

Speech to the Institute of Public Administration Australia (ACT Division)

“Prosper the Commonwealth: The Public Service and Nationhood”

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I should like to address the role played by the public service as one of the central national institutions of our democratic Commonwealth. I need to begin with the act of British settlement in 1788. British institutions were the platform for the building of a distinctly Australian system of national governance. With the assertion of British sovereignty in 1788, the foundations of that system were laid. On that January summer’s day, the Common Law, with its ancient rights, the political philosophy of Hobbes and Locke, the primacy of Parliament over absolute monarchy, and so much more, came ashore. From settlement to Federation in 1901, and extending to today, we built the national institutions of governance which constitute the anchor points of our democracy: representative or parliamentary democracy and ‘responsible’ or ministerial government; the rule of law; and the machinery of executive government, including the public service.

However, it should not be thought that our colonial forebears were passive recipients of British political and legal wisdom. Nor should it be thought that British ‘constitutionalism’ arrived fully formed in 1788. Our colonial forebears took the opportunity presented by political reform and increased self-government in the 19th Century to build a local mode of democratic practice— not least with the expansion of the electoral suffrage, especially for women.

On 1st January 1901, a new body politic, the Commonwealth of Australia, came into being, and our Constitution became the fundamental law of Australia. Following British and colonial practice, Chapters I, II and III of the Constitution confer separate powers to the legislature, the executive and the judiciary. Most relevantly, ‘executive power’ as conferred in Chapter II is the power to administer laws and to carry out the business of government. Our fellow public servants were present at the creation of the Commonwealth of Australia when the Governor-General created through the Executive Council the first departments of state under s64 of the

Constitution – Attorney-General’s, Defence, External Affairs, Home Affairs, Postmaster-General’s, Trade and Customs, and the Treasury. In the official history of the Australian Public Service, published in 2001 under the auspices of the Centenary of Federation, there is an image (at page 3) of the first administrative arrangements order, written in Prime Minister Barton’s own hand, setting out the ministry list – the first three of which were Barton himself as Prime Minister and Minister for External Affairs, along with the Attorney-General and the Minister for Home Affairs. And so were laid the legal and administrative foundations of the Commonwealth.

We were also bequeathed another inheritance at this time. In the latter half of the 19th Century, the British civil service underwent significant reform, in the wake of the Northcote-Trevelyan report of 1854, reforms which laid the platform for a merit-based, professional and impartial civil service in the United Kingdom, shorn of the corruption and patronage of earlier times. Thankfully, again, we followed British practice whereby those reforms influenced the development of the colonial civil services and then the public service of the new Commonwealth.

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Why is this history important? Is “the past” not dead? Is it not a created zone of memory, an ideology by which we sanctify our culture, buttress institutions, legitimate power, and invest our societies with a destiny which conveniently validates the present? Whether or not history serves these or other purposes, I shall leave to another day. For my purposes today, suffice to say that history and memory are essential to self-knowledge. They foster identity, continuity and community. A nation-state is not an arbitrary geographical construct that happens to be inhabited at any one time by randomly selected individuals who lack any prior connections or common history. It is not a blank slate to be made and re-made every generation.

The very idea of ‘Australia’ implies continuity in terms of identity and institutions. A nation is of course an ‘imagined community’. Citizens are essentially strangers to one another in that we will never know more than a handful of our fellow countrymen and women, meet them, or even hear of them - even with the spread of social media. But a nation is not an ‘imaginary community’. It is a real phenomenon. The nation-state is a concept which politically and socially binds people, time and space, in that it links our predecessors, our contemporaries and our descendants within a bordered space. Through the nation-state, we are bound together by a ‘social contract’ which is the basis on which rules are set and interests harmonised. The ‘social contract’ founds the political community, shapes its institutions, confers authority, and ensures that power is distributed and balanced. The latter ensures that government can be effected with legitimacy, without any citizen having to seek recourse through extra-constitutional action.

