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# LEADERSHIP SPILL RULES FROM THE CONSTITUTIONAL PERSPECTIVE

*Greg Taylor*[*]

## Abstract

Recently both major political parties have adopted rules increasing the security of tenure of their federal parliamentary leaders. Both parties now require a specially high majority of their parliamentary members to bring about a vacancy in the leadership. For example, a Prime Minister who is federal A.L.P. leader cannot be removed from the latter post unless 75% of the members of the parliamentary party support such action. This article documents and analyses those rules and then asks three questions. First, can the rules be repealed by ordinary motions in the two party rooms without any special majority, restoring the previous position under which a bare majority was sufficient to unseat the leader? Secondly, are the new rules legally enforceable? And thirdly, what should the Crown and the Courts do if there is a dispute about who the rightful parliamentary leader and thus Prime Minister is?

## 1. Introduction

H.L.A. Hart commences *The Concept of Law*[1] by pointing out, in prose at once beautiful, illuminating and humorous, that much effort has been devoted to determining the nature of law in a fashion which has not been the case in relation to medicine or chemistry, for example. No-one has ever thought it worthwhile insisting, he points out, that essential parts of chemistry are in truth not part of that discipline at all – but it is otherwise for law. His observations are certainly correct, but it is also the case

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[1] Clarendon, Oxford 1991, p. 1.

that little effort has been devoted, at least in our legal tradition, to delimiting the respective domains of the sub-fields of law. Where, for example, does constitutional law end and administrative law begin? What about the borderlands of property and contract law? Questions such as whether the rule in *Walsh* v. *Lonsdale*[2] properly belongs to contract law or property law are not likely to produce much interest in the practical common-law world. Yet even one significant external border of law, that between constitutional law and politics, has hardly been defined.[3]

In textbooks and University courses constitutional law will usually include the constitutional conventions, however briefly they may be mentioned, on which trifling details of constitutional practice such as the very existence of the office of Prime Minister depend, as well as the federal and perhaps also the State capital-C constitutions against the background of the British inheritance and the common law. Little to nothing will be said about political parties even though they have been mentioned, albeit briefly, in the federal Constitution for over forty years now and have existed in their modern form for well over a hundred.[4] Probably most scholars, if asked about the categorisation of the rules about party registration,[5] for example, would put them under a separate although allied heading, "electoral law". Partly we ignore political parties in constitutional law because we have a written and rigid federal Constitution and naturally enough constitutional law focuses on it; the brief mention of political parties in s 15 of the federal Constitution (and the equivalents in some State Constitutions)[6] is, on the one hand, as nothing compared to the vast importance of political parties in day-to-day practice and, on the other, a tiny proportion of the written document. Indeed, the capital-C Constitution is still largely pretending that we are in the eighteenth century. Rules that are not there may have this effect also. In advising the creators of a television series some years ago, the present author was surprised to be told by its scriptwriters that they had simply assumed that any M.P. who changed parties would have to resign from Parliament and contest a by-election. But, on reflection, this is a quite natural assumption from a modern point of view, or indeed any point of view rooted in the political system

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[2] (1882) 21 Ch D 9.

[3] Some few attempts have been made such as Wise, "The Limits of Constitutional Law" (1986) 37 Am Jo Comp Law (Supp.) 383, 384-387. The matter is also touched upon briefly in Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 Fed LR 223, 223f. Even where the Courts have explicitly drawn a vaguely comparable division in the private law between principle and policy it has often been left to academics to try to give any content to the distinction, as for example in Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 MULR 569.

[4] For a historical and comparative perspective on the emergence of political parties into written constitutional documents and statutes, see Sawer/Gauja, "Party Rules : Promises and Pitfalls" in *id.* (eds.), *Party Rules? Dilemmas of Political Party Regulation in Australia* (A.N.U. Press, 2016), pp. 2-4, 12-14.

[5] At federal level these may be found in Part XI of the *Commonwealth Electoral Act* 1918.

[6] *E.g. Constitution Act* 1934 (S.A.) s 13 (5).

as it has existed since 1910, in which parties are fundamental to political organisation and the way in which the sovereign people vote. But it is false because the constitutional system still assumes that we are voting for individuals.[7]

It is certainly beyond the scope of any one contribution to attempt to delimit the proper bounds of constitutional law, but recently both major parties in Australia have adopted formal rules relating to changes of leadership in their federal parliamentary parties.[8] These leaders fill the positions of Prime Minister and Leader of the Opposition *via* well-known constitutional conventions and practices. The background to the recent rule changes is, of course, the extraordinary turnover in federal party leadership on both sides in the period from 2010 to 2018, with each party losing two sitting first-term Prime Ministers to internal challenges and each desiring as a result to project a more stable image to

[7] Laws removing party defectors from Parliament can exist, such as Division 4 of Part VII of Papua New Guinea's *Organic Law on the Integrity of Political Parties and Candidates* or ss 55AAB – 55E of the *Electoral Act* 1993 (N.Z.), on which see Orr, *The Law of Politics : Elections, Parties and Money in Australia* (2nd ed., Federation, Alexandria 2019), pp. 90f.

[8] According to Rudd, *The P.M. Years* (Pan Macmillan, Sydney 2018), pp. 315, 533, there was a Caucus rule in existence in the federal A.L.P. parliamentary party before 2013 : it required a formal petition signed by a third of the members of the party for a ballot to be held. This does not of course require any discussion here as it does not provide for a super-majority. It was probably merely the trigger for calling an extraordinary meeting. As far as I know, no rules comparable to that adopted federally in 2013 have been adopted at State level, although no attempt at a comprehensive survey was made. However, it is noticeable that the Rules of the Queensland Branch of the A.L.P. (on line at https://www.queenslandlabor.org/members/party-rules-html/) require (Rule 39 (7) (c)) a leadership ballot if 'not less than 50% of members of Caucus petition the State Secretary for a ballot'. There is a similar provision in Rule 2.1.4 of Schedule G to the Victorian Branch's Rules (on line at https://www.viclabor.com.au/wp-content/uploads/2020/09/2020.09.14-Victorian-Labor-Rules-current-as-at-14-September-2020.pdf). This means no change as far as the level of dissatisfaction in the parliamentary party is concerned; it is merely that some rule was needed given that the Rules in both States now provide for party members other than parliamentarians to be involved in the selection of the leader and accordingly there must be some more detail about how a leader can be removed otherwise than by the process used for selection.
On the leadership of the Greens Party, see Gauja, "Leadership Selection in Australia" in Pilet/Cross (eds.), *The Selection of Political Party Leaders in Contemporary Parliamentary Democracies : A Comparative Study* (Routledge, Abingdon 2014), p. 191; on the federal parliamentary leadership of the National Party, see the report of consideration of comparable rules to those of the Liberal Party in Rosie Lewis, "'Lib-Style' Bid to Shore Up McCormack Shelved", "The Australian", 6 February 2020, p. 4. There is also a very useful overview published on line by the federal Parliamentary Library and written by Cathy Madden : "Party Leadership Changes and Challenges : a Quick Guide", Research Paper Series 2019-2020, available at
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/PartyLeadershipChangesChallenges.

the public in future[9] and to restore trust in Australia's political system among voters[10] and confidence internationally.[11] Even in the United Kingdom, which has had comparable rules for much longer than we have and is also still accustomed to the idea that the constitution is not primarily found in any one document, texts on constitutional law and even discussions of it by political scientists mention their comparable rules briefly if at all.[12] But such rules, to put matters at their very lowest, affect the way in which constitutional law is practised. There is also a question about the legal status and enforceability of such rules. Moreover, constitutional law can tell us something about the interpretation and operation of the rules around the selection of the two federal parliamentary party leaders who are the sole candidates for appointment as Prime Minister.

