CONSTITUTIONAL DESIGN, ACCOUNTABILITY AND WESTERN AUSTRALIAN GOVERNMENT: THINKING WITH AND AGAINST THE "WA INC" ROYAL COMMISSION

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The Royal Commission into "WA Inc" recommends various institutional reforms to combat executive dominance and the related phenomena of secrecy and lack of accountability in Western Australian government. However, the Commission largely ignores the contribution of a well designed State constitution to accountable government and, as a consequence, underplays the need for constitutional reform. This article supports the Commission's criticism of the Westminster model and also its implicit rejection of the need for reformers to abandon the Australian constitutional tradition. But it argues that advocacy of selective constitutional changes, particularly involving electoral arrangements and patronage, would have been a better strategy for correcting imbalances in Western Australia's political institutions than the Commission's recommendations for changes to procedure and practice.

Of the recent spate of public inquiries into aspects of government in several Australian states, it is the Western Australian Royal Commission into Commercial Activities of Government and Other Matters[1] which has raised the largest questions about the adequacy of basic institutions of government.[2] Perhaps the most important finding of the Royal Commission

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1. WA Royal Commission *Report into Commercial Activities of Government and Other Matters* (Perth: Govt Printer, 1992) Parts I & II.
2. For an overview of the Royal Commission's work, see B Stone "Accountability Reform in Australia: The WA Inc Royal Commission in Context" (1993) 65 *Aust Quarterly* 17.

was that the deficiencies in accountability associated with the so-called "WA Inc" period of Labor government in the 1980's were not solely due to the vices and failings of particular ministers, nor to the outlook and modus operandi of the political party to which they belonged, but were rather a manifestation of fundamental weaknesses in the State's system of responsible government. Despite some rather sweeping denunciations of the Westminster model, however, there is little aside from scattered hints in the Royal Commission's report about how and why existing institutions are deficient.[3] Further, whilst reference is made in the Report to aspects of the Western Australian Constitution, little sense is communicated of the role of a constitution or of the contribution that constitutional reform might make to the improvement of governmental accountability.[4]

This article has three main purposes:

- To flesh out the Royal Commission's implicit argument that there are adverse consequences for public accountability in central elements of the institutional arrangements Australia took over from Britain;
- To argue that the Commission's reform agenda under-emphasizes the importance of the Western Australian Constitution and its reform to the key issue of accountability highlighted by the Commission; and
- To advance a case for particular constitutional changes.

THE WESTMINSTER MODEL AND WESTERN AUSTRALIAN GOVERNMENT

It is a commonplace of comparative constitutional analysis that Australian governments, unlike their counterparts in the United States, are characterised by a large overlap between the persons exercising executive and legislative powers. This begins with the Queen, who is not only the fountain-head of executive power but also a constituent part of parliament. Ministers, who constitute the practical executive, must be members of parliament. This is either a formal constitutional requirement, as in the case of the Commonwealth

3. There are suggestions that the inherited model of government is now inappropriate because of changes in the size of government and the forms of administrative agency in use (Report ¶ 3.1.2). Elsewhere in the Report (eg ¶ 5.2.1) reference is made to the dominance of parliament by disciplined mass parties as a principal source of institutional weakness.

4. Why this is so is unclear. There is a suggestion in the Report's Preliminary Observations that the Royal Commission saw some issues in constitutional reform as beyond its mandate. But this did not prevent discussion of other constitutional issues in the Report.

parliament, or a constitutional convention, as in Western Australia.[5] In contrast, no member of a United States executive (with the partial exception of the Vice-President who is President of the Senate) may be a member of the legislature.

The democratic justification for fusing executive and legislative powers is that where the executive is drawn from and remains part of the legislature, the latter has the ability — through threat of withdrawal of support — to hold the former accountable to a representative assembly. Thus government is to be held indirectly accountable (via parliament) to the public at all times. At the same time, however, the fusion of executive and legislature establishes an institutional logic which threatens accountability. It means that the basic condition of existence for the ministry is the maintenance of solid majority support (at least for key financial legislation and other tests of confidence) in the lower house of parliament. This structural prerequisite for government provides a strong incentive for the ministry to seek means by which to dominate that house. Compare the situation in the United States, where a President's effectiveness may be impaired by a lack of influence over Congress, but his security in office for four years is unthreatened.