Consider the process of conferring citizenship. With every pledge of allegiance on the part of new citizens, and affirmation of allegiance on the part of existing citizens, our mutual bonds of national association are invoked, as are the undertakings that we have made to one another, to our forebears and to our descendants through the ‘social contract’ that is otherwise known as ‘Australia’. That is why our citizenship pledge and affirmation invoke allegiance to Australia

and its people; to our shared democratic beliefs, rights and liberties; and bind us to the observance of our laws.

National governance is the expression - and enabler - of sovereignty. A nation-state has to be able to make laws and enforce them, and carry out its policies and implement public programmes - and it has to be able to do so within secure borders. All key public goods are organised and effected on national lines – the operation of law, defence, immigration, border protection, taxation, welfare, public safety, education, health, labour markets, and so on. Even where international agreements and treaties have a bearing, their impact is mediated through sovereign law-making and executive action.

There is I would contend a 'nationhood power' – or the constitutional capacity which can be deduced from the existence and character of the national body politic. The extent of the powers and capacities of executive government can be inferred from powers which are conferred by statute, or which reside as the prerogatives of the Crown (including those which are referable to s61 of the Constitution), or are a consequence of the nature of the legal personality of the Commonwealth. This array of powers and capacities is not of course unlimited, and is checked by the Constitution and the law, but within those constraints is as broad and as deep as the nation requires at any particular point. These powers and capacities enable the proper conduct of government for the benefit of the nation. They underpin enterprises and activities which are peculiarly associated with the execution and maintenance of the Constitution, with government for the common good, and with the peace and order of the polity - and which cannot be carried out otherwise, or by any other entity.

This focus on nationhood does not mean isolation from the world. It means that we as a people are sovereign within our state, and we have to be able to protect that sovereignty. Our coming together as a nation in 1901 was a manifestation of sovereign will. Rather than representing a “dead” past, that sovereign act of founding a body politic remains a living force which is reflected in the continuity of Commonwealth laws, the chain of executive action which can be traced back to Federation, and the body of judicial authority which is reflected in the jurisprudence of the land. These threads do not themselves, when viewed backwards in time, terminate on 1st January 1901. The legislative, executive and judicial powers of the Commonwealth themselves extend back in time to inherited legislative, administrative and jurisprudential traditions which were incorporated in the body politic of the Commonwealth at its founding.

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Taking such a long duration view of national institutions matters, and never moreso than when geopolitical and social trends are leading us to think that with the advent of new technologies of connectivity, global inter-connectedness and the rise of global networks of influence we might, perhaps, be able to put musty old political concepts behind us, especially those which have their antecedents in imperial eras.

Let me argue to the contrary. Institutions anchor our polity and ensure that power is legitimated and wielded with consent. I am specifically interested in the national institutions

which constitute the British form of 'constitutionalism' which we inherited through settlement. Our particular 'social contract' cannot be understood without reference to that tradition, and the subsequent evolution of our system of national governance.

British 'constitutionalism' consists of a set of institutional practices which are concerned with a particular mode of distributing the power of the state (known as the "Westminster system"). It reflects historical norms, 'rules' and conventions, some of which are codified but most of which are not. In this system, power is divided such that no single person or group of people can effect arbitrary rule, or indeed a dictatorship, without being checked. The 'rule of law' is the most fundamental value which underpins our system of national governance, a value which holds that power is not to be exercised arbitrarily or oppressively, or absent due process.

The most relevant idea of the Westminster system for public servants is that of ministerial responsibility. The responsibility of the Minister to the electorate through the Parliament, which flows from s64 of the Constitution, is the key feature in our system for effecting popular control over the direction of government. The end of responsible government is that the will of the people prevails, and for that reason Ministers are expected to explain their actions and policies to the Parliament and to keep it informed. Ministers are responsible to the Parliament for their conduct as Ministers, and for that of their departments and agencies. Of course, under the rule of law, Ministers, their departments and agencies are also under judicial scrutiny, not least in light of the original jurisdiction of the High Court, upon which the Constitution confers the power to issue constitutional writs (s75).

