Upholding the Australian Constitution Volume Ten

Proceedings of the Tenth Conference of The Samuel Griffith Society

Hotel Grand Chancellor, Brisbane, 7–9 August, 1998

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Foreword

John Stone

The Samuel Griffith Society's tenth Conference was held in Brisbane, and the papers delivered to it constitute the bulk of this Volume in its Proceedings, *Upholding the Australian Constitution*. The qualification derives from the inclusion also in this Volume of an Occasional Address delivered to the Society in Sydney last May by Professor Kenneth Minogue, on the topic *Aborigines and Australian Apologetics*. If these Proceedings had contained nothing else, they would have been worthwhile for that paper alone.

In fact, of course, these Proceedings contain a great deal else—namely the twelve papers delivered in Brisbane, together with the brief concluding remarks of the Society's President, the Rt Hon Sir Harry Gibbs.

As with all its predecessors, the Brisbane Conference dealt with a number of themes. In the aftermath of the Constitutional Convention held in Canberra last February, four papers provide various forms of post-mortem on that unhappy occasion. Despite the varying personal standpoints of the four authors (one of whom is a self-professed republican), all are united on one point: namely, that the malformed proposal which emerged from the Convention is not merely unsatisfactory, but positively dangerous—adding further, as it would, to the already excessive power which the Executive, and the Prime Minister in particular, now exercises within our constitutional system.

Four days after the conclusion of our Conference the federal Government launched its so-called "tax package". That package includes provision for a Commonwealth-imposed goods and services tax (GST) which would worsen even further what students of our federal system call the "vertical fiscal imbalance" (VFI) between the taxing powers and the spending responsibilities of the Commonwealth and the States, respectively. Then, seventeen days later, the Prime Minister advised the Governor-General to dissolve the present Parliament so that a federal election may be held on 3 October, 1998.

As this foreword is being written, the election campaign is under way, and before these Proceedings are published early in November, we shall know the outcome. Suffice to say here that, against that background, the last three chapters in this Volume are directly relevant, not merely to the VFI issue, but to the issue of federalism more generally. As such, they go to the heart of the concerns to which, from the outset, this Society's efforts have been directed.

In particular, Professor Geoffrey Walker's paper on *Ten Advantages of a Federal Constitution* provides a heart-warming re-statement of the positive virtues of federal systems of government. In doing so, it reminds us of some of the reasons why in our increasingly centralised Australia today we have a growing sense of alienation between government in Canberra and the people _ particularly those in the outlying States. At a time when political observers have been puzzling over the reasons for the rise of Pauline Hanson's One Nation party, Professor Walker's paper may provide the more disinterested among them, at any rate, with some clues.

In his concluding remarks to the Conference, Sir Harry Gibbs referred to "the undemocratic suggestion that judges should remedy the omissions of the legislatures". Three of the papers in this Volume touch, in one way or another, on that issue. That by Dr John Forbes, examining in some detail the regrettably non-illustrious history of the Federal Court since its unnecessary creation two decades ago by the Fraser Government, is of particular importance, having in mind the prospective role for that Court laid down in the recently amended *Native Title Act*. It will be interesting to see whether the Court's pronouncements in that area prove to be as open to question as, say, its performance during the waterfront dispute earlier this year to which, *inter*

alia, Dr Forbes refers. As Sir Harry Gibbs said, quoting an English judge, Lord Reid: "Where Parliaments fear to tread, it is not for the courts to rush in".

For the rest, it remains only to say that, like its nine predecessors, this Volume contains a wealth of material which deserves to be widely read, and widely debated. Like them, it is to that objective that it is dedicated.

Dinner Address

Reinventing the Federation

Hon Rob Borbidge, MLA

It is a delight to be here tonight: to be among people whose rigorous conservative convictions guarantee a stimulating evening ahead of a weekend of debate and discussion that will at times be robust.

I chose my topic for tonight's speech very deliberately, because it is clear to me, as it is to a great many others on the conservative side of the national debate, that we really have no choice but to reinvent the federation.

Without this action, the federation will be irreparably damaged, perhaps fatally so, and the people's freedoms with it.

That would be a very serious crisis.

And this is of course a serious occasion, even though in the convivial ambience of dinner.

But if you will allow one small pun, can I say that in no way is it hard labour to spend time among people who share the conviction that conservatism not only has a glorious tradition and a fine record of achievement, but also a glorious future.

That future demands some very hard work. It is a great national task to achieve a better future than we have a past — and we have a wonderful past.

This work must never cease. A little fable from the writer Italo Calvino comes to mind to illustrate this point. In his book *Invisible Cities* he writes of Thekla, a city forever under construction.

One passage is remarkably to the point where we are concerned tonight, to canvass the question of reinventing the federation.

Calvino writes:

> "If you ask, 'Why is Thekla's construction taking such a long time?', the inhabitants continue hoisting sacks, lowering leaded strings, moving long brushes up and down, as they answer, 'So that its destruction cannot begin' ".

Moving from the mythical Thekla to the real Australia, the lesson is absolutely obvious. The Founding Fathers provided a foundation stone. They gave the vital spark to a dynamic new nation and clothed it in the fine cloth of federalism.

They pointed us towards a future they knew — with the easier certainties of earlier times — they could not design, but for which, in their wisdom — and that included the wisdom to comprehend the real dynamics of politics and the true motivation for individual and communal advancement — they provided a signpost.

It is about that future and our path to it that I want to talk tonight.

I want to talk about the future in the same vein as the Founding Fathers did, indeed as that fine Queenslander Samuel Griffith did.

I want to talk about the future of our country, about the future of our Federation, in the context of the process of renewal that any dynamic society, and any energetic people, must make a continual process if they are to advance.

I believe we — conservatives, some thinkers, some doers, together a great coalition — can point the way.

The context in which Australians must advance their interests and those of their country is complex. It is the promise of diversity that is our strength, and the danger of division — and I mean the division of ideals, not of geography or political jurisdiction — our greatest challenge.

At the Constitutional Convention in Canberra in February I made the following comments. They were received quite well, for which I am modestly grateful. They are entirely apt for our deliberations here tonight. I said:

> "Even if Federation in 1901 failed to confer the full measure and quality of independence we enjoy today, subsequent Acts of the British Parliament and the several legislatures of Australia remedied that condition ...
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> "Time passes. People and nations change. This is recognised and welcomed everywhere. The Australia about to enter the second century of its magnificent federation is a country the founders of federation would hardly recognise. But we are not unique in that sweep of change — only in the measure of it and our responses to it.
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> "Where we are unique is in being Australian, in the world view we have developed, and in our many relationships in the region and throughout the world. We are unique in having created our own way of dealing with life and events".

The argument I was advancing at the Convention was the case for the constitutional monarchy, for the existing system, for the Constitution we know and live under, and which has protected us so magnificently for near a century.

The sound principle — that something is not an anachronism just because of the passage of time; and certainly not just because some fevered scribblers and in-your-face lawyers say it is — is just as pertinent in the argument over federalism.

It is my argument — and I think in general terms it is the conservative argument — that in the Australian context federalism equals freedom.

That political freedom complements and enhances our great diversity.

That diversity makes us all richer, materially as well as spiritually.

And that the highest task of government is to advance the material and spiritual wellbeing of the people.

Geoffrey Walker, who on Sunday will be giving a paper entitled *Ten Advantages of a Federal Constitution,* and who very kindly sent me an advance copy of it, takes the view that the 21st Century will be the era of federalism worldwide.

Australia is in the vanguard yet again.

He suggests — I won't canvass the detail here — that the spread of global capital and the end of bipolar superpower confrontation empowers the argument in favour of federalism.

I think he's absolutely right. In a much more competitive world, governments simply have to maximise every chance for the people who elect them to benefit from the new rules.

Conservatism has a head start there, because conservatism is all about the competitive spirit.

One of the most exciting things about Australia is its diversity.

The diversity of its geography.

The diversity of its ecology.

The diversity of its climates.

The diversity of its people.

And most of all, the diversity — the astonishing depth and breadth of the diversity — of its opportunity.

A century after the closing chapters of the great movement that made this continent a nation, we have to admit that the Founding Fathers did not have precisely the same vision we have today.

But that doesn't mean it was narrower or less responsive to challenge. In fact, I would submit, it was actually far broader and more responsive than much of what passes for genuine debate today.

One of the most important lessons of history is that rewriting it is a self-serving, sterile and potentially dangerous pursuit. There is not enough history taught. If there were, the foolishness of

applying the standards of one's own time to the events and politics of the past would be crystal clear.

The Founding Fathers reacted to their world. They created a nation — a federal nation — in the midst of the greatest empire the world has ever known.

It isn't fashionable to make that point these days. It doesn't go with the black armbands, for one thing, or with the wrong-headed determination of the post-history generation to rework everything from the wheel onwards.

Of course the world of the 1890s was an entirely different one from the world we inhabit on the cusp of the new millennium.

The little world that was Australia a century ago was also very different from today's Australia.

It is the genius of conservatism — of open-minded, inquisitive conservatism — that it builds productively on the past instead of wastefully deconstructing it.

Of course the world has changed radically over the course of the past century.

Conservatives respect this fact and work forward from it, advancing ideas in the veritable presence of the past. Conservatives draw inspiration from the past, and gain sustenance from it.

Conservatives know it makes no sense to ignore the lessons of history or to denigrate them.

Some of you may remember that in February, 1997 (we were celebrating the first anniversary of the State Coalition Government — we celebrated the second anniversary too, but sadly, and with modest determination I think wrongly, won't be celebrating a third) I gave a speech that set rather a lot of hares running.

It was the now famous — some might say infamous — attack on the High Court.

In fact it was nothing of the kind, but it was portrayed as such by the media, which declared it a site of national significance and immediately fenced it in with hundreds of thousands of angry words.

Its chief problem was that it caused injury to the prevailing orthodoxy. We all know that in these days of liberty, only by permission of the great and powerful, or at any rate the most noisy, is that permissible. Otherwise, causing injury to a prevailing orthodoxy is very nearly a hanging offence.

I had no course open to me other than to plead guilty. That's another benefit of living under the rule of lore - that's L-O-R-E.

Because tonight's topic suggests that revisiting of this issue might be useful, I'm going to repeat a little of what I said back then, in February, 1997. With public spiritedness, I plead guilty in advance, thereby I hope saving the bailiffs some of their resulting workload.

I said then — and it is just as apposite now, despite changes to the Court since the dark day on which I gave voice to heresy — that we do not see a High Court which is motivated by what that great Australian jurist Sir Owen Dixon called "strict and complete legalism".

Instead we have judges who are anxious to radically change the law. The dynamic approach to constitutional interpretation, first advanced as a judicial theory by the then Chief Justice of the High Court a decade ago, has been taken up enthusiastically.

This newly defined activism has produced judgments which have implied a number of far-reaching rights based neither on the provisions of the Constitution nor its structure.

They are based instead on the alleged assumptions of the Australian people when they voted for the Constitution a century ago or the supposed intent of those who laboured so honourably to frame the Constitution.

Jurists have in effect raised the remarkable — and I still think remarkably dangerous — proposition that there are yet to be discovered, and only judicially identifiable, rights and restrictions that have their origin outside of the Constitution.

If we are to reinvent our federation — and I believe we must — then we must look towards a Court that cannot agree with the view of Mr Justice Kirby that there is "no clear divide which marks off the limits of judicial creativity".

The several legislatures of Australia hold sway over the several separate sovereignties that make up our great Federation. It is there — less than in the law, although law reform is an essential part of governance — that the great project to improve and broaden federalism must take place.

This will take goodwill — and I believe we have goodwill in abundance, since we are all Australians and rightly pursue a common national goal.

That goal, lest anyone not be aware of our fundamental driving force as a people, is to advance Australia.

But this does not mean the States ceding more and more power to the Commonwealth, until eventually they become merely the supine distribution agencies of an all-powerful central government.

It does not mean the States must give up more and more of what makes each of them unique within our Federation.

It does not mean that, because we all think of ourselves as Australians first, we should give even a second's thought to becoming a unitary state, even one with the sort of emasculated regional structure that strong central governments and their bureaucracies prefer — the better to leg-rope them.

We are 18 million people on an island the size of the continental United States, the inheritors of a millennium's worth of democratic development, the beneficiaries of a system and a society that has planted roots, once alien, now native, in a place far distant from whence the overwhelming majority of us sprang.

We cling to the coastal strip — although less so in Queensland, where our proud boast is to be Australia's most decentralised State — in disparate and distant communities. We are brought together by our nationalism, and held apart — and I believe productively held apart — by the very diverse nature of our populations and circumstances.

What we must do therefore is build upon that natural advantage. It is always possible to agree to disagree. A federal system means choice — even at the very basic level of agreement over local issues.

But a true federal system, a truly responsive federation, must devise an operational arrangement that represents a compact between equals. Reinventing the Federation will require tremendous goodwill, an openness of mind that frankly has often eluded us in the past, and a commitment to sensible change.

The final extent and scope of that change can be left for another time. I would simply say that it should be the maximum possible, so that Victorians can be Victorians, New South Welshmen can be New South Welshmen, Tasmanians can be Tasmanians, South Australians can be South Australians, West Australians can be West Australians, Territorians can be Territorians and Canberrans - unless they live at Queanbeyan! - can be Canberrans.

Queenslanders will be Queenslanders, as always. And that's not just a throwaway line: genuinely, and I believe beneficially, Queenslanders really have always been different.

If we are to reinvent the federation, and make it work better than ever and to our collective benefit, then there are some essential reforms to look at.

We must have a properly effective federal-State compact, one that deals with the federal aspects of Australian affairs, and which is genuinely a partnership of equals.

We must end the financial nightmare created by the Commonwealth's super-preponderance as the nation's revenue raiser.

We must, as a necessary adjunct of this, fundamentally reform the taxation system so that the States have their own growth revenue streams.

We must eliminate wasteful duplication — by a sensible redistribution of powers and responsibilities.

And we must do all of this in a way that harnesses the unique advantages of each separate component of this Federation.

It is true that this is a tough call. It is something that will need vision to see it through.

But the vision of what might result if we do not reinvent the federation, if we flee the field and leave it to the centralists, is one that should alarm everyone.

Not simply for the opportunity lost, but for the future not gained.

Thank you for your indulgence in listening to me tonight. I wish the Society good fortune and your Conference success.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this tenth Conference of The Samuel Griffith Society, and our second here in Brisbane. As one who had, briefly, the privilege of serving as a Senator for Queensland, and of therefore becoming temporarily a kind of honorary Queenslander, it is a particular pleasure to return here in this way.

When, last March, the Board of Management decided on this venue, we were aware both of the possibility of a federal election in the second half of 1998, and of the likelihood of a Queensland State election around mid-year. Since election campaign periods are never the best time for holding Conferences about genuinely interesting questions, the Board naturally wished to avoid clashing with either event.

In the outcome, as you know, the Queensland election was held on 13 June last, so that our choice of this weekend for our Conference proved well-judged from that viewpoint. Until recently, however, some of us were still holding our breaths lest today (or a subsequent Saturday this month) might still turn out to be the day of the federal election. From the viewpoint of the Society, we can only be grateful that that danger too has been averted.

As you probably know, the Society has had, almost from the outset, a policy of inviting the Premier of the State in which we are meeting to address the opening dinner on the Friday evening. Thus, when we met in Brisbane in 1994, we invited the then Premier, the Honourable Wayne Goss, to address us — although, because of a clash of dates with a Premiers' Conference in Sydney, he was in the event unable to do so.

So, when we had decided to hold this Conference in Brisbane, and having in mind the timing matter about the State election which I have already mentioned, we were in something of a dilemma. If our judgment proved to be right (as it did), the question was, who would be Premier of Queensland when we met on 7 August?

After due deliberation the Board decided that, in these circumstances, the only proper course was to issue our invitation to the then Premier, the Honourable Rob Borbidge – *not* by way of implicitly expressing a view about the electoral outcome, on which we had no opinion, but, on the contrary, because to do otherwise *would* have been to express such a view. We also took the view that, if Mr Borbidge were to be good enough to accept our invitation, then that invitation should stand irrespective of the election outcome.

So that is how we came to be addressed last night, not by the Premier, but by the new Leader of the Opposition.

I thought that I should put these facts on record to avoid any possible misunderstanding. In the event, Mr Borbidge's address to us last night on *Reinventing the Federation* proved to be a valuable contribution to the debate which, for the past six years or so, this Society has been doing its best to stimulate.

In his address to us last night Mr Borbidge remarked on one point in particular which I think is worth reiterating here this morning. At a time when we are all being enjoined, in the strongest terms, to value our "diversity" as a people, and when those most vehemently expressing that view are the opinion-forming elites in our academies, in our major political parties, and not least in our media, it is remarkable that those same elites should appear to value so lightly the marvellous opportunities for diversity which our federal Constitution so fortunately provides. If "assimilation" is not appropriate for our people, why is it that a "one size fits all" approach to centralising power in Canberra is thought to be appropriate for our polity?

When we last met, in Perth last October, the "ten point plan" Native Title legislation was before the Parliament, and the Government had indicated that there could be no further

compromise on that matter. Now that its "7_ point plan" has been enacted, one can only reflect on what a difference a Queensland election can make.

At that time I referred in my introductory remarks to the equally serious matter of the so-called "vertical fiscal imbalance" between the States' spending responsibilities and their much diminished revenue raising abilities. I noted that that was one of the matters to be addressed in the Commonwealth Government's proposals for major tax reform, but added that I was " not noticeably holding my breath".

Next Thursday we shall finally see those proposals formally unveiled, and tomorrow morning two of our speakers, Professor Brian Galligan and *The Australian's* economics editor, Alan Wood, will give us their appraisals on the situation in regard to vertical fiscal imbalance. Subject to what they may have to say, I am still breathing regularly.

This morning, however, we shall commence with four papers comprising, so to speak, a post-mortem on the outcome of the Constitutional Convention held in Canberra last February. So far as the republican "model" emerging from the Convention is concerned, the term "post mortem" appears wholly appropriate. The first of these papers is by Sir David Smith, who is well known to all members of this Society for his courage, his personal integrity and his devotion to public service. Your chairman for that and the three subsequent papers will be our Vice-President, Sir Bruce Watson, and I ask that you make him welcome.

Chapter One

A Funny Thing Happened on the Way to the Referendum

Sir David Smith, KCVO, AO

On Friday, 13 February, 1998, in the House of Representatives Chamber of Old Parliament House, Canberra, republican delegates to the 1998 Constitutional Convention began to clap and cheer and embrace each other as the vote on the final resolution was taken. Spectators in the public gallery stood and cheered with them. But in the months that have followed, the republican euphoria has dimmed, even for some who had so enthusiastically joined in the clapping and the cheering and the embracing back in February. Not only have some of them predicted that the referendum to turn this country into a republic will fail: some have even dared to suggest that it will be a disaster for Australia if the referendum is carried.

The final resolution recommended to the Prime Minister and the Parliament that the republican model supported by the Convention be put to the people in a constitutional referendum. This resolution received the votes of 133 of the 152 delegates. It was supported by delegates representing Australians for Constitutional Monarchy because we, too, want the issue of the republic settled once and for all. We welcome the opportunity to have it taken out of the hands of the various elites who have controlled and stifled the debate to date, and to have it put to the Australian people.[1]

Of more significance was the preceding resolution, which called for the Convention to support the adoption of the Turnbull republican model in preference to our present constitutional arrangements. The Turnbull model, which went under the grandiloquent title of the Bipartisan Appointment of the President Model, and under which the President would be appointed by the Commonwealth Parliament, and removable by the Prime Minister, received the votes of only 73 of the 152 delegates, or 48 per cent. Hardly a ringing endorsement.

Two earlier resolutions were also put to the Convention on that final day. The first one expressed the Convention's support in principle to Australia becoming a republic, and received the votes of 89 of the 152 delegates.

The second resolution dealt with what were described as transitional and consequential issues — a collection of motherhood issues to be set out in a new Preamble within the Constitution, as distinct from the present Preamble which is, of course, outside the Constitution.

This new Preamble would start with "We the people of Australia", followed by references to "Almighty God"; the origins of our Constitution; the evolution of the Commonwealth as an independent, democratic, and sovereign nation under the Crown; our federal system of representative democracy and responsible government; affirmation of the rule of law; the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders; Australia's cultural diversity; respect for our unique land and the environment; the agreement of the Australian people to re-constitute our system of government as a republic; another assertion of our sovereignty and our commitment to our new Constitution; provision for ongoing constitutional change; affirmation of the equality of all people before the law; recognition of gender equality; and recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia's indigenous peoples. This rag-bag collection of "feel-good" statements would give us a new Preamble that would be longer than the rest of the Constitution put together.

Then, no doubt having scared themselves witless at the magnitude and the potential significance of what they had done, the republicans added two riders: that the Preamble should be

drafted in such a way that it does not have implications for the interpretation of the Constitution; and that the Constitution itself should state that the Preamble is not to be used to interpret the other provisions of the Constitution. This resolution received the votes of 102 of the 152 delegates.

It is interesting to note that, of the four resolutions put to the Convention on the final day, the one which received the smallest number of votes, and the only one which failed to get the support of even a bare majority of delegates, was the Turnbull republican model, which is to be pitted against our present Constitution at next year's referendum. What a pathetic outcome after seven years of so-called public debate.

I propose to say more about the Convention proceedings, and about the debate over the past six months since the Convention, but it might be useful to look first at some of the events which brought us to the Convention in the first place.

In 1985 the Hawke Government set up a Constitutional Commission consisting of three very distinguished constitutional lawyers and two former heads of government — Sir Maurice Byers, former Solicitor-General of Australia; Professor Enid Campbell, Professor of Law at Monash University; Professor Leslie Zines, former Professor of Law at the Australian National University; the Hon Sir Rupert Hamer, a former Liberal Premier of Victoria; and the Hon E.G. Whitlam, a former Labor Prime Minister. The Commission was advised by five expert advisory committees, including an Advisory Committee on Executive Government, chaired by the Rt Hon Sir Zelman Cowen, a former Governor-General of Australia.[2] In all, more than forty eminent Australian men and women were involved in the review process.

The Commission was required to report on the revision of the Australian Constitution in relation to four major aspects of our life as a nation.[3] These were:

(i) Australia's status as an independent nation and a federal parliamentary democracy;
(ii) the most suitable framework for the economic, social and political development of Australia as a federation;
(iii) an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and
(iv) to ensure that democratic rights are guaranteed.

In setting up the Constitutional Commission and its five Advisory Committees, the Hawke Government had placed high hopes in their ability to help us prepare our Constitution for the 21st Century. But then the Government seemed to change its collective mind; or was it just the Attorney-General, Lionel Bowen, changing his mind?

With the Commission required to report by 30 June, 1988, the Government had proposed to hold a referendum in December of that year. Suddenly, it brought the referendum forward to September. The rub is that, although the Commission finished writing its report on the afternoon of 30 June, the first part of its two-part report was printed only a few days before the four *Constitution Alteration Bills* were introduced in Parliament on 10 May, 1988,[4] while the second part of the report, which dealt with matters that were the subject of the referendum, did not become available until after the referendum had been held.

In total, the Commission made over 100 specific recommendations for alterations to the Constitution, but the Hawke Government selected only a few to be put to the people. It gave no reasons for rejecting the others. The four propositions that were put to the people did not represent the top priorities of the Commission, and indeed one of them — dealing with the terms of members of Parliament — was actually contrary to the recommendation of the Commission.

With so many substantive issues that it might have put to the people, the Government put together a collection of second-order proposals which Professor Geoffrey Blainey was to describe as "a clever assault on Australian democracy".[5] Even the form of the referendum questions was designed to deceive: instead of being couched in customary neutral terms reflecting the short titles of the Bills, the questions on this occasion were couched in deceptive — even dishonest —

terminology.[6] And yet, all four referendum proposals were soundly and decisively rejected in the worst defeat of any referendum proposals ever put to the Australian people.

In response to its first term of reference, requiring it to report on the revision of our Constitution to "adequately reflect Australia's status as an independent nation",[7] the Commission traced the historical development of our constitutional and legislative independence, and concluded:

> "It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament".[8]

The Commission went on to report unanimously that "the development of Australian nationhood did not require any change to the Australian Constitution".[9] Two and a half years later this recommendation was also rejected by the Government that had commissioned it.

In April, 1991 in Hobart, the Australian Labor Party's national conference resolved that Australia should become a republic on 1 January, 2001. The motion was moved by a junior back-bencher right at the end of the conference, when most of the delegates had already begun packing up to go home. The conference chairman, in declaring the motion carried on the voices, chided delegates for their apparent lack of enthusiasm.

For the next eight months the Hobart resolution just sat on the conference record. Bob Hawke was still Prime Minister, and he was of the view that no change should be made to our present constitutional arrangements during the Queen's reign. But in December, 1991 Paul Keating became Prime Minister, and he set about trying to turn Australia into a republic as quickly as possible.

From the outset, Keating's motivation was clearly anti-British. He denounced those who disagreed with him as "lickspittles" and "forelock tuggers"; he derided the Constitution as a British document, despite its inspiration and its drafting being entirely Australian; and he publicly attributed his republicanism to his Irish Catholic background, a view which is not shared by all Irish Catholic Australians.

Soon other republicans announced their reasons for wanting to change our Constitution. We were constantly reminded that the republic was "inevitable". The arrogant assumption of the inevitability of something on which the electorate was yet to exercise a free and democratic vote was an insult to the Australian people.

The media quickly weighed in with their support. On the whole, most of those who are engaged in the media are personally committed to the republic. They are allowed to intrude their personal views into their news stories and commentaries, so that the line between news reporting and comment becomes blurred or sometimes even disappears altogether. It's not very professional or ethical, but it has been very effective in skewing the debate.

Paul Kelly, the then Editor-in-Chief of *The Australian,* told a constitutional seminar that the media would give prominent and priority coverage to constitutional change because "the media has a vested interest in change — change equates to news, and news is the lifeblood of the media".[10] In other words, the media support constitutional change, not because it is good for Australia but because it is good for their business.

Peter Collins, a former senior Liberal Minister of the Crown in New South Wales, and now Leader of the Opposition in the State Parliament, told us that he was a republican because the ultimate decision-making process for Australians rests with a foreign government, and that "it would be from the British Government that any monarch receives, and will continue to receive, advice on constitutional issues".[11] The assertions made by Peter Collins are simply not true, and what is more, they ceased to be true two years before he was born.

Al Grassby, a Minister of the Crown in the Whitlam Labor Government, told us that the monarchy was responsible for the recession of the late 1980s, for the one million Australians who were unemployed, for the business excesses of that period, and for the exodus from Australia of our top scientists![12] How can you possibly have a sensible debate about constitutional change with people who argue like that?

Michael Lynch, General Manager of the Australia Council for the Arts, told us that the monarchy stifles artistic talent and prevents our artists from fully expressing themselves![13]

Former Chief Justice of the High Court of Australia, Sir Anthony Mason, confessed that he had become a republican at the age of eight, while watching a cricket Test match between Australia and England during the 1932-33 bodyline series, though it would seem that he waited for sixty-five years before revealing it.[14]

Janet Holmes a Court, an Australian Republican Movement delegate to the Convention, told a delegation from the British Chamber of Commerce that she wanted a new flag and a new Constitution because an Asian Cabinet Minister had told her that his country would help the Australian people in their struggle for independence from Britain![15] It also worries her that her Asian acquaintances are confused by the Queen's portrait hanging on Australian Embassy walls.[16]

Sallyanne Atkinson, former Lord Mayor of Brisbane, former Australian Trade Commissioner to France, and an Australian Republican Movement delegate to the Convention, said that she was a republican because she found the French confused by the fact that the Queen of England was also Queen of Australia.[17] I should have thought that the French would have been more confused by the fact that, following their bloody revolution of 1789 and the execution of their Monarch, they endured the Reign of Terror, an Empire under Emperor Napoleon, the restoration of the Monarchy, the Second French Empire, Republics One, Two, Three and Four, and the Vichy Government that collaborated with the Nazis during World War II, before President de Gaulle gave them their current Fifth Republic. The Trade Commissioner might more usefully have spent her time in Paris in telling the French something of the enduring stability of our constitutional arrangements.

Unfortunately, Mrs Atkinson is typical of so many of our foreign service officials. The former Secretary to the Department of Foreign Affairs and Trade, Richard Woolcott, and other former diplomats from that Department, have argued for constitutional change in order to simplify matters for our overseas diplomats when it comes to explaining our constitutional arrangements to foreign Heads of State and their officials.[18] Mr. Woolcott has mentioned particularly his own difficulties in explaining the 1975 Dismissal to former President Suharto of Indonesia as a reason for altering our Constitution![19] If our diplomats and trade representatives cannot understand, explain and defend our present system of government, they should get off its payroll.

Bill Ferris, the former Chairman of the Board of the Australian Trade Commission, and now the Chairman of the Australian Venture Capital Association, told us that the republic would present a windfall marketing opportunity for Australian exporters because our present constitutional arrangements were harmful to the overseas promotion of our products and services.[20] According to Mr. Ferris, the republic will help us gain international recognition for our technology and our inventions, and will ensure that much more venture capital than at present will flow back into our newer industries.[21] So now we know — the monarchy is responsible for our trade deficit!

Lindsay Fox, founder and Chairman of Fox Group Holdings Pty Ltd, and an Australian Republican Movement delegate to the Convention, together with other business leaders, saw the republic as an opportunity for Australia to "re-badge" and "re-brand" itself, thus reducing the nation, its history, its Constitution and its system of government to the level of a new car or a packet of detergent.[22]

Neville Wran, former Premier of New South Wales and an Australian Republican Movement delegate to the Convention, told us that changing to a republic would boost jobs and invigorate Australia's spirits.[23]

With so many specious arguments being advanced for constitutional change, what hope has the ordinary Australian of understanding how the present system actually works? Most Australians don't know enough about our present system to enable them to put into proper context any proposals for change. The Constitutional Commission reported in 1988 that almost 50 per cent of all Australians were unaware that Australia has a written Constitution, and that in the 18-24 year age group the level of ignorance rose to nearly 70 per cent.[24] In 1994 the Keating Government's Civics Expert Group found that nothing had changed, with 82 per cent of Australians still knowing nothing about the content of the Constitution.[25]

The sad thing is that ignorance about our Constitution is just as pronounced among members of Parliament as it is in the general community. During last year's parliamentary debate on the legislation which led to the Convention, the last word on the Bill was had by the Honourable Member for Werriwa, Mark Latham, a member who has served on parliamentary committees dealing with public administration and constitutional affairs and who is, of all things, the Opposition's shadow minister for education. In the course of that speech he revealed his total ignorance of the basic provisions of our Constitution in relation to the powers and functions of the Queen and the Governor-General. In his attempts to describe these provisions he was dead wrong: his references to our constitutional arrangements were simply not true. I do not think he was being mischievous or that he deliberately misled the Parliament — he just doesn't know any better.[26]

Right from the outset, the role of the Governor-General under our Constitution has never been properly understood, as I hope I demonstrated in my paper to this Society's eighth Conference in March, 1997.[27] That conference paper became the basis of a paper[28] which I tabled during my speech on the first day of the Convention.[29]

The nub of the republican push, at least so far as supporters of the Keating/Turnbull/Australian Republican Movement model are concerned, consists of a desire to assert our independence of Britain and to have an Australian Head of State. But the Constitutional Commission found that we have been fully independent at least since 1945.[30] It reported that:

> "…..[a]lthough the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it".[31]

As the Governor-General is undoubtedly a constitutional Head of State, and as the office has been held by an Australian since 1965,[32] the republican nub is very small indeed.

Whether republicans like it or not, a long series of legal opinions and political decisions since 1901 has confirmed that Australia has two Heads of State: a symbolic Head of State in the Queen, and a constitutional Head of State in the Governor-General. The role of the Governor-General viz-a-viz the Sovereign was finally put beyond all doubt in 1984 when, acting on the advice of Prime Minister Bob Hawke, the Queen revoked Queen Victoria's 1900 Royal Instructions to the Governor-General — instructions that were invalid and should never have been issued.[33]

In the lead-up to the Convention, republicans and the media drew comfort from statements by former Governor-General Sir Zelman Cowen and former Chief Justice of Australia Sir Anthony Mason, so let us look carefully at what these two distinguished and learned gentlemen actually said.

In his Washington lecture last September, Sir Zelman restated his earlier view that:

> "…..the case for conversion to a republic had not been made out, since we had achieved the substance of independence within the existing framework of government, and I believed

that it served no significant national interest to go further, to create community division without compensating benefit".[34]

But he went on to add:

"On further reflection, I have come to the conclusion that this symbolic change [to a republic] should be made, and that it is a matter of importance for an independent Australia to state simply and unambiguously our national status in constitutional terms".[35]

Sir Zelman did not, however, reconcile this change of mind with his own use of the term "Head of State" in previous interviews and speeches to describe the role of the Governor-General, and his oft-expressed view that, in carrying out his constitutional duties, the Governor-General acts in his own right and not as a representative or surrogate of the Sovereign.[36]

I find this particularly odd as it was Sir Zelman who, in 1980, when I was his Official Secretary, set me off on my research into the constitutional position of the Governor-General by pointing out to me that, in the exercise of his constitutional role, the Governor-General was not the Sovereign's representative or surrogate. And in 1987 Sir Zelman had chaired the Advisory Committee on Executive Government, whose advice had helped the Constitutional Commission to conclude in 1988 that we were already a sovereign and independent nation, and that our Constitution required no alteration on that score.[37]

As a precondition for his support for the republic, Sir Zelman set out other constitutional matters which he now sees as central to proper constitutional change, including enumeration and definition of the powers of the President.[38] But this is the very matter which Mr. Keating told the Parliament and the nation that his Government had found impossible to do,[39] and which the Constitutional Convention found too difficult to do and left for the Parliament to consider.[40] It should also be noted that Sir Zelman's views are not shared by former Governor-General Bill Hayden, nor would they have been shared by former Governors-General Sir John Kerr, Sir Paul Hasluck and Lord Casey, to my certain knowledge, and probably not by other former Governors-General as well.

Sir Zelman was followed into the debate a month later by former Chief Justice Sir Anthony Mason. I have already referred to Sir Anthony's confession of his closet republicanism from the age of eight. When asked about the monarchists' view that we had two Heads of State, and that we already had an Australian constitutional Head of State in the Governor-General, he replied: "They should re-read section 2 of the Constitution".[41]

Of course, Sir Anthony made no reference at all to s.61, under which the Governor-General exercises the executive power of the Commonwealth; he conveniently ignored the fact that s.2 and s.61 refer to two different sets of powers.[42] He overlooked the fact that the monarchists' view is supported by such eminent constitutional lawyers and jurists as Inglis Clark and Harrison Moore, both of whom had participated in the drafting of our Constitution;[43] Lord Haldane, sometime Lord Chancellor of Great Britain and President of the Judicial Committee of the Privy Council;[44] former Justice of the High Court, Dr. H.V. Evatt;[45] former Solicitor-General of Australia, Sir Maurice Byers;[46] and two former Chief Justices of Australia, Sir Harry Gibbs[47] and Sir Garfield Barwick.[48]

When asked about the difficulty of codifying the Governor-General's reserve powers, Sir Anthony replied that Malcolm Turnbull could do it in half an hour. It was a great pity, though not at all surprising, that the ABC interviewer failed to ask Sir Anthony why, if it really was so easy, had Prime Minister Keating said that it could not be done at all; and why had Malcolm Turnbull, if he could do it in half an hour, still not done it after seven years; and why had the Australian Labor Party still not done it after being warned about the general problem by Dr. H.V. Evatt sixty-two years ago?[49]

Sir Anthony also credited Malcolm Turnbull with putting forward what Sir Anthony called a moderate proposal for constitutional change, yet Turnbull had to tell a National Press Club audience that the republicans had not been able to settle the details of their proposed

constitutional changes.[50] Although this failure had now gone on for the past seven years, Turnbull claimed that they would be able to do this fairly quickly once the people had voted for a republic. That, of course, was when the republicans were still hoping to hijack the debate by persuading the Government to go to a plebiscite before a referendum. Instead, the Government held the Constitutional Convention to see if the republicans could really make up their minds as to what sort of republic they thought we should have.

The holding of the Constitutional Convention showed just how unprepared the republicans really were on the question of the republic. Though they agree that they want to remove the Queen from our Constitution, they are utterly divided and confused over who or what to put in her place. The reality is that the Crown has a most important role in ensuring the continuity and the stability of our system of government. Behind it lie almost a thousand years of history and tradition which none of the several republican models on offer could hope to replicate. Indeed, after seven years of "It's inevitable", and a two-week, multi-million dollar Convention, the republicans are still hopelessly divided over just what "It" actually is.

Under our present system of government the constitutional Head of State is chosen by the Government of the day, is advised by the Government of the day, and may be removed on the advice of the Government of the day. All public office holders are either elected by the people, or appointed by those who have been elected by the people. Nothing could be more democratic, or more republican.

The role of the Crown in the appointment and removal processes ensures that the Governor-General's allegiance is to the entire nation and not just to those, whether in the community at large or in the Parliament, who voted him or her into office. In our democracy, election to a public office, as distinct from appointment, carries with it the notion of a mandate, with policies to pursue and supporters to be rewarded, and there is no place for such influences on the person who occupies the desk at Government House, Canberra. I have known Governors-General who have been deterred from acting or speaking in a particular way simply because they knew they had been appointed and not elected. It would be constitutional madness to surrender this very powerful restraint on what is potentially a very powerful position under our Constitution.

Last year, as republicans argued over the Keating/Turnbull/ARM republic (in which the President would be appointed by Parliament), and a popular election republic (in which the President would be elected by the people), we saw Sir Zelman Cowen opposed to popular election of the President, while Sir Anthony Mason was not. At about the same time, Mr. Richard McGarvie, former Judge of the Supreme Court of Victoria and former Governor of Victoria, entered the debate to reject both methods of electing a President:

> "They may sound all right in theory. They sound innocuous but are really changes of drastic potential. In the living reality of the political culture and constitutional practice of this country they would immediately corrode and ultimately destroy our democracy".[51]

Mr. McGarvie was to have a profound influence on the outcome of the Convention.

The republican delegates came to the Convention in disarray, so much so that in the initial stage the Convention was presented with no less than ten republican models. Faced with the tightly disciplined Australian Republican Movement, some of the other republicans quickly formed a loose coalition and called themselves the Direct Election of the President Group. By Day 9 the Convention was down to four republican models. The "Direct Elects" made an overture to the ARM, which would have required Parliament to receive public nominations for President, from which Parliament would have selected the candidates who would contest a popular election. This overture was ignored.[52]

The essence of the McGarvie intervention was to point out the defect in the ARM model relating to the dismissal of a President, for the requirement of a two-thirds majority of Parliament would have made virtually impossible the removal of a President who was causing grief to the

Government of the day. Unfortunately, in their scramble to cobble together a few more votes for their model, the ARM have placed the President entirely at the mercy of the Prime Minister, who would be able to summarily dismiss the President, subject to later ratification by the House of Representatives only. The Senate is to be involved in the appointment process but is to be excluded from the removal process. So much for federalism. That State and Territory parliamentary delegates could support such a proposal is beyond belief.

In an attempt to placate those republicans who wanted, and still want, the people to be involved in the appointment process, the ARM offered them a committee that would receive nominations from the community and compile a short list for consideration by the Prime Minister. This committee would operate in secret, nominations made to it and recommendations made by it would be secret, and the Prime Minister would not be bound by its advice. Sir Harry Gibbs has rightly described this process as a clumsy sham.[53]

In the concluding ballots the Direct Election model was eliminated ahead of the McGarvie model: the final survivor was a significantly modified ARM model. Among Convention delegates it became known as the "camel", and the Treasurer, Peter Costello, referred to it as a "hybrid on a hybrid on a compromise".[54] At the end of the Convention the ARM and the "Direct Elects" were still at loggerheads, remain so today, and will be right up to the referendum.

Mind you, the "Direct Elects" don't deserve too much sympathy over their disappointment. By the end of Day 2 the Australian Republican Movement had used the procedures of the Convention to side-line the "Direct Elects" and to exclude their proposals from further consideration: nothing, it seemed, was to be allowed to stand in the way of the Turnbull steamroller.

Former Governor-General Mr. Bill Hayden was outraged by this travesty of democracy, and he drafted an amendment that was designed to allow the "Direct Elects" back into the debate. He obtained a seconder from among their ranks — Pat O'Shane — and he set about getting the numbers. He approached me and asked if my monarchist colleagues and I would support his motion. When I protested that we were not there to help an unworkable republican model get up, he reminded me that Clem Jones had tried — unsuccessfully, as it turned out — to eliminate the Constitutional Monarchists from further participation in the Convention on Day 1, and that we should therefore know how it felt to face being cheated out of a right to participate throughout the Convention. There was a delicious irony in the fact that the "Direct Elects" had now received a dose of the medicine they had tried to administer to us, but in the end I was able to tell Pat O'Shane that we would come to her aid and that of her colleagues.

The threat of a rebuff to the Australian Republican Movement on the floor of the Convention set off a flutter in the dove-cote, and the matter was quickly brought before the Resolutions Group. After a hurried lunch-time meeting, the Resolutions Group presented the Convention with an interim report and made the novel recommendation that resolutions which received 25 per cent support should go forward to the next stages of debate. It further recommended that this recommendation be adopted retrospectively, so that earlier resolutions which had failed to achieve 51 per cent support, and which had thus been eliminated, would again be put to the vote and re-admitted if they received 25 per cent support.

As the presenter of the Resolutions Group's novel proposal, Gareth Evans was credited with getting the "Direct Elects" back into the game, but the real credit for restoring this bit of democracy to the Convention's proceedings should go to Bill Hayden. He did not switch camps, as the media claimed; he still supports our present Constitution; and he certainly did not deserve the scorn which, in their ignorance, the media heaped on him. He was simply defending the right of all Convention delegates to participate throughout its deliberations.

A feature of the concluding stages of the Convention was the raft of amendments which were made to the ARM model as Malcolm Turnbull sought to pick up extra votes from republicans who were not fully committed to his particular model. As each key element of the model was

being settled by the Convention, last-minute amendments were circulated: we even had the spectacle of Malcolm Turnbull drafting amendments on the floor of the Chamber and having them projected on the screens as the final votes were being taken. So much for the well-thought-out republican model which we are to be asked to accept in place of our present Constitution.

Moira Rayner, a member of the Resolutions Group, has given a description of the bullying and offensive behaviour which was used to deliver the results ARM wanted;[55] and Peter Costello has described how Malcolm Turnbull came to him "like Nicodemus, by night to try and steal my vote on this, and said 'Don't worry about any of that: the Parliament can ignore it' ".[56] No wonder the ARM model failed to satisfy even a bare majority of delegates.

Oddly enough, Malcolm Turnbull's final comment that "Parliament can ignore it" seems to have struck a chord with Peter Costello. This newly declared republican, who refused to support the final compromise ARM model, was reported as saying that he would urge Parliament to amend it when the *Referendum Alteration Bill* came before it. It was pointed out that the Government would have scope to tinker with elements of the ARM model when it is drafting the legislation.[57]

For the Government to allow the Treasurer and the Attorney-General to produce their own versions of what they think the Constitutional Convention should have come up with, or for Parliament to tolerate such action, would be a betrayal of the Convention, and a repudiation of undertakings given by the Prime Minister and the Leader of the Opposition to put the Convention's republican model to the Australian people at a referendum — undertakings which were given to the Convention immediately after its Chairman and Deputy Chairman had handed the final communique to the Prime Minister.[58]

I hope that the community debate that lies ahead of us will be aimed at keeping the bastards honest, and I am heartened by the reported comments of Senator Nick Minchin, Special Minister of State:

> "The Government made a fundamental covenant, both with the Convention and the public, that we would introduce legislation to give effect to the model agreed by the Convention. We will not be departing from that. After all, that is the model championed by the ARM itself".[59]

What the Minister was saying after the Convention was merely confirming what the Prime Minister had said in his opening speech to the Convention:

> "I inform the Convention that if clear support for a particular republican model emerges from this Convention my Government will, if returned at the next election, put that model to a referendum of the Australian people before the end of 1999".[60]

He was followed by the Leader of the Opposition, who said that "[t]he next step after this Convention must be a direct appeal to the people".[61]

One of the most shameful episodes of the Convention failed to arouse even a ripple in the media, which in itself is a sad commentary on the standards of public life in this country. On Day 7, on the recommendation of Gareth Evans on behalf of the disgraceful and discredited Resolutions Group, the Convention adopted a contrivance that had been designed to control the way in which ACM delegates could vote in the final votes. It was deliberately contrived to prevent us from voting strategically, and the republicans were quite shameless in admitting this when called on for an explanation.[62]

Unconvinced by the explanation for what was a most extraordinary voting procedure, Bill Hayden said:

> "Frankly, Gareth, if I did not know you well, I would say there is a bit of a ramp being worked up here in a way that is not unknown in the Labor Party conferences".[63]

Mr. Hayden's objections to the proposal were supported by a number of delegates, including Peter Beattie, then Queensland's Leader of the Opposition and now its Premier. When he had finished speaking, Mr. Beattie was taken outside the Chamber by Malcolm Turnbull. A few

minutes later Mr. Beattie returned to the Chamber and voted for the proposal. When I called across to him, "Why the turn-around, Peter?", he laughingly replied, "I've been persuaded to see the light".

Shortly afterwards, I moved and former Senator Reg Withers seconded a motion[64] by which we made another attempt to amend the voting pattern for Day 9 and to reject the rigged voting pattern which Mr. Hayden, and Mr. Beattie, had denounced in the earlier debate. As soon as we had spoken, Mr. Turnbull strode across the Chamber to us and said: "If you go ahead with your amendment, all deals are off", to which Mr. Withers replied: "We made no deals with you, Malcolm, so push off".

What the republicans didn't realise was that, in the final vote to choose the Convention's preferred republican model, ACM still had the capacity to upset their schemes completely anyway, had we wanted to. What they didn't know was that we had taken a decision last December to allow the republicans to choose their own model without any interference from us. We felt we could not honourably go into the referendum to oppose a model which we had helped to select. But the whole episode shows how the ARM was prepared to control the Convention at any price.

The motion for the adoption of the compromise model was moved on the tenth and final day by Archbishop George Pell, whom Mr. Lloyd Waddy described in his reply as:

> "…..a man appointed by the head of the oldest continuous monarchy in Europe, the Vatican, where Australia sends its own Ambassador. It is interesting that His Grace is able to be such a monarchist in his occupation and such a republican in his sentiment".[65]

The Archbishop spoke of the constitutional monarchists having voted with discipline, integrity and honour,[66] a theme that was taken up by other delegates and by sections of the media. I was angry earlier at the suggestions that we might have voted strategically, and that the method of voting had to be specially contrived to prevent this, and I said so at the time.[67] But I think I was even more upset later by those who seemed surprised that we had in fact acted honourably and with integrity, and praised us for it. Had they really expected us to act differently?

In summing up the Convention I can do no better than quote from the latest paper by Mr. Richard McGarvie:[68]

> "February's Constitutional Convention was enormously successful in revealing to the public for the first time the importance and complexities of the issue and the crucial differences in practical effect between the safe and risky ways of becoming a republic.
>
> "That the place in history of the model and the method of community choice which emerged from the Convention for the 1999 referendum, will be no more than that of an educational step contributing to the later resolution of the issue, is not the fault of the Convention process.
>
> "It is the result of the model's basic structure having been designed in the warm glow of theory, promoted in the public relations mode designed to attract votes, and its actual impact on our system in the harsh realities of politics receiving little attention. At the Convention other structural parts were added on, so as to get the votes on the floor that enabled the model to draw the highest level of minority support there".

Well, so much for the Convention — what has happened since? By and large the media have left republicanism alone for the time being — they have more important fish to fry. But commentators and academics have continued to tease out the many questions left unanswered, or with unsatisfactory answers, by the Convention. The Editor of *Quadrant,* Mr. P.P. McGuinness, has said that:

> "[t]he real question remaining for Australia is whether the electorate can be persuaded to accept a republican model which it never wanted. ... In the meantime, the elitist republicans ... may well ensure that republicanism of all kinds is defeated at the 1999 referendum".[69]

Professor Brian Galligan, Professor of Political Science at the University of Melbourne, has described the Convention model as deeply flawed and anti-republican, and has predicted that it will

fail at the referendum. For Professor Galligan the real issue "is not whether Australia becomes a republic or not; we are that already according to any substantive meaning of the term", and he goes on to show that we are a republic in the modern political sense of the term and in the constitutional sense of the term.

Professor Galligan is concerned that the debate has been in the hands of "constitutional tinkerers", and he reminds us, in terms that will resonate with members of this Society, that the progressive elites and the Labor Party, who now comprise or support the constitutional tinkerers, have been persistent throughout Australian political history in their calls to:

> "…..abolish federalism and the States because they are obstacles to democratic centralism, to abolish the Senate because it divides the legislature and provides equal representation for smaller States, and to jettison judicial review by the High Court because it is undemocratic".[70]

Mr. Harry Evans, Clerk of the Senate, has injected a note of reality into the debate by pointing out some of the practical problems which could be caused by the adoption of the Convention model. He has reminded us that the effect of constitutional proposals in recent years has been to dismantle constitutional safeguards; that the provision of constitutional safeguards is quintessentially republican; and that a country without safeguards is no republic.[71]

One of the most blatant pieces of dissembling I have so far come across in the post--Convention debate is to be found in the latest magazine of the Constitutional Centenary Foundation. It got the facts right in describing the content of the Convention's final Communiqué, but in its summation of the vote on the final model it gave up all pretence of bi-partisanship.

The final vote on the Turnbull model was 73 in favour, 57 against and 22 abstentions. After ten days of public debate and private negotiating, 79 delegates refused to endorse the Turnbull model — 48 per cent supported it and 52 per cent declined to support it — yet the Constitutional Centenary Foundation felt able to tell the readers of its magazine that the model had been "endorsed by a majority of delegates who voted for or against the motion".[72] Such weasel-wording is unworthy of the Foundation and the on-going debate.

Some of the best and most recent published contributions to the debate will be found in the June, 1998 issue of *The University of New South Wales Law Journal*.[73] The entire issue has been give over to *The 1998 Constitutional Convention: An Experiment in Popular Reform*. It contains fourteen articles, including one by our President, Sir Harry Gibbs, and six by Convention delegates. If I mention only some of them, I hope the others will forgive me, for I believe that all have made contributions to the debate which the community is yet to have.

Professor George Winterton, Professor of Law, University of New South Wales, and an appointed delegate to the Convention, believes that the Commonwealth Parliament should "generally honour" the Convention's resolutions. He also acknowledges that the Turnbull model is "flawed, but not beyond repair by a parliamentary committee or by the Convention itself if recalled". The Professor seems to hope that elements which he sees as unsound, inappropriate or incomplete, will be repaired, no doubt by reinstating proposals of his own which were not accepted by the Convention.[74]

Professor Cheryl Saunders, Professor of Law, University of Melbourne, and Deputy Chairman of the Constitutional Centenary Foundation, comments that the Convention model is "significantly flawed", admits that, "[w]ith hindsight, minimalism has been a mistake", and now hopes for "some active intervention by the Parliament".[75]

Professor Greg Craven, Professor of Law, University of Notre Dame Australia, and an appointed delegate to the Convention, notes the development at the Convention of three distinct strands of Australian republican thought, where previously it had tended to be perceived as a single, more or less uniform entity. His three strands are: radical republicans who favour dramatic change to the Constitution; mainstream or ARM republicans who ardently desire dramatic change

in our constitutional symbols, but not in our substantive systems of government; and conservative republicans who reluctantly accept the republic as inevitable but want to ensure that the new republic is merely an adaptation of our highly successful constitutional monarchy. Professor Craven, who was deeply troubled by some of the Convention's decisions, raises some real and troubling questions for any republican, particularly a conservative one.[76]

Linda Kirk, Lecturer in Law, University of Adelaide, and an ARM delegate to the Convention, perceives a number of incongruities in the Convention model, particularly in relation to the dismissal of a President, and calls for the Parliament to reinstate an alternative proposal raised by the ARM at the Convention and rejected.[77]

The position taken in his paper by Mr Jason Yat-Sen Li, an elected delegate to the Convention, is a little worrying. He saw the Convention, and he sees the republic, purely in terms of the interests of Australians of non-English-speaking backgrounds (NESBs). Dr Tony Cocchiaro, an ARM elected delegate from South Australia, told the Convention that he had gone through the *Delegates' Handbook* and had identified only twelve NESB delegates.[78] As the first line of my entry read: "Born Melbourne 1933 (family migrated to Australia from Poland 1929)",[79] I interjected, "Did you count me?" but received no answer.[80]

The answer has now been given by Mr Li — he lists Dr Cocchiaro's twelve, and my name is still not there. Of the now thirteen NESB delegates, three were constitutional monarchists, yet Mr Li writes of four NESB issues on which he believes that NESB Australians find common ground. All relate to changing our Constitution to that of a republic. He tells us that 30 per cent of Australians are NESBs; he assumes that there is a common NESB view about constitutional change; he ignores completely those NESBs who are opposed to constitutional change; and he ignores the other 70 per cent of the community who are not NESBs, just as he ignored the non-republican NESB delegates. Altogether a disappointing and unhelpful contribution to the debate.[81]

Julian Leeser, a law student at the University of New South Wales, an ACM elected delegate, and the youngest elected delegate at the Convention, has raised the loosest of all loose end which the Convention left unresolved — does the referendum need to be carried in four States or in six States? Importantly, if the voters of two States reject the referendum, will they be allowed, or able, to remain as monarchical States within a republican Commonwealth, or will they be forced to become republican States anyway, regardless of how they voted? Mr. Leeser concludes that:

> "The republic debate has been a divisive one. The worst scenario for republicans who argue that a republic will bring Australians together is a High Court challenge that will tear Australians apart".[82]

Sir Harry Gibbs dissects the Convention and its model with his customary precision, and sums it all up in his final paragraph:

> "One rather gets the impression that some delegates to the Convention were less concerned to achieve excellence in the proposed constitutional model than to have a republic at any price. The model proposed by the Convention is so obviously defective that it must surely have little chance of success at a referendum. If, by some possibility, it were adopted, the result would be a disaster for Australia".[83]

I cannot leave this survey of the current state of the debate without referring to the latest contribution by former Chief Justice of the High Court, Sir Anthony Mason. In March of this year the Australian National University Law School, which last December did me the honour of appointing me an honorary Visiting Fellow, invited me to give the first paper in a public seminar series on *The Republic: What Next?* My seminar paper was based on my paper to this Society's March, 1997 Conference in Canberra.[84] It stated the case for my "two Heads of State" view, and it pointed out that the Convention had confirmed my view when it determined that the powers of the President shall be the same as those currently exercised by the Governor-General. If the former will be a Head of State, then the latter must be a Head of State now.

Nine weeks after my paper Sir Anthony gave his paper in the ANU public seminar series.[85] In his opening paragraph he stated that, for the most part, he would deal with constitutional and legal issues, but that he would also indulge himself to the extent of commenting on some observations made by earlier speakers in the seminar series. So far as I can tell, I was the only earlier speaker whom he singled out — I was certainly the only one whom he named.

Sir Anthony once again quoted s.2 of the Constitution and stopped there, thereby revealing himself as just another republican who cannot read on as far as s.61.[86] Sir Anthony found it very easy to say that my view of our Constitution is incorrect. After all, I am not a constitutional lawyer. I am not even a lawyer. I am only a political scientist, and I am therefore a very easy mark for a former Chief Justice of the High Court.

Sir Anthony might have found it more difficult to tackle the seven distinguished constitutional lawyers and jurists, and one Governor-General who is also a distinguished constitutional lawyer, to whom I have already referred. Sir Anthony is obviously not aware that our Constitution gave to our Governor-General executive powers not previously granted to any other Governor-General in the British Empire. Sir Anthony is obviously not aware that Queen Victoria's Ministers were wrong in advising her to issue Royal Instructions to the Governor-General in 1900. And Sir Anthony is obviously not aware that the Queen revoked those Instructions in 1984.

Sir Anthony tries to take me up on what I have said about Governors-General being accorded Head of State status when travelling overseas. I have referred to the 51 State and official visits to 33 foreign countries since 1971. Sir Anthony mentions only one such instance, and gets it wrong. He talks of a supposed visit by Sir John Kerr to Iran for the Coronation of the Shah. The Coronation visit was made by Sir Paul Hasluck in 1971: Sir John Kerr's State visit to Iran was made in 1975.

Sir Anthony refers to the early role of the Governor-General as the representative of the British Government — a situation which did exist, and was changed in 1926 — and speculates on whether I am aware of this. I am indeed, for I delivered a paper on the subject in Parliament House, Canberra, in 1995 in the Australian Senate's *Occasional Lecture* series.[87] What Sir Anthony refers to as a change in the way the Governor-General saw the responsibilities of his office was in fact a change in the way British and Australian Ministers saw the responsibilities of the office — the Governor-General had nothing to do with it.

Sir Anthony refers to a so-called convention that the Governor-General does not attend a function in Australia when the Queen herself is present. We certainly had such a practice once, but there was no constitutional or practical reason for it, and Sir Anthony is in error in his reliance on it. He correctly states that the Governor-General has not attended when the Queen has "opened" the Commonwealth Parliament.[88] But he is wrong in his assumption about the reason for this. The Standing Orders of both Houses of the Parliament provide for the "opening" speech to be delivered by the Governor-General, and in 1953 both Houses amended their Standing Orders to provide that, in certain circumstances, references to the Governor-General shall be read as references to the Queen.

In a footnote to this part of his paper Sir Anthony states that the "*Royal Style and Titles Acts* were enacted by the Commonwealth Parliament on two occasions (1953 and 1973) to set at rest any doubts that the Queen could deliver the address at the opening of Parliament". But Sir Anthony manages to get this wrong too, for the *Royal Style and Titles Acts* did no such thing — they merely amended the Queen's Royal Style and Titles! Sir Anthony has confused these Acts with the *Royal Powers Act* 1953.

That Act was not only the basis for the amendment of the Standing Orders of the Parliament. Its purpose was also to enable the Queen, whenever she is present in Australia, to exercise any power under an Act exercisable by the Governor-General. The Act does not prevent the Governor-General from continuing to exercise his statutory powers while the Queen is in

Australia, and in fact Governors-General have continued to do so. Thus we see that the representative role, which seems to have bedazzled Sir Anthony, is actually reversed, with the Sovereign being empowered by the *Royal Powers Act* to act as a delegate of the Governor-General.

Sir Anthony's final attack on me centres around Sir Zelman Cowen's absence when the Queen opened the High Court building in Canberra in 1980. And you will not be surprised when I tell you that Sir Anthony gets this wrong too.

Sir Anthony refers to what he is pleased to call a robust convention which decrees that there is no place for the Governor-General when the Queen is present. Sir Anthony is wrong again, for there is no such convention. To be sure, in Australia we had followed such a practice on previous Royal visits, but I knew of no constitutional or other basis for it, so I took the matter up with Buckingham Palace in the course of our preparations for the 1980 visit. I was told that the Palace knew of no basis for the practice, which seemed to be peculiar to Australia, and that the Queen would be pleased if the Governor-General were present when she opened the High Court.

I so informed the ceremonial officers of the Department of the Prime Minister and Cabinet, and draft orders of arrangements were prepared which provided a place for the Governor-General on the dais. It was only when the Prime Minister, Mr Malcolm Fraser, saw the draft that he decided that the Governor-General should not be present: with the Governor-General out of the way, his place in the official procession next to the Duke of Edinburgh would be available for the Prime Minister. Sir Zelman asked me not to pursue the matter, but he was disappointed and very hurt.[89]

When the Queen opened the Commonwealth Games in Brisbane in 1982 the Governor-General, Sir Ninian Stephen, was present and seated next to her, as had been the Governor-General of Canada when the Queen had opened the Commonwealth Games in Edmonton in 1978 — two years before our High Court opening. So much for Sir Anthony's so-called robust convention.

Perhaps next time Sir Anthony will be more careful before he indulges himself in commenting on observations made by earlier speakers, and less dismissive of what he was pleased to call the Head of State nonsense. If the participants in the seminar series were exposed to nonsense, they certainly didn't get it from me.

In bringing this paper to a close, I can do no better than use the words of Richard McGarvie in his latest contribution on the subject:[90]

> "I consider that the referendum in 1999 will fail because Australians are instinctively a wise people. They are well aware that they have the responsibility for maintaining for future generations one of the world's oldest and best democracies, which Australians have built. A referendum campaign tends to be all-revealing. By the time they vote, people will realise how the model would damage essential elements of our democratic system, and how much it would strain our federation to have the Commonwealth become a republic while the States are left to fend for themselves. The referendum will not resolve the republic issue because numerous voters, at heart favouring a republic, will put their democratic system and federation first, and vote against it".

As we approach next year's referendum, it is time that the Australian Republican Movement came clean, and told the people of Australia their real reasons for wanting to alter our Constitution. The Turnbull model will not give us independence, for we have that already. It will not give us an Australian Head of State, for we have that already. It will not give us a republican form of government, for we have that already. And it will not give us a better Constitution, for even the ARM's most ardent supporters are now telling us why it will not work, and are seeking to change it. Nicodemus in the night clearly has not been able to improve on what our Founding Fathers fashioned so carefully and so patiently over two decades. With the help of $40 million of taxpayers' money, the Australian Republican Movement has been given the chance to put up, and it failed. It is surely time that it shut up!

Endnotes:

1. For a summary of the final day's proceedings see *Report of the Constitutional Convention,* Volume 1, pp. 40-41; for details of the resolutions and the voting on each one, see *Report of the Constitutional Convention,* Volume 2, pp. 118-134.

2. *Executive Government: Report of the Advisory Committee to the Constitutional Commission,* Canberra Publishing and Printing Co., Canberra, 1987.

3. *Final Report of the Constitutional Commission,* Australian Government Publishing Service, Canberra, 1988, p. 1.

4. *Commonwealth Parliamentary Debates (H of R),* 10 May, 1988, pp. 2385-91.

5. Geoffrey Blainey, *What the Constitutional Commission Achieved: A Comment*, in Brian Galligan and J.R. Nethercote (eds), *The Constitutional Commission and the 1988 Referendums,* Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (A.C.T. Division), Canberra, 1989, p. 15.

6. Richard Alston, *The No Case*, in Galligan and Nethercote, *op.cit.,* p. 87.

7. *Final Report of the Constitutional Commission, op.cit.*, p.1.

8. *Ibid*., p. 75.

9. *Ibid*..

10. Paul Kelly, in a speech to the Constitutional Centenary Foundation, 12 November, 1993.

11. *The Weekend Australian,* 28-29 August, 1993.

12. *The Canberra Times,* 8 December, 1993.

13. *The Australian,* 25 October, 1994.

14. *The Australian,* 28 October, 1997: see also note 41 below.

15. *The Canberra Times,* 26 March, 1998.

16. *The Age*, 7 November, 1997.

17. *The Australian,* 8 October, 1997.

18. *The Sydney Morning Herald,* 9 January, 1998.

19. Personal knowledge.

20. *The Canberra Times*, 1 September, 1993; and repeated in *The Canberra Times*, 10 October, 1997.

21. Bill Ferris, *Confidence at home helps us out abroad*, in *The Australian,* 10 October, 1997.

22. See, for example, James Kirby, *Business begins to join the republican team*, in *Business Review Weekly,* 10 November, 1997; Michelle Grattan, *What's in it for business?,* in *The Australian Financial Review,* 24 January, 1998; and Bill Ferris, *op.cit.supra*.

23. *The Australian Financial Review,* 20 November, 1997.

24. *Final Report of the Constitutional Commission, op.cit.*, p. 43.

25. *Whereas the People ... Civics and Citizenship Education,* Australian Government Publishing Service, Canberra, 1994, pp. 18-19.

26. *Commonwealth Parliamentary Debates (H of R),* 28 August, 1997, p. 7120.

27. *The Role of the Governor-General*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 167-187.

28. *But We Already Have an Australian Head of State*, tabled 2 February, 1998. See *Report of the Constitutional Convention,* Volume 2, p. 19.

29. *Report of the Constitutional Convention,* Volume 3, pp. 66-69.

30. *Final Report of the Constitutional Commission, op.cit.*, p. 75.

31. *Ibid*., p. 313.

32. Lord Casey was appointed on 22 September, 1965.

33. See note 27 above. Two distinguished Australian constitutional scholars, A. Inglis Clark, who had worked with Samuel Griffith on his drafts of the Constitution, and who later became Senior Judge of the Supreme Court of Tasmania, and W. Harrison (later Sir Harrison) Moore, who had worked on the first draft of the Constitution that went to the 1897 Adelaide Convention, and who later became Professor of Law at the University of Melbourne, expressed the view that the Instructions were superfluous, or even of doubtful legality, on the grounds that the Governor-General's authority stemmed from the Australian Constitution, and that not even the Sovereign could direct him in the performance of his constitutional duties. That advice was to be confirmed in 1975 in an Opinion entitled *Governor-General's Instructions*, given to Prime Minister Gough Whitlam by the Solicitor-General, Sir Maurice Byers: *Opinion of the Solicitor-General of Australia,* 5 September, 1975.

34. Sir Zelman Cowen, *One Hundred Years a Nation: Australia Looks to 2001,* the *Inaugural Melbourne Lecture,* Georgetown University, Washington, D.C., 23 September, 1997, p. 2.

35. *Ibid.*.

36. See, for example, the report of an interview, *The Fragile Consensus,* by Claude Forell, *The Age*, 13 August, 1977; and Sir Zelman Cowen, *Leadership in Australia: The Role of the Head of State*, being the *Williamson Community Leadership Lecture,* Melbourne, 31 May, 1995, p. 2.

37. *Final Report of the Constitutional Commission, op.cit.*, p. 75.

38. Cowen, *Inaugural Melbourne Lecture, op.cit.*, p. 11.

39. *Commonwealth Parliamentary Debates (H of R),* 7 June, 1995, pp. 1434-41.

40. *Report of the Constitutional Convention,* Volume 1, p. 45.

41. ABC Television, 27 October, 1997; ABC Radio, 28 October, 1997; see also note 14 above.

42. H. V. Evatt, *The King and his Dominion Governors,* Frank Cass and Company Limited, London, 1967, 2nd. Edition, pp. 311-12; and Byers, *Opinion of the Solicitor-General of Australia, op.cit.*.

43. See note 33 above.

44. [1916] 1 A.C., pp. 586-7, quoted in Evatt, *op.cit.*, p. 311.

45. *Ibid.*.

46. Byers, *op.cit.*.

47. Sir Harry Gibbs, *A Republic: The Issues,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 1- 16.

48. Sir Garfield Barwick, *Parliamentary Democracy in Australia,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 5 (1995), pp. 205-219.

49. Evatt, *op.cit.*, pp. 1 - 11. (First edition published in 1936).

50. National Press Club lunch, Canberra, 30 July, 1997; a debate between Mrs. Kerry Jones, representing Australians for Constitutional Monarchy, and Mr. Malcolm Turnbull, representing the Australian Republican Movement.

51. Richard McGarvie, *Our Democracy in Peril: The Safe Way to a Democratic Republic*, in *The Australian,* 1 May, 1997; and (1997) 101 *Victorian Bar News,* 31.

52. Moira Rayner, *A View from the Fringe*, in *The University of New South Wales Law Journal,* Volume 4, No. 2, June, 1998, p. 28.

53. Sir Harry Gibbs, *Some Thoughts on the Constitutional Convention,* in *The University of New South Wales Law Journal,* Volume 4, No 2, June, 1998, p. 16.

54. *Report of the Constitutional Convention,* Volume 4, p. 975.

55. Rayner, *op.cit.*, pp. 29-30.

56. *Report of the Constitutional Convention*, Volume 4, p. 975.

57. Christopher Dore, *New republican Costello wants changes before he signs on*, in *The Australian,* 16 February, 1998. See also Karen Middleton, *Vow to amend model before poll*, in *The West Australian,* 16 February, 1998; and *Republicans hope to win Treasurer's support*, in *The Age,* 16 February, 1998.

58. *Report of the Constitutional Convention,* Volume 4, pp. 997-9. For the text of the Communiqué see Volume 1, pp. 42-50.

59. Mike Steketee, *Republican Rumble*, in *The Weekend Australian,* 11 July, 1998.

60. *Report of the Constitutional Convention,* Volume 3, p. 3.

61. *Ibid*., p. 7.

62. *Report of the Constitutional Convention,* Volume 4, pp. 626-641.

63. *Ibid*., p. 634.

64. *Ibid.,* pp. 648-9.

65. *Ibid*., p. 970.

66. *Ibid*., p. 966.

67. *Ibid.,* p. 333. Mr. Malcolm Turnbull claimed that a system for voting on the republican models had to be devised to prevent "people who are committed to the defeat of the referendum voting in favour of the model they regard as being most likely to be able to be defeated by them". See also Report of the Constitutional Convention, Volume 4, p. 334 and p. 393 for responses by the author to Mr. Turnbull.

68. Richard McGarvie, *Resolving the Republic Issue by 2005,* (1998) 105 *Victorian Bar News,* 18.

69. P.P. McGuinness, *The Constitutional Convention*, in *Quadrant,* April, 1998, pp. 2-3.

70. Brian Galligan, *The Constitutional Convention*, in *Quadrant,* April, 1998, pp. 17-21.

71. Harry Evans, *Strange Death of an Australian Republic*, in *Australian National Review,* April, 1998, pp. 13-14.

72. *Round Table,* No. 1, 1988, p. 5.

73. *The University of New South Wales Law Journal,* Volume 4, No. 2, June, 1998.

74. George Winterton, *The 1998 Convention: A Reprise of 1898, ibid*., pp. 4-9.

75. Cheryl Saunders, *How Important was the Convention?, ibid.,* pp. 9-12.

76. Greg Craven, *Conservative Republicanism, the Convention and the Referendum*, *ibid.,* pp. 18-20.

77. Linda J. Kirk, '*Til Dismissal Us Do Part: Dismissal of a President*, *ibid.,* pp. 20-22.

78. *Report of the Constitutional Convention,* Volume 3, p. 287.

79. *Ibid.,* Volume 1, p. 106.

80. *Ibid.,* Volume 3, p. 287.

81. Jason Yat-Sen Li, *The Constitutional Convention from an Ethnic Australian Perspective: Was it all Chinese, Greek and Double Dutch?,* in *University of New South Wales Law Journal, op.cit.*, pp. 30-33.

82. Julian Leeser, *Tying Up the Loose Ends of the Constitutional Convention: Is it a Four or a Six? Time to Call in the Third Umpire?, ibid*., pp. 36-38. See also Sir Harry Gibbs, *A Republic: The Issues*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 1- 16; and Sir Harry Gibbs, *The Constitutional Framework of the Australian Monarchy*, Gareth Grainger and Kerry Jones (eds), *The Australian Constitutional Monarchy,* Australians for Constitutional Monarchy, Sydney, 1994, pp. 23-35.

83. Sir Harry Gibbs, *Some Thoughts on the Constitutional Convention*, *op.cit.*, pp. 16-17.

84. See note 27, *supra.*

85. Sir Anthony Mason, *The Republic and Australian Constitutional Development*, unpublished seminar paper, 11 May, 1998.

86. The respective sections are:

> "2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him".
>
> "61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

87. *An Australian Head of State: An Historical and Contemporary Perspective*, in *Papers on Parliament,* Number 27, March, 1996, Department of the Senate, Canberra, pp. 63-82.

88. In actual fact Parliament has never been opened either by the Queen or the Governor-General, but by Deputies appointed for this purpose by the Governor-General. See J.R. Odgers, *Australian Senate Practice,* Sixth Edition, 1991, pp. 232-235; also L.M. Barlin (ed.), *House of Representatives Practice,* Third Edition, p. 241.

89. Cowen, *Williamson Community Leadership Lecture, op.cit.,* p. 14.

90. McGarvie, *op.cit.,* 105 *Victorian Bar News,* 18.

Chapter Two

The Movement to an Australian Republic: A Missed Opportunity

Dr. Suri Ratnapala

Introduction

It appears from the outcome of the recent Constitutional Convention, and the views of a majority of leading republicans, that the aim of the republican movement in Australia is to preserve the current constitutional system while replacing the monarch with a locally selected and largely ceremonial President. Although many republicans have serious reservations about the technically flawed model endorsed by the Convention, the republican movement as a whole has turned its back on substantial constitutional reform as a means of progressing to the republican ideal, and has opted for a form of cosmetic republicanism which leaves the Constitution pretty much as it is. As a republican in the liberal tradition, I am deeply disappointed at what I consider to be a missed opportunity for genuine republican reform in Australia.

In classical theory, a republic is a form of government designed to advance the public good (*res publica*). Public good in this sense did not mean the collective good in the modern socialist sense, but the common good, as opposed to the good of the rulers or ruling classes. Thomas Paine remarked in his *Rights of Man*, that "Republican Government is no other than government established and conducted for the interest of the public, as well individually as collectively".[1]

Some republicans also emphasised civic virtue, but the liberal republican tradition was to seek the advancement of the public good through means such as the rule of law, representative (as opposed to direct) democracy, and checks on power by its dispersal both territorially and functionally.

If we are serious about the republican ideal, we should look closely at the fundamentals of our Constitution to consider ways in which we could make it more effective in the pursuit of the public good. In my view, the constitutional system, both at federal and State levels, falls short of the republican ideal in a significant sense.

In this paper I explain what I consider to be four major flaws of the current constitutional system, and suggest ways of reform. In doing so, I will be proposing that Australia should seriously consider adopting a modified version of the American constitutional model. I am not suggesting that such reform is politically feasible in the near term. While opinion polls consistently indicate that a majority of Australians prefer to elect their President in a republic, there is no evidence that a majority supports a system where an elected President exercises actual executive power, as opposed to the limited range of "reserve" powers currently exercised by the Governor-General. There is virtually no support for this model from political parties.

It is reasonable to assume that the current lack of public support for the American system may reflect, at least in part, the lack of public understanding of the nature and the detail of that system. The arguments made in this paper constitute a plea for informed discussion of this model, and an attempt to provoke a public debate concerning its suitability for qualified adoption in Australia as part of the republican agenda.

I should also hasten to clarify that this essay is not an argument against the kind of change proposed by the mainstream republican movement, namely, the retention of the existing system of government while transferring the monarchical functions exercised by the Governor-General to a President chosen by the houses of Parliament.

My own view is that the residual value of the constitutional monarchy is insufficient to justify the hereditary privileges it perpetuates. Given the fact that the Australian politicians and

the public at this point of time wish to retain the existing system of modified Westminster democracy, the retention of the hereditary monarchy can be justified only if it is seen as an essential attribute of it. No one has claimed that it is. Elsewhere in the world, the model is seen to work, within its limits, with elected or appointed officials performing the functions of hereditary constitutional monarchs. The option produced by the Convention, imperfect as it is, is unlikely to seriously alter the constitutional *status quo*. It has the advantage of eliminating hereditary privilege.

However, it is hoped that this essay will demonstrate that the replacement of the hereditary monarchy by an official chosen by the Commonwealth Parliament should be regarded as the start, but not the end of the current constitutional reform movement in Australia.

In my view, the Australian constitutional scheme is flawed in four respects:

1. The system of responsible government which is central to the Constitution fails to ensure that the Executive is popularly elected. In other words, there is no assurance under this system that the government of the day is elected to its term of office by a majority of the people.
2. The system makes Parliament subservient to the Executive, except in the uncommon situation where the government does not command a majority of the lower house.
3. The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures.
4. The system reduces the chances of the most able persons being chosen to perform executive functions.

The system does not ensure popular government

One of the most obvious, and least talked about, facts about the Australian constitutional system is that it can and does produce governments which are rejected by the majority of the people. It is almost as if there is a conspiracy of silence on this issue on the part of politicians and media commentators.

In Australia, the executive government is formed by the leader of the party which has the confidence of the lower House. After a parliamentary election, the leader of the party which is likely to command the support of a majority of members in the lower House is appointed as the Prime Minister, and the Prime Minister chooses the ministry from within his own party ranks or from the ranks of coalition parties. Hence, the government is chosen or determined at parliamentary elections according to the number of seats won, not according to the number of votes gained. One does not have to be Einstein to work out that under the "first past the post" single member constituency system, a party could receive a minority of the popular votes and yet gain a majority of the seats in Parliament. What this means is that a party which lost the nationwide popular vote could end up supplying the executive government.

Before Tony Blair's election in 1997, the last British government to be elected by more than 50 per cent of votes was in 1935! In Australia, citizens are compelled by law to vote, but we often have governments rejected by a majority. This, in spite of compulsory preferential voting intended to ensure that the winning candidate in an electoral district is approved by more than 50 per cent of the voters in that district — where necessary, after counting their second and lower preferences. Mr Menzies in 1954 and 1961, Mr Gorton in 1969, and Mr Hawke in 1990 won government with a minority of the two party preferred vote. This happens all too often at State level. Three of the current State governments in Australia lack majority support.

It is also clear that a switch to proportional representation does not solve this problem. Indeed, it has the potential to make the executive government even less representative of the popular choice. While proportional representation makes a lot of sense with respect to the election of the members of the legislature, under the Westminster system of responsible government, it does not lead, necessarily, to majority government. In many European democracies which combine forms of responsible government with proportional representation,

hardly ever has there been a government elected by a majority of the people. Tasmania, the only Australian State which has proportional representation in the lower House, has a government which received very much less than 50 per cent of the popular vote.

Clearly, the problem is not with the electoral system but with the Westminster system of responsible government, which entrusts executive power to the party which enjoys, for the time being, the express or tacit support of a majority of members of Parliament. The distortion of the popular wish concerning who should rule us is aggravated by the requirement of compulsory voting, and the requirement of indicating preferences at federal elections. The compulsion to indicate preferences is particularly insidious. It forces many voters to grant preferences to parties they have no wish to support, in order to validate their primary vote.

In contrast, a system which enables the public to directly elect an executive President by a preferential system of voting will ensure that the candidate who is most preferred by the electorate or, at any rate, the candidate who is least objectionable to the electorate, is chosen as the head of government. It is true that the American system of presidential elections is capable of distorting the public choice, owing to the absence of preferential voting and the intermediacy of the Electoral College. In the absence of preferential voting, an election can produce a winner who may not be the most preferred or least objectionable candidate. However, a system where the Executive is directly elected on a preferential voting system, or on the French type "run off ballot" system, would produce a government preferred by a majority of the electorate, or least objectionable to the electorate, every time.

The system makes Parliament subservient to the Executive

The great virtue of the Westminster system is said to be its capacity to make the Executive responsible to the elected house of Parliament. This responsibility is enforced by the convention which requires the Prime Minister, whose party is defeated on a confidence motion or on an Appropriation Bill, to tender the resignation of his government, or to advise that Parliament be dissolved and new elections be held. The responsibility to Parliament is said to be further reinforced by ministers' duty to answer questions in Parliament relating to the conduct of their departments, and their duty (observed mainly in the breach) of resigning when they are individually censured by Parliament.

Though this view of Westminster democracy was, perhaps, true of the English constitution during its classical era, it is no longer the case in Britain or anywhere else where the system is practised. Today, Parliament is subservient to the executive will, except in the unusual instances when the government party does not have a majority in the lower House.

The reality now is that Parliament (or more accurately, the "lower" House through which ministerial responsibility is supposed to be enforced) is confined to two functions. Firstly, after an election, it acts as an electoral college to pick the ministry and shadow ministry. Secondly, it provides two die-hard and vociferous cheer squads for the Government and Opposition to enliven the proceedings of the House. The great virtue of Westminster democracy has become its fatal contradiction.

How did this transformation occur ? Before the *Reform Acts* in the British Parliament, the monarch was the executive both in name and in fact. Though Parliament was theoretically sovereign, the monarch was able to control it through ministers who used royal patronage to manipulate both the Members of Parliament and the electorate. Ministers held office during the King's pleasure, not Parliament's confidence. They were responsible to the King, not Parliament. All this was possible because the franchise was extremely limited and the electoral system was wholly corrupt, as exemplified by the infamous "pocket boroughs" and the "rotten boroughs".

The situation changed in the nineteenth Century with the enactment of the *Reform Acts* of 1832, 1867 and 1884. These Acts extended the franchise, effected electoral reforms and established mass democracy, though women did not get their right to vote until well into this

Century. The extension of the franchise meant that it was much more difficult to manipulate the electorate. There were just too many voters to bribe!

The reforms brought about a dramatic change in the nature of parliamentary democracy. The vestiges of ministerial responsibility to the King disappeared, and ministers became fully responsible to Parliament and Parliament became accountable to the electorate. Politicians needed mass support to get elected to government, and hence needed to promise people what they desired. It was more important to be popular among the voters than to be liked by the King. Hence, the ministers became independent of the Crown and replaced the monarch as the true Executive.

The nineteenth Century has been described as the classical period of the British constitution. Following the Great Reforms, it seems as though the electorate was supreme. The voters could count on their representatives to keep the government honest and to remove it when it misbehaved.

But this situation could not last. While the monarch was the real executive, Parliament could chastise his or her ministry with impunity. Parliament could call ministers to account, impeach them, or otherwise force them out of office, without disruption to the administration of the realm. There was a real separation of powers between the executive monarch and the legislature, and each balanced the other. In this sense, the classical British constitution resembled the current US Constitution, with the difference that the Executive was chosen by heredity and not by the ballot. Indeed, one could say that the fundamental feature of the classical constitution was entrenched for posterity in the written US Constitution, even as it withered away in the unwritten constitutional tradition of Britain.

Once real executive power was transferred to the ministry, and the convention was established that the ministry which lost the confidence of the Commons had to resign, Parliament for the most part could not express its lack of confidence in the ministry without actually ending the government's life, and that of the Parliament itself, as it would force a new general election.[2]

What occurred then was a classic of Darwinian selection. The new reality meant that only political parties which could secure the unquestioning obedience of its parliamentary group could form an effective government. The party Whip was born, and the independent member of Parliament became vestigial. Henceforth, intra-mural debate would be tolerated in the back rooms, but not on the floor of the House where it mattered.

It is one of the tremendous ironies of political history that the growth of Parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated, and the Executive regained its ascendancy over Parliament, except in the unusual circumstances where no party secured a majority and the Prime Minister led a minority government.

Why did the electorate tolerate the subservience of its representatives to the will of government? Why did the people not insist on proper oversight of government? The reason is that they had no real choice. The system simply did not allow an undisciplined party to remain in power for any length of time, hence no party allowed its members any freedom in Parliament. The only alternatives to monolithic political parties were the independent candidates, and they had no prospect of governing at all. As all the parties behaved in exactly the same way, the electorate had no real choice in this respect.

There was another reason for the electorate's impotence in enforcing parliamentary discipline on the government. After the Great Reforms, the electorate was clearly in a position to make demands which politicians could not ignore. Then something funny happened. Politicians discovered that they could turn the tables on the electorate by making offers which segments of the electorate could not ignore. They found a fertile marketplace where benefits and privileges

could be traded for votes. Elections could be won through distributional coalition building, that is, by putting together offers to a sufficiently large number of special interests.

Politicians were helped in this enterprise by the absence of constitutional limits on parliamentary power. They were able to gather unto themselves vast powers with which they could create and dispense largesse to groups of voters, more often than not at the expense of other groups. As Professor Geoffrey Brennan notes, Parliament became "a prize awarded to the winner of an electoral competition".[3]

Brennan describes this view of Parliamentary democracy as follows:

> "On this view, voters are rather like consumers in a marketplace; they desire policies from the government and they vote for those policy packages they prefer. Candidates of political parties are analogous to firms; they bid for custom by offering policies in competition with one another. In this way, electoral competition is analogous with market competition; politicians can be construed as offering alternative bids for office (like competitive tenders for a construction job), and the bid that is most preferred by the electorate is successful".[4]

I find myself in substantial agreement with Professor Brennan's description of the current state of Westminster democracy. He finds that Parliament today is "just a piece of theatre" and the vote "pointless ritual",[5] but argues that this theatre plays an important part in the bidding process of the political marketplace which constitutes the main game.[6] Whether or not we put it as high as that, it seems reasonably clear that in the routine circumstances, Parliament today is very much the servant of the Executive.

In contrast, where the Executive is directly and separately elected by the people for a fixed term of office, the legislature is free to play an independent deliberative role. Since a vote against the government's policies does not threaten the life of the government or of the legislature, individual representatives act independently or in direct response to their constituency wishes.

The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures

The most serious consequence of the subservience of Parliament to the Executive is the incapacitation of the electorate to influence, directly and decisively, specific legislative measures. In the US model of separated powers, legislation proposed or favoured by the Executive has no guarantee of approval by Congress. Even more importantly, Congress is able to pass legislation opposed by the President, although a special majority is required if the President chooses to veto the bill. In the Westminster model, for the most part, laws proposed by the Executive pass, and those opposed by the Executive end up in the bin!

In Australia, the situation is mitigated somewhat by the existence of an elected Senate. The Senate succeeds from time to time in preventing the passage of laws proposed by the Executive. However, this capacity should not be exaggerated. Owing to the nature of the system, Senators maintain party discipline in the upper house. The executive will can be resisted only where the government does not have a majority in the upper house and is unable to secure the support of minor parties. Even when opposition parties hold the majority of votes in the Senate, they are inhibited by Westminster convention from acting like the US Senate. Such a role is simply incompatible with the Westminster principles of responsibility to the lower House. In any event, the Senate is powerless to enact any legislation which is opposed by the Executive, for under this system, the lower House remains necessarily under the control of the government.

Thus, under the Westminster system, accountability is enforced through the electoral process. The electorate votes for policy packages or comprehensive bids presented by political parties. These packages are designed strategically to appeal to a sufficient number of common and diverse interests which would deliver victory on the election night. Marginal constituencies become particularly important in this exercise. The theory is that the winner will be punished by

the electorate at the next election, if it has failed to honour the promises contained in the package. I have two major problems with this theory.

Firstly, I think it overestimates the capacity of the electorate to monitor, and pass judgment on, a government's term of office in the context of a bargaining democracy. In implementing its program over a term of office, most governments would disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a government may still win with the aid of a new or modified coalition of interests. Except when major errors or abuses are committed, elections are decided by the ongoing bidding process, which allows parties to recoup lost support by new promises to the disaffected groups or to alternative groups. The accounting process is also undermined by the fact that a great deal of government activity cannot be monitored, as it happens outside Parliament within bureaucratic structures which elude political and judicial scrutiny.

Secondly, I have trouble with the price we pay for this kind of accountability. The "Parliament as prize" model requires that we choose from among competing bids which constitute whole packages or programs to be pursued over several years. They contain things that we like and things that we don't like. We can only get the programs that we like by agreeing to many programs that we don't like.

For example, I cannot say to a political party, "I accept your tax policy, your privatisation policy and your tariff reduction policy, but I reject your media ownership policy and your immigration policy". Even if I say so, at the ballot box I cannot split my vote. If I take one, I take the other. It is not an unreasonable assumption that the decisive issue at the 1993 general election was the Coalition's proposed goods and services tax (GST). But after the election there were many fringe groups who claimed that Labor had mandates on a range of issues which, by themselves, would never have received majority support. We cannot blame those groups for making the claims, or the Labor Party for implementing them regardless of majority wishes. Our political system invites such claims and legitimises them.

It is true that in electing a Senator or Congressman, an American voter also cannot split her vote. She has to take her representative as she finds him, espousing some policies she likes and others she dislikes. However, the US voter is much better off, as her representative can be made to change his mind without endangering the lives of the Executive and the legislature. Besides, the fact that a candidate for Congress is not inextricably bound to a party policy package means that she can be far more responsive to her constituency in formulating her positions on individual issues. The flip side of this situation is that, unlike in Westminster democracy, a US voter can punish an individual legislator for betrayal of a cause without punishing a government. The Australian voter cannot split her vote with respect to the Executive and the legislature, because the Executive belongs to the party that wins the legislature. The US voter can.

It is important to note that this particular criticism of the Westminster system is not that it promotes the formation of political parties, but that it requires a degree of party discipline which destroys the principle of executive responsibility to Parliament. Political parties are a naturally selected phenomenon in any large democracy. Candidates who band together can offer voters more things than those who remain independent. So, there will always be political parties.

In the US model, the degree of cohesion within political parties is dictated by voter sentiment. Obviously voters see advantages in their delegates being part of a powerful group. At the same time they would like their delegates to break ranks when they think that the group is making a wrong decision. Therefore, the American system tends towards optimality in party discipline, as representatives constantly fine tune their performances between solidarity and independence. In contrast, Westminster democracy leaves no room for the evolution of an optimal party system.

The system reduces talent in government

It would be tempting to accept the loss of the deliberative and supervisory capacities of Parliament if there were a return in the form of administrative excellence. Unfortunately, there is no such payoff but, on the contrary, the Westminster system is structurally handicapped from producing excellence in government.

The system requires the great departments of government to be administered by ministers of state, and for ministers of state to be Members of Parliament. Now we all know that there are very able men and women in Parliament. However, Parliament by its very nature provides a very poor talent pool from which to select the administration of the state. Consider the following.

To begin with, for a Member of Parliament to get preselected by her party and then get elected at the poll, she must have a certain range of skills and attributes. However, they are not necessarily the skills and attributes which provide for excellence in administration. On the contrary, they may be impediments to good administration, which we associate with qualities like efficiency and fairness. Of those who get elected, only members of the government party are eligible for the ministry. In the demographically smaller States of Australia, and in Queensland where there is only one chamber of Parliament, this means that the ministry must be drawn from an extremely small group of successful contestants at the election.

Now, one may argue that administering a government department is very different from the management of a business. Ministers must not only make economic and managerial judgments, but also political judgments. This involves a balancing of interests of a kind which does not usually trouble business managers.

However, it is easy to exaggerate this dimension. In practice, political judgment often translates into partisan strategy whereas, as governments all over the world are discovering, good economics and good management make good politics. In any case, there is no reason to think that only incumbent Members of Parliament possess the political judgment needed in public administration.

The main theoretical reason for requiring ministers to be Members of Parliament concerns the need for individual and collective ministerial responsibility. In theory, ministers can be held accountable for their actions through questions and censure motions. The practice, as we know, is very different. A government which has a majority will use Question Time to its own partisan advantage. Censure motions have no chance of success in a House governed by party whips and dominated by a ruling party.

The key to ministerial responsibility to Parliament is the capacity of members to act independently of the Executive. Unfortunately the Westminster system, as it has developed, leaves no room for such independence.

Endnotes:

1. Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution,* London & Toronto: J.M. Dent & Sons, 1906, p.174.

2. If an alternative government having the confidence of the Commons was available, the general election could be avoided.

3. Brennan, G, *Australian Parliamentary Democracy: One Cheer for the Status Quo*, (1995) 11(1) *Policy*, p.20. Professor Brennan's paper was earlier published in *Views on Parliamentary Democracy*, in the series *Papers on Parliament*, 22, Department of the Senate, Parliament House, Canberra.

4. *Ibid*..

5. *Ibid.*, p.17.

6. *Ibid.*, pp.20, 21-22.

Chapter Three

The Republic: Is there a Minimalist Position?

David Russell, QC

"We are governed by idiots".[1]

Introduction

I have taken an observation of the late Maxwell Newton as my starting point, not because I am seeking to comment on the result of the recent Queensland election, and still less as a commentary on the federal Coalition government, but because it seems to me to crystallise a critical distinction between American constitutional theory and Australian constitutional theory which is relevant to my topic.

The American approach is to regard all government as potentially bad, and capable of being an instrument of oppression if in the wrong hands. As a result, the United States Constitution contains a series of institutional checks and balances directed to ensuring that, if the powers of the executive, legislative or judicial branches of government are exercised wrongly, the wrong can be corrected and the wrongdoer brought to account.

The British approach has tended to be far less fearful of the possibility of government falling into the wrong hands and needing potential restraint, and more inclined to blame failings of particular governments upon individuals rather than structures. Consistent with this approach is the absence of a written constitution or formal restraints upon parliamentary sovereignty, such as a Bill of Rights and, possibly more damaging, a tendency to look for moral blame when the system fails and, not finding it, to conclude that no action is necessary to prevent future failure.

Australian constitutional theory (or at least what passes for the "progressive" component of it) tends to accept the British approach, coupled with a lament that appropriate development towards nationhood has been retarded by a "horse and buggy" Constitution which the people are unreasonably reluctant to modernise (by conferring more powers upon the Commonwealth government and, within that government, the executive branch).

Executive summary

The essential propositions to be advanced in this paper are that:

- institutional restraints on government are important;
- within the Westminster context, such constraints as do exist are inextricably interconnected with the constitutional monarchy;
- so-called "minimalist" change, by abolition of the monarchy whilst retaining other features of our present system, will exacerbate tendencies towards untrammeled executive power, thereby bringing about major change;
- of all possible constitutional options, the so-called minimalist position is the least desirable result, and certainly less preferable to a republican model constructed on a strict separation of powers model;
- and in consequence, whilst a great deal of republican strategy has been directed to securing the support of constitutional monarchists for the so-called minimalist position, as the republican model embodying least change to existing arrangements, constitutional monarchists, if compelled to choose between republican models, should reject that approach and support instead an elected presidency on the United States model.

The separation of powers

The most significant institutional restraint on governments lies in the doctrine of the separation of powers itself.

Its classic exponent, Montesquieu[2] divided the functions of government into three basic categories: legislative (i.e., making laws), executive (i.e., implementing laws), and judicial (i.e., resolving disputes). In his *The Spirit of Laws,*[3] he reasoned that freedom was dependent upon these functions being exercised by separate organs of government:

> "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> "By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and other simply the executive power of the state.
>
> "The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in tyrannical manner.
>
> "Again, there is no liberty, if the judiciary power be not separated from the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> "There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting the public resolutions, and of trying the causes of individuals".[4]

Montesquieu regarded these requirements as being satisfied by the then existing English constitutional arrangements.[5] In fact, United States constitutional arrangements nowadays come closest to Montesquieu's ideal. However, the significance of Montesquieu's analysis of the United Kingdom arrangements should not be overlooked, and still less is it correct to describe it as "a French idea that was embraced by the Americans in their Constitution".[6]

At the time Montesquieu wrote, it would have been inconceivable that the Westminster Parliament would be a mere cipher of the executive branch of government, so that the presence in the Parliament of the Ministry (or indeed the senior judiciary) did not mean that at that time his analysis was flawed — although, as events have turned out, the presence of the Ministry in the Parliament proved to be the Trojan horse whereby the effective capture of the legislature by the Executive was effected.

The present Westminster constitutional model, with executive authority exercised by Members of Parliament but in most circumstances only theoretically responsible to Parliament, is for that reason not a separation of powers model. The Commonwealth Constitution follows the separation of powers doctrine so far as the judicial power of the Commonwealth is concerned,[7] but not otherwise.[8] The Constitutions of the States do not do so as a matter of law,[9] although in practice the States do not often vest judicial powers in non-judicial bodies.

A recurrent critique of current Australian arrangements has been that the necessary balances between the executive, legislative and judicial functions of government are lacking. For example, a former Governor of Victoria (prior to his taking up that office) commented that:

> "That pressure against judicial independence which is most constant and potentially destructive, is pressure, in its chronic or acute forms, from the political and administrative executive. The threat mirrors the growth of an increasingly powerful political executive, which in practice controls the legislature, or at least its most influential house, most of the time".[10]

The 1992 *Strategic Management Review* of the Victorian Parliament, prepared by Professors K. Foley and W. Russell for its Presiding Officers (one Labor, one Liberal) included the following comments:

> "[A] system of government in which the executive branch was not subject to the requirement to operate within the rule of law (legislated by an independent Parliament and interpreted by an independent judiciary) would not be a parliamentary democracy at all, but at best a form of executive government disciplined only by elections if these were held.
>
> "These arms of government are not static in relation to one another, and commentators on constitutional development frequently discuss the relative movement of one arm with relation to another. The three arms are in fact in a dynamic tension with one another, and the workings of the system can be seriously jeopardised if one arm achieves total dominance over the others.
>
> "In Australia there has been a serious tendency toward untrammeled executive dominance ...
>
> "[We] ... consider that the underlying principle of executive dominance and the weakening of the other arms of government is a problem in this State, and we also consider that improvements need to be made to better allocate powers and responsibilities among the arms of government in a number of areas in Victoria ...
>
> "Unless the implications of [the] need to balance the arms of government are fully understood and acted upon, there is a real danger that the executive branch will make the other branches subservient, and the checks and balances required in the Constitution will be lost".

It is against a background of "the relative movement of one arm with relation to another" and "dynamic tension" that the question I have set for myself, namely, "Is there a minimalist position?", must be answered.

The minimalist position

At a basic level, the answer to the question is that there are two: the model preferred by the Australian Republican Movement, of parliamentary election with a special majority, and the so-called "ultra-minimalist position", first propounded by the former Victorian Governor Richard McGarvie, involving appointment of the President by a group of, for want of a better term, "wise men" comprising, for example, the existing State Governors.

The common element of each is that, whatever else may change, the powers of the Prime Minister and Cabinet cannot be reduced. In fact, for the reasons which follow, the probability is that they would be increased. The explicit reason for this has been stated by the Australian Republican Movement as being the need to attract support from the conservative side of politics — an approach which appears to be bearing fruit, given that the majority of Liberal participants in the Constitutional Convention supported a republic on a minimalist basis, notwithstanding that support for the constitutional monarchy is part of the Liberal Party's platform.

Each model, to put it into historical perspective, reflects largely the processes of the Polish Monarchy prior to the third partition of Poland at the hands of Catherine II and Russia.

The circumstances of the election of the last Polish King, Stanislaw Poniatowski, and his fate are, perhaps, instructive. The Polish constitutional structure simply denied to the government of the day powers required to deal with the threat posed by Catherine II and Russia. Those whose co-operation was required to ensure effective government chose to withhold it. In the present context, the important point to note is that the test of effective operation of a

constitution is not how it operates when things are going well, for in such circumstances normal processes of government will accord with community requirements. The test comes when things are going badly, and the normal civilities and usages of politics have been abandoned by the major participants.

Given the public's demand for involvement in the process of election, it is hardly to be supposed that the McGarvie model has any prospects of ultimate success in any referendum, and this paper therefore concentrates instead on the proposal which emerged from the Constitutional Convention.

The effect of the proposed change will be felt at two levels: how it will affect the operation of the Constitution in a crisis, and how it will address the underlying malaise of the growing power of the executive branch of government.

The Constitution in crisis

Australia is fortunate that it has had few occasions upon which its Constitution has been called upon to resolve situations in which the normal civilities and usages of politics have been abandoned. The most notorious is comprised in the events of November, 1975 and, whatever may be thought of the tactics of the various participants, the Constitution at that time performed its task adequately by providing a mechanism whereby the people could resolve the issue. One might expect, therefore, that whatever other problems proposed changes might seek to address, the proposed model would address those events in at least as final a way as does the present Constitution.

Remarkably, precisely the opposite is the case. The republican model to be put before the people proposes that the existing powers of the Governor-General should not be changed, but that he should be liable to be dismissed by the Prime Minister of the day, subject to confirmation of that dismissal within one month by the House of Representatives alone by a simple majority (contrasted with his appointment by a two-thirds majority of both Houses of Parliament).

It is probably idle to suggest that, in a constitutional crisis, members of Parliament will do other than act in accordance with the wishes of their respective Parties. Certainly in 1975 none did. Whatever the position might be, it would be most unwise to assume that a determined Prime Minister would not have the necessary support within the House of Representatives to secure ratification of the dismissal of the Governor-General if that was a necessary part of his strategy.

Against that background, the events of 11 November, 1975, if they were to recur under the proposed dispensation, take on the quality of high farce. Each participant in the meeting would be aware of the existing precedent. Each would have the legal capacity to dismiss the other, so long as the other had not dismissed him first. Each presumably would attend the meeting with the documentation necessary for the dismissal of the other duly executed, and requiring only delivery to make it legally effective. Each would be waiting for the first indication from the other that this might occur with a view to taking pre-emptive action.

The problems do not, however, end there. Presumably the meeting would occur in private, in circumstances in which the only record of what occurred would be the recollections of the participants. Assuming that each reaches the conclusion that the time has come to dismiss the other, and takes the necessary action at about the same time, the legal consequences of what occurs would depend literally upon which of them delivered the document first. This itself could easily become a matter of dispute, which would need to be resolved by a trial, the principal issue in which was, which of the parties had the better recollection in circumstances where the absolute truth could never be known. The delays for which the law is renowned no doubt would come into play, and in the meantime no-one would know who was running the country.

In short, the very situation which lies at the heart of much of the argument for change to present arrangements would not only be not dealt with in an improved way by the proposed change: it could well be incapable of resolution in any practical way.

In the absence of crisis

The proposed system would have to work in a non-crisis situation as well. Here it would aggravate existing undesirable trends.

The dismissal of the Lang Government in 1932, not because it lacked supply but because it was proposing to act illegally, no doubt has encouraged better behaviour in later administrations in all States and the Commonwealth. It is clear that many Governors-General and Governors have not accepted that their role is that of a mere cypher – whilst acting strictly within their constitutional role – and have exercised considerable influence for the good in other ways. These informal processes provide many of the checks and balances which exist in Australia.

The history of the Westminster system in the absence of the monarchy suggests that, by removing the monarch, the essential character of the system is lost. This has a formal element: the process of reporting to, and consulting with, the Queen undoubtedly strengthens those who hold the office in their resolve to act with propriety and convention, and provides a body of precedent and potential sources of advice. But it has an informal one as well, because it strengthens the office itself in the minds of the electorate as a whole, thereby providing a counterbalance in the minds of the politicians to the present Parliamentary majority.

It is not coincidental, therefore, that republican "Westminster" models have seen a decline in the standing of the position, most notably in India, where at State level the appointments are made by the central government and often do its political bidding. Nor is it coincidental that a number of recent appointments within Australia by governments with republican tendencies seem barely (if at all) consistent with an apparent desire to add lustre to the office by the distinction of the appointee, although in some of these cases at least it must be said that a potentially unpromising appointee, assisted perhaps by the dignity and tradition of the office, has performed with a distinction which seems not to have been intended by those responsible for the appointment.

Whilst Ireland was still a dominion, the de Valera government established a model which had until recent times not been emulated elsewhere: the Governor-General (a former Minister) occupied no official residence, performed no functions other than those strictly necessary for constitutional reasons, and performed those constitutional functions literally over the kitchen table. Mr Carr's recent initiatives in this area do not even have the merit of originality.

In short, experience elsewhere suggests that Australia would end up with another politician with no authority, at a time when the other institutional checks and balances — Parliament and the Courts — are themselves in circumstances which are hardly propitious.

There are significant disfunctionalities in the system at all levels. This goes beyond the fact that the legislature and the courts are producing sub-optimal outcomes from time to time: rather, they are failing in their essential constitutional functions.

The legislature

> "Parliamentary democracy is a system whereby people who think they are gifted amateurs (and very, very few are) purport to make laws that deal with issues beyond their experience. Expecting our political caste to make consistently intelligent decisions about tax is naïve. They must rely on the advice of their bureaucratic advisers – i.e., Treasury and the Australian Tax Office".[11]

If the key to the power of Parliament within the Westminster system is, as historians have said, its control of public finance ("the power of the purse"), then a review of the current effectiveness of parliamentary control of that power is instructive.

There are two elements of the power of the purse. The first is control of exactions of money from what would now be called the taxpaying public. The second is limiting the access of the executive government to the proceeds of revenue gathering activity. In short, tax and supply.

Parliamentary control of the former is almost totally non-existent. We have a system of which Sir Harry Gibbs has said:

> "It is not an exaggeration to say that the *Income Tax Assessment Act* is obscure and uncertain in its operation, it is burdensome to comply with, and to prevent avoidance it resorts to heavy penalties and to discretions so wide as to make it a gamble for a taxpayer to endeavour, quite legitimately, to reduce the tax payable. Such a law reflects no credit on the society which tolerates it".[12]

And despite sporadic attempts to reform it, it has simply kept getting worse, notwithstanding official assertions to the contrary, such as:

> "Within four years Australians will be working in one of the best designed tax systems in the world ...".[13]

The objectives which might reasonably be regarded as the fundamental responsibilities of the Parliament in this area are:

- opposition to new or increased taxes unless the additional revenue is clearly necessary;
- ensuring that the revenue demands of the state in relation to taxpayers are explicitly imposed in clear language; and
- ensuring that revenue authorities comply with the rule of law in the collection and recovery of tax.

There are of course other parliamentary responsibilities, including monitoring the operation of the tax system to ensure that it meets the classic goals of simplicity, equity and efficiency as well as, in modern times, international competitiveness. But important as these are, they are not constitutional roles. Parliament's failure in the latter areas has, perhaps, obscured its failings in the more fundamental, constitutional, areas.

Their constitutional importance is more easily understood when one recalls the role played by the *Ship Money Case* in the Stuart period. John Hampden, a member of Parliament, was assessed to £1 for ship money, a tax raised by Royal Prerogative. He objected on the grounds that, as a resident of a rural area, he should not have to pay it, and further that it was a tax which could only properly be imposed to meet temporary exigencies and not be a permanent source of government revenue.

The modern equivalent of Gray's "village-Hampden"[14] is most likely to be stigmatised by the revenue as a "tax cheat", much as Hampden was. On the determination of the *Ship Money Case* against Hampden, the Earl of Strafford expressed the "wish that Mr Hampden and others to his likeness were well whipt into their right senses".[15] This differs little in principle from the approach of our modern revenue gatherers, of whom it has been said:

> "Just as Reformation heretics were drawn and quartered and their fragments left to rot in a cage in a public square, I believe that, at its core, the Australian Tax Office harbours the same zeal for making its moral point to those it perceives as straying from the ethical straight and narrow".[16]

The unpopularity of new taxes has led many governments in recent elections to promise that there will be no new taxes and no increases in existing taxes. Notwithstanding that, the tax base has been significantly widened in many areas. The means whereby that is done has now become sufficiently common that it warrants analysis in its own right.

Typically, the Parliament is told that the proposed measure is necessary to combat "tax avoidance". This has the dual attraction of ensuring that there will be little parliamentary scrutiny of the proposal (and there is little enough in respect of any taxing measure) because no-one wishes to appear to be "soft on tax avoidance", or, even worse, encouraging it; and that the government which introduced the measure will be able to claim that it is not in breach of its election commitments or, to use the current technical jargon, its "core promises" (as opposed to non-core promises). Indeed, the capital gains provisions were initially justified on the basis that they would

not raise significant revenue, but would prevent tax avoidance by converting income to capital gains.[17]

It is hard to avoid the conclusion that virtually all tax legislation (and much other legislation) is not even read, let alone understood, by those whose actions make it the law. The result was described, in another context, as a legislative sausage machine:

> "In these days Bills introduced mean Bills passed. A Government with a majority ..., and no Legislative Council to hinder them, puts a Bill in at one end of the machine, the Minister concerned turns the handle, and out it comes at the other end, only requiring the signature of the Governor to make it law".[18]

Supply legislation, whatever else might be said of it, is rarely complicated. But except in the comparatively rare cases of a determined upper House (or hung lower House) willing to refuse it, the notion of parliamentary use of the power to refuse supply as a real sanction on the activity of the Executive is fanciful at best. And the events of 1975 demonstrate that, even then, recourse to the Crown may be necessary to ensure that a government does not seek to govern without supply.

The reality is that Parliament has simply abrogated its constitutional functions in the areas which, historically and constitutionally, were the source of its power.

The Executive

Whilst most critics of the system of government in Australia identify the increasing power of the executive branch as against the other branches as the cause of the problems experienced in recent times, it may be questioned whether even from its own perspective the Executive is working satisfactorily.

One of the principal problems of what has been called the "Washminster" system is that we have neither the accountability provided through the Westminster system (because Ministers do not in fact accept responsibility for departmental action and, due to the combined effect of judicial and administrative review mechanisms, official freedom of information procedures and the unofficial version of those procedures (leaks) and, where they exist, anti-corruption bodies, have no effective capacity to control it), nor that available under the United States model (because those who exercise bureaucratic power cannot in many cases be held accountable personally).

During the days of the former Queensland Coalition government one memorandum which passed to a Minister's office stated, in as many words, "Coalition policy is not government policy – in fact, the policy of the former government remains in effect". Needless to say, the actions of many in the bureaucracy certainly appeared to proceed on the basis that this was the proper position.

Sir Humphrey Appleby in *Yes, Minister* responded to James Hacker's observation, following Baldwin on Northcliffe, that the civil service sought power without responsibility, which had been the prerogative of the harlot through the ages, with the proposition that it was preferable to responsibility without power, which was the politician's lot. Whilst clearly an exaggeration, this is not wholly without foundation, and a situation in which it is clear that persons responsible to the community should exercise power and be accountable for their stewardship is fundamental to democracy.

The Judiciary

> "I guess the spoils go to the victors".[19]

This is not the occasion to analyse recent decisions of the High Court, which have been the subject of many papers given to the Society, or the Federal Court. Rather, the purpose is to note a disturbing trend which, if not checked, will diminish the capacity of the third branch of government to perform its role if that has not, as many of the papers presented to this Society would argue, already occurred.

In addition to ensuring judges are secure in their office, independence of the judiciary requires that attempts are not made to politicise the judiciary by appointing as judges only persons sympathetic to the government of the day.

The notion that judges should not be appointed for political reasons is of comparatively recent history. As Sir Harry Gibbs has pointed out:

> "Of course things in England were not always in this happy situation. For centuries, some appointments to the bench were made simply on the basis of political or personal favouritism. In 1587 Queen Elizabeth I appointed as her Lord Chancellor her favourite dancing companion, Sir Christopher Hatton, who had never been called to the bar and who, it was said, rather disparagingly, could hardly know the distinction between a *subpoena* and a *latitat*. In more recent times the story was told of how Lord Halsbury answered an inquirer who had asked whether, *ceteris paribus*, the best man would be appointed to a judicial position: he replied, '*Ceteris paribus* be damned, I'm going to appoint my nephew' ".[20]

In Queensland, there have been clear instances of favouritism in the appointment of judges in the past. Mr Justice McPherson has observed:

> "The choice of McCawley, Blair, Brennan and Webb was not made in order to encourage the belief that judicial appointment remained the prize for pre-eminence in the practising profession. Men like Feez, Stumm, and MacGregor, and later Hart, Real and Fahey, were passed over because of their political opinions".[21]

In 1930 a Royal Commission found in respect of former Premiers Theodore and McCormack that:

> ".....men who have occupied high and responsible positions in the State ... betrayed for personal gain, the trust reposed in them, and have acted corruptly and dishonourably".[22]

The Crown declined to prosecute Theodore and McCormack, but sought to recover moneys from them in a civil action and failed. Subsequently, all barristers who acted for Theodore were appointed to the bench by the 1932-1957 Labor Governments. Although amongst those who acted for the Crown were leaders of the Bar, none was appointed, although one was appointed to the District Court upon its re-establishment in 1959.[23]

The proper principles applicable were explained by the (Conservative) United Kingdom Lord Chancellor as follows:

> "My first and fundamental policy is to appoint solely on merit the best potential candidate ready and willing to accept the post. No considerations of party politics, sex, religion, or race must enter into my calculations and they do not. Personality, integrity, professional ability, experience, standing and capacity are the only criteria, coupled of course with the requirement that the candidate must be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability. My overriding consideration is always the public interest in maintaining the quality of the Bench and confidence in its competence and independence".[24]

These were first adopted in the United Kingdom by Lord Jowitt, Lord Chancellor in the Attlee (Labour) Government.[25]

Sir Harry Gibbs concluded in relation to the appointment of judges that:

> "No matter what the Court, to achieve the result that all appointments are solely on the basis of merit (i.e., legal excellence and experience coupled with good character and suitable temperament), it would seem essential that those making the appointments should seek and obtain adequate and informed advice from the judiciary and the profession. Various procedures may be suggested for ensuring that such advice is given, but no procedure will be effective if the will to appoint only the best is lacking. In the end, we must depend on the statesmanship of those in all political parties".[26]

One means of ensuring that a departure from this practice is easily noticeable is to ensure that the composition of the group from which the judiciary will be selected is not subject to

political manipulation. In that regard, the recent totally unmeritorious steps towards the abolition of Queen's Counsel by most State Governments provide an ominous portent.

The signs have been plain enough for those who wished to see them. Justice Meagher of the New South Wales Court of Appeal has observed:

> "… Dr H. V. Evatt … was the Chief Justice of New South Wales' Supreme Court from 1960 to 1962. When he was appointed he was suffering from advanced senility. He plainly could not manage the job. He was old and ill, uncomprehending and inarticulate, incontinent and barking mad".[27]

One would hope that such an appointment would not be made today. But recent developments give even more grounds for concern. The notion that the judiciary should mirror the make-up of the community (and perhaps reflect politically correct views) has achieved some prominence in recent times in Queensland at least. The Government has just appointed to the second most senior judicial position in the State a former District Court Judge who was, prior to her appointment, junior to 21 Supreme Court Judges, 22 other District Court Judges and, had she continued in actual practice, 60 Queens' and Senior Counsel, as well as 50 junior counsel.

The rationale for the appointment is of interest:

> "The position with respect to seniority is simply this: it is an important matter to be taken into account. At the end of the day, however, it is important that these appointments be made on merit. It is particularly important with respect to the position of women in the judiciary, because it is notorious that women have been under-represented in judicial offices. It is important that, in making those appointments, we should have regard to an inclusive approach which includes the whole of the community, including women.
>
> "It is therefore a matter of some great pride and achievement that we have now achieved in Queensland an Australian first, that is, the first woman in the history of Australia to attain the position of President of the Court of Appeal. Justice McMurdo brings to that position not only a depth of experience and expertise following seven and a half years in the District Court, not only a deep love of justice and intellectual rigour, and not only a commitment to Aboriginal reconciliation, but also a particular expertise in the field of criminal law which, after all, constitutes the bulk of the work of the Court of Appeal.
>
> "There are some who believe that judicial positions should always go to the good old boys from the big end of town, but that is not a view which this government adopts …".[28]

and:

> "This issue is not about consultation; it is about the appointment of a woman judge. It is Labor Governments that have led the way in appointing women to the District and Supreme Courts and the Court of Appeal. What the member for Warwick is agitating is the cause of those arch conservatives in the legal profession who believe judicial appointment must always go to the good old boys from the big end of town who have been to the right schools and are members of the right clubs. We are a multicultural society. Women make up a little more than half of our community, yet they are few and far between on the Court benches. It is high time the membership of the Courts reflected more accurately the make-up of society".[29]

But again as Justice Meagher has commented, in the context of entry into the profession,[30] a Court which accurately reflects the make-up of society is unlikely to be entirely satisfactory:

> "By all means abolish these barriers to entry and extend an invitation to the new competitors: people who can't speak English, people who can't read or write, people with criminal backgrounds, thieves, liars and people who are ignorant of the law. Then they can have a merry time demolishing the necessity of telling the truth and burying the notion of honesty. That is what the future holds if the motivated and progressive take charge".

Distasteful as the United States process of judicial confirmation is, if the statesmanship which Sir Harry Gibbs identified as necessary is going to continue to be absent, formal processes of

that nature will be the community's only protection from inappropriate appointments which will both debase the institutions of the judicial branch of government in the minds of the public and, more importantly, have the capacity to inhibit their performance of their duty.

Summary

Opponents of the change which is sought to be imposed may well not accept that it is their responsibility to assist in the design of any republican model, taking the view that it is for the proponents of change to identify what change they want, and then to persuade the people that the change will be for the better.

On the other hand, the current failings of the present system can be recognised without supporting the need for the changes sought. This paper has sought to show that these deficiencies come in large part from the absence of checks and balances on the executive. If that be correct, it follows that remedial action requires either the restoration of the former checks and balances, or substitution of new ones. The changes proposed as part of a possible move to a republic involve moves in entirely the opposite direction.

The minimalist position undoubtedly would involve the least textual change to the existing Constitution. However, far from it following that simply deleting the monarchy from our present arrangements would be the change which would be most acceptable to monarchists, it is precisely because monarchists believe those checks and balances are important (however imperfectly they may operate at present) that it is logical that they should reject change which will eliminate them. If, contrary to the monarchists' preferred position, change is to come anyway, then monarchists should be concerned to ensure that the change should retain and enhance, as far as possible, those restraints on executive power which are plainly required.

In this sense, the people — whose opinion, whenever it has been asked, has been to support an elected Presidency as part of any republican model — are correct. Undoubtedly it would change existing arrangements, and provide an alternative centre of power to the Prime Minister and Cabinet of the day. Undoubtedly, ultimately it would lead to a model of government not unlike that operating in the United States. But the deficiencies of that model, glaringly obvious as they may be, are as nothing compared to the deficiencies of the Westminster system stripped of its remaining checks and balances. It is, perhaps, this point which the people instinctively understand, and the elitists in the Australian Republican Movement either do not or will not.

It should not be ignored, either, that the United States model is not without its advantages, of which perhaps the most notable is the wider talent pool available for the choice of political heads of departments. It is difficult to imagine a less appropriate career path for the head of a department of state than that which currently obtains, if the person concerned is expected to have significant skills of organisational management and leadership.

Of all possible worlds, the so-called minimalist model is the worst.

Endnotes:

1. Maxwell Newton (1968).

2. Charles de Secondat, Baron de Montesquieu (1689-1755).

3. *L'Esprit des Lois* (1748) (Tr. T. Nugent, Revised J. V. Pritchard) Book XI, paragraph 6: *Encyclopaedia Britannica Great Books of the Western World,* Volume 38.

4. *Ibid*., pp.69-70.

5. *Ibid*., pp.74-5.

6. cf. Malcolm Fraser : *Constitutional Change: The Illusion of Progress,* published in *Federation into the Future* (1998), CEDA, Melbourne.

7. *Attorney-General (Commonwealth) v. The Queen (Boilermakers' Case)* 1957 CLR 529.

8. *R. v. Dignan* (1931) 46 CLR 73.

9. *Clyne v. East* (1967) 2 NSWR 483 — although this statement must be qualified in the light of the majority judgments in *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

10. The Hon Mr Justice R E McGarvie, *The Independence of the Judiciary, Quadrant,* March, 1992, p.55.

11. P. Haggstrom (former Special Tax Adviser, Office of the Commonwealth Ombudsman): *Tax Reform: The Emperor's Clothes* (1998), *The Tax Specialist,* Volume 2, No.12 at pp.2-3.

12. *The Need for Taxation Reform:* Sir Harry Gibbs, 11th National Convention, Taxation Institute of Australia, 5 May, 1993.

13. The Hon PJ Keating, MP, House of Representatives, 26 February, 1992, *One Nation* Statement, p.15.

14. Thomas Gray: *Elegy written in a Country Churchyard:*
    "Some village-Hampden, that with dauntless breast,
    The little tyrant of his fields withstood,
    Some mute inglorious Milton here may rest,
    Some Cromwell, guiltless of his country's blood".

15. Green, *A Short History of the English People* (1874) — republished (1992) by the Folio Society, London at p.535.

16. Haggstrom, *op. cit.,* at p.4.

17. Parliament was told the new tax would raise $50 million in 5 years. In the fifth year alone the tax collected was $600 million.

18. Bernays, CA, *Queensland — Our Seventh Political Decade, 1920-1930,* Sydney: Angus & Robertson, 1931, p. 46.

19. ACTU Queensland State Secretary John Thompson, *Courier-Mail,* 7 August, 1998, in the context of industrial law changes.

20. Sir Harry Gibbs CJ, *The Appointment of Judges,* Address to the Australian Institute of Judicial Administration, 23 August, 1986.

21. B H McPherson JA, *The Supreme Court of Queensland*, p.338.

22. *Report of Royal Commission appointed to inquire into and report upon certain matters relating to Mungana, Chillagoe Mines, etc.,* in *Queensland Parliamentary Papers* (1930) Vol.1, p.1366.

23. The identity of those who appeared may be found in *R. v. Goddard and others* [1931] QWN 37.

24. Lord Hailsham LC: *Law Society Gazette,* 28 August, 1985 at p.2,335.

25. Sir Robert Megarry: *75 Years on — Is the Judiciary what it was?,* The Edward Bramley Lecture, 1984.

26. *op. cit*., pp.14 - 15.

27. Address to the St James Ethics Centre, 27 August, 1998.

28. Hon M J Foley, MLA, *Queensland Parliamentary Debates,* 4 August, 1998.

29. *Ibid*., 5 August, 1998, p.1610.

30. *op. cit.*.

Chapter Four

Australia, the Republic and the Perils of Constitutionalism[1]

Ian Holloway

Next year, we are to vote in a referendum on the forty-third proposal to amend the Constitution. As a result of the Constitutional Convention, held in Canberra this past February, a model for a republican form of government emerged, which, the Prime Minister has promised, is to be put to the people — who will determine the issue in an exercise of the popular sovereignty which our current Constitution vests in us. If the referendum passes, the Prime Minister has said, legislation will be introduced in time for Australia to become a republic on 1 January, 2001 — the centenary of federation.

The development of the republican model through a Constitutional Convention was itself intended to be an illustration of our "people's sovereignty". Though some were critical of the fact that not all of the delegates were elected (thereby confusing majoritarianism with representative democracy), the model adopted for choosing Convention delegates was aimed at ensuring that the views of the broad diversity of the Australian population were represented in the proceedings.

In some respects, the fortnight's proceedings bore out the wisdom of the Prime Minister's decision to adopt the delegate selection model that he had: not only was he given a republican model which he can put to the people in a referendum next year, but a broad range of other issues — ranging from the rights of the Indigenous peoples to respect for the environment — were canvassed for possible inclusion in some form or another in any new Constitution. And the very close of the Convention, when the applause broke out from the floor, first raggedly, then with increased resonance, carried with it a sense of national moment that we seldom permit ourselves the luxury of experiencing today.

Yet in another respect, the Convention ended on a saddeningly hollow note. For one thing, it left *many* loose ends. As critics — both republican and monarchist — have already begun to point out, the so-called "Bipartisan Appointment" model that the Convention adopted is so defective as to make it simply unworkable in its present form. Moreover, the Convention bequeathed to us an unwieldy list of things which are sought to be included in any new constitutional preamble: a summary of our constitutional history to date, a reference to the Almighty, a recognition of our federal system of representative democracy and of responsible government, an acknowledgment of the prior occupation of Australia by the Aboriginal peoples, a recognition of our present-day cultural diversity, *etcetera, etcetera*. Indeed, if any new preamble contains all that the Convention said that it should, it will in length rival the actual Constitution itself! But more than anything else, the serious Convention-watcher is left with the deep feeling of despair that so few of the delegates seemed to be aware of the real significance of their proceedings. For when, despite all the cajoling and attempts at persuasion, the Convention was not able to adopt a republican model by even a bare majority vote, the resulting disunity spoke volumes about the social dynamic that awaits us if we press on further down the path of constitutionalism.

The spectre of constitutionalism

Now, the nature of constitutional dynamism is something that is difficult to discuss with precision. Almost by definition, the process of constitutional change — particularly in a system like ours, where the actual constitutional document is so difficult to alter — is both ephemeral and

incremental. Hedging, imprecision and conjecture must be the stock-in-trade of the Anglo-Australian constitutional scholar.

Take, for instance, the question of when it was that Australia became an independent nation. It is clear that in 1901, we were not one. It is equally clear that by 1986 (when, in its last Imperial act for Australia, the British Parliament passed the *Australia Act*), we were. But the precise point at which we transcended from sort-of "super-colony" (as the new Commonwealth was in 1901), to fully independent member of the community of nations (as we were by 1986) is one that has proven impossible to determine. The best that the Hawke-appointed 1988 Constitutional Commission, comprised of some of Australia's leading constitutional minds,[2] could do was to say that it took place some time between 1926, when the Imperial Government adopted the Balfour Declaration, and the end of the Second World War.

So in a way, one understands the inclination of constitutional observers to shy away from the unknowable. Yet, the fact is that we now sit poised at the brink of a referendum, in which we are going to be invited to commit ourselves irrevocably to a period of sustained debate over constitutional alteration. And lest there be any doubt of this, it is worthwhile to remember that the Convention recommended that, if the referendum is passed, *another* Constitutional Convention should be held, to consider a further range of constitutional amendments — which in substance would be much broader than those sought to be embodied in the shift to a republican form of government. Happily — though probably depressingly for those in favour of constitutional change — there is a useful comparator, to which we can look to see exactly what we would be letting ourselves in for before we embark on the journey along the path of constitutionalism. That is Canada.[3]

We seldom think of the link today, but Australia and Canada share more in common than almost any other two countries on earth. They share a common political root. They share a legal system. They share a federal model of government. They share a military tradition. They share an ethnography. They share an odd, yet appealing, mix of British reserve and American openness. These things alone make the Australian-Canadian comparison an apt one. But there is another, rather more contemporary, aspect of the similarity. Today, Australia and Canada are both troubled countries; countries with a grave sense of unease. Both are smallish nations (in terms of economy and population, that is) trying to grope their way through, and find a place in, the world of the "post": post-colonialism, post-industrialism and post-modernism.

In both countries, people are asking the same sorts of questions: what exactly does it mean to be an Australian or a Canadian at the cusp of the twenty-first Century? How can one maintain a national distinctiveness in an era where national borders no longer mean much? How is one to reconcile the realities of multi-ethnicity and multi-culturalism with long-held (if imperfectly realised) Anglo-European ideals of equality and the rule of law? Yet, despite all of this, one searches the pages of the Convention *Hansard* in vain for anything other than a passing reference to the recent Canadian experience with constitutional reform.

Perhaps it is a reflection of fear of the sheer enormity of questions like this, but the lack of any real comparative analysis reveals another similarity between the two countries: in each, the debate over constitutional issues has come to be phrased in curious, almost distorted, terms. On neither side of the Pacific has the focal point of the debate been the philosophical foundations according to which society is ordered. Nor has it involved a search for any sort of consensus about national values or ideals. Instead, in both Australia and Canada, the national unease has been reflected in an almost pathological obsession with the formal provisions of the Constitution. Without meaning any disrespect to the participants – for they are (for the most part, at least) a group whom I respect and admire greatly – this is made amply clear by the style and tone of the debate over various models of republicanism that has been taking place in Australia over the past six or seven years.

One might describe the way in which our debate over constitutional reform has been taking place as the "spectre of constitutionalism". By this is meant a fixation with the form, rather than the substance, of the terms of a country's constitution, and a seemingly uncontrollable compulsion to lurch towards a fundamental alteration of its form without realising that this in fact is being done, and without paying heed to the consequences which will necessarily follow on from the alteration.

This is a point that is too often overlooked by today's constitutional agitators. The most important part of a constitution is not the document itself, but rather the dynamic that exists under the constitutional order to support a country's social and political life. To put it another way, the most critical part of a constitutional debate ought to do with the small "c" constitution, rather than the capital "C" one.

One does not make this observation with any smugness or feeling of superiority. On the contrary, in a great many respects, the essence of the debate that is taking place here has a familiar ring to anyone who has studied recent Canadian history. For even though Canada does not have an organised republican movement, it has – just like Australia – been gripped of late by the spectre of constitutionalism. In fact, the Canadian experience with constitutional pathology has gone much further down the road than the Australian, and there are some valuable lessons that we in Australia could gain from looking at the Canadian experience with the overall process of formal constitutional change, and the effects that it can have upon a society's underlying cohesiveness.

Canada as a constitutional analogue

Canada, as most will know, was formed in 1867, out of a federal union of four British North American colonies: Nova Scotia, New Brunswick, Quebec and Ontario. Over the years which followed, the remainder of Britain's North American possessions joined the union, the last being Newfoundland, which became a Province of Canada in 1949. At present, Canada consists of ten Provinces and two Territories, although one of the Territories is due to be sub-divided into two separate Territories (one under Aboriginal self-government) in 1999.

Canada's head of state is Her Majesty Queen Elizabeth II. Section 9 of the Canadian Constitution[4] provides that executive authority in Canada is "declared to continue and be vested in the Queen". But quite apart from the form of the Constitution, it is clear that there is no question but that the form of government contemplated by the new nation was a monarchical one, which resembled in spirit the government of the United Kingdom. Like the *Commonwealth of Australia Constitution Act*, the Canadian Constitution was a creation of the Imperial Parliament, but also like its Australian counterpart, it had its origins in a draft prepared in Canada, by Canadians, for Canadians.[5]

The preamble to the Constitution makes plain the common understanding of the framers. "Whereas", it begins,

> "the Provinces of Canada,[6] Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...".

As in Australia, a Governor-General is appointed to act on the Crown's behalf, and to carry out public functions in the Queen's stead.[7] As the Earl of Dufferin, one of the first holders of the office, once put it, the Governor-General of Canada is "the head of a constitutional State, engaged in the administration of a Parliamentary government".[8]

In contrast to Australia, however, the formal position of the Crown in Canada seems quite secure. Section 41 of the *Constitution Act 1982* provides that, in order for there to be a future constitutional amendment which would affect the position of the Crown, there must be unanimous agreement among the federal government and the Provinces[9] — something which, given the

fractious nature of Canadian federalism, is difficult to imagine ever occurring. Nevertheless, Canada has been embroiled in a round of near-steady constitutionalism since the 1970s — since the Prime Minister of the day, Pierre Elliott Trudeau, made it his ambition to alter the Canadian Constitution.

As has been noted, the Canadian Constitution, like the Australian, was a statute of the Imperial Parliament. Unfortunately, however, unlike the framers of the Australian Constitution, the Canadian "Fathers of Confederation", as they are known, could not agree on a formula with which to amend the Constitution. This being the case, after confederation constitutional amendments still had to be passed by the Imperial Parliament on Canada's behalf.

This was a theoretically anomalous situation, to be sure, but in the pragmatic Canadian way (another characteristic which Australia and Canada share, many might claim) a convention was developed whereby, if the federal government wished to amend the Constitution in a way which would affect provincial competence, it would first seek the support of a substantial number of the Provinces. Following this, a request would be made of the British Parliament, which would pass the amendment without question.[10]

Canada and out-of-control constitutionalism

From a theoretical perspective, this *was* rather anomalous, but it permitted the Canadian Constitution to develop to make provision for things which could not have been contemplated by the Fathers of Confederation in the 1860s. Nevertheless, Mr Trudeau made it his life's mission to rectify the theoretical deficiency. He was to be the one who succeeded in "bringing the Constitution home" (as the rhetoric of the day had it) where everyone else had failed. Accordingly, he came up with a plan which would accomplish two things: first, the British would surrender all remaining rights they had to legislate for Canada (much as was done in the *Australia Acts*). A necessary precondition to this, of course, was developing an acceptable amending formula, so that Canadians could formally amend the Constitution themselves. Secondly, the Trudeau plan called for the entrenchment in the Constitution of a Bill of Rights (known in Canada as the *Charter of Rights and Freedoms*).

Without going into the detail of the story (though it does make for interesting reading), the bottom line was that in political terms, Mr Trudeau succeeded in his goal through the sheer force of will. Initially, he was opposed by a number of Provinces, but he managed to win them over. If they did not agree, he said, he would go to London unilaterally (as, by virtue of the *Statute of Westminster* 1931, he could do).[11] In the end, the province of Quebec was the sole holdout. Trudeau's chosen solution in the circumstances was to reach a deal with the other nine Provinces and simply to ignore Quebec's opposition.

Now one might have different views about the nature of the relationship between the French and English speaking populations in Canada, but the fact that Canada's sole francophone Province did not participate in the patriation process was of tremendous symbolic importance. While the fact is that one doubts that the Quebec government would have agreed to *anything* which was acceptable to the rest of Canada, it is no exaggeration to say that most adult Quebeckers — even Quebeckers who had no sympathy for the separatist cause — felt betrayed by the actions of the federal government.

It is that feeling of betrayal that has been responsible for the repeated failed attempts since patriation in 1982 to bring Quebec back into the constitutional fold. The first attempt began shortly after the election of a Conservative government in 1984. Brian Mulroney, the new Prime Minister, immediately began to seek amendments to the Constitution which would be acceptable to Quebec. This set of constitutional proposals came to be known as the "Meech Lake Accord", after the location of the Prime Minister's summer residence, where the proposed terms had been agreed upon.

The Accord would have given Quebec special rights in the Constitution which no other Province had. These included a formalised role in the regulation of immigration, a constitutionally entrenched role in appointments to the Supreme Court of Canada, and a right of veto over future constitutional amendments. The Accord also included a formal, but undefined, statement that Quebec constituted a "distinct society" within Canada. While the Accord had been agreed to by each of the provincial Premiers, in order for it to come into force, it had to be ratified by resolutions of each provincial legislature by 23 June,1990.

The inclusion of a "distinct society" clause, in particular, rankled with many Canadians, and in the end, the Meech Lake Accord failed. Two provincial legislatures failed to ratify it in time. In Newfoundland, the Premier did not want to put it to a vote in the Legislative Assembly, because he knew that it would be resoundingly defeated, and he did not want a formal political message of rejection to be sent to Quebec. In the western Province of Manitoba, the sole Aboriginal member of the provincial legislature, in a protest over what many considered to be the short shrift given to Aboriginal concerns in the Meech Lake Accord, successfully used stalling tactics (which were entirely lawful) to delay the vote until after the deadline had expired.

As one might expect, this led to bitter resentment in Quebec. So the provincial government — which at the time was pro-Canadian in orientation — issued a set of "minimum demands", which of course included the "distinct society" clause. But by then, other groups — Aboriginal peoples, women, other cultural societies — began to say that, if the Constitution were to be amended to address the concerns of Quebec, then the opportunity should be taken to right other perceived constitutional wrongs. So this time, the federal government was forced to put together a very complex package which tried to reconcile all of these competing goals.

Not surprisingly, in trying to come up with a package which could please everyone, the government ended up in pleasing no one. Many French-speaking Canadians were unhappy because they felt that their historical status as one of the two founding peoples of Canada was being forgotten. Most native groups were unhappy because they felt that their long-standing grievances were not being given sufficient consideration. And some women's groups were unhappy because they felt that the argument was over a document prepared by a bunch of dead white males.

Nevertheless, in the end, the Government managed to cobble together a deal — this time called the "Charlottetown Accord". But what made the Charlottetown proposals different from the Meech Lake Accord was that they provided that the Accord be put to a referendum. This was somewhat unique, for unlike in Australia, referenda are not part of the Canadian political tradition.

In the campaign leading up to the referendum, which was held in 1993, Canadians were subjected to a media blitz. Voting "Yes", they were told, was the only way to save the country.[12] Moreover, most of what P P McGuiness would call the "chattering classes" were urging a "Yes" vote. The leaders of all three of the (then) major political parties, a number of university academics, retired members of the judiciary — all were telling Canadians that, even if they did not like the deal, they had to vote "Yes" in order to keep Canada together.

Yet, despite this extreme pressure (in what is in my personal opinion one of the defining chapters in Canadian democracy), the Canadian people said "No".

They said "No" to a deal that had been arranged by people who did not really have a sense for what ordinary Canadians — the Canadian "battlers", so to speak — felt and believed. They said "No" to having a deal forced upon them by the social elites, and being told that they then only had one way in which to exercise their franchise. And they said "No" in a huge majority. But as fine a thing as this assertion of what North Americans call "grass-roots" democracy may have been in principled terms, Quebec's feeling of bitterness and betrayal thereafter became even more profound. So a separatist government was elected in Quebec and, as most will remember, the provincial government in 1995 held a referendum on separation which only lost by about one per cent – less than fifty thousand votes!

Australia, the Republic and the perils of constitutionalism

So what does this say about Canada today? And, more importantly, what lessons does the Canadian story hold for the Australian constitutional debate?

To be blunt, in social terms, the Canada of today is in many ways not a pretty sight. Many will remember the 1993 federal election, when the Canadian Conservative party was virtually wiped out. It was reduced from 250-odd seats in the Parliament to just two. In truth, however, the *real* story is not in the garish headlines that accompanied the Conservatives' fall in fortunes, but rather in the social aftermath that the electoral pattern reflected. Simply put, Canada is today in a Balkanised state. Region has been pitted against region, and group against group.

Republicans have from time to time argued that the Canadian scenario could not take place in Australia, for here, there is no single group like the French in Canada to act as a focus of division.[13] But I am not so sure. For one thing, were, say, Western Australia or Tasmania — or both — to vote "No" in a republican referendum,[14] it seems to me that the damage to the Australian federation could be nearly as great as that which resulted from the exclusion of Quebec from the constitutional agreement in 1982.

Moreover, in a post-*Mabo* and post-*Wik* Australia, one could imagine that a failure to secure formal Aboriginal support for whatever constitutional change is attempted could, in symbolic terms, actually surpass the damage caused by the perceived slight to Quebec. And lest there be any doubt at all about the fragile nature of Australian social unity, one need only consider the frightening level of disharmony revealed by the extent of the One Nation party's electoral success in the recent Queensland election.

Furthermore, there is here in Australia a burgeoning "rights culture" which could easily fuel the same sorts of fighting over pieces of constitutional pie that has taken place in Canada of late. Many will remember, for instance, Dr Carmen Lawrence's statement at the 1995 Labor Party conference in Hobart, that Australian women are "hungry for the exercise of power". So, too, are many other groups in society, one imagines.

The lesson that the Canadian experience with constitutional dynamics holds is surely that constitutionalism is like a Genie: once let out of the bottle, it can never be put back again. In Canada, the past twenty years have represented a level of infatuation with the terms of the Constitution that is still alien in this country. Probably the closest we have come to a similar episode was during the referendum over the banning of the Communist Party in 1951 (which, many now forget, was in fact carried in three of the six States). But there are now many here who, like the Canadians, believe that reform of the Constitution is the key to national rejuvenation — that, unless all of the ills facing society are specifically addressed in the Constitution, nothing constructive can be done about them.

Constitutionalism is a form of "feelgood-ism". If we accept that the Constitution, including its preamble, ought to represent an affirmation of our national values — of what it means to be Australian — then it follows naturally that the Constitution should contain reference to the things we hold dear. It makes us feel good about ourselves to talk about making the Constitution "more relevant" or "more inclusive". *Per se*, there is nothing wrong with this. But the problem is that people who view the relationship between the Constitution and the national spirit this way have the equation backwards. As American legal scholar Alpheus Thomas Mason once put it, "a nation may make a Constitution, but a Constitution cannot make a nation."[15]

Moreover, in today's multicultural, post-modernist society, it is virtually impossible to reach any real consensus about a statement of national values, except if it is stated at such a level of generality as to be meaningless.[16] As the Canadian experience makes clear, the inevitable end-result of trying to please everyone through constitutional inclusion is that no one is pleased. The natural consequence of constitutional bloatedness is an environment of antagonism; of competing feelings of entitlement between different groups within society that can only be destructive of

social cohesiveness. To put it in language that I used earlier, by expanding the terms of the capital "C" Constitution, we are inexorably moving towards an upset of the more critical small "c" constitutional dynamic.

(There is another aspect to the question of inclusion within the Constitution of an enunciation of "national values", as well. That is that by placing matters within the provisions of the constitutional text, we are rendering successive generations prisoner to our prejudices. Had this view of the role of a Constitution been taken by the framers of the current document, for instance, the very first "national value" to have been stated would have been White Australia.)

Now, republicans — particularly the so-called "McGarvie-ites" and members of the Australian Republican Movement – can argue that the sort of constitutional alterations they had in question were of the minimalist kind, and that it is unfair to compare their version of the republican project with the Canadian experience. To a point, this is a fair criticism. But as we also saw during the Convention, the fact is that here, the debate about "minimalist" change is rapidly becoming moot. The capitulation of the ARM group at the Convention to the forces of short-term populism, and even then, their failure to secure a majority in favour of the adopted republican model, speaks of a constitutional petulance that is far beyond the power of a Malcolm Turnbull or a Neville Wran to control. To use a hackneyed expression, the "real" republicans, as they called themselves, punched far, far above their weight throughout the Convention — something which they could not do had they not been riding a genuine crest of public support.

The point — a point which the minimalist republicans have completely overlooked – is that it is impossible in this day and age to consider constitutional amendment in isolation. People in favour of change may suggest that it can be done quickly – and cleanly. Well, the simple fact is that it cannot. The experience of Canada, whose unhappiness should serve as our natural constitutional laboratory, must surely teach us that once a Constitution is opened up, *especially in a rights conscious society*, as ours is rapidly becoming, it becomes a Pandora's box.

Endnotes:

1. An earlier (much briefer) version of this paper was published in the April, 1998 issue of *The Adelaide Review*.

2. Specifically, the Hon Gough Whitlam QC, the Hon Sir Rupert Hamer, Sir Maurice Byers QC, Professor Leslie Zines and Professor Enid Campbell.

3. The writer, though now an Australian citizen, is originally from Canada.

4. Originally known, and still known to many, as the *British North America Act 1867*. In 1982, as part of a broad package of constitutional amendments which will be discussed in more detail below, the name was changed to the *Constitution Act 1867*.

5. There were a series of constitutional conferences, held in Charlottetown, Prince Edward Island (1864), Quebec (1864) and London (1867).

6. *I.e.*, the present-day Ontario and Quebec.

7. *Constitution Act 1867*, s.11. In the Canadian Provinces, the Queen's representatives are known as "Lieutenant Governors" rather than Governors. The office of Lieutenant Governor is provided for by s.58 of the *Constitution Act 1867*.

8. Speech in Halifax, Nova Scotia, August, 1873 (quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at p.700).

9. It provides:

> "An amendment to the Constitution of Canada in relation to the following matters may be made ... only where authorized by resolutions of the Senate and the House of Commons and of the legislative assembly of each province:
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;...".

10. For a discussion of this convention, see P W Hogg, *Constitutional Law of Canada* (3rd ed., 1992), at pp. 62 - 64.

11. At the opening of a meeting of Federal-Provincial governments in 1980, for example, Mr Trudeau offered the following response to an expression of disagreement made by one of the Provincial Premiers:

> "... I'm telling you gentlemen, I've been warning you since 1976 that we could introduce a resolution in the [Canadian] House of Commons patriating the Constitution, and if necessary we'll do this unilaterally. So I'm telling you now, we're going to do it alone. We're going to introduce a resolution, and we'll go to London, and we won't even bother asking a Premier to come with us". (quoted in P E Trudeau, *Memoirs* (1993), at p.306)

12. As an aside, this is something I predict will happen here if a plebiscite is held. There will be a campaign to make people feel disloyal to Australia if they vote to uphold the present Constitution.

13. See, e.g., Malcolm Turnbull's attack on my views in *The Australian Financial Review* of 13 February, 1997.

14. Assuming, for the sake of argument, that unanimity would not be required to effect the change in a constitutionally valid way.

15. A judicial version of this view, which might be of special interest in Australia today, was once offered by Harlan J of the Supreme Court of the United States in *Reynolds v. Sims* (1964) 377 US 533. Speaking in dissent, he said:

> "[The judgments of the 'Warren Court'] give support to a current mistaken view of the Constitution and the constitutional function of this court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle' and that this Court should 'take the lead' in promoting reform when other branches of the government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process".

16. On the place and role of a constitutional statement of values, Sir Anthony Mason has recently said:

> "[J]udges look for an authoritative source of values on which to base rules of law, whether they take the form of constitutional interpretation, statutory interpretation or common law principles. A constitutional recital of values would be an extremely authoritative statement of values which could inform the formulation of constitutional principles. The problem, it seems to me, is that we do not know what would come of it in the hands of judges. I do not say this by way of criticism of the judges. On the contrary, my criticism is that you would be giving the judges a statement of values without telling them what they are to do with it. To include a provision that the [constitutional] preamble cannot be resorted to for the purposes already mentioned is simply to convert it to a Clayton's preamble. But I would have no strong objection to a statement of values simply to inform the formulation of common law principles and the setting of legal standards so long as we could agree on the relevant values to be included. That agreement would be very hard to achieve". (*The Republic and Australian Constitutional Development*, unpublished seminar paper, Australian National University, 11 May, 1998).

Chapter Five

Taking Stock of the Role of the Courts

Hon Peter Connolly, CBE, QC

The inaugural Conference of The Samuel Griffith Society was held in Melbourne on 24 July, 1992. Not long before, on 3 June to be precise, the High Court had delivered its judgment in what is now known as *Mabo No. 2*, surely one of the most bitterly criticised judgments ever delivered in a British territory with respect to the highest court in that territory, and regarded then and over the ensuing years as evidencing breathtaking contempt for established legal principle and for the eminent predecessors of the judges who decided it, whose views obviously counted for nothing.

The President of the Society, Sir Harry Gibbs being unavoidably absent, I was invited to deliver the inaugural address and took advantage of the opportunity to nail a flag to the staff of Sir Owen Dixon's strict legalism. *Mabo* was a case in which the law had been firmly settled from 1847 at the very latest, the principle being that the waste lands of the colony of New South Wales were — and had ever been from the time of the first settlement of the colony in 1788 — in the Crown: that they were, and ever had been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as thenceforth her property, they had been and might now effectually be granted to subjects of the Crown.

That statement, of course, came from the decision of Stephen CJ in *Attorney-General v. Brown (1848)*.[1] It had never been doubted in Australia by a competent court until 3 June, 1992. It had been affirmed by the most distinguished High Court Justices of the past, including Isaacs J in 1913, Windeyer J in 1959, Barwick CJ (with the concurrence, be it noted, of McTiernan, Menzies and Stephen JJ) in 1973, and by Dawson J in 1988 in *Mabo No. 1*. Stephen J observed in the *Seas and Submerged Lands Case,*[2] "That originally the waste lands in the colonies were owned by the British Crown is not in doubt". Nonetheless, in *Mabo No. 2* Brennan J revealed to an astonished profession, a good 200 years too late, that the decisions and opinions of the past confounded sovereignty with title to land. This unflattering opinion was delivered with remarkable insouciance, having regard to the fact that the name of Dixon himself could have been added to the list of Justices mentioned above.[3]

This was but the beginning. At the Society's second Conference in July, 1993 papers on this subject were delivered by Mr SEK Hulme, QC, the Hon. Bill Hassell and Mr Jack Waterford. At the third Conference in November, 1993 papers on *Mabo No. 2* were delivered by Dr Colin Howard, who spoke on the *Racial Discrimination Act* 1993, which is of course the linch pin of the *Mabo No. 2* revolution, and by Mr Graeme Campbell, MP. The Proceedings for that year reveal that the Hon. Sir Walter Campbell, on the launching of Volume 2, also had much to say on the topic.

The fourth Conference in July, 1994 saw Dr Geoffrey Partington and Dr John Forbes delivering papers on relevant aspects of the problem posed by *Mabo No. 2*. Dr Partington's paper was of considerable value as enabling the uninstructed to identify the source of findings made by Deane and Gaudron JJ in highly emotive language in *Mabo No. 2* as to the treatment meted out to the Aborigines in the course of settlement. It is now clear that the source of these bitter revelations was James Cook University. The fact that they were never tested by being received into evidence, which would have enabled them to be countered by other appropriate evidence, and that they played a major part in the judgment of those Justices as, indeed, they freely concede, is one of the many odd features of that case. Some would regard breast-beating as a curious approach to the resolution of a question essentially of law. This Conference saw two other papers on the native title question, one already noted by Dr John Forbes and the other by Dr Colin Howard.

The fifth Conference has been the only one in which native title did not play a major part, but there were no less than three papers on the external affairs power which, as is now generally recognised, is capable, whenever invoked, of permitting the Commonwealth to legislate on any subject it chooses, thus rendering s.51 of the Constitution otiose and destroying the original essentially federal character of the Constitution. It is curious to recall that this development, long advocated by the political forces which never really approved of the federal distribution of power between the Commonwealth and the States, goes back to the *Tasmanian Dam Case,* when the Commonwealth, then in the hands of a conservative majority, acted out the policy of its opponents to enable it to intervene in the domestic affairs of the State of Tasmania in a matter which was, in truth, none of its domestic business.

The sixth Conference in November, 1995 not unnaturally saw a great deal of concern about the external affairs power and the state of the federation, with a powerful address by Sir Garfield Barwick, then in retirement, and a masterly review of the foreign affairs power by Mr Hulme, QC. However, the native title question had not slipped from the agenda, which included a scholarly paper on this topic by Dr Howard dealing with problems peculiar to the State of Western Australia. There was also a powerful paper by Sir Harry Gibbs on the subject of a possible Bill of Rights, to which he was strongly opposed. The notion of a Bill of Rights is dear to the hearts of those who would see political questions "judicialised". Indeed, the recently retired Chief Justice of the High Court had acknowledged that this would be the consequence of a Bill of Rights, of which he spoke with enthusiasm at a conference in Canberra in July, 1992.

In June, 1996 the Society held its seventh Conference, and the emphasis at this stage was very much on native title, the Commonwealth having passed its *Native Title Act.* By then it had become apparent that there would be no attempt at a rational examination of the problems involved, but at least the leader of the government which put through the *Native Title Act* 1993 believed that the legislation would produce a measure of certainty and security to those who, prior to *Mabo No. 2*, never suspected that grants of title could be displaced or endangered by the process of judicialising this essentially political question.

In a paper by Dr Forbes attention is drawn to the statement of the Prime Minister, Mr Keating, on the second reading of the Bill, stating his Government's view that, under the common law, past valid freehold and leasehold grants extinguished native title, a view which is expressly recorded in the preamble to the *Native Title Act* 1993. This had indeed been the view of Mason CJ, Brennan J and McHugh J in *Mabo No.2*.[4] It is obviously no fault of Mr Keating's that the *Wik Case* effectively negated his assumption, which was clearly based on the principle stated in *Attorney-General v. Brown* referred to earlier in this paper.

When the eighth Conference was held in March, 1997 the *Wik* decision had been delivered, and this Conference and its successor in October, 1997 were dominated by the problems created by the concept of native title, which was coming to be seen as an illegitimate child which must somehow be accommodated if it could not be got rid of.

The unwisdom of departing from the understanding of the law which existed prior to *Mabo No. 2* had been pointed out by Dawson J in his judgment in that case.[5] However, when *Wik* was argued no party sought to reargue the correctness of *Mabo No. 2*.[6] One would therefore have expected that the majority view in that case would have been applied. The conclusion of Kirby J was, however, that the Court had decided that grants by the Crown falling short of an interest in fee simple (being the equivalent of full ownership) may permit the possibility of the co-existence of the rights under a "pastoral lease" and what we must now call "native title".[7] It is becoming the new orthodoxy. It matters little that an assumption to the contrary was held by the government of the day when the *Native Title Act* 1993 was passed, and that that assumption is to be found in the preamble to that Act. It matters naught that the proposition is directly inconsistent with the law which had governed the situation since 1788.

It is entertaining, though scarcely reassuring, that Kirby J took the opportunity in *Wik* to point out the unwisdom of the *Mabo No. 2* decision, emphasising the many reasons of legal authority, principle and policy which made preferable the understanding of the law which had been stated in *Attorney-General v. Brown.* His Honour pointed to some, at least, of the distinguished High Court Justices of the past who had accepted the principle of that case.

The *Wik* decision is reported.[8] At pp. 205 to 207 Kirby J had this to say as part of the introduction to his judgment:

"The Mabo decision and its aftermath:

> Before the decision of this Court in *Mabo v. Queensland [No.2],*[9] the foundation of land law in Australia was as simple as it was clear. From the moment that the lands of Australia were successively annexed to the Crown, they became 'in law the *Property* of the King of England'.[10] It was so in respect of Eastern Australia when Governor Phillip received his first commission from King George III on 12 October, 1786. It was so after the first settlement of the English penal colony was established in Sydney in 1788.[11] No act of appropriation, reservation or setting apart was necessary to vest the title in the land in the Crown. All land, including all waste lands of the colony, were 'without office found, in the Sovereign's possession.... as his or her property'.[12] Land interests were thereafter enjoyed only as, or under, grants made by the Crown. This doctrine, providing the ultimate source of all interests in land in Australia, was upheld by early decisions of the courts of the Australian colonies. But it was also accepted,[13] affirmed[14] and reaffirmed[15] by this Court. Although the indigenous inhabitants of Australia (Aboriginal and Torres Strait Islanders) 'had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest',[16] their legal interests in, and in relation to, the annexed land were considered to be extinguished. If they were to enjoy any such interests thereafter, they could do so only by, or under, a grant from the Crown, the universal repository of the ultimate or 'radical' title.[17]
>
> "This apparently unjust and uncompensated deprivation of pre-existing rights distinguished the treatment by the Crown of the indigenous peoples in Australia when compared to other settlements established under the Crown in the American colonies,[18] Canada,[19] New Zealand[20] and elsewhere. The principle was criticised.[21] However, from the point of view of the settlers, their descendants and successors, it was part of Australia's historical reality. From the point of view of legal theory, it had a unifying simplicity to commend it: no legally enforceable rights to land pre-existing annexation and settlement. No title to land except by or under a Crown grant made out of the royal prerogative of the Sovereign in the earliest days and thereafter pursuant to enabling legislation.
>
> "Into this settled and certain world of legal theory and practicality, the decision in *Mabo No. 2*[22] intruded. By that decision, this Court unanimously affirmed that the Crown's acquisition of sovereignty over the territories which now comprise Australia might not be challenged in an Australian court. Upon the acquisition of such sovereignty, the Crown acquired a radical title to the land. But, by majority, the Court held that what it called 'native title' survived the Crown's acquisition of sovereignty and of the radical title".

Some of the decisions referred to by Brennan J in *Mabo No. 2* and restated by Kirby J in *Wik* were dealt with in my paper in Volume 2 of this Society's Proceedings, where it is pointed out that the Canadian and United States decisions required settled habitation for native title to be recognized, and that the doctrine of *terra nullius* was recognized by the International Court in the very decision relied on by Brennan J in *Mabo No.2*. I shall not repeat what I said on that occasion. However, further cases cited in the passage above by Kirby J show the high level of social organisation and lengthy tenure which existed before the Courts of those countries acknowledged Indian or native title.

The case of *Cherokee Nation v. Georgia*[23] cannot rationally be invoked as authority for Aboriginal native title in Australia. The Cherokee were found by the European settlers "in the quiet and uncontrolled possession of an ample domain", and had "by successive treaties yielded their lands", those treaties solemnly guaranteeing the residue "until they retained no more than was deemed necessary to their comfortable subsistence".[24] The Supreme Court of the United States had no difficulty in recognising them as a state, they having been accepted as such from the settlement of what is now the United States. Their title to their land was not and never had been in dispute.

The headnote to *Worcester v. Georgia*[25] clearly evidences the immense difference between Australia and the United States in this connection. Thus it is said that the Indian nations "had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil from time immemorial".

The *Pasamaquoddy Tribe Case*[26] concerned a treaty establishing a guardianship role between the United States and the tribes, and the decision went simply to the right of the tribe or the State of Maine to terminate the responsibility of the US Government under the legislation.

The *Apassin Case*[27] dealt with the question whether "spouse" included a "common law spouse".

The paragraph cited earlier from the judgment of Kirby J makes a number of things quite clear. First, the "native title" held by the majority to have survived the Crown's acquisition of sovereignty was, in fact, entirely inconsistent with that sovereignty, and with the doctrine that the sole source of interests in land was the Crown or a grant from the Crown as owner. Second, the Court's decision in *Mabo No. 2* dispossessed the sovereign of property in the wastelands of Australia. Third, the decision of the majority could only operate as a reversal of longstanding legal principle, unchallenged since 1847. It was not a return to earlier principles erroneously displaced by some past decision, nor was it a development of the law in response to some change of circumstance. It was thus wholly outside any ordinary course of judicial decision-making.

Guerin's Case[28] dealt with a statutory scheme of disposing of Indian land, the question being whether the Crown was in the position of a trustee. It is difficult to see what this sort of situation contributed to the judgments.

It is difficult to resist the conclusion that the majority in *Mabo No. 2* were emotionally driven by what they saw as unjust treatment of the Aboriginal people, as compared with the attitude towards them of the United States, on the one hand, and our sister Dominions on the other; and, above all, by the leadership said to have been displayed by the International Court in, as it is contended, rejecting the notion of *terra nullius.*

Kirby J appears to have accepted the view attributable to Brennan J in *Mabo No. 2*, that treatment of the Aboriginal people in Australia was unjust compared with the treatment of aboriginal people in the American colonies, Canada and New Zealand. His Honour appears to be relying upon the references to those decisions which are to be found in the judgment of Brennan J, as he then was, in *Mabo No. 2*.

The simple fact, however, is that all of the decisions emphasise the fact that a precondition of native title was settled habitation of long standing. The references are given in the paper which I delivered at the second Conference in July, 1993.[29] The reason was obvious as a matter of history. In pre-historic times, wave after wave of human beings, obviously under the pressure of increasing populations, flooded across Europe, and race after race enjoyed brief superiority only, in turn, to be replaced by a further wave of population.

However, by the time of European colonisation of the New World, it came to be accepted that the displacement of settled people from places which they and their ancestors before them had colonised was unacceptable. On the other hand, where land in the New World was found not to be the property of anyone, that is to say, as we would put it, had not been reduced into possession or, to use the Latin phrase, was *terra nullius,* no moral or ethical objection was seen to its being

colonised by Europeans. In other words, the intermittent presence of itinerant nomads was not seen as a barrier to European settlement. The conditions on which international law disapproved the dispossession of aboriginal people in the new world were precisely those which came to form part of the law relating to native people as set out in the decisions relied upon by Brennan J in *Mabo No. 2*, four of which are analysed in my paper in Volume 2. It should be mentioned that the assertion by Brennan J that the International Court had rejected the *terra nullius* test in the Western Sahara case is also shown there to be quite incorrect.[30]

Shortly, the law of nations required settled habitation for a substantial period, and the domestic law of the United States, Canada and New Zealand accorded native title to those who could meet these scarcely stringent conditions. Any other view would have justified the nomad in seeking to exclude the farmer in perpetuity from the land over which the nomad moved with the seasons. The development of towns and ultimately cities could not have occurred.

In situations in which the human race was hungry for land, it would indeed have been an incitement to violence if the whole of the Australian continent, while presumably from time to time visited by the nomadic tribes, had been regarded as subject to a form of native title which excluded the new settler, especially where the new settler had the skill to produce the fruits of the earth by farming it, while the original inhabitant did not settle on the land and was no more than an intermittent hunter and gatherer. To say this is not to despise the nomad, who is indeed celebrated in Professor Blainey's famous book, *The Triumph of the Nomad*. It is simply to deny his right to lock the land away from settlement and improvement.

What then is the present position? It is now obvious that *Mabo No. 2* was not intended by the inventor of native title to be much more than a public relations exercise, assuring the Aboriginal population of the existence of "native title" subject to largely unprovable conditions such as continued connection with the land, but accompanied by a wink and a nod to the holders of pastoral leases by way of assuring them that their tenures would exclude "common law title".

Dis aliter visum

By the time *Wik* was decided, Brennan CJ found himself in a minority, in which he was supported by Dawson J, who had never believed in the *Mabo* doctrine but who did believe in the stability of the land tenure system, and by McHugh J, consistently with his position in *Mabo No. 2*. Obviously enough, both of these Justices had considered that Crown leaseholds would be a satisfactory limitation on the otherwise massive intrusion of "common law title" into the settled land of the continent.

This view has now proved illusory. The warm inner glow generated by the invention of "common law native title" must now yield to the cold reality of *Wik,* and the realisation that the land title system of rural Australia is in a state of total uncertainty. For the effect of each pastoral lease must, it seems, be individually examined for its possible effect on native title, the only attendant certainty being that, even when the lease prevails, it will take years and immense financial outlays to establish the legal situation. This will, of course, be more than acceptable to the industries which have sprung up around native title (notably specialist lawyers on the one hand and compliant anthropologists on the other).

As to the first, in *Wik* there were sixteen interests or groups each with their own solicitors, separately represented by a total of seventeen senior counsel (QCs or SCs) and sixteen juniors. The parties included the Commonwealth, all the States except NSW, and the Northern Territory. As Kirby J pointed out, no party in *Wik* sought to reopen the correctness of *Mabo No. 2,* which must now be perceived to have been invented with a disastrous miscalculation as to its effects on pastoral and mining interests. The wink and the nod has now proved as illusory as the law which, for nearly 200 years, had guaranteed the title of Crown lessees.

The Aborigine is not a farmer. If there is any credible evidence of serious grazing or farming of the vast tracts of the Northern Territory which have been handed to the Aboriginal people, the fact is certainly not widely known. The present consequence of all this self-indulgent but not

unrewarded activity by the legal profession at all levels certainly invests the Aboriginal claimants with a nuisance value which is probably of more use to them than the title itself. Aided and abetted by sociologists and lawyers they are, at this stage, invested with a capacity to delay, seemingly indefinitely, development which is essential to the country. We are, in a sense, back to the problems which led medieval lawyers to speak of land being held in *mortmain*, that is, by a dead and unproductive hand.

Conclusion

The Court, of its nature, has no capacity for pragmatic decision making, which is why the efforts of the Justices to dig themselves out of the quagmire they have created lands them even deeper in the mess. Only the Parliament can sort it out. It is quite incredible that, in the few short years since 1992, the land titles of Australia should have become a playground for lawyers, sociologists, anthropologists and journalists. No one dares to tell the electorate how much it is costing, but they can tell for themselves that it is never-ending and, so far, has served no useful purpose.

One pragmatic solution might be to accept *Mabo No. 2* with all its faults so that, at least, a Crown grant would be conclusive of the title of the grantee. The other is to abandon the oppressive requirement that title holders whose titles are attacked by Aboriginal claimants be under an obligation to negotiate until a case has been made out. The current situation offers them a choice between walking off the land and bankrupting themselves in protracted negotiation with claimants who may never make out a case, but are funded by government at the expense of the Australian people in asserting their claims.

Happy ending?

Since this paper was initially prepared, the Senate has reconsidered many aspects of the native title problem. As a result of understandings reached between the Government and Senator Harradine, the Senate has withdrawn from certain positions which it had adopted, and the Bill, with consequential modifications, was returned to the House with the amending legislation essentially as amended by the Senate. By reason of the drafting complications, the final text is not yet available, but for immediate purposes the state of the legislation may be shortly and no doubt imperfectly described as follows.

The most helpful document available at the moment of writing (24 July, 1998) is a paper which was made available to the writer by Senator O'Chee, the National Party Whip in the Senate. It is headed *Native Title Amendment Bill,* July, 1998 Amendments. References to "the Agreement" are to the agreement reached between the Government and Senator Harradine. The essential features of that agreement are set out in the paper, the principal of such features being as follows:

"Rationale

> The agreement delivers certainty in relation to freehold, exclusive leases and non-exclusive leases. Those with grants of freehold or exclusive possession have the certainty of knowing native title is extinguished completely and permanently.
>
> Pastoral leases have the certainty that native title is suppressed for the term of the pastoral lease (including any renewals) to the extent native title is inconsistent with primary production activities.
>
> The High Court is currently considering the question whether native title can revive after a freehold grant. It was argued that the position in relation to grants of non-exclusive leases (e.g., pastoral leases) is not so clear because some of the judgments in the High Court's decision in Wik left open the possibility that native title rights which are inconsistent with such a grant are only 'suppressed' for the duration of the grant, not extinguished.

In any event, the Government believes that its view of the law, that a pastoral lease does in fact extinguish inconsistent native title rights permanently, will be ultimately confirmed by the High Court…..

4. Primary production

Original position

The Bill makes clear that a government can grant additional rights to a pastoralist to undertake new activities in the future provided that those activities come within the definition of 'primary production'…..

Agreement

The Bill will now limit the operation of this provision to activities which could have been authorised on a lease on 31 March, 1998.

Rationale

All relevant State and Territory governments had confirmed that their legislation regulating pastoral leases contained sufficient discretions (either in the Minister or Pastoral Board) to give full effect to the intentions of the 10-point plan concerning diversification on pastoral leases.

5. Primary production — "off-farm" activities

Original position

The Bill ensures that a government can grant licences for grazing or for access to or the taking of water in the future (where such rights are not now in existence) on vacant Crown or reserved land abutting pastoral or freehold tenures where that activity is connected with the farming activity on those tenures, provided notification is given to any native title holders and they have an opportunity to comment. Renewals of such rights can be made without reference to native title holders……

6. Renewals of pastoral lease and other interests

Rationale

These amendments confirm the right to negotiate will not affect pastoral lessees extending the term of their lease or converting it to perpetual. However it does provide native title holders with an opportunity to be consulted by the relevant State or Territory Government".

One of the features of the previous legislation which had occasioned most difficulty for miners and pastoralists was the seemingly endless