

Disclaimer: The thesis proposal shown below was developed in 1996. It is intended as a guideline to structuring a thesis proposal. It should be seen as an example of how to formulate major themes for analysis.

Outline of Thesis Proposal **"Constitutional Checks and Balances on the Commonwealth Executive"**

Aims of Thesis

- To identify the extent of the need for checks and balances on the exercise of executive power within the modern Australian system of representative government.
- To identify and critically evaluate the checks and balances currently operating in contemporary Australian constitutional law and practice in relation to the exercise of executive power by institutions of the executive government.
- To make suggestions for clarification of the operation of such checks and balances where necessary. Further, to suggest extensions and / or modifications to current checks and balances where they may not be operating in an effective manner to control the powers of the executive.
- To suggest practical ways in which certain suggested checks and balances might be incorporated into Australian constitutional practice without necessarily relying on formal amendment of the Commonwealth Constitution under the section 128 mechanism.

Reasons for the Inquiry

The need for different categories of powers to be exercised by separate institutions of government has been recognised consistently in democratic political systems the world over. The argument for this has been that over-centralisation of power can lead to corrupt government ¹. Thus, most modern democratic systems of government are constructed in a way that separates different classes of governmental power and vests each class of power in the control of a different organ of government. Under a political system which incorporates such a "separation of powers" doctrine, executive, legislative and judicial powers are vested in separate arms of government ².

Additionally, it has been noted that under a federal system, central and state powers are vested in separate *levels* of government ³. This type of separation of powers between different levels of government may also be seen as a mechanism to prevent the concentration of too much power in the hands of one centralised level of government ⁴.

¹ See, for example, Wood, D., Hunter, R. and Ingleby, R., "Themes in Liberal Legal and Constitutional Theory" in Hunter, R., Ingleby, R. and Johnstone, R., (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) Allen & Unwin: New South Wales, 53-55; Hamer, D., "Can Responsible Government Survive in Australia?" in *Papers on Parliament No. 26: Republicanism, Responsible Government and Human Rights* (August 1995) Department of the Senate: Canberra, 43-4; Booker, K., Glass, A. and Watt, R., *Federal Constitutional Law: An Introduction* (1994) Butterworths: Victoria, 159.

² For example, it has been held that there is a separation of powers doctrine implied into the text of the Australian Commonwealth Constitution, particularly in relation to the structure of the Constitution and the drafting of sections 1, 61 and 71 which vest legislative, executive and judicial power respectively in separate arms of the Commonwealth government (*R v Kirby; Ex parte Boilermakers' Society of Australia* ("*The Boilermakers' case*") (1956) 94 CLR 254, 274).

³ This is the case in federations such as Australia, the United States and Canada.

⁴ See, Hunter et al (above).

Despite the protections afforded to a democratic system by the separation of powers doctrine, most democracies have developed other checks and balances on the exercise of various classes of powers. The rationale for such checks and balances is to create additional protections for democracy by preventing any class of power from being exercised in an uncontrolled or undesirable manner by a particular institution of government.

One category of power that may be of particular concern if it is exercised in an unchecked manner is executive power. At its most basic level, executive power is the power to "execute" or administer the laws made by the legislature⁵. This entails the day to day carrying out of government programs that have been established within various legislative frameworks. However, in practice, in many modern representative democracies it is the executive arm of government that makes the significant governmental decisions and drafts new governmental programs as bills which are presented to the legislature for consideration. Where a party political system is in operation, and the members of the executive government are drawn from the party with a majority in the legislature (or, in many cases, in the lower chamber of a bicameral legislature), the executive will generally have the power to initiate and carry out any governmental scheme, using the parliament that it controls to enact its desired programs into law.

This is arguably the case in Australia where the members of the executive government are drawn from the party with the majority in the House of Representatives⁶. Many commentators on the Australian system of government have emphasised the difficulties inherent in such a system in terms of the concentration of power in the executive government⁷. Hamer, for instance, has spoken out against the perceived over-concentration of power in the Commonwealth executive government:

[The Commonwealth Parliament] is totally useless as a legislature, merely acting as a rubber stamp for the bills produced by the governmental party. As an example of its performance, during the twelve years from 1976 to 1987, under two different governments, when nearly 2,000 bills were passed, not a single opposition amendment to any of them was accepted - with the exception of two bills which were handled by an experimental procedure, an experiment that was soon stopped by government.⁸

Hamer's concern, which has been recognised by others⁹, is that notwithstanding that the Commonwealth Constitution embodies a separation of powers doctrine in theory, the practical reality is that the executive, not the parliament, controls the operation of Commonwealth legislative power.