This constitutional tradition also relevantly has at its centre the Cabinet system, and the idea of collective Cabinet responsibility and solidarity. The Cabinet is not mentioned in the Constitution. Moreover, the Constitution does not specify the role of the office of Prime Minister. Nor does it set out the procedure by which a Government is formed – which of course falls to the political force which is able to command a majority on the floor of the House of Representatives, insofar as confidence and supply are concerned. The Constitution does not require the formation of an Opposition, led by the Leader of the Opposition, and nor does it require that there be a 'caretaker convention', whereby a Government does not, once an election is called, take significant decisions, absent consultation with the Opposition.

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Perhaps we in the public service take these issues to be simply the natural order of things, and we are not moved to look behind that order of things. At one level, our Constitution, laws and regulations, and the policies and programmes of the executive, seem to constitute our entire realm of consciousness and action. What more is there to comprehend or contemplate? I would suggest much. For one thing, I am becoming concerned, and increasingly so, at the paucity of knowledge of these traditions and understandings amongst public servants – even relatively senior ones. We need to do more to teach and inculcate this worldview.

An apolitical public service is one of the key institutions in our Westminster system. It is the repository of knowledge and practice in relation to key Westminster understandings – such as the Cabinet system and the caretaker conventions, both of which are documented by way of

administrative guidelines which are maintained by the Department of the Prime Minister and Cabinet, under the authority of the Prime Minister. Moreover, the public service is the custodian of continuity in administration, and the repository of knowledge, managerial and administrative skills, strategic policy capability, and service delivery competency. It increases the nation's 'democratic efficiency' – that is, it ensures that elected governments are able to rely upon a ready-made administrative and policy machine which is able to implement its policies and programmes as directed.

Only the public service can bring the widest lens to bear on any given issue, given its broad and deep access to intelligence and data, and its unique capabilities, many of which are not entrusted to the private sector or to non-government groups. While the policy space is crowded and contested – as it should be in a democracy – the public service has a privileged position, due to these capabilities and to its trusted role as the premier, and sometimes sole, adviser to government. Deep, long-term policy thinking and strategic imagination on the part of the public service, and a mutual commitment to a policy partnership, are at the heart of the ministerial-departmental relationship, a relationship which joins the political and the administrative elements of the executive in its most important function – focussing on the advancement of the nation and the “common-wealth”, by which I mean the common good or common well-being. Of course, Ministers must decide the major issues of policy. Our democratic order permits no other approach. However, a public service which does not see itself conjoined to this endeavour has lost its way.

While the public service exists primarily to serve the Government of the day, it also maintains a jealous watch on the papers and records of earlier governments, while also maintaining an underlying capability to serve future governments, including by way of an ability, and a disposition, to switch its loyalty to a newly elected government at the appropriate moment. Elected governments are fully entitled to expect loyalty and dedicated service from its officials. In my experience, Ministers recognise also that this means that former governments are entitled to expect the on-going discretion of the officials who served them, and that discretion all round is a crucial ingredient of our system of governance. The fact that we have a career-based service enhances the effectiveness and cohesion of our democracy, precisely due to this capacity to attend to the interests of past and future governments while only ever serving the commissioned government of the day. In my experience, Ministers and seasoned staff overwhelmingly appreciate this, and indeed fully expect the public service to act accordingly.

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For all of that, it would be mortally dangerous to our system of government for the public service to come to possess an aggrandised conception of its role in the proper processes of government - as the ultimate guardian of 'the public interest', located outside of the political process. There is no legitimate basis for contending that unelected officials have any purportedly 'supranational' responsibility as custodians of the 'public interest', somehow separately identified from the domain that is termed too often to be that of 'politics'.