Executive control of parliament in Westminster-derived systems has been underpinned by a variety of institutional factors including, in particular, the financial initiative of the executive; the executive's constitutional power to dissolve parliament; official patronage; electoral systems designed to over-represent large parties and manufacture parliamentary majorities;[6] and mass parties with highly disciplined parliamentary representatives. The latter factor is the most heavily emphasised in accounts of parliamentary decline,[7] but it is arguable that patronage is equally if not more important, because of the huge growth in ministerial positions during the twentieth century. In Western Australia, for instance, there are currently 17 ministers plus four unsalaried, but not unrewarded, ministers called "parliamentary secretaries". This constitutes 45 per cent of the minimum number of votes necessary to control both houses of parliament. With the other patronage positions, such as the presiding officers of one or both houses of parliament and the chairs

5. One qualification should be noted. Under s 43(3) of the Constitution Acts Amendment Act 1899 (WA) at least one minister must be a member of the Legislative Council.

6. In the 6 major democracies employing plurality or majority electoral formulas, elections in the period 1945-1980 resulted in "manufactured" parliamentary majorities forty five per cent of the time compared with "earned" majorities only twenty five per cent of the time. See A Lijphart *Democracies* (New Haven: Yale UP, 1984) 167.

7. See eg H Evans *Constitutionalism and Party Government in Australia* (Perth: Australasian Study of Parliament Group, 1988).

of various parliamentary committees, the executive has a clear majority in the parliamentary caucus of the governing party or parties.

Patronage is thus of enormous direct importance to the executive, but it is also very important indirectly in strengthening party discipline, or loyalty to leaders, among those yet to attain office. With such a small proportion of the parliamentary membership of the governing parties not benefiting from executive patronage, each member must feel that she has an excellent chance of preferment if only she keeps clear of scandal and shows loyalty to the party.

By these means the Westminster model has, in Australia and elsewhere during the course of the twentieth century, come to be closely associated with a much lamented phenomenon — the growing, and ultimately close to absolute, executive domination of lower houses, with major adverse consequences for public accountability. Supporters of the Westminster model justify executive dominance as concentrating governmental power in the hands of the leadership of the party which has received, through its victory at a general election, the mandate of the public. However, over the past twenty years Westminster majoritarian democracy has come under strong challenge even in its former bastions, Britain and New Zealand.[8] The reasons are various, but include growing inadequacies in arrangements for accountability, random instances of governmental arrogance or adventurism and, perhaps most importantly, what might be termed the retreat from collectivism.

Against this trend, the late 1980's saw a reassertion in public debate about accountability in the Australian States of the relevance of the Westminster model as a normative ideal. Such a positive evaluation of the Westminster model was promulgated in Western Australia by the (Burt) Commission on Accountability[9] which reported only two years before the WA Inc Royal Commission was established. But, as suggested above, there is no enthusiasm for Westminster in the Royal Commission's report. On the contrary, the language of the report suggests that the Commissioners arrived at a view of the institutional weaknesses of Western Australian government similar to that outlined above.

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8. S E Finer (ed) *Adversary Politics and Electoral Reform* (London: Wigram, 1975) 3–32; Lord Hailsham *The Dilemma of Democracy. Diagnosis and Prescription* (London: Collins, 1978); R Brazier *Constitutional Reform: Re-shaping the British Political System* (New York: OUP, 1991); G Palmer *New Zealand's Constitutional Crisis: Reforming Our Political System* (Dunedin: McIndoe, 1992).
9. WA Commission on Accountability *Report to The Premier, the Hon P Dowding* (Perth: Govt Printer, 1989).