⁵ See, for example, the definition of "executive" in Bird, R., (ed), *Osborn's Concise Law Dictionary* (7 ed) (1983) Sweet & Maxwell: London, 140; see also, Booker, K., Glass, A. and Watt, R., *Federal Constitutional Law: An Introduction* (1994) Butterworths: Australia, 124.

⁶ By comparison, in the United States there is a more strict separation of powers under which the elected President heads the executive government, the major officeholders of which are appointed by him / her, whereas the Congress (the United States legislature) is separately elected by the citizens.

⁷ See, for example, Ratnapala, S., "Westminster Democracy and the Separation of Powers: Can they Co-exist?" in Department of the Senate, *Papers on Parliament No. 26. Republicanism, Responsible Government and Human Rights* (August 1995) Department of the Senate: Canberra, 87.

⁸ *Hamer (above)*, 41.

⁹ See, for example, Ratnapala, S. (above); Thompson, E., "The 'Westminster' Mutation" in Weller, P. and Jaensch, D. (eds), *Responsible Government in Australia* (1980) Drummond: Victoria, 36; Sharman, C., "Australia as a Compound Republic" (1990) 25(1) *Politics* 1, 3.

Thus, there may be an over-concentration of governmental power (of a mixed legislative and executive character) in the one arm of government, the executive¹⁰.

Other practical realities within the Australian system of government suggest that this may be the case. One example may be the fact that the executive arm of government has often been granted very broad regulation-making powers under various pieces of legislation, obviously at the instigation of the executive government itself. The High Court has held this practice to be unobjectionable, despite the separation of powers doctrines¹¹.

From these observations, several points can be made about the effectiveness of the separation of powers doctrine as a protection against the over-concentration of government functions in the executive in Australia. The first point is that there is not a strict separation of powers between the executive and legislative arms of government at the Commonwealth level in Australia¹². The members of the executive are drawn from the legislature¹³ and, in the modern party political system, the executive represents the party with the majority in the lower house and exercises effective control over both executive and legislative power in the usual case¹⁴. Secondly, the High Court seems unwilling, at least in some instances, to act as a check on the executive in terms of its exercise of significant amounts of legislative power¹⁵.

Obviously, as Australian constitutional law and practice have developed, the separation of powers doctrine has been first identified and then applied in a flexible way to the question of the separation of legislative and executive power. However, alongside these developments has been the development of other checks and balances on executive and legislative power which have been primarily aimed at preventing the concentration of too much power in the same group of people. Sometimes these checks and balances have been directed specifically at the executive, and other times at the parliament, particularly the House of Representatives as the chamber predominantly controlled by the executive government of the day.

The object of this thesis will be to identify some of these checks and balances that exist within modern Australian constitutional law and political practice. An attempt will then be made to evaluate critically the operation of these mechanisms as effective checks on the overuse of power by one group of people, particularly in situations where power may be exercised in a manner which could be regarded as undemocratic. Suggestions will then be made as to areas in which the operation of some of these mechanisms could be clarified or extended / modified to better achieve the aims for which they have developed over time. Finally, consideration will be given to the best method for incorporation of these suggested changes into Australian constitutional practice. It will be suggested that informal codification of some of these ideas, perhaps in the form of a "Code of Practice" for the executive, may be preferable

¹⁰ Similar comments may be made in respect of the United Kingdom system of government from which much of the Australian system of government has been derived.

¹¹ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

¹² This has been recognised by many commentators in Australia. See, for example, Booker et al (above), chapter 7; Zines, L., *The High Court and the Constitution* (3 ed) (1992) Butterworths: Australia, 136-143; Hanks, P.J., *Constitutional Law in Australia* (1991) Butterworths: Australia, 393-397.

¹³ See section 64 of the Commonwealth Constitution which states that all government ministers shall, within three months of their appointment, hold a seat in the House of Representatives or the Senate.

¹⁴ There may be instances in which the executive government does not reflect the majority party in parliament. For example, in the situation where no particular political party gains a clear majority in an election, a minority government may be formed. In such cases, parliament may serve as a more effective check on the executive government than in the usual "majority party" situation.