As I touched on earlier, the very object of executive government is to utilise all of the powers and capacities which are intrinsic to nationhood in order to advance *the public interest*. This

consists of substantive and purposive activity, where ends, means and ways have to be brought together, first in policy and then in action. Only the elected executive can determine these questions. While we in public service are all expected to act ‘in the public interest’ – which goes to procedural questions of acting reasonably, impartially, honestly, lawfully, with integrity, and avoiding conflicts of interests, properly accounting for public funds, and so on – only elected members of the executive can *determine* and *advance* ‘the public interest’, for only they can do so under the supervision of the people through their elected representatives.

The requirement for the public service to be politically neutral does not, and cannot, mean that the public service is uninvolved in ‘politics’ as such. Governing is intrinsically concerned with politics, in that it entails the public contest of values, ideas and policies. In this sense, the implementation of policy is a part of the ‘political’ process of the nation. This does not mean that the public service is ‘politicised’. There is no inconsistency in the APS being both responsive to the government, on the one hand, and simultaneously existing as an apolitical career service to enhance the effectiveness and cohesion of Australia’s democracy.

Almost 50 years ago, on 18th November 1968, Sir Paul Hasluck gave the Garran Oration to this body. He was at the time serving as the Minister for External Affairs, and would go on to serve as the Governor-General (1969-74). The title of his Oration says it all: ‘The Public Servant and Politics’. Sir Paul said in his Oration that ‘[P]olitics is as comprehensive and as complex as the whole process of decision-making in government...The public service cannot avoid politics any more than fish can avoid the water in which they swim.’ He advised public servants to be jealous of their honour and not seek to please a Minister – but rather to inform and advise in good conscience according to one’s knowledge and judgement.

The public servant cannot be unaware of political happenings. They are all around us. What is important for the public servant is to absent oneself from any partisan discussions and avoid exposure to raw politics, especially as it might relate to electoral considerations or criticisms of the Opposition. Secretaries of departments have a particular obligation to protect the boundary between the political and the administrative – especially in relation to the law as it relates to non-interference in public service appointments; the integrity of departmental advice as provided (which must never be withdrawn or modified at the request of the Minister or ministerial staff); and generally upholding the impartiality of the public service. Ensuring that everyone stays on the correct side of the line is not always straightforward and there are grey areas. In my experience, Ministers and seasoned staff well understand this, and are just as keen to ensure that the ‘administrative’ does not stray into the ‘political’.

Of course, as already observed, in our Westminster system, Ministers are duty-bound to make the final decisions on all matters of policy, but in my experience Ministers are equally, in the main, inclined to take advice in relation to matters such as legal risk, expense, conflict with extant Cabinet authority, implementation challenges, international complexities and so on. I would contend indeed that, constitutionally, the elected and unelected executive is a single, integrated scheme. This is best seen in the partnership between a Minister and a Secretary, a partnership which joins the political and the administrative in an association for the common good, and specifically for the employment of national powers and capacities for the advancement of the public interest. There is no doubt that the Minister is in charge as the senior partner, while the Secretary by law runs the Department “under the Minister”. I deliberately here am using the term “partnership” – it is a time-limited association which does not extend, for instance, beyond elections where the government is defeated. If you are

looking for a reference to “teams” in this context, you would be listening to a lecture on the operation of political parties. As in any partnership, the relationship has to be built on close trust and evident confidence, for the sake of the proper conduct of the administration of the Commonwealth.

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Unlike some other aspects of our version of the Westminster system, the underlying conventions of the public service as an institution have been codified in law, in the form of the Australian Public Service Values and the associated APS Code of Conduct, which are enshrined in the *Public Service Act 1999*. Relevantly, the Act (s10) requires APS officers to be ‘committed to service’, which amongst other things requires us to be responsive to Ministers, and understand the Government’s objectives and the environment in which it operates. The Act requires us to be ‘accountable’ to the Australian community under the law, within the framework of Ministerial responsibility. It requires us to be ‘impartial’ and apolitical, providing the Government with advice that is frank, honest, and timely, and is based on the best available evidence. The Australian Public Service Commissioner has issued Directions which spell out the expectations of APS officers with regard to impartiality. In summary, we are expected to serve irrespective of which political party is in power and of our own personal political beliefs, and our actions must not provide grounds for a reasonable person to conclude that we could not serve a government of another political persuasion.

