system, their appetite for reform is stronger than one might expect.

Popular disenchantment with the two major political blocs is at an all-time high. The fact that electoral reform and the strengthening of legislative controls over the executive are not only good in themselves but would also provide a mechanism to overturn the dominance currently enjoyed by the two major political blocs, means that a campaign which focuses on the inherent unfairness of the electoral system and on the unaccountability of the executive to Parliament would have a chance of inspiring sufficient public outrage to lead to constitutional change. And therein lies the challenge: Voters need to overcome their fear of constitutional reform and take the initiative to effect change, rather than passively bewail their dissatisfaction with the status quo.