¹⁵ See, for example, *Dignan's case* (above).

in some instances to relying on the section 128 amendment mechanism in the Constitution to effect formal change. Advantages and disadvantages of such a Code of Practice will be dealt with in the final section of the thesis.

Issues for Discussion

The following describes the types of issues likely to be discussed in the thesis.

The types of checks and balances proposed to be analysed in the thesis may include:

- temporal restraints on the accumulation of legislative and / or executive powers; for example, fixed term appointments for parliamentarians;
- the operation of the doctrine of responsible government in modern Australian representative democracy;
- judicial review of executive decisions;
- judicial review of the legislative process;
- judicial identification of implied rights in the Commonwealth Constitution which may impact on the way in which certain political practices are conducted (for instance, conduct of federal elections);
- the potential for a Head of State to act as check on executive and / or legislative power; and
- the Senate's power to function as a House of Review and sometimes as a more significant check on activities of the House of Representatives and, effectively, the executive government of the day.

Having evaluated the constitutional laws and practices that have developed since federation in relation to the above, it should be possible to identify where there is room for improvement in this area. Suggestions would then be made for ways in which the checks and balances which have developed in the system might operate more effectively. Further, recommendations would be made for the establishment of additional checks and balances.

Such recommendations for the future would include consideration of the following¹⁶:

1. *The reworking of the position of the Australian Head of State.* This may be of particular relevance in the lead up to the centenary of federation while there is still significant debate over the issue of whether Australia should become a republic¹⁷. If the office of Head of State were reconsidered, it would be appropriate to consider issues relating to the levels of accountability owed to the Head of State by the executive government and the House of Representatives.

This issue should be considered in conjunction with item 2 below. It would necessitate a consideration of possible constitutional amendment in this area. Some suggestions for such amendment have been made recently by several commentators in the area¹⁸.

¹⁶ A number of the following issues are interconnected and account would need to be taken of this in the structure of the thesis.

¹⁷ On this debate, see, for example, Republic Advisory Committee Report, *An Australian Republic: The Options (1993)* Commonwealth Government Printer: Canberra (the "Turnbull Report"); Keating, P.J., "An Australian Republic: The Way Forward" (speech delivered to the House of Representatives, 7 June 1995); Galligan, B., *A Federal Republic: Australia's Constitutional System of Government (1995)* Cambridge University Press: United Kingdom; Winterton, G. (ed), *We, the People (1994)* Allen & Unwin: Australia; Teague, B., "An Australian Head of State the Contemporary Debate [sic]" in *Papers on Parliament No. 26* (above).

¹⁸ See, for example, Winterton, G. (above), *The Turnbull Report* (above).

2. *The total or partial identification and codification of some constitutional conventions relating to the powers of the executive government, the legislature and the Head of State.* This may be particularly relevant in relation to a number of supposed conventions which were hotly debated at the time of the 1975 constitutional crisis¹⁹. Such codification may give more workable solutions to problems such as: (a) whether and, if so, when, the Senate has power to block supply; (b) whether the Governor-General has power to act against the advice of his Prime Minister; and, (c) identification of the circumstances in which a Prime Minister may be regarded as acting "illegally" or "unconstitutionally".

Several commentators have suggested that codifying a number of conventions relating to certain governmental practices would clarify many issues relating to the levels of responsibility that certain institutions of government owe to each other; for instance, the degree to which a Prime Minister may be accountable to a Head of State and vice versa, or the degree to which the executive government may be accountable to one or both Houses of Parliament²⁰.

Codification could take place in a number of ways. Several options have been mooted in the Turnbull Report²¹. These included the incorporation of such conventions into the text of the Constitution, the enactment of legislation incorporating certain conventions, and the drafting of a "Code of Practice" on conventions as a guide to executive decision-makers²². Codification of conventions may also provide for the justiciability of certain conventions in matters before the High Court which may, in turn, serve as an additional check on the exercise of executive power.

3. *A reconsideration and potential reworking of constitutional provisions and/or constitutional conventions relating to the doctrine of responsible government.* This may clarify certain significant issues relating to potential checks on the power of the executive. It might be that the doctrine of responsible government needs to be reworked and somehow codified (either by way of constitutional amendment or otherwise) to clarify issues such as: (a) the extent to which the executive is actually responsible to parliament, if at all; and, (b) if there is executive accountability to parliament in modern Australian democracy, the extent to which the executive is accountable to the Senate, if at all. (Clearly there is an overlap here with item 2 above in terms of issues such as the possibility of codifying constitutional conventions that impact on the operation of the doctrine of responsible government.)