Moreover, public service employment is taken to go beyond the implied contractual duty that would be owed to an employer. We are ‘officers’ who are charged to carry out the business of the Commonwealth, holders of special positions which serve public and constitutional purposes. To the end of maintaining public confidence, we are required to ‘act in the public interest’ and to observe tighter strictures and limitations in terms of integrity and professional standards than are to be found in most other areas of employment.

Taken together, the law and our own professional outlook mean this: our vocational calling is to assist governments to be better than they would otherwise be, but not to seek to make them different governments, which perhaps might conform to our preferences and outlooks. If we have a different interpretation of the ‘public interest’, and feel strongly enough about it, we should resign our positions as public servants and run for elected office ourselves.

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It is sometimes said that we are living in a ‘post-truth’ world, which is characterised by so-called ‘fake news’ and disinformation, as well as the ascendancy of opinion, belief and emotion over facts and ‘the Truth’. The modern milieu has an appearance of immediacy (“going viral”) and connectedness (with its trending, hashtags, and ‘influencers’) – whereby, it is thought, ‘power’ is able to be attained through being connected to networks of influence, as distinct from traditional institutions of authority, which tend to be predicated on mediated (and

therefore indirect) power. Some would thereby contend that the very nature of power is being transformed, in that it is being deconstructed and dispersed through global networks which render archaic ideas such as the 'border', the 'state' and the 'nation'.

In this milieu, confidence in institutions is eroding and 'Truth' has, it seems, become a battlefield, and not simply due to the increased volume of opinion and comment, the mobilisation of sentiment, the rise of identity politics and the polarisation of civic discourse. The idea of 'Truth' is also, it seems, being deconstructed by the deliberate interference and manipulation of opinion, with the objective being of sowing confusion and discord in democracies – so as to undercut their deliberative capacities, sap national will, and corrode strategic confidence.

In this world, it is clear that connectedness has not proven to be a catalyst for democratic renewal and transformation. It is perhaps ironic that as information is approaching limitlessness, we are narrowing our horizons of interest, as our search preferences, and their unseen underlying algorithms, curate and limit our discursive fields. We should not delude ourselves. In the digital age, the 'Truth' is still mediated – by algorithms, foreign interference, market research, disinformation, and so much more. We are not seeing, as the digital-industrial complex would have it, the unmediated expression of the popular will, free of the taint of 'power'. Rather, our shared sense of what is true is being undermined and power is being reframed, under a veneer of 'freedom' – but without the apparatus of representation and the mediation of power which allows the latter to be held to account.

So, what is to be done? Our system of representative democracy and responsible government, an impartial public service, and the rule of law are foundations which will hold us secure in the face of the storm surge of 'post-truth' falsehood and disinformation. Intrinsic to our scheme of national governance are traits which are the antithesis of 'post-truth' – moderation, deliberation, scrutiny, check and balance. The epistemological model of democracy is necessarily empirical. Democrats say that 'Truth', while contestable at a metaphysical level, can – for the purposes of informing deliberative action - be arrived at through investigation, experimentation, verifiable data analysis, research and modelling, and reasonable conjecture about the future. I should especially like to think in this context that traditional public service values might well come into vogue as antidotes to the temper and tone of the times, values which favour reason, evidence, diligence, and dispassionate and disinterested endeavour. Moreover, democratic discourse presumes the resolvability of difference, the ability to arrive at a view of 'the public interest', and deliberative action by elected officials and those of us who have taken up the vocation of public service.

In a representative democracy, we moderate and check power in the ballot box with our pencils, when we are asked to express our preference as to who will represent us, and from that group, who will govern us. Such a simple thing, the putting of a pencil mark on a piece of paper – but from this simple act flows the governance of the 'common-wealth'. That is why we have to protect that ballot box, that pencil, and that piece of paper.