THE SEPARATION OF POWERS AND CONSTITUTIONAL REFORM

If there is a fundamental institutional weakness in Australian governments generally, and Western Australian government in particular, what is the solution? The Royal Commission seems to have believed that the appropriate response is to seek to modify rather than replace existing institutions. But some critics of Western Australian government have argued that nothing short of wholesale constitutional redesign, including a clear separation of executive and legislative powers, is needed.[10] Such a prescription might seem to follow logically from the analysis presented above. However, aside from the practical difficulty of convincing the members of what is after all a functioning democracy to embrace a completely new constitutional beginning, there are a number of arguments against the move to a full separation of powers. I shall review these briefly in order to explain why I think the Royal Commission was right on the basic issue.

Virtue in constitutions is never unalloyed and inconveniences may increase with transplantation. Even within the United States, where attitudes towards government have been strongly influenced by the Constitution and the views of its authors, there is a substantial body of elite opinion critical of the existing form of the separation of powers.[11] Those holding these views have traditionally tended to be "liberals" wanting more activist government, particularly in the field of social policy. But it is not only liberals who have criticised the inability of American governments in recent times to form and carry out consistent foreign and budgetary policies. It is unlikely that Australians, accustomed to more substantially empowered governments, would find congenial the lack of leadership, the delay and the extreme fragmentation often displayed in United States policy making.

Nor is the value of a constitution independent of other components of the political system. The recent upsurge of criticism of the United States Constitution is related to the increasing occurrence of "divided government", where the President faces a House of Representatives or a Senate or both,

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10. M Webb "Sovereigns not Subjects: Toward New Constitutions for the Australian States" and M Webb & P O'Brien "The Ghost in the System" in P O'Brien & M Webb (eds) *The Executive State · WA Inc and the Constitution* (Perth: Constitutional Press, 1991) 345–347.

11. See eg C M Hardin *Constitutional Reform in America. Essays on the Separation of Powers* (Ames: Iowa State UP, 1989); J L Sundquist *Constitutional Reform and Effective Government* (Washington: Brookings Institution, 1986); J E Chubb & P E Peterson (eds) *Can the Government Govern?* (Washington: Brookings Institution, 1989).

controlled by the opposing political party.[12] In general, the consequences of the separation of powers cannot be simply read off the United States experience at any one time, but will be strongly affected by such semi-autonomous factors as the nature of the party system, the electoral laws and the behaviour of electors in the country concerned. The effect of an American-style separation of powers on Australia is by no means as easy to predict as some of its advocates believe.

Adoption of a full separation of powers may not only be undesirable but also unnecessary. Not only would such a step cast aside the accumulated experience which enables existing institutions to work reasonably well, it would also foreclose the possibility of reforms to revitalise existing institutions. As Sharman[13] has argued with reference to the Senate, small changes to political institutions may have large effects. Much can be achieved by constitutional tinkering and, as is argued below, Australians are far from exhausting the possibilities of this sort of reform.

In approaching this task, Australian reformers may do as well to examine their Westminster as their American constitutional heritage. There is less difference between these traditions than is often recognised, or than my earlier comparison would suggest. To focus on the separation of powers as the defining feature of United States government is somewhat misleading. It is arguable that "checks and balances", that is the sharing of powers, is at least as important. This was certainly the view of James Madison[14] who argued that Montesquieu himself had favoured only a partial separation.

As is suggested by the fact that Britain was Montesquieu's reference point, the characterisation of British government as devoid of a separation of executive and legislative powers is similarly misleading. Vile has shown that:

> [V]irtually the whole history of English constitutionalism has been characterized by the recognition of the need for a *partial* separation of the personnel of government, and a *partial* separation of the functions of government.[15]

Vile blamed the popularity of Bagehot's description of British government as embodying a fusion of executive and legislative powers for

12. Previously rare, divided government has been the rule since 1954 whenever there have been Republican presidents: 1955-1960, 1969-1976 & 1981-1992. See Hardin, id, 204.
13. C Sharman "The Senate, Small Parties and The Balance of Power" (1986) 21 *Aust Journ of Political Science* 20.
14. A Hamilton, J Madison & J Jay *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York: New American Library, 1961) No 47.
15. M J C Vile *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) 226.

obscuring this fact. While the concept of fusion became increasingly appropriate to the British system after the Reform Act 1867, the mid-Nineteenth century system of parliamentary government was characterised by "balance", or a mutual checking of executive and legislature.[16]

The problem with the British arrangements for controlling power was thus not the principles upon which they rested, but the fact that their supports were purely internal to the parliament and hence vulnerable to changes in parliamentary dynamics. Democratisation (which weakened the House of Lords and the Monarch), the emergence of modern political parties (which disciplined members of the Commons) and the growth of government (which expanded patronage) were sufficient to destroy the delicate constitutional balance praised by Nineteenth century observers.

Broadly similar forces have operated on Australian governments with similar effects. But, as Sharman[17] has argued, British-style parliamentary government underwent significant change when it was implanted in the Australian colonies. Written constitutions, judicial review, and non-aristocratic upper houses made for a system of government with certain extra-parliamentary supports for its checks on executive power. These departures from Westminster, which have become even more important as Australian government has evolved, offer considerable potential for improving the accountability of executive power. If this is so, abandoning our indigenous constitutional tradition in favour of the American seems unnecessary, or at least premature.

THE ROLE OF THE UPPER HOUSE

Among the most important of Australian institutional departures from Westminster are the strong upper houses at the Commonwealth level and in five of the six States. These bodies create the possibility of a rather different model of parliamentary control of the executive to that associated with the Westminster model. Accountability under the latter is supposed to result from a government-opposition dialectic in a single parliamentary chamber. But, in the model I am suggesting is relevant to contemporary Australia, accountability depends as much on a dialectic between the second chamber, or upper house, and a lower house dominated by the government.

For this inter-house dialectic to be fully activated, the party, or coalition,

16. Id, 222–223.
17. C Sharman "Australia as a Compound Republic" (1990) 25 *Aust Journ of Political Science* 1.

in the majority in the lower house should not also possess a majority in the upper house.[18] A traditional means of ensuring differently composed chambers is to require staggered elections for upper house members. In Western Australia, however, that means was in 1987 replaced by another, a proportional representation electoral system for the Legislative Council. Judgment on the effectiveness of the change must await the results of the next few elections, but there are indications that it may produce a pattern of outcomes similar to that experienced in the Senate in recent times where both major party blocs are normally denied a majority.

It should be noted that the justification for strong upper houses in Australian government is precisely that for a strong separation of powers elsewhere: that it forces governments to justify their policies, to negotiate with political representatives outside their ranks, and to accept compromises which take account of the interests and opinions of significant minorities. Indeed, the model I have presented looks something like a separation of powers with the executive, covered with a thin parliamentary veneer, confronting an independent parliamentary chamber in the form of the upper house. Interestingly, a popular suggestion for reform of Australian upper houses, given a degree of support by the Royal Commission, is the complete removal of ministers from those chambers. Such a change would strengthen the sense of an institutional separation of the functions of governing and control, or review, of government.

The model described above is not fully applicable to Australia at present because the upper houses, in the States if not at the Commonwealth level, tend to lack the status or legitimacy to realize their potential. Lack of status results in part from the perception that upper houses continue to be bastions of privilege and conservatism. However, that perception must weaken over time as it is increasingly at variance with the reality. For instance, in Western Australia, following the changes to the electoral system in 1987, the party with a traditional grievance against the Legislative Council (the Labor party) has in consecutive elections won a greater percentage of seats than it has received in votes. Tables 1 and 2 set out the results.

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18. At present in WA, after a period from 1983 to 1993 when the (Labor) government lacked control of the Legislative Council, the Liberal-National coalition has a majority in both Houses — albeit a very narrow one in the Legislative Council. This change has had a widely perceived deleterious effect on the capacity of the Parliament to call the government to account.

Table 1:
Labor Party Vote and Seat Shares
in Recent WA Legislative Council Elections

	1989	1993
Votes (%)	41.3	36.8
Seats (%)	47.0	41.2

Table 2:
Labor Party Legislative Council Vote & Seat Shares in 1993 by Area

	Metropolitan Area	Non-Metropolitan Area
Votes (%)	37.3	35.5
Seats (%)	41.2	41.2

Source: Western Australian Electoral Commission statistics.

The Royal Commission's report included a strong statement of the value of Western Australia's Legislative Council, implicitly very much in accordance with the analysis presented here. Thus, it emphasized the Council's "vital, if unrealised, place in our constitutional fabric".[19] It recommended a review of the Council's electoral system with a view to increasing the range of interests represented, thereby enhancing the status of the Council as a "house of review".

Cutting across this theme, however, is the Commissioners' suggestion that the Council's power to block supply is somehow inconsistent with its review function. The rationale is not set out in full, but seems to be that minor party representatives (whose presence the Commission wants to encourage) should not be able to determine the fate of a government. This argument is frequently voiced in Australia but it rests on a false premise. Supply, like any other legislative measure, can only be blocked through the combined action of half the representatives. There would seem to be nothing objectionable

19. Report ¶ 5.3.6.

about parliamentary minorities, whose individual voting power is identical to that of other representatives, forming part of such a voting bloc. Certainly, any suggestion that minor parties and independents necessarily exercise their parliamentary power less responsibly than major parties would be difficult to substantiate.

The power to block supply is not inconsistent with the exercise of parliamentary review, where the latter is taken to imply the ability to pass judgment on all the activities of government. On the contrary, it is an important if necessarily little used instrument for the performance of this function. It is, in a sense, the upper house's equivalent of the lower house's vote of no confidence as a means of making the ultimate judgment on a government's actions, not all of which are encompassed by its legislative programme.

Removal of the upper house's power over supply would also contribute to a weakening of the status of that institution, precisely the opposite outcome to that which the Royal Commission wished to achieve.[20]

CONSTITUTIONAL REFORM AND ACCOUNTABILITY

A major objective of the Royal Commission was to seek ways of improving the accountability of Western Australian government. Accountability in contemporary Australian government is realised through four basic control systems:

- A popular control system, empowering citizens to force their representatives to be responsive to their concerns;[21]
- A legislative control system, requiring the executive to justify its actions to a representative body;
- A judicial and quasi-judicial control system, designed to protect basic liberties and impose specified procedural requirements on government (eg, the provision of certain information, such as reasons for decisions, to members of the public);
- A system of performance control, supervising requirements that

20. It should be noted, however, that the Commission envisaged the removal of the power to follow other reforms designed to enhance the position of the Legislative Council: see Report ¶ 5.3.12.

21. A requirement for regular, democratic elections is the obvious item here. But these are supplemented in certain countries by instruments of direct democracy, namely, the recall, the initiative and the referendum. On the case for direct democracy, see G de Q Walker *Initiative and Referendum: the People's Law* (Sydney: Centre for Independent Studies, 1987).

administrative bodies satisfy certain objective standards or measures of performance (eg, that they provide annual reports containing specified, audited information).

The Royal Commission, following trends in Australia and elsewhere over the past two decades, places a heavy emphasis on the third and fourth of these systems. Its concerns in these areas are generally quite defensible.[22] However, a case can be made that it underplays the importance of reform of the first and second control systems. In particular, it makes too little of the fundamental contribution of well designed political institutions, backed by constitutional guarantees, to accountability in government.

This is not to say that reform of political institutions is completely ignored. In addition to the Royal Commission's emphasis on the need for an expanded role for the Legislative Council, several suggestions are made in the report: that the operation of Question Time be reviewed;[23] that parliament should manage its own budget;[24] that parliamentary committees be adequately staffed;[25] that committees should not always be chaired by members of the governing party;[26] and that legislation committees might be a good idea.[27] But only one of these matters (the financial independence of parliament) is actually the subject of a recommendation from the Royal Commission; the remainder are passed on to the proposed Commission on Government without much, if any, indication of the Royal Commission's judgment as to their importance.

In the light of the foregoing discussion about the importance of upper houses, it might be concluded that the Royal Commission's support for a stronger Legislative Council (albeit one with reduced financial power) was all that was required. However, the experience of the Labor governments of the 1980's in Western Australia, which ultimately gave rise to the Royal Commission, is evidence that other institutional changes are needed. For this was a period in which the Legislative Council was, due to the governing party's lack of a majority, a strong institution; and yet the Royal Commission found, quite plausibly, that the government was insufficiently checked by parliament. The limited, mainly procedural, refashioning of the Council proposed by the Royal Commission would be unlikely to improve the overall

22. For a fuller discussion of the matters covered in this paragraph, see Stone supra n 2.
23. ¶ 3.8.3.
24. ¶ 5.2.4.
25. ¶ 3.9.5.
26. ¶ 3.9.7.
27. ¶ 5.7.2.

situation greatly.

What is needed is a more comprehensive exercise in institutional redesign, aimed at restoring that "balance" between government and parliament much admired by the constitutional commentators of the past. Just as importantly, it is necessary to acknowledge, as the Royal Commission fails to do, that a major role of a constitution is to provide external support for desired relationships within and between political institutions. Constitutional change is thus indispensable to any serious attempt to rebalance Western Australia's institutions of government.

Institutional redesign in Western Australia should focus on the factors identified above which have underpinned growing executive dominance. A few systemic changes designed to eliminate or weaken some or all of those factors, thereby creating a new institutional logic or constellation of incentives, are likely to be more effective than the Royal Commission's preference for many detailed changes at the more superficial level of institutional procedure and practice. Because it does not treat the underlying causes of the problem, the latter approach means working constantly against actors' institutional interests and thus would need to be sustained over the long term. (Long term reform is not quite an oxymoron, but it is inevitably a precarious exercise.) Four reforms of the former, or systemic, type are worthy of brief discussion here. It should be noted that there is no suggestion that the following reforms encompass all desirable change; rather, the argument is that they would create an environment in which other institutional reforms could be successfully pursued.

1. Fixed term parliaments

Curtailing the executive's discretion to dissolve parliament by establishing more or less fixed dates for lower house elections would remove or weaken a traditional instrument available to the executive for disciplining the parliament.[28] Thus it might be expected to embolden minor parties and independents and also to facilitate greater shows of independence from back bench members of the governing party. The idea of fixed term parliaments has achieved considerable support in Australia over recent years and it has been adopted, in slightly different versions, in Victoria, South Australia, New South Wales and Tasmania.

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28. For a more comprehensive survey of the arguments for and against this change, see J McMillan, G Evans & H Storey *Australia's Constitution. Time for Change?* (Sydney: Law Foundation of NSW, 1983) 263–266.

However, there are several reasons why this reform should not be given priority in Western Australia. First, its overall effect on the balance of power between government and parliament is uncertain. Indeed, part of the appeal of a fixed term for lower houses, especially among those who continue to nurse a grievance about the role of the Senate in the constitutional crisis of 1975, is that it prevents upper houses from forcing governments to elections they would rather not have. Secondly, it may be unnecessary. In Western Australia, as in the other mainland States with upper houses, the desire of governments to synchronise lower house elections with those for the fixed term upper houses acts as a disincentive to early elections. Thirdly, in a state like Western Australia, where there are typically very few independents or minor party representatives in the lower house, fixing parliamentary terms seems to be putting the cart before the horse. The priority should be to facilitate a more representative parliament. Once measures to achieve this result have been implemented, means of protecting the most vulnerable representatives can be explored.

2. Electoral reform

Electoral reform is a means of attacking two important supports of executive dominance, namely the exaggeration of winning margins in the translation of votes to seats and the extreme discipline of Australian parliamentary parties. Proportional representation is the obvious remedy for the former problem and would incidentally ameliorate the adverse effect of party discipline on the parliament by requiring more negotiation and compromise within parliament than is typical under current electoral systems for mainland Australian lower houses.[29] But, as Sharman[30] has shown, attention must be paid to aspects of electoral laws besides the method of converting votes to seats if the desire is to weaken party discipline itself. Ticket (or block) voting, the appearance of party names on ballot papers, and "how to vote cards" all help to bind the candidate to the party and are not permitted for that reason in Tasmanian House of Assembly elections.[31]

29. The debate over the respective merits of majority versus proportional voting systems has been going for more than a hundred years. For recent overviews, see V Bogdanor *What is Proportional Representation? A Guide to the Issues* (Oxford: Robertson, 1984); A Lijphart & B Grofman (eds) *Choosing an Electoral System Issues and Alternatives* (New York: Praeger, 1984).

30. C Sharman "Diversity, Constitutionalism and Proportional Representation" in M James (ed) *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice* (St Leonards: Centre for Independent Studies, 1982).

31. Id, 106–107.

Primary elections, as used in the United States, would be a more radical method of weakening the dependence of candidates on parties. In Western Australia there is no ticket voting for Legislative Assembly elections, but the overall effect of the electoral laws is to give the party elites enormous leverage over elected representatives. Major changes incorporating some or all of the measures mentioned here would be needed to reduce that leverage.

The standard objection to such reform is that it would impair the stability and effectiveness of government. This may have been the view of the Royal Commissioners, who seem to take for granted that the Legislative Assembly (in their terms, the "House of Government") should possess a majoritarian electoral system and normally be firmly controlled by the government of the day. But doubt is increasingly being cast on the conventional wisdom. Finer[32] was perhaps the first authoritative British writer to challenge the ready equation of stability with executive durability and of effectiveness with programmatic government. In New Zealand, the Royal Commission on the Electoral System[33] argued in favour of a shift to a more proportional electoral system, without believing that governmental stability and effectiveness would suffer unduly. A proposal to change to a "mixed member proportional" system, similar to that which has long operated in Germany (hardly an example of governmental ineffectiveness) was approved by the New Zealand electorate at a referendum held conjointly with the 1993 general election. Closer to home, a recent comparative study of regime change in Western Australia and Tasmania,[34] while not directly concerned with the issue of effectiveness, suggests that proportional representation in Tasmania has not produced a notably less stable form of government than Western Australia's majoritarian electoral system. Perhaps most interestingly, Lijphart's[35] comparative analysis of 18 established democracies provides evidence that governmental systems based on proportional representation not only give superior representation but may also be more effective than their majoritarian counterparts.[36]

32. Supra n 8.
33. NZ Royal Commission *Report on the Electoral System: Towards a Better Democracy* (Wellington: Govt Printer, 1986).
34. C Sharman, G Smith & J Moon "The Party System and Change of Regime: The Structure of Partisan Choice in Tasmania and Western Australia" (1991) 26 *Aust Journ of Political Science* 409.
35. A Lijphart "Democracies: Forms, Performance and Constitutional Engineering" (1994) 25 *Euro Journ of Political Research* 1.
36. See also A Lijphart "Constitutional Choices for New Democracies" (1991) 2 *Journ of Democracy* 72; G B Powell Jr *Contemporary Democracies. Participation, Stability and Violence* (Cambridge: Harvard UP, 1982).

3. Reducing the effects of patronage

It was suggested earlier that patronage may be the major instrument of executive dominance in Australian parliaments.[37] Certainly it is a far more powerful instrument than it was when Western Australia's Constitution was proclaimed in 1890.[38] At that time the Constitution specified that there should be no more than five ministers in a parliament of 45 members (30 members of the Legislative Assembly and 15 members of the Legislative Council). This constituted only 21 per cent of the minimum number of votes necessary to control the parliament. Today, as noted above, that figure is 45 per cent. There is nothing magical about the original ratio of ministers to members of parliament, but the current figure is much too high to allow any progress to be made towards re-establishing a balance between parliament and government.

The Royal Commission largely ignored this fundamental problem. The most effective solution would be a constitutionally entrenched ratio of ministers to members of parliament which is guaranteed to leave well over half of a governing party's parliamentary membership without the benefit of any form of government patronage. (A maximum number of ministers, including parliamentary secretaries, equivalent to a quarter of a bare parliamentary majority in each house might be an acceptable guideline.) Such a reform would have implications for the size of the parliament on the assumption that it would be undesirable to reduce the number of ministers substantially.[39] However, there is a good case to be made on other grounds that there are currently too few members of the Western Australian parliament.[40]

4. Further entrenching the constitution

The Australian constitutional tradition, extending back to the colonial period, has incorporated a notion of the constitution as higher law.[41] Among the ways in which this was manifested in Western Australia was the

37. But note C Sharman "The Constitution of Western Australia 1890-1990" in D Black (ed) *The House on The Hill: A History of the Parliament of WA 1832-1990* (Perth: WA Parliamentary History Project, 1991).
38. Id, 293, 296.
39. This assumption is contested by those who believe the role of state government can and should be radically reduced: see eg M Nahan & T Rutherford *Reform and Recovery An Agenda for the New Western Australian Government* (Perth: Institute of Public Affairs, 1993) 405.
40. Sharman supra n 37, 295, 310.
41. Sharman supra nn 18 & 37; R D Lumb *Australian Constitutionalism* (Sydney: Butterworths, 1983).

requirement under section 73 of the Constitution Act 1889 (WA) that legislation to amend the Constitution be approved by absolute, rather than ordinary, majorities in each house of parliament. More recently, some parts of the constitutional structure have been further entrenched by an additional requirement that they be approved by a majority of electors at a referendum.[42] The reforms proposed above would each require changes to the Western Australian Constitution. Given their fundamental importance to the restoration of institutional balance to the system of government, and the fact that there would be incentives for a wide range of political actors to undermine them, there is a strong case for any such changes to be strongly entrenched through the application of the referendum requirement for their subsequent alteration.[43]

CONCLUSION

Sharman[44] has argued convincingly that Australian government generally, and Western Australian government in particular, rests upon a distinctive and coherent constitutional tradition which seeks to combine parliamentary government with strong constitutional rules which disperse power. The argument of the current paper is both that reform is needed to bring about a better balance between the power concentrating and the power dispersing forces in the institutions of government and also that the Australian tradition provides a sound basis for the reform task. The particular reforms I have advocated are less important than the general suggestion that reformers need to be more aware of the contribution of constitutional design to good government.

The fate of the Royal Commission's report seems to illustrate that proposition. The Commission chose to push administrative reform by legislative means, largely leaving any case for reform of the political institutions to be made by its proposed successor body, the Commission on Government. A year and a half after the Royal Commission brought down its report, it is obvious to all both that the Commission's reform agenda is heavily dependent on the initiative and support of the executive and that the executive is (necessarily, whatever its partisan complexion) a most uncertain

42. The constitutional amendments to which this provision applies are those seeking to alter the role of the governor, to reduce the size or powers of either house of parliament, to permit either house to include members not "chosen directly by the people" or to alter the procedure for amending the Constitution.

43. Webb & O'Brien supra n 10 have argued forcefully for a comprehensive incorporation of electors into WA constitutional politics.

44. Sharman supra n 37, 298; Sharman supra n 18, 2–3.

supporter of any reform which harms its narrow institutional interests. The alternative strategy, promotion of constitutional reform designed to entrench a more even balance between executive and parliament, would have attacked directly what the Commission itself identified as the root of the problem and would also have indirectly assisted progress in the areas highlighted by the Commission.

This is not to suggest that constitutional reform can or should be quickly or easily effected. The Commission was surely right to suggest the need for extensive community debate. However, it is just because such reform is difficult as well as important that the support of the Royal Commission would have been desirable. The running on the issue may soon pass to the Commission on Government which, with luck, will be established before the second anniversary of the report of the Royal Commission. But even supposing it sees fit to tackle questions of constitutional design, this body will find progress difficult in an area so largely ignored by its prestigious parent.