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[9] See in particular Tiffen, *Disposable Leaders : Media and Leadership Coups from Menzies to Abbott* (Newsouth, Sydney 2017), ch. 11. This book is recent, but too recent to document or analyse the last of the four changes, the deposition of Malcolm Turnbull in favour of Scott Morrison in 2018. (By "first-term Prime Ministers" in the text I refer to the fact that each Prime Minister had won the previous election and only that election, although two of those displaced had also ruled for some longer or shorter period before that election.)
The A.L.P., in particular, used to be known for sticking loyally by leaders through successive election losses; nowadays some do not even make it as far as a general election, and that is so on the conservative side also. In the U.K. it was apparently against the rules for any challenge to occur to a sitting leader of the Parliamentary Labour Party holding the office of Prime Minister until 1980 : Bale/Webb, "The Selection of Party Leaders in the U.K." in Pilet/Cross (eds.), above n 8 at 14. Such rules are not necessarily desirable either, as pressure, if it builds up, will seek an outlet in some other way, and there is also an obvious reduction in accountability.
In Savva, *Plots and Prayers : Malcolm Turnbull's Demise and Scott Morrison's Ascension* (Scribe, Brunswick 2019), p. 330, the Hon. Trevor Evans M.P. is reported as reflecting on whether the recent instability in leadership is caused by 'a weakness in the system that has become evident only after the breakdown of the traditional media model, or whether the root cause is something peculiar to this current generation of leaders in Australia'. These are not bad attempts, but it would indeed be a fine thing if anyone could say what the cause of the last ten years' instability has really been. Indeed, if such knowledge existed it would help us design a rule to counteract it, or even know whether any such rule is feasible.

[10] Walsh, "The Revolving Door of Australian Prime Ministers" in Evans/Grattan/McCaffrie (eds.), *From Turnbull to Morrison : the Trust Divide – Australian Commonwealth Administration 2016 – 2019* (M.U.P., 2019).

[11] Rimmer, Foreign Policy under the Coalition : Turbulent Times, Dwindling Investments", in Evans/Grattan/McCaffrie (eds.), above n 10 at 61.

[12] For example, Brazier, *Constitutional and Administrative Law* (8th ed., Penguin, London 1998), pp. 170, 265f; King, *The British Constitution* (O.U.P., 2007), pp. 342f; Leyland, *The Constitution of the United Kingdom : a Contextual Analysis* (3rd ed., Hart, Oxford 2016), p. 92. A very eminent scholar reviews the question of the constitutional status of parties, although without specific reference to leadership elections, in Bogdanor, "The Constitution and the Party System in the Twentieth Century" (2004) 57 Parl Aff 717.

**2. The rules**

Needless to say the rules on leadership changes are not published in any official source, nor is there any version on the Internet endorsed by either party.[13] The content of the rules must instead be gathered from media reports.

According to a report in the "Australian" newspaper,[14] the rule on the Labor side restricts leadership spills to situations – and this is said to be a direct quote – 'where at least 75 per cent of the members of the federal parliamentary Labor Party sign a petition requesting that an election for a leader be held when in government and 60 per cent when in opposition'. The somewhat inelegant phrasing may be due to the fact that originally, as proposed by Kevin Rudd during his second and briefer term as Prime Minister and leader of the Federal Parliamentary Labor Party from June to September 2013, the 75% threshold would have applied in Opposition as well;[15] it was only in Caucus that it was reduced to 60%, presumably by tacking words on the end of the original motion as an amendment. This is nevertheless far higher than the threshold in the U.K. Labour Party, where only 20% of M.P.s can trigger a vote on the leadership.[16] Such a vote would occur under the A.L.P.'s procedures for electing a leader, a subject on which cl. 27 of the A.L.P.'s National Constitution starts off in a curiously ambiguous way :

[13] Gauja, above n 8 at 191, 194. There was no answer to enquiries by the author directed to a member of Parliament on each side who appeared, from the office held within the parliamentary party, to be a suitable recipient of a request for an official version of the rules. More informal approaches of various other types also saw no success with one exception, for which I am most grateful : some information was supplied to me from the ranks of the Liberal Party. That informs some of what is stated in the text below but there is no further attribution in the footnotes where this is so.

[14] Troy Bramston, "A.L.P. Constitution Still Lacks Leadership Buffer", 6 December 2018, p. 6.

[15] Rudd, above n 8 at 549f; "Transcript of joint press conference, Canberra, 8 July 2013 : changes to Australian Labor Party leadership rules", https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2579087%22;src1=sm1.

[16] For the Conservative and Unionist Party the level required to trigger a vote, rather than change the leader, is even lower, at 15% : Bale/Webb, above n 9 at 14.

Federal Parliamentary Leader

27. (a) This clause applies when the rules of the FPLP [the Federal Parliamentary Labor Party] require the election of the Leader of the FPLP (in this clause, “the Leader”) to include a ballot of Party members other than members of the FPLP.

(b) The Leader must be elected by :

(i) a ballot of eligible Party members, and

(ii) a ballot of the members of the FPLP,

where the results of each ballot are given equal weighting and added together.

(c) In paragraph (b) (i), “eligible Party member” :

(i) means a financial Party member at the time nominations open who has not subsequently resigned or been expelled; but

(ii) does not include members of the FPLP.

(d) The National Executive must make rules for the conduct of the election, including the ballot under paragraph (b) (i), in consultation with the FPLP.

(e) The FPLP must make rules for the conduct of the election, including the ballot under paragraph (b) (ii), in consultation with the National Executive.[17]

The new rule of Caucus (the “FPLP”), not mentioned in the above extract from the National Constitution or anywhere else in it, that requires 75% or 60% to remove a parliamentary leader and cause an election under this process does not of course prevent a leader from causing a vacancy by resigning, including resigning under pressure. The Caucus rule also specifically allows the leader personally to call for a leadership contest – in other words, in effect resigning but staying on while the contest proceeds, whether as a mere caretaker or as part of an attempt to be re-elected.

[17] Published on line at https://www.alp.org.au/media/1574/alp_national_constitution.pdf. Greg Brown, “A.L.P. Push to Change Leader Elections”, “The Australian”, 23 June 2020, p. 7, reports on views in senior ranks of that party to the effect that cl. 27 (c) (i) should be amended to specify a qualifying period of membership such as a year and possibly even a requirement to have attended branch meetings before party members are allowed to vote lest branch-stackers or pressure groups subvert the process by having a large number of members join up solely to participate in the leadership vote. It is generally thought that the Labour Party in the U.K. was the target of such tactics in recent leadership elections.

The decision of Caucus to adopt its new rule, as announced by Kevin Rudd, also contained a further element proposed by him, namely that the petition must state as the ground for seeking new leadership 'that the current leader has brought the party into disrepute'.[18] On proposing this part of the new rule publicly a fortnight before its adoption, Mr Rudd explained it as follows :

> That's simply a means by which the parliamentary party could form a judgment that the leader – the parliamentary leader – was a person who at that stage was causing the party reputational damage of a significant order of magnitude and therefore you need to have what is called a recall mechanism.[19]

The idea here is evidently that there should be some objective standard for removal, not merely a change in the numbers within Caucus. It is however plain that what brings the party into disrepute or causes it 'reputational damage of a significant order of magnitude' will always be in the eye of the beholder.[20] A further – and intentional – deterrent against leadership change is provided by the fact that if the A.L.P. leader is removed, the party will be left in limbo for three months or so while the new leader is elected (unless the position is not contested).[21] As far as procedures are concerned, a press report states that the original motion referred to the need for a petition to be written, 'but Labor M.P.s say it could simply be a show of hands or a formal ballot in a Caucus meeting'.[22]

On the Liberal side the rule is both simpler and more restricted. It was adopted, allegedly, by consensus of their party room and after consultation with the Liberal Party's leadership group and the Hon. John Howard O.M., A.C. on the idea. The Whips recommended the precise level of support that would

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[18] "Transcript of Doorstop Interview, Balmain, 22 July 2013 : Labor Party Reforms; Asylum Seekers", https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2611821%22.

[19] Transcript, above n 15.

[20] Paul Kelly, "Rudd to be Most Powerful P.M.", "The Australian", 10 July 2013, p. 10, opines that 'Rudd would have survived this test in 2010 anyway because he did not breach the "disrepute" criteria [*sic*]. That verges on corruption or offences that transcend unpopularity.' This pronouncement merely shows a lack of imagination. It would not be difficult to construct an argument that any one government policy, or Mr Rudd's general leadership style, was causing 'reputational damage of a significant order of magnitude'.

[21] Rudd, above n 8 at 593.

[22] Troy Bramston, above n 14 at 6. This requirement for a petition is evidently an inheritance from the previous rule : see above, fn 8.

be needed for a motion to unseat the party leader : the new rule requires a two-thirds majority to unseat a Prime Minister who has won a general election. The rule does not apply if the party is in Opposition nor to a Prime Minister who has not been endorsed by the people at a general election.[23] Christopher Pyne tells us that this is because the parliamentary leadership, in the culture of the Liberal Party, is designed to be held securely only by those who succeed, and a leader who has not succeeded is as vulnerable as a C.E.O. who is not making a profit.[24] However, the Liberal Party, unlike the A.L.P., has never had formal written party-room rules,[25] and there is no reason to think that it has created such a category of formal rules for the purpose of enshrining this new rule; at most the rule could be recorded only in the minutes of the party-room meeting of the day on which it was adopted. It is also worth reminding ourselves that the Liberal Party is, of course, regularly in coalition with the National Party, but that latter party's parliamentarians have no vote on the Liberal leadership; it is solely the Liberal M.P.s and Senators who determine that and the two-thirds majority is accordingly a majority of them only.[26]

Not all political professionals welcomed the introduction of these new rules. The Hon. Julia Gillard A.C., Visiting Honorary Professor at the University of Adelaide, wrote :

> The answer to the question, "Why do I support this Labor leader?" should not be because he or she polls well or because the rules say I am stuck with them. The answer has to be found in actual and informed consent that this person represents what I believe in and has the leadership capacity to pursue it. […]

[23] Transcript, Prime Minister, "Reform to the Parliamentary Liberal Party", Canberra, 3 December 2018, at https://www.pm.gov.au/media/press-conference-treasurer-0; Joe Kelly, "P.M. to End Leadership Turmoil", "The Australian", 4 December 2018, p. 4. 'It was supported near-unanimously, albeit not necessarily 100 per cent enthusiastically' : Savva, above n 9 at 329. Pyne, *The Insider* (Hachette Australia, Sydney 2020), pp. 375f presents matters with a slightly different emphasis : the Prime Minister presented the proposal to the party room which could not but agree given that it accepted that too many leadership spills had been indulged in in recent years; however, we also learn from Mr Pyne that the leadership group was consulted about the proposal before it was made. In the transcript referred to earlier in this footnote, the Prime Minister referred to consultation with the 'Liberal ministry' – that cannot be Cabinet given that it contains members of another party, and so presumably this is more or less the same group as Mr Pyne referred to.

[24] Pyne, above n 23 at 275.

[25] Crisp, *Australian National Government* (5th ed., Longman Cheshire, Melbourne 1983), p. 250; Pyne, above n 23 at 375.

[26] I avoid here the oxymoronic phrase "government backbenchers". Backbenchers are by definition not members of the Executive. At most they support the Executive in Parliament, but they are not, for example, bound by Cabinet solidarity.

[T]he rules adopted about the Labor leadership […] on removing the Leader should be changed. These rules literally mean that a person could hang on as Labor leader and as Prime Minister even if every member of Cabinet, the body that should be the most powerful and collegiate in the country, has decided that person was no longer capable of functioning as prime minister. A person could hang on even if well over half of their parliamentary colleagues thought the same.

Ironically, I argue against these rules, even though under them I would have unseated Kevin Rudd in 2010, given colleagues would have signed up in sufficient numbers to have him gone, but he could never have defeated me in 2013.

I argue against them because they are a clumsy attempt to hold power; they are not rules about leadership for purpose.

Indeed, the new rules represent exactly the wrong approach to address the so-called "revolving door" of the Labor leadership. These rules protect an unsupported, poorly performing incumbent rather than ensuring that the best person gets chosen and supported for the best reasons : specifically the attachment of the Labor party to the leader's defined sense of purpose and vice versa.[27]

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[27] In the "Guardian Australia On Line", 14 September 2013, at : https://www.theguardian.com/world/2013/sep/13/julia-gillard-labor-purpose-future. See also Gillard, *My Story* (Knopf, North Sydney 2014), pp. 445f. On the historical point about the "numbers" in 2010, Kelly, above n 20 at 10, says, 'Maybe this number [75%] was against Rudd in 2010. Maybe. But not against Hawke in 1991 or Gillard this year [2013].' He essentially repeats this assessment in *Triumph and Demise : the Broken Promise of a Labor Generation* (Melbourne U.P., 2014), p. 480 ('doubtful' whether Gillard would have got 75% in 2010) and adds (p. 481) that '[t]he 75 per cent threshold is too high, privileging stability before accountability'. On the other hand, Phillip Coorey, "Super Saturday Provokes Dark Mutterings in Labor", "The Australian", 29 June 2018, p. 39, says that '[n]o-one disputes' that Julia Gillard would have received 75% of the Caucus votes when challenging Kevin Rudd in 2010. Patrick, *Downfall : How the Labor Party Ripped Itself Apart* (Harper Collins, Sydney 2013), p. 142 has the numbers at 72 to 43, which is not 75% support, although after the time when those numbers were counted, a few hours before the party meeting, there might have been further changes : it will be recalled that Mr Rudd did not contest the leadership after it became vacant with his own resignation in 2010, and accordingly the precise percentage of Caucus that would have voted against him is not known. In 2013, on the other hand, Julia Gillard contested and lost the leadership to him in a Caucus vote, but by a majority well short of 75%.

There are complicated and difficult issues here, roughly comparable to designing a process for removing a president in a republic – a question mixing constitutional law, political science and possibly other disciplines as well.

It may be that even Mr Rudd has come to see some small degree of wisdom in the remarks just quoted, as he has said that more thought should have been given to removing Mr Bill Shorten as parliamentary leader before the general elections of 18 May 2019.[28] The recent stability in the Labor Party's federal parliamentary leadership may in part be a result of the new rules, but other political factors have also played a role. The rules will be truly tested, both as regards their utility and their longevity, only when circumstances arise in which there is again considerable dissatisfaction within the parliamentary party about the leader's performance. The same applies also, of course, to the Liberal Party.

One academic commentator says that the new rules are 'purely symbolic, as any leader suffering even a 50 per cent vote against them would immediately become an easy target for attacks from both sides'.[29] It is indeed hard to think that the position of a Prime Minister of either political persuasion who had "won" a leadership spill motion because "only" 65% of the party room voted against him would be very secure, nor that an A.L.P. leader, if pressured into resigning after such a vote, could possibly win a leadership ballot in which half the votes go to Caucus members. Nor can the rules prohibit the moving of a motion that does not declare the leadership vacant but is designed to test feeling against a leader or even as a public rebuke and humiliation.

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[28] Greg Brown, "Rudd Says Shorten to Blame for Poll Defeat", "Weekend Australian", 24 August 2019, p. 2. However, a "Correction" was published in the "Weekend Australian", 31 August 2019, p. 2, stating that Mr Rudd had been 'incorrectly paraphrased' in some unspecified way in this report. As a result the author listened to the recording of the event behind this report at http://kevinrudd.com/media/. Mr Rudd certainly did not resile from his rules, which he said were a pre-condition for his agreement to return to the leadership in 2013 (see also Rudd, above n 8 at 534f, although there is no reference to the super-majority for deposing a leader in that source), but he certainly also did suggest that more consideration should have been given to changing leaders before the general elections of 2019. See also Rudd, above n 8 at 550, 589.
[29] Tiffen, above n 9 at 233; see also Savva, above n 9 at 330.

**3. Double entrenchment problems**

Clause 27 of the A.L.P.'s National Constitution was quoted earlier. It was observed that, although adopted in 2018, it makes no reference to Caucus's rules about leadership changes from 2013. It concerns itself merely with the election of a leader if the position is vacant. The position is not vacant if the parliamentary leader has not been removed in some way. It is merely a rule of Caucus, the sub-group of party members who are members of federal Parliament, that requires 75% of the parliamentary party's membership to bring this about if the party is in government or 60% if it is not.

This has led some commentators to the view that the rules restricting the capacity of both parliamentary parties to effect a vacancy in their leadership could simply be abolished by the ordinary majority of the parliamentary party, whereupon it would then again be possible to remove a leader by a simple majority.[30] Even in the press conference announcing the A.L.P.'s new rule, Kevin Rudd said, 'The Caucus is the master of its own destiny',[31] hinting that perhaps it may still be able to choose to do that. And the A.L.P.'s National Constitution of 2018 states in clause 25 that, unless there is another provision somewhere in the Party's platform or decisions, which on this point there is not, 'the majority decision of the relevant Parliamentary Labor Party shall be binding upon all members of Parliament'.[32]

One view, indeed, is that such rules are 'designed to be broken'[33] – that this flaw is well known and the rule exists largely for the purposes of show, so that the party can argue in public that it has done something about leadership stability and if elected to government will ensure that, aside from extraordinary circumstances in which there is an overwhelming majority for change and the party's leader has brought it into disrepute, the people will be governed by the person they expected to be governed by. In part this state of affairs is, at any rate, inherent in the nature of things : as already noted, no rule can outlaw motions designed to make a leader's position untenable without actually deposing the leader. In the case of the A.L.P., which has two different thresholds depending upon whether the party is in government or not, it is also remarkable that no attempt was made to specify

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[30] Bramston, above n 22 at 6; Coorey, above n 27 at 39; Latika Bourke, "Labor set to abandon Kevin Rudd's leadership rules", "Sydney Morning Herald", on line only, at : https://www.smh.com.au/politics/federal/labor-set-to-abandon-kevin-rudds-leadership-rules-20150630-gi16w2.html.
[31] Above n 18.
[32] Above n 17.
[33] Coorey, above n 27 at 39.

which of the two super-majorities would be needed to repeal the rule, or whether it is really two separate rules and the lower threshold applies also to repeal of the provision that applies if the party is in Opposition.

However, the present Prime Minister, Scott Morrison, in announcing the Liberal Party's comparable rule, went out of his way to deny the possibility of such swift change in the rules to restore the old order of things. While stating twice that the Parliamentary Party was 'sovereign', whatever that may mean in this context, he mentioned in his opening remarks that 'for that rule to be changed, it would require a two-thirds majority of the Parliamentary Party', and in answering questions provided the following elaboration :

> Journalist : Prime Minister, could this rule be overturned by a simple majority?
>
> Prime Minister : No.
>
> Journalist : Why not?
>
> Prime Minister : It requires a two-thirds majority.
>
> Journalist : To overturn the rule?
>
> Prime Minister : Yes that's right.[34]

At least for public consumption, then, and subject to the various caveats above about the possibility of humiliating the leader and attempting to force a resignation, the position taken by the Liberal

[34] Transcript, Prime Minister, above n 23. One small and evident error in the transcript has been corrected.

Party's parliamentary leader is clear. The party's federal Constitution provides that the federal parliamentary party shall 'appoint its Leader, who shall thereupon become the Parliamentary Leader of the Organisation',[35] but there is no other information on the selection of the federal parliamentary leader in it, nor is there an equivalent of the A.L.P.'s general power in the parliamentary party to govern itself in cl. 25 of the National Constitution quoted above. That however might be thought to be a power that is taken for granted by the Liberals, and indeed one that is inherent in any collection of people.

In the language of constitutional law, this is a problem of double entrenchment. It is accepted that a provision requiring a specially high majority for amending or repealing a law must itself be protected by the same process from amendment or repeal, for otherwise the restriction on repeal or amendment can be swept aside by repealing, using the ordinary procedure, the requirement for a specially high majority, and then there is no longer any restriction preventing the substantive amendment desired. In other words, if s 2 says that s 3 cannot be repealed except by a two-thirds majority but s 2 is not also protected from repeal by a two-thirds (or higher) majority, s 2 can simply be repealed by the ordinary majority and then there is no requirement affecting the repeal of s 3 any more. Cases of such single, and thus ineffective entrenchment have existed in the constitutional law of the Australian States.[36] In the case of the Liberal Party it would appear that this problem has been catered for : according to the Prime Minister, the rule provides that it cannot itself be abolished unless the same majority votes for abolition as would be required to unseat the leader. In the case of the A.L.P., it would appear that there is no double entrenchment.

That is not quite the end of the matter however. In the case of the Liberal Party it must still be asked whether one set of members of the parliamentary party has the right to impose such a self-denying ordinance on later members. A later majority of that party, being just over 50% but under 66⅔%, may find itself asking, when seeking to unseat a Prime Minister and being told that it has the numbers neither to do so nor to sweep aside the rule preventing it from doing so, 'Upon what meat doth this

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[35] Cl. 52 (a). The Federal Constitution is published on line at https://cdn.liberal.org.au/pdf/2010%20Liberal%20Party%20of%20Australia%20Federal%20Constitution.pdf.

[36] See, for example, *Western Australia* v. *Wilsmore* (1982) 149 CLR 79, 83-85, 99f; Twomey, *Constitution of New South Wales* (Federation, Leichhardt 2004), pp. 314f. In our own day a similar manoeuvre has occurred : the *Fixed-term Parliaments Act* 2011 (U.K.) s 2 (1) (b) required a two-thirds majority in the House of Commons on the motion "That there shall be an early parliamentary general election" to bring about an early election. This rule was bypassed by the *Early Parliamentary General Election Act* 2019 (U.K.) s 1 (1) which in effect overrode the 2011 Act and called an election for 12 December 2019. It did not, of course, require passage by anything more than the ordinary majority (although it did require the assent of the Lords, unlike a motion).

our Caesar feed, That he is grown so great?' – by what right have the powers of the majority been restricted by a motion perhaps ten or twenty years old? In constitutional terms, this is a question about whether there is any power to impose such restrictions upon future decision-makers. While the theory of parliamentary sovereignty certainly has a role to play, and there is a vast literature on that topic which cannot be reviewed here, I have argued that it is ultimately reasons of public policy which have led to the generally accepted view that a Parliament cannot restrict its powers for the future except under the clear and fairly narrow express authorisations in constitutional law enabling it to do so. It is the need for continuing democratic control of the law by successively elected Parliaments that, in the absence of any valid constitutional authorisation for such a step, prevents transient majorities governing at any one time from attempting to rule us from the grave by immunising their decisions from future change.[37] In the Liberal Party there is no such constitutional authorisation for the party room to create special rules that cannot be abolished except by super-majorities. That being so, the easy answer would be to say that the motion restricting amendments of the rules is unauthorised by the organisation's basic documents and the parliamentary party therefore remains, in the Prime Minister's phrase, 'sovereign' – able to reverse its decision at any point by a simple majority.

Such a conclusion, however, would undersell the capacity of the 'sovereign' parliamentary party. This would appear to be the first time that it has adopted any rule restricting the powers of the majority in the future, and perhaps time is needed to see whether the custom of that body sanctifies the rule by use. A parliamentary party is not, after all, a Parliament with wide-ranging legislative powers, democratic majorities oscillating from one side to the other and sovereignty inherited from Westminster as is confirmed in s 2 (2) of the *Australia Act* 1986 (Imp. & Clth). The federal Liberal party room can govern only itself, and it may be that this rule will be established as the sole exception to the usual rule of bare majority and as such become generally accepted by the group of people to whom it applies and whose powers it restricts. In that sense, the party room is 'sovereign' : if its members over time accept practices as binding on them and their successors by custom, that becomes the law of the party room. Furthermore, it is opposed to the tradition of the Liberal Party for organisational documents such as the Federal Constitution to attempt to govern the parliamentary wing in any detail.[38] In looking for an authorisation for super-majorities in that document, we are therefore looking for something

[37] Taylor, *Constitution of Victoria* (Federation, Leichhardt 2006), pp. 465-470.
[38] Brett, *Australian Liberals and the Moral Middle Class : from Alfred Deakin to John Howard* (C.U.P., 2003), pp. 13-18; Crisp, above n 25 at 247-250.

that we should not expect to find : we are looking in the wrong place. Only the practice of the parliamentary party will determine whether the rule restricting repeals of the two-thirds requirement becomes binding or not.

In relation to the A.L.P. an easy answer is also available : the restrictive rule can itself be repealed at any time by an ordinary majority given that there is no double entrenchment, which would require some specification of which of the two thresholds is required for repeal or indeed whether each is applicable to the repeal of the part of the rule to which it relates, which would thus be divisible for this purpose into two rules. However, such an easy answer would overlook the fact that we are not dealing with a sovereign Parliament here, restrictions on the legislative capacity of which, such as special hurdles to changing the law, should be read narrowly, implied reluctantly and certainly not invented. It would moreover be odd to impute to the movers of a motion that a certain thing should not be done without a certain procedure an intention that the procedure selected may nevertheless be circumvented by the simple expedient of moving a preliminary motion cancelling the initial decision. Surely we can say, when the absolutism of parliamentary sovereignty disappears from the picture, that "what cannot be done directly cannot be done indirectly".[39] However, these arguments would overlook the fact that the Caucus is 'sovereign', in the present Prime Minister's use of that word which appears to mean something like "capable of governing itself and its own master in all respects", neither by the custom nor by the law of the Australian Labor Party, which historically has had a much more centralised and extra-parliamentary decision-making process going right back to the fear of its founders that elected representatives would "rat" and refuse to carry out the workers' commands once on the cushy benches of Parliament.[40] Clause 25 of the National Constitution subjects Caucus to the decisions of the party's extra-parliamentary body at all levels and then goes on to empower its majority, which of course means the ordinary majority. In the terms of traditional constitutional law, Caucus, as far as it has power, has a grant of continued power over its own proceedings in the party's sovereign National Constitution. It cannot take that grant away from itself as it is subordinate to the party's National Constitution which makes the grant and which it cannot amend. The stream cannot rise above its source, and the National Constitution would have to be amended to permit Caucus to limit on its own motion the powers conferred upon it by that document. It is therefore correct to say

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[39] On this maxim, see, *e.g.*, Singh, "'What Cannot be Done Directly Cannot be Done Indirectly' : Its Meaning and Logical Status in Constitutionalism" (1966) 29 MLR 273.
[40] See, for example, Crisp, above n 25 at 189-203.

that the Federal Parliamentary Labor Party's rules about bringing about a vacancy in the leadership can be repealed at any time by an ordinary majority of Caucus.

**4. Legal enforceability**

Assume that I am wrong and that the A.L.P.'s rule cannot be repealed by a simple majority, or that the attempt to do so is not made : are the new rules legally enforceable? The same question may be asked of the Liberal Party's rules, leaving aside the entrenchment point and my different and less certain answer in relation to that party on that topic.

Thirty or forty years ago, the idea that an internal party rule might be thought of as enforceable by the Courts would have been barely arguable. The leading case was *Cameron* v. *Hogan*[41] which denied that the Courts had a role in enforcing internal party rules. Since the early 1990s, however, a string of cases have emerged which have distinguished that case, although it is noticeable that, partly because many of them were interlocutory or otherwise urgent, none of the cases enforcing party rules has gone beyond first-instance Courts.[42] The sole apparent exception is *Mulholland* v. *Victorian Electoral Commission*[43] which reached the Court of Appeal for Victoria, although it is itself something of an exception to the usual run of cases on internal party affairs given that it involved the validity of a public administrative act, namely the registration of a certain person as the registered officer of a party, rather than solely the party's internal rules; the validity of the Victorian Electoral Commission's act

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[41] (1934) 51 CLR 358.

[42] There remain limits however : unsuccessful applicants for membership, rejected in accordance with party rules, were rightly sent away empty-handed in *Baker* v. *Liberal Party of Australia (S.A. Division)* (1997) 68 SASR 366.
In *Coleman* v. *Liberal Party of Australia, New South Wales Division (No. 2)* (2007) 212 FLR 271, 280f, the Judge speculated that the lack of appeals may also be because party members have welcomed the involvement of the Courts in settling intra-party disputes given that they are impartial. See also Orr, above n 7 at 124f; Orr, "Private Association and Public Brand : the Dualistic Conception of Political Parties in the Common-Law World" (2014) 17 Critical Review of International Social and Political Philosophy 332, 339.

[43] (2012) 36 VR 167. The case had many sequels, recounted in *Mulholland* v. *Funnell* [2016] VSCA 290 which also reached the Court of Appeal for Victoria, but only for leave to appeal to be refused, as was special leave to appeal to the High Court of Australia ([2017] HCASL 76).

depended in effect on whether internal rules had been complied with; it was held, on examining them, that they had not been; as a result, the public administrative act was void.

The line of cases enforcing internal party rules alone, often in a suit between party members, began with *Baldwin* v. *Everingham*[44] in which the single Judge held that he was able to distinguish the authority of the High Court of Australia in *Cameron* v. *Hogan* on the ground that political parties were now publicly registered and their internal workings were therefore no longer private matters which the Courts would not supervise. Dowsett J. added :

> It is one thing to say that a small, voluntary association with limited assets, existing solely to serve the personal needs of members should be treated as beyond such supervision; it is another thing to say that a major national organisation with substantial assets, playing a critical role in the determination of the affairs of the country should be so immune.[45]

Not everyone is convinced by his Honour's 'long leap of logic'[46] in distinguishing authority binding on him on the basis of the minimal statutory recognition of parties. However, that could be merely a fig-leaf designed to allow distinguishing and thus liberation from authority to occur. If seen on a broader basis in line with the quotation just reproduced – as a decision that public law should include political parties given their extraordinary importance to the actual functioning of the polity – his Honour's decision is much more easily supported and is a shift in the boundaries of public, perhaps even constitutional law that recognises realities as they have existed for over a century.[47] However, there is an

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[44] [1993] 1 Qd R 10. It is not necessary to review all the other cases for present purposes. Other principal cases, aside from those mentioned in the text and other footnotes, are *Burston* v. *Oldfield* [2003] NSWSC 88; *Galt* v. *Flegg* [2003] QSC 290; *Coleman (No. 2)*, (2007) 212 FLR 271; *Fennell* v. *Brough* [2008] QSC 166; *Greene* v. *McIver* (2012) 263 FLR 450; *Johnston* v. *Greens (N.S.W.)* [2019] NSWSC 215 (in this case the party was an incorporated association and the remedies available under the legislation for the incorporation of associations were therefore also available). See further Orr, above n 7 at 115-126. There is also a discussion of some of these cases and an overview from the perspective of political science in Gauja, "Dilemmas of Party Regulation : Hands-On Courts versus Hands-Off Legislators?" in Gauja/Sawer (eds.), above n 4 at 173-190.

[45] At 17. As can be seen from his Honour's reasoning, he was also aided by authority of the High Court of Australia relating to registered trades unions in reaching this conclusion : *Edgar* v. *Meade* (1916) 23 CLR 29. In *Clarke* v. *Australian Labor Party (S.A. Branch)* (1999) 74 SASR 109, 150 Mullighan J. said something similar to the words quoted in the text.

[46] Forbes, *Judicial Review of Political Parties* (Parliamentary Research Service, Canberra 1996), p. 15.

[47] *Coleman (No. 2)*, (2007) 212 FLR 271, 278, 280; Gauja, "From Hogan to Hanson : the Regulation and Changing Legal Status of Australian Political Parties" (2006) 17 PLR 282, 285, 294; Orr, above n 7 at 120.

isolated recent Victorian case in which a single Judge continued to follow *Cameron* rather than the later line of authorities starting with *Baldwin* and stated, 'as a judge at first instance, it is not appropriate for me to decline to follow a decision of the High Court on the basis of perceived changes in social conditions or circumstances'.[48] The whole question is overdue for consideration at a much higher level.

Nevertheless the majority of single-Judge decisions remains firmly on the side of justiciability, and if either Parliament or the High Court of Australia considers the matter it is to be hoped that the maximum degree of accountability on the part of political parties would be expected. This approach rightly emphasises the public nature of the power actually exercised by political parties which makes them much more important than any old voluntary and unincorporated association, such as a tennis club, whose members should be able to decide for themselves what status their rules have among themselves.[49] We are already at the point, however, where even the A.L.P.'s rules stating that the 'National Constitution and everything done in connection with it' will not be 'enforceable by law, or be the subject of legal proceedings'[50] will not prevent judicial supervision. There is additionally no reference in those rules to any Caucus rules such as are presently in question, and we should not be anxious to extend the reach of clauses that, in effect, attempt to oust the jurisdiction of the Courts. At any rate, there is at least one case from South Australia[51] involving comparable State rules and another from Victoria[52] in which it was held that such provisions did not stand in the way of curial enforcement of internal whole-of-party rules and the matter remained justiciable; at most such statements about the lack of intention to create legally enforceable rights might go to discretionary considerations in issuing a declaration, for example.

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[48] *Setka* v. *Carroll* (2019) 58 VR 659, 688. Mr Setka abandoned an appeal against this decision, stating that he had chosen to resign his membership of the A.L.P. for policy reasons unrelated to those that had prompted his litigation : Simon Benson/Ewin Hannon, "Setka Forced Out of A.L.P. in Victory for Albanese", "The Australian", 24 October 2019, p. 1.
Compare the more relaxed attitude taken in Canada to the question of revision of higher Courts' rulings by lower Courts in the light of changed circumstances : *Carter* v. *Attorney-General (Canada)* [2015] 1 SCR 331, 361.

[49] Gauja, above n 47 at 294; Orr, above n 7 at 123f; Orr, above n 34 at 338f.

[50] Cl. 2 (a). See also cll. 48, 50. There is no equivalent of this clause in the Liberal Party's Federal Constitution : *James* v. *Wilson* [2019] NSWSC 17, [42], para. (f).

[51] *Clarke*, (1999) 74 SASR 109, 134; see also the further proceedings : [1999] SASC 415, [29] – [33].

[52] *Barker* v. *Australian Labor Party* [2018] VSC 596, [217] – [223]. In *Sullivan* v. *Dellabosca* [1999] NSWSC 136, [28], the State equivalent of cl. 2 (a) was held to be merely 'added reason to exercise the discretion to refuse to make a declaration in proper circumstances' – the principal reason being that no useful purpose would be served by doing so. However, the balance between the two considerations was the other way around in *Jackson* v. *Bitar* [2011] VSC 11, [8]f : first the Judge mentioned the purportedly non-binding status of the rules, and only then discretionary factors relating to the remedy sought.

All this authority relates nevertheless to published party constitutions which are meant to be binding in some way or other upon all the party's members. As a matter of principle it would seem surprising for a Court to attempt to enforce a rule of a parliamentary party which meets in secret and does not even publish its rules. No indication whatsoever exists that such rules are intended to create legal rights among the members of the parliamentary party, every imaginable indication is against it, and any such suggestion would probably be met with indignation mixed with astonishment on the part of the members of the parliamentary party. Such party rooms do exercise public power and are certainly part of the governmental machinery as a political scientist would see it, but they are accountable in every case for the powers they exercise in the public forum of Parliament. The slow death of *Cameron* v. *Hogan* shows that sometimes surprises occur,[53] but that does not mean that everything that would be surprising is also going to happen or should be allowed to happen.

There is some analogy with the suit by a former Minister of the Crown seeking to question his dismissal on the ground of misconduct which arose recently in *Stewart* v. *Ronalds*.[54] The analogy is far from complete because an act of the Crown was involved, whereas in the case postulated here the suit would involve only actions internal to the party and be between two party members, one of whom had lost the leadership of the parliamentary party as a result of an alleged infringement of party-room rules while the other had gained it. Nevertheless, if the party in question were in government the office of Prime Minister would be at stake in our type of case, and in *Stewart* Allsop P., with whose reasons Handley A.-J.A. agreed on this point, held that the claim by the former Minister would involve determining 'quintessentially political questions. This is not a function of the Courts. It is the function of Parliament and through it, the people of New South Wales.'[55] This provides us with another reason, beyond the intended status of party-room rules, for denying their judicial enforceability : there are two high, proper and easily accessible fora for accountability for any breach of such rules and indeed for changes of party leadership as a whole : namely, Parliament itself and then, first through it and then independently of it at the next general election, the people who will be called upon sooner or

[53] Another recent surprise on the justiciability front is the decision in *R (*ex. rel. *Miller)* v. *Johnson* [2020] AC 373, but that concerned preventing Parliament from sitting during a period of serious political turmoil which is not in issue here.

[54] (2009) 76 NSWLR 99. Another analogy, from a comparable jurisdiction this time, is s 49.7 of the *Parliament of Canada Act* (R.S.C., 1985, c. P-1), introduced in 2015 : 'Any determination of a matter relating to the internal operations of a party by the caucus, a committee of the caucus or the caucus chair is final and not subject to judicial review'. This includes rules relating to leadership spills in s 49.5, although s 49.8 (1) (c) allows parliamentary parties to opt in or out of the rules in s 49.5 and most if not all have chosen to opt out.

[55] (2009) 76 NSWLR 99, 112.

later to pass judgment upon the party leaders. They are the fora in which such acutely political matters should be judged. Nor are matters improved by the A.L.P.'s requirement 'that the current leader has brought the party into disrepute', for, as we have seen, this is also largely a political standard. While it is certainly true that some acts that are legally significant, such as conviction for a serious crime, would clearly meet the "disrepute" test, many, many others would be extremely hard to assess by legal standards and can be properly characterised as disreputable or not only by the exercise of political judgment.

A final and interesting question that would arise in any such litigation is whether parliamentary privilege would prevent the Courts from considering the question. This issue would arise under article 9 of the *Bill of Rights* 1688 as explained in s 16 of the *Parliamentary Privileges Act* 1987 (Clth). Authority is divided on the question whether parliamentary privilege can arise in party-room meetings. In *R* v. *Turnbull* (no relation), the sole Australian authority, a single Judge of the Supreme Court of Tasmania ruled that '[t]he Caucus, or private meeting of members of a party, to determine joint action in Parliament, is essentially a body which operates outside Parliament, whatever effect it intends to produce in Parliament, and cannot, in my opinion, claim parliamentary privilege'.[56] Unfortunately the law report does not state what statements exactly from Caucus meetings were in issue, and reference to newspaper reports of the trial in the "Mercury" does not assist either; perhaps in the end the evidence was not called. On the other hand there is a case in New Zealand in which a Master held that party-room meetings could partake of parliamentary privilege.[57] Something may depend upon the matter that is actually discussed in the party room; if it is the leadership of the political party and the office either of Prime Minister or alternative Prime Minister, as distinct from (say) political tactics at the forthcoming election, it would be easy to argue that that topic falls within the category of 'words spoken […] for the purposes of or incidental to'[58] the business of the House of Representatives, which is, as was famously said of its British equivalent, our electoral college for choosing the Prime Minister. If a group of like-minded members of Parliament assembles for the purpose of deciding who shall receive the support of such of them as are members of the House of Representatives in choosing the Prime Minister, what they say must surely be said for the purposes of the House's business. However, in order for parliamentary privilege to apply the evidence of the words spoken must be tendered,

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[56] [1958] Tas SR 80, 84.

[57] The case is unreported but recorded in Campbell, *Parliamentary Privilege* (Federation, Leichhardt 2003), p. 179 and criticised by the Clerk of the House of Representatives in McGee, "Parliament and Caucus" [1997] NZLJ 137. Of course, the words 'for the purposes of or incidental to' about to be cited in the text did not apply in New Zealand nor in *Turnbull*. The same may be said of the dicta in *R* v. *Chaytor* [2011] 1 AC 684, 705f.

[58] *Parliamentary Privileges Act* 1987 (Clth) s 9 (2).

under s 16 (3) of the Act, for the purpose, to put it compendiously, of questioning its truth.[59] In the case postulated no such intention would exist; it would simply be a matter of producing evidence of the votes recorded for each leadership candidate, and what they said to attract supporters would not be relevant.

Accordingly parliamentary privilege would not stand in the way of admitting such evidence were the matter justiciable. However, the conclusion reached earlier, for other reasons, is that neither party's internal party-room rules restricting leadership challenges is legally enforceable.

**5. Disputes about the legitimate leader**

It is not difficult to imagine circumstances in which the applicability of the leadership spill rules and consequently the result of a purported election might be disputed. Most obviously, in the federal Parliamentary Liberal Party a purported repeal of the rules by a majority of less than 66⅔% on the theory that the 'sovereign' party room cannot bind itself for the future might be followed by the purported election of a new leader. In the A.L.P. the next step after the repeal of the rules by an ordinary majority and consequent dismissal of the parliamentary leader by less than the previously required majority would be commencing that party's process for election of a federal parliamentary leader by a mixed electorate consisting of its members of Parliament and rank-and-file members under cl. 27 of the A.L.P.'s National Constitution quoted earlier – assuming that Caucus did not also abolish the rules requiring the members' participation, as cl. 27 allows it to do. In that case the parliamentary leader would again be elected by the Caucus alone.

In either party the legitimacy of the election of a new federal parliamentary leader might be disputed by the adherents of the incumbent leader who would not concede that the office was vacant at all. They would argue that the conditions precedent to the arising of a vacancy had not been met given that the rules restricting leadership challenges had not been validly repealed nor the specially high

[59] This takes the more expansive view of the prohibition endorsed in *Rann* v. *Olsen* (2000) 76 SASR 450, 471-473; *cf.* also *Chaytor*, [2011] 1 AC 684, 701.

hurdle prescribed by them surmounted. We have already concluded that the Courts would have no role in determining the question whether the party's leadership was vacant because the rules in question are not legally enforceable. However, given that there would be the need for a leadership election it is conceivable that actions might be brought seeking to restrain the party's officials from holding one, particularly in relation to the A.L.P. given (on the assumption stated) that it has a long process involving officials and employees of the party and not merely action in the party room.

A suit to enjoin the A.L.P.'s officials from setting in motion the procedure for a new election or for a declaration that they must not hold such an election is not beyond the realms of possibility. As we have seen, even the statement in the party's National Constitution that it is not intended to create legally enforceable rights has not deterred some Courts from enforcing its commands. However, such a suit would require the Courts to consider the question whether a vacancy in the leadership has truly arisen under the Caucus rules. It is only if that is not the case that an injunction or declaration relating to a new election of the leader could be issued and the outcome of the case would therefore depend on the answer to that question. As compliance with such Caucus rules is not justiciable, the Courts would not be able to proceed with any such suit. It would then be for the A.L.P. to deal with the matter *via* its own internal processes. It may well be that political pressure would ensure that a compromise solution would be found by this point; if not, under cl. 16 (d) of the National Constitution 'the National Executive may exercise all powers of the Party on its behalf without limitation',[60] and there is also a National Appeals Tribunal established under cl. 30. During such processes, it is again conceivable that an allegation might be made that rules in the National Constitution have been breached or some party body has misunderstood or exceeded its powers or not provided natural justice. In such a case the matter could theoretically still reach the Courts, but at one remove, so to speak, from the actual question of leadership. An analogy is provided by, for example, *Clarke* v. *Australian Labor Party (S.A. Branch)*,[61] where the question was not, of course, whether Mr Clarke was the right candidate for pre-selection for the A.L.P. or even whether he was personally eligible, but rather whether rules under the party's constitutional arrangements that would have an effect upon his success in the pre-selection battle had been followed or were about to be correctly followed. But given the extreme importance of the federal parliamentary leadership it is impossible to think – unless there is a cataclysm comparable to the great party split of 1955 – that there could be any further need for the Courts' aid

[60] The meaning of this provision was judicially considered in *Setka* v. *Carroll* (2019) 58 VR 659, 688-696. See further above, fn 48.
[61] See above, fn 51.

by this point because political pressure will have solved the dispute more or less justly but with clarity at least.

We must also ask ourselves, however, what the Crown should do if there are two rival leaders of the party in government – either party – and each claims appointment to the office of Prime Minister. This situation could arise if the Prime Minister in office has been purportedly removed from the party leadership in a manner that is claimed not to be in accordance with the leadership rules and then, disputing the validity of the removal from the party leadership, refuses to resign as Prime Minister, while there is another person who claims to have been elected as party leader in place of the Prime Minister in office and therefore also lays claim to the office of Prime Minister.

It is not of course the Crown's role to solve, to mediate in or in any other way to become involved in such intra-party disputes (and that is why the Crown would have no role at all if the party in question were not in government and "only" the position of Leader of the Opposition were at stake).[62] It is the Crown's role to appoint as Prime Minister the person who holds the confidence of the House of Representatives. Fortunately, in the case of the Liberal Party at least such a situation as postulated is likely to arise only when that House is sitting. This is because leadership challenges usually take place when all, or almost all parliamentarians are in Canberra for parliamentary sittings, and the Liberal Party's leadership rules involve solely parliamentarians not only in deposing a party leader who is Prime Minister but also in electing a new leader. In such a case disputes about who is the legitimate parliamentary leader of the party and thus Prime Minister could be resolved on the floor of the House if there is no success in doing so elsewhere, and the Governor-General need only await developments in the House and act accordingly. It may nevertheless be that a few hours' adjournment of the House would aid the resolution of the problem, and a very short adjournment for that purpose would be unobjectionable.

[62] The matter would not be entirely without legal interest. For example, someone would need to determine who was entitled to the extra salary payable to the Leader of the Opposition under cl. 5 and Schedule 1 of the *Parliamentary Business Resources (Office Holder) Determination* 2017 and the *Remuneration Tribunal (Members of Parliament) Determination* 2019. The Leader of the Opposition also has certain other statutory rights, such as the right to a briefing on intelligence matters conferred by the *Office of National Intelligence Act* 2018 (Clth) s 18. But such matters could wait and would not involve the Crown.

In the case of the A.L.P. it is also possible that a leadership contest of disputed legitimacy might be resolved when the House is sitting; conversely, it is also possible that the Liberal parliamentary party might meet to change its leader immediately after the House's adjournment for some weeks or that a leadership contest in the A.L.P. might be resolved, perhaps by an election in which there is only one candidate, when the House is adjourned for a similar period. In that case there would again be two rival claimants to the office of Prime Minister and no House sitting to resolve the issue. Such a chaotic situation would, it is hoped, be solved by political means : one or other claimant would be prevailed upon to withdraw in the interests of salvaging something of the wreck that such a party would have become. Should this not occur the Prime Minister, being the "old" leader of the parliamentary party allegedly deposed by a rival in disregard of the party-room rules about leadership changes, should ask the Speaker, in whom the power is actually lodged,[63] to summon the House of Representatives very speedily so that the true forum for the resolution of the question can perform its function. If such action is not forthcoming from the Speaker, a most unlikely event given that in such circumstances the Speaker would be justified in breaking with past practice and convening the House even if a request from the government to do so is not immediately made, a recent and comprehensive analysis by Professor Anne Twomey shows that in the final analysis, if other less far-reaching expedients fail and there is no voluntary concession of defeat and relinquishment of office on the part of the "old" head of government (as happened in Queensland in 1987 in the nearest Australian analogy to the present hypothesis),[64] the reserve powers are available to allow the Governor-General to cause the

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[63] Under House of Representatives Standing Order 30 (3), which provides permanent authority for the Speaker to convene the House at a date other than that fixed for its resumption after adjournment. Elder (ed.), *House of Representatives Practice* (7th ed., Department of the House of Representatives, Canberra 2018) p. 241, states that 'such action would only be taken at the request of the Government'.

[64] Twomey, *The Veiled Sceptre* (C.U.P., 2018), pp. 555-583. The legal source of the power is s 5 of the Constitution which allows the Governor-General to appoint times for the 'sessions' of Parliament. As this word means what it usually means in parliamentary law and practice (see Ex rel. *Miller*, [2020] AC 373, 394), the Governor-General cannot appoint meeting times but only fix the start of a session. However, s 5 also allows the Crown to prorogue Parliament. It would be necessary to do this also without advice and then appoint a time for the commencement of a new session, even one commencing half an hour after the prorogation. Luckily none of this rigmarole would be necessary if the Speaker could be prevailed upon to act, which would surely be so.
On the other hand, if the House were sitting when a disputed leadership change occurred and the Prime Minister provided advice to prorogue it for any non-trivial period of time, such advice would be quite improper. There are discussions about whether there is a reserve power to refuse advice to prorogue in the literature (*e.g.* Twomey, *Veiled Sceptre*, ch. 8, with whose conclusions I again generally agree), but in a case such as the one presently under discussion it would doubtless take the Governor-General longer to consider whether to follow advice to prorogue than it would for the House to express its mind on the question of confidence, and that would mean that the advice to prorogue would likely be overtaken by events. Otherwise there is now authority for setting aside a prorogation made without reasonable justification and which has a serious effect upon democracy : Ex rel. *Miller*, [2020] AC 373, 408-410.
An interesting suggestion is made by King, above n 12 at 342f : in such extreme situations the Crown should appoint an "honest broker" to avoid becoming directly involved in politics. Such a person would obviously be much more needed in the United Kingdom where there is no appointed stand-in for the Monarch.

House to sit without receiving any political advice to do so. The present author agrees with Professor Twomey's analysis – in the situation postulated it would be an urgent necessity to have the matter resolved by the competent authority, the House of Representatives, as speedily as possible – and could not add anything useful to it.[65]

**6. Conclusion**

Making it harder on paper to remove the party leader who is Prime Minister is a change in Australia's small-c constitutional arrangements. It may well be some decades before the full implications of the change can be stated. It is conceivable that there will be little or no effect on our governmental system, either because the rules themselves do not last or because ways and means are found to circumvent them, such as by passing ordinary party-room motions which make it impossible for the self-respecting leader to remain. If, however, there is an increase in the Prime Minister's security of tenure, as well as that of the Leader of the Opposition at federal level, a real change, not merely one on paper, in our governmental arrangements will have been brought about. This is something recognised not least by opponents of the new rules such as Julia Gillard.

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It is also possible, if a very serious disruption to the party system were in progress, that the House of Representatives might be unable to agree on a person who should be appointed as Prime Minister, in which case the Crown's best option might be to dissolve it once the impasse is revealed to be insuperable so that the issue can be referred to the people. Professor Twomey's work also covers such cases.

[65] Professor Twomey documents the events at above n 64 at 563f. I agree with her conclusion at pp. 582f that the better response in such a situation, had it not been resolved politically, would not be to dismiss the head of the government, without advice of course, and then to look for another head of government who would advise summoning the House, but rather simply to summon the House without advice from the head of government.

Another situation, that of a leadership change in the governing party when it is in a minority government, is dealt with in Twomey, "Advice to the Governor-General on the Appointment of Kevin Rudd as Prime Minister" (2013) 24 PLR 289, 301. Although a leadership change was involved in that situation, it was different from the one considered here : no special rules about leadership changes applied as this was just before the A.L.P. invented its, and there was no doubt that the parliamentary leadership of the governing party had validly changed. See also on a constitutional issue raised in the most recent leadership change, in which Mr Turnbull lost office to Mr Morrison, Anne Twomey, "Eligibility not an Issue in G.-G.'s Deliberations", "The Australian", 28 June 2019, p. 29; Savva above n 9, ch. 7 & pp. 212-214.

As has been shown here, these rules have the potential to raise quite complicated problems of public and constitutional law. It is to be hoped that the nightmare scenarios considered here never eventuate, although it is well to think about what should happen if they do and interesting to speculate about how the constitutional system would be able to cope with them if they did occur. The recent twists and turns of the Brexit saga in the United Kingdom show that we do have to be ready to deal with constitutional surprises, and also that shiny new rules can have unexpected knock-on effects when applied outside the run-of-the-mill situations for which they were designed. In the United Kingdom, the *Fixed-term Parliaments Act* 2011 was not designed for the major disruption of party discipline following the surprise result of the Brexit referendum of 2016 and the subsequent difficulties in agreeing on the terms on which the United Kingdom would withdraw from the European Union. The Act interacted with other rules, among them the Labour leadership selection rules which kept a leader in office who was widely distrusted within his own parliamentary party, to produce an impasse of many weeks' duration during which the government could neither command a majority in the House of Commons for its proposed deal with the E.U. nor procure an election on the topic. It remains to be seen what more subtle changes our new leadership rules will work in the operation of our constitutional machinery. Such changes may also test the boundaries of constitutional law and politics.

[66] The impasse was eventually resolved as stated above, fn 36.