Beyond this general frame, we should seek to encourage an informed and active citizenry – including through civics education and digital literacy. The discourse of civics will need to be enhanced and made more accessible – and will have to consist of more than a primary school visit to Parliament House. Impartial and professional journalism will become even more crucial, as will be an apparatus and capacity for 'fact checking'. Elections will have to be

protected, and with each election, new assaults will have to be anticipated and thwarted in an unrelenting struggle. Active thought will have to be given to the protection of the freedom of political communication, which is essential to representative democracy, and which has come to be a constitutionally enforceable right.

Our intelligence, security and law enforcement agencies, graced with powers that only Parliament can grant, and continually supervised in the performance of their functions, will have to wage an unceasing war, especially in the cyber shadows, against attacks on democracy that will become more pervasive – some driven by nihilism, and others by sinister statecraft, born of geopolitical motivations. We will have to construct ever-stouter defences against the dark arts of disinformation and political warfare.

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As we look ahead, one thing can be certain: the public service as the continuous component of the state will be at the service of the nation. The past is not “dead”. Rather than ignoring our institutions, or allowing them to corrode through indifference, we should see them as sources of strength and stability, and we should rededicate ourselves to passing on their precious wisdom.

Perhaps rather perplexingly, I mentioned dictatorship during this lecture. In this age, it would not be far-fetched for us in the West to pause to reflect on the historical lessons of other eras and draw inspiration from those who have in times past fought to defend democracy. They did so because they carried in their hearts and minds the assumed values and assumptions which constitute the deep corpus of democratic thought and sentiment. In February 1935, Winston Churchill published an article entitled “Why Not Dictatorship?”. In it he argued against those in Europe, and Britain, who were at that point inclined to advocate for illiberal dictatorship, as a solution for the social and economic ills of the post-Depression era.

Churchill would have none of it. He argued that democracies must fight against this ‘loose talk of dictatorships and one-man power’, and that society must be protected from the malice of such rulers. Churchill argued that democracies must guard with the utmost vigilance the “...inviolability of even the humblest home; the right and power of the private citizen to appeal to impartial courts against the State and against Ministers of the day; freedom of speech and writing; freedom of the press; freedom of combination and agitation within the limits of long-established laws; the right of regular opposition to government; the power to turn out a government and put another...in its place by lawful, constitutional means; and finally the sense of association with the State...’. Churchill was a great parliamentarian, first and foremost, and from that flowed all of his achievements, including his most glorious ones. And the greatest lesson from this greatest of democrats? Democracy is an outlook before it is a law, an instinct before it is a rule, a tradition before it is a procedure.

I doubt that dictatorship could arise in the hallowed democracies of the West, except to say that in a world where nothing is ‘True’ and everything appears possible, who can say for certain. In an era of rage and discord, we have to trust our institutions to bear the strain and stresses of the age. I should certainly like to think that our institutions and, in Australia at

least, our culturally-ingrained scepticism would safeguard us. Vigilance might nonetheless be in order.

Optimistically, I end on this note. Robert Garran called his memoirs *Prosper the Commonwealth* (1958). If you examine his legacy, you will find someone who was utterly dedicated to public service, in the purposive sense that I have chosen to emphasise. In the sense of being embarked on nation-building, and using the powers and capacities that are intrinsic to our nationhood to advance the common-wealth, to secure the nation and protect the Constitution, and to unify the people, while respecting their democratic right to differ. It was with more than half an eye cast in his direction that we chose the following purpose statement for the Department of Home Affairs, a departmental title known unto Garran: our purpose statement being **Prosperous//Secure//United**.

As we face another review of the Australian Public Service, it is to be hoped that a substantial reform agenda will emerge, and one which moves beyond the soul-less focus of the managerialist frame of some earlier efforts - an ideology which would have been unfamiliar to our forebears, who knew only active and purposeful public service which, when properly partnered with the political executive, was dedicated to wielding for the common good the full powers and capacities of the nation.

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