It may be that the doctrine of responsible government is so fundamentally flawed in its application to modern Australian political practice that it needs to be rejected decisively as a check on executive power. If, in reality, the executive government controls the lower house, there may no longer be any place for the doctrine of responsible government in Australian constitutional law and practice. Therefore, the question of the very existence of the doctrine in modern Australian politics needs consideration here.

4. *The clarification of the Senate's role as a check on executive power.* Again, perhaps constitutional amendment or some other kind of codification on the role of the Senate in modern Australian political practice would clarify the situations in which the Senate may validly function as a check on the executive. Issues that need clarification in modern Australian constitutional

¹⁹ This refers to the events of 11 November 1975 (and the political activities which preceded them) which culminated in the then Prime Minister, Gough Whitlam, being dismissed by the then Governor-General, Sir John Kerr.

²⁰ See, for example, The Turnbull Report, 89-116; Cooray, L.J.M., *Conventions, the Australian Constitution and the Future* (1979) Legal Books Pty Ltd: Sydney, 91.

²¹ See footnote 17 above for full citation.

²² *ibid.*, 94-112

practice include: (a) the extent to which the executive government may be responsible to the Senate under the doctrine of responsible government (as noted in item 3 above)²³; (b) the ability of the Senate (as opposed to the executive party controlled House of Representatives) to take action against members of the administration for contempt of parliament; and (c) the extent to which minority party and independent senators holding the balance of power in the Senate should be considered to have a democratic mandate to veto or otherwise temper executive government action in their role as members of parliament²⁴.

Particular consideration may also need to be given to recent High Court pronouncements and academic commentary on the nature of representative democracy in modern Australian constitutional law and political practice and the role of the Senate within such conceptions of democracy²⁵. It may be that if the Senate is regarded as a more "democratic" chamber than previously thought, this would support a notion that the executive owes some degree of accountability to the Senate. The development and increasing use of powerful Senate Committees in Australian political practice may also support such a line of reasoning. However, the question may be put whether it is appropriate for the High Court in particular to make sweeping statements about the nature of representative democracy in Australia. This issue is taken up in item 5 below.

5. *Examination of the role of Commonwealth courts as checks on executive power and suggestions for clarification/ extension of such checks.* Under the separation of powers doctrine as it operates in Australia, judicial power is separated quite strictly from legislative and executive power²⁶ subject to some minor exceptions²⁷. Thus, judicial power, as exercised by the High Court and the Federal Court in particular has the potential to operate as a powerful check on the executive. Questions therefore arise as to (a) the ways in which Commonwealth courts have operated in the past as a check on executive power; and, (b) whether it is necessary to clarify the extent to which courts may operate in such a way.

In terms of current practice, the ways in which courts may be seen to check the exercise of executive power include the following:

²³ This would involve a consideration of the literature that arose during the debate around the 1975 constitutional crisis in relation to the role of the Senate as well as more contemporary literature and judicial comment about responsible government and representative democracy in Australia.

²⁴ Kernot, C., "Mandate Rests in the Votes" (21 March 1996) *The Australian*, 11; Kernot, C., "Democrats Telegraph a Stand" (12 March 1996) *Sydney Morning Herald*, 13; Kernot, C., "The Frustrations of Being an Umpire" (1996) 28 *Parliamentary Pattern* 24-25; Kernot, C., "The Role of the Australian Democrats in Australian Politics" (speech to Public Questions Society, Wesley College, Melbourne, 12 May 1995); Jenkin, G., "Me Australian Democrats' Key Principles" (3 May 1996) <http://www.uq.edu.au/~e2gienki/ad.principles.html>, 1.

²⁵ See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Langer v Commonwealth* (1996) 134 ALR 400; *McGinty v Western Australia* (1996) 134 ALR 289; Galligan, B., *A Federal Republic: Australia's Constitutional System of Government* (1995) Cambridge University Press: United Kingdom; Galligan, B. and Uhr, J., "Australian Federal Democracy and the Senate" (1990) 1 *Public Law Review* 309.

²⁶ See, for example, *The Boilermakers case* (above); *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

²⁷ See, for example, cases such as *Harris v Caladine* (1991) 172 CLR 84 where certain judicial powers were held to be validly delegated to executive officers of the Family Court; *Grollo v Commissioner of Australian Federal Police* (1995) 131 ALR 225 (following *Hilton v Wells* (1985) 157 CLR 57) where Federal Court judges were held to be able to exercise certain administrative functions provided that they were not incompatible with their judicial functions.

- Judicial review of administrative decisions under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the "ADJR Act"). Under the ADJR Act the Federal court is empowered to review certain decisions made by the executive government. This does act as a check on the executive to some extent, but has certain pronounced limitations: (a) the Federal Court can only check executive action in cases specifically brought before it - it cannot comment on anything that does not arise as a dispute between two or more parties; (b) as the powers of judicial review are granted by legislation, they may also be removed by the parliament which, as noted above, is usually controlled predominantly by the executive; (c) the Federal Court is limited by the provisions of the ADJR Act in relation to the type of decisions it may review, the factors it may take into account in reviewing such decisions and the types of orders it may make.
- High Court decisions which impact directly on administrative decisionmakers. Some High Court decisions reviewing the discretion exercised by administrative decision-makers may also operate to some extent as a check on the misuse of executive power. The *Teoh* case²⁸ is an example of the High Court making a decision (on the impact of international treaties on Australian law) which affected the executive's ability to make decisions in particular ways.

The result of the *Teoh* case was that administrative decision-makers were bound to have regard to the terms of relevant international treaties when exercising decision making functions. This may be regarded as a type of judicial check on executive function in the sense that it regulated the way in which certain executive activities were to be conducted.

However, the inherent disadvantages in relying on this class of High Court decisions as an effective check on misuse of executive power are: (a) such decisions are generally a result of a dispute between two or more parties being sent to the High Court on appeal on a significant point of constitutional or international law so it they will only arise rarely and in a piecemeal fashion; and (b) it seems that such decisions can be overridden in practice by simple executive directive, and certainly by legislation²⁹.

- Judicial intervention in the legislative process. The High Court has considered the question of whether it has the constitutional power to make pronouncements on the validity of bills before they receive the Royal Assent in cases where a mandatory requirement of the legislative process³⁰ has not been observed³¹. There has never been a decisive High Court pronouncement to clarify the Court's ability to make such pronouncements. However, if this question could be clarified in the

²⁸ Minister for Immigration and Ethnic Affairs v *Teoh* (1995) 69 ALM 423.

²⁹ Mason CJ (as he then was) and Deane J in *Teoh* expressly recognised that the inferences drawn by the High Court in relation to legitimate expectations created by the executive government's ratification of a treaty would only operate in the absence of "statutory or executive indications to the contrary". In the wake of the *Teoh* case, the executive government did issue a directive that contradicted the High Court's decision in the case (see joint statement by Senator Gareth Evans and the then Attorney-General Michael Lavarch, No. M44, 10 May 1995). Further, legislation was drafted by the executive government to codify the government's preferred position on international treaties and administrative decision making (see the Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth)).

³⁰ On the meaning of "mandatory" requirement, see *Clayton v Heffron* (1960) 105 CLR 214; *Victoria v Commonwealth* (1975) 134 CLR 81 (the "PMA Case").

³¹ See, for example, *Cormack v Cope* (1974) 131 CLR 432; *Boland v Hughes* [1988] 14 Leg Rep 18.

affirmative, an additional check on executive power may be created. By checking the way in which parliament, at least the lower house of which is usually controlled by the executive, seeks to enact legislation, the High Court may have power to prevent certain undesirable consequences from arising as a result of the invalid passage of bills through parliament. As has been recognised in the past, it is not necessarily sufficient that invalidly enacted legislation is usually subject to subsequent challenge in the High Court as the parties who seek to challenge an invalid enactment may lose standing subsequent to the enactment of the legislation³². This is of particular concern as the parties seeking to challenge compliance with the legislative process in relation to Commonwealth bills may often be members of opposition parties who are usually in a position of disempowerment in parliament as a result of the executive's effective control of the lower house.

- Discovery of implied rights in the Constitution. A final way in which the High Court may be seen as operating as a check on the exercise of executive power in practice is a consequence of the discovery of implied rights in the Constitution. The obvious example is the implied guarantee of freedom of communication in relation to political and governmental matters³³. This guarantee has operated in practice as a fetter on the ability of the Commonwealth Parliament (at the instigation of the Commonwealth Executive) to enact legislation which limits the ability of politicians and electors to speak freely in relation to political processes³⁴. Criticisms have certainly arisen in relation to the appropriateness of the decisions of the High Court in the area of implied rights³⁵. Ironically, such criticisms are often based on the separation of powers doctrine itself. The argument is that by implying rights into the Constitution, the High Court is really usurping the role of the parliament (and also the people at referendum) by itself amending the Constitution without reference to the section 128 amendment procedure set out in the Constitution.

It should be noted that the High Court does not currently operate as a check on legislative power in terms of the enforcement of constitutional conventions. Although the High Court has recognised the doctrine of responsible government and the existence of the various constitutional conventions which underpin the doctrine³⁶, such conventions have been regarded in constitutional practice as non-justiciable³⁷.

³² This argument was run by the two plaintiff opposition senators *Cormack v Cope* who argued that they had standing to sue prior to the holding of the joint sitting that had been called under the section 57 deadlock procedure in the Commonwealth Constitution. However, subsequent to the enactment of the legislation, they would lose standing. In that situation, the legislation was successfully challenged subsequently in the PMA Case. It should not be assumed, however, that there will always be a party with standing willing to challenge the validity of legislation subsequent to an procedurally invalid enactment.

³³ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

³⁴ See particularly, *Australian Capital Television Pty Ltd v Commonwealth* (above) and *Nationwide News Pty Ltd v Wills* (above).

³⁵ See, for example, Barwick, G., "Democracy Too Precious for Political Tinkering" (3 April 1995) *The Australian* 13; Goldsworthy, J., "The High Court, Implied Rights and the Constitution" (March 1995) *Quadrant* 75; Fullagar, I., "The Role of the High Court: Law or Politics" (1992) 67 *Law Institute Journal* 72; Virtue, B., "The End of Democracy?" (1992) 27 *Australian Law News* 7.

³⁶ See, for example, Mason J (as he then was) in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364-5; Brennan J (as he then was) in *Theophanous v Herald & Weekly Times Ltd* (1994)

Some issues for consideration in the thesis in relation to the role of the High Court in particular as a check on executive power may include:

- (a) To what extent, if at all, should constitutional conventions be justiciable? (This connects with issues raised above in relation to the potential for codification of such conventions.
- (b) Is it appropriate for the High Court to uncover "implied rights" and make other constitutional implications that impact as a check on executive power?³⁸ Should there be some kind of constitutional limitations set down as to the extent to which the High Court may make constitutional implications which have a significant impact on the executive government's ability to carry out its programs? If so, what kind of limitations should there be and how should they be incorporated into modern Australian constitutional practice?
- (c) Is it appropriate for the High Court to comment on the nature of Australian representative democracy in a manner that may impact on the executive's ability to cover out some of its planned programs and additionally may impact on the operation of certain constitutional conventions? For example, if recent High Court cases are interpreted as describing the Senate as a more "representative" chamber than previously thought, might this impact on conventions relating to the level of accountability owed to the Senate by the executive government?
- (d) Is it necessary to clarify / codify (either by constitutional amendment or otherwise) the abilities of the High Court to intervene in the legislative process, particularly in relation to bills which are passing through the complex section 57 or section 129 mechanisms? It may be desirable to allow certain persons with an interest in the legislative process (perhaps opposition or minority party members of parliament) to have standing to bring such actions where failure to make such allowance may result in questionable legislative practices by the majority in parliament, effectively controlled by the executive. (In relation to sections 57 and 128 of the Constitution in particular, it may be worth considering whether any amendments are necessary to clarify the operation of the sections³⁹. This would make it easier for the Court to determine whether the provisions of the section in question had been / or were likely to be contravened in a particular case.)

182 CLR 104, 147; *Australian Capital Television Limited v Commonwealth* (1992) 108 ALR 577, 630 (per Dawson J) and 666 (per McHugh J).

³⁷ See, for example, Street, H and Brazier, R. (eds), *deSmith Constitutional and Administrative Law* (5 ed) Penguin: United Kingdom, 45; Cooray, L.J.M. (above), 101.

³⁸ It should be borne in mind in such a discussion that the application of the separation of powers doctrine at the Commonwealth level in Australia is itself a result of constitutional implication. See *The Boilermaker's Case*.

³⁹ For example, consideration perhaps should be given to amending sections 57 and 128 in relation to the meaning of "failure to pass" so that there can be greater certainty as to whether relevant three month intervals have elapsed (see the PMA Case).