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### ***The Consensus Artifact* and the Australian Constitution**

In Australia, we are fortunate to have experienced stable government for many decades. However, this stability has come at the expense of adaptability and innovation in the face of a rapidly changing 21<sup>st</sup> century world. Our stability has resulted from a cumbersome and self-interested three-tier government system that stubbornly resists most attempts to be reformed. For Australia's political system, trying to cope with the demands of the modern world, is like trying to get to the moon using horse and buggy technology.

Across Australia, the level of discontent with our existing system of government continues to grow. Perceptions of political corruption, party factionalism and ministerial cronyism dominate the media. There is public anger over the endless bickering between States and between the States and Federal Government that stalls essential public spending. People worry about the increasing influence of special interest groups. Communities are frustrated over not having a political voice and not being listened to by their elected representatives. In most people's minds, politicians have too little accountability and too much power.

Overseas experience suggests this problem is not unique to Australia. The United Nations has noted that people all over the world, are losing faith in the concept of 'democracy', because they are not able to hold their elected governments accountable. This issue is explored by the United Nations Department of Economic and Social Affairs (UNDESA) in a World Public Sector Report (WPSR) 2007, titled *People Matter: Civic Engagement in Public Governance*. The report highlights the growing level of public frustration and one of its conclusions is that: "... there may be a need to examine whether the highest law of a country (the constitution) has the provisions for participation and engagement beyond deliberations at the parliament."

When considering the current Australian Constitution, a strong argument can be made that, like its overseas counterparts, it does not contain appropriate provisions for public participation in the political process. So far, attempts by the public to intervene in the bull fight that is Australian politics have had mixed results.

For instance, street protests, political lobbying, petitions, national ad campaigns and other instances of high profile public activism and dissent campaigns, have had some wins such as Bring David Hicks Home and Close the Gap on Indigenous Health. The problem with this strategy, is that while governments might publicly bow to this kind of pressure, change policy and issue all sorts of press releases, too often they sit on their hands and do nothing towards change. One only has to look at the woeful lack of action since the Aboriginal Deaths in Custody Inquiry began in 1987, to see this process of passive resistance at work.

Other less hyped attempts at public participation have largely failed. For example, every year since 1995, the National Schools Constitutional Convention has been held at Old Parliament House in Canberra. Every year, over one hundred senior secondary students, from feeder conventions conducted by the States and Territories, have come together and debated key issues and made recommendations to the Senate of Australia. The result, no changes in government policy or political debate.

If any government does seriously commit to policy reform, that reform can easily be swept aside by a change of government at the next election. As an example, consider the Howard government's abandonment of Australia's Human Rights commitments during the period from 1996-2007. The public has to start the lobbying process all over again from scratch.

It requires a hardy spirit and determined mind, to prevail throughout this one step-forward-two-steps-backwards political dance that unfolds over the course of years or even decades. Even the most committed political lobbyist can despair and give up. From the sidelines, the general public, perceiving this lack of progress, seems to have concluded that these problems are beyond anyone's ability to fix.

It is also worth facing the fact that many areas of government decision-making and policy development are purposely excluded from any public input and scrutiny. The development of treaties, international agreements and conventions are a good example, as are publicly unpopular and highly criticised decisions like going to war on Iraq.

With an education system that provides little civic education and a media that fails to fully investigate and question the status quo, the average person is left trying to grapple with political issues and implications they don't really understand. Even though most people are interested in society and the broad rules of government and law, they just can't relate to the details that make the political system tick. Most people are battling with their own personal life-issues like their kids' schooling, how long the hospital waiting list is for their knee operation, will they have a job by the end of the year and how to keep up with the mortgage payments. In short, people feel too caught up in their own lives to be involved in the affairs of state. After all, that is why they elect politicians in the first place, to represent them and make the political decisions they don't have the time, energy or understanding for. It is also convenient for those in power to have the public distracted from political issues in this way. After all, it reduces the need for tiresome public accountability.

Time-frames are cause for concern. Politicians and governments invariably work on short, three to four year time horizons. That is the adversarial nature of our Westminster parliamentary system. With political leaders focused on short-term issues and policies, successive governments from both sides of politics have failed miserably to make our lives richer and the world a better place. Sadly, we can't rely on our Constitution to guide our elected representatives, as it contains no instruction on a large range of important national issues.

Think-tanks, lobby groups and political organisations aren't much help to the public either. Their main focus is on influencing government. They don't really have the interest or the resources to show the public how to grapple with the democratic process. When they do engage with the public, it is usually to seek some mandate for a given policy stance they have taken, rather than involving the public in their deliberation process.

It is all very well for those with a keen interest and commitment to politics, to look down their noses at the general public and brand them as apathetic. But asking the average person to ponder the implications of the rule-of-law, or what effect a change to a quota preferential voting system might have, just isn't fair. In the same way, one wouldn't expect a politician to be able to read the wiring diagram of a commercial airliner or work out the orbital trajectory of a satellite.

Yet previous attempts at democratic change have taken this elitist stance. The framers of such change agendas, usually start with grand visions and aspirations that average people can't relate to because they don't seem connected to their daily life. After all, how is the separation of powers going to give their kids a better education? They then delve straight into the most complex, detailed and least understood mechanisms of our political system and expect the masses to get fired up about what are, from the public's perspective, dull and tedious issues.

In societies that have experienced years of internal conflict or war, people are very motivated to take part in such political processes, no matter how tedious the issues might be. However, in stable societies like Australia, where the machinery of government is largely self-regulating and the majority of the population are well off, there is a lack of engagement in the political process. To improve the situation, we need to resolve two fundamental questions. What public participation mechanisms need to be embedded in the political system to allow the public to be involved? And what civic education is needed to encourage the public to want to use these mechanisms in the first place?

Solving these two questions is the main thrust behind the book, *The Consensus Artifact* by Rodger Hills. Using a new and alternative approach, *The Consensus Artifact* creates the important connections between the complex world of politics and the day-to-day issues that affect everyone's life. Hills starts from the idea that by helping people understand the political environment and implications arising out of straight-forward, daily issues, they gain confidence and understanding of the more complex issues in politics. He believes strongly that given this foundation, people will be inspired to tackle more difficult issues in a bottom-up approach to democratic reform, rather than a top-down approach.

The range of daily issues that really matter to people are a well known group of concerns that the majority of voters in the Western world consider of high importance in their lives. These include global warming, education, health care, taxation, industrial relations, employment, transport costs and human rights. *The Consensus Artifact* gives people a clear and easy-to-understand explanation of these issues, as well as how they could be tackled in a democratic way. Using a series of hypothetical interviews with fictitious experts, the book introduces people to important aspects of these common problems.

The book makes a clear case for taking many of the issues we currently leave up to politicians to solve, out of their hands and placing them into a new constitution. The logic behind elevating issues like sustainability, financial system and health care into a constitutional framework, is to protect the fundamental will of the people from being manipulated, diluted or turned into political footballs by those in power.

Imagine if the Australian Constitution banned all forms of pollution. Australia would be able to make a significant contribution to preventing global warming. What if the Australian Constitution regulated the financial system. Banks wouldn't collapse and people's hard-earned money would be safe. If the Constitution made the government provide the best

health care system in the world, for free, for all citizens, the public wouldn't have to worry about getting prompt treatment and how to pay for it.

Unfortunately the current push for an Australian Republic is not concerned with any of these issues. It is being driven by a belief in a heavy handed, top-down approach, with a new Constitution considered only as an afterthought. Given the hash that generations of political leaders have made of our society, having them controlling the push for a Republic and drafting of a new Constitution is like putting a fox in charge of the chicken farm.

## **A New Democratic Alternative for Australia**

While experts on both sides of Australian politics argue for a change to the current Australian political system through parliamentary bills and public referendums, Hills offers a better alternative. Better that is for the Australian public. He proposes a popular movement of ordinary people getting together outside of the main-stream political process and drafting their own constitution. While many would see this as a daunting challenge both logistically and politically, such a process would have greater democratic legitimacy as it would truly reflect the will and sovereignty of the Australian people.

The key starting point is to promote and strengthen adult civic education. Once again, *The Consensus Artifact* provides a working model, by giving section-by-section explanations of the key building blocks of democracies. Each chapter of the book is largely self-contained, so subjects can be understood without the need to build on previous material or for the book to be read sequentially.

The book explores ways of improving the level of public participation in government at all levels, including:

- Citizen Initiated Referendums where people can vote to alter existing legislation, propose new legislation, seek impeachments or dissolve corporations that repeatedly break the law.
- Negotiated Rulemaking where the public enters into a deliberative dialogue with government departments and agencies to seek agreement on the purpose, structure and application of any rules or regulations being proposed.
- Treaty Ratification where an automatic referendum process occurs on international agreements that require the Constitution or the law to be bound by foreign legislation or agreements.
- People's Juries to determine constitutional interpretation and application instead of the High Court.
- Complete Freedom of Information so the public has access to all publicly funded information and documentation.
- Public Referees who investigate public complaints against government and official wrong-doing.
- Non-Profit People's Banks that operate for the benefit of members of the public and are guaranteed by the government.

- Worker Cooperatives that, during times of hardship, can expropriate abandoned industrial facilities, technologies or commercial property.
- Civic Responsibility where people are encouraged to make public any legislation, policy or action that has adversely affected themselves, other citizens or the environment, where people are to advise legislators of laws that are outdated, irrelevant or inappropriate, and where the public is instructed to disobey or resist laws that decrease human rights.

## How Does the Australian Constitution Shape Up?

If we accept that one of the ways of getting long-term political change, and real democracy, is to draft a new constitution, it is important to understand how our current Constitution fares when compared with other modern examples. *The Consensus Artifact* contains a Universal Constitution (a model constitution) that distils ideas and conventions from many countries. It also shows how democratic, human rights and social justice principles can be drafted into constitutions and taken out of the fickle control of government. The Universal Constitution clearly shows how outdated constitutions like the Australian Constitution can be redrafted.

The following table demonstrates how the existing Australian constitution compares with the requirements of modern democracies.

Provisions	Universal Constitution	Australia's Existing Constitution
Legislature	✓	✓
Election of Legislators	✓	✓
Head of State	✓	✓
Head of Executive	✓	
Senate	✓	✓
Election of Senators	✓	✓
Making of Laws	✓	✓
Review and Audit of Laws	✓	
Executive - Ministers	✓	✓
Executive – Public Service	✓	✓
Executive - Departments	✓	
Judiciary and Courts	✓	✓
Equality Before the Law, Due Process and Right of Appeal	✓	✓
Indigenous Affairs	✓	
Human Rights	✓	
Hardship Provisions	✓	
Freedom of Speech, Assembly and Petition	✓	
Changes to Constitution	✓	✓
States and Regional Government	✓	✓
Taxation System	✓	

Monetary System	✓
Foreign Trade System	✓
Electoral System	✓
Citizenship and Civic Responsibilities	✓
Eligibility for Office	✓
Conduct in Office	✓
Termination from Office	✓
Civil Peace and Police	✓
Defence and Conflict	✓
Separation of Church and State	✓
Corporate Affairs	✓
Resources, Production and Sustainability	✓
Protection of Nature	✓
Education System	✓
Health Care and Fitness System	✓
Food, Water, Waste, Energy, Transport and Communications Security	✓
Housing Security	✓
Political Parties	✓
Scientific Endeavour	✓
Industrial Relations	✓
Land Tenure System	✓
Social Welfare System	✓
Essential Services Security	✓
Consumer Protection and Fair Trade	✓
Heritage Protection	✓
Workplace Protection	✓

## Power to the People

When put to them, most people are sceptical of the idea that ordinary people could draft a constitution. In Australia, we have been conditioned to think that affairs of state such as the Constitution, are for our elected political representatives and the High Court to deal with. There is even a common belief that only constitutional lawyers can draft constitutions. This is a misconception. Constitutional law is the body of law that builds up in response to a written constitution. Therefore constitutional law is not about the writing of constitutions, only their interpretation. It is a surprise to most people that there are no qualifications or prerequisites needed to draft a constitution. It can literally be written by anyone and *The Consensus Artifact* provides guidance on how to go about just that.

The book even contains a useful glossary of political and legal terms to help readers grapple with many of the unfamiliar political, legal and social terms used in any discussion of democracy. If readers wish to delve further into the constitution building process, further guidance can also be found in the reference list of influential political books by significant authors.

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## Praise for *The Consensus Artifact*

### Review by Daniela Giorgi

Education Officer NSW Parliament and Curriculum Adviser, Civics and Citizenship, NSW Department of Education and Training

"This easy to read, well-written book gives clear, yet detailed explanations of what can be complex issues that surround Constitutions - the framework of laws that govern our legal and political systems. *The Consensus Artifact* is a valuable reference for thinking about these structures.

Part One of the book introduces readers to the International Constitutional Harmonization Project, which is a hypothetical non-government organisation formed to research and develop a Universal Constitution. The second part of the book uses hypothetical interviews with imaginary democratic experts from around the world, to explore topics related to the drafting of a Universal Constitution. These topics range from citizenship, elections, taxation, courts, and law-making through to finance and conduct in office. Part Three presents the Universal Constitution, distilled and created from the issues raised in the hypothetical interviews.

The Universal Constitution and the book itself, make an interesting basis for discussion of these important issues. A valuable addition to national, state, university, public and school libraries; this book renews our understanding of the complexity and richness of our civil society as well as its possibilities."

### Review by Jennifer Connor

Australian Law Librarian - Volume 16, Number 2, 2008

"Interesting philosophical discussion on constitutional development."

### United Nations Department of Economic and Social Affairs (UNDESA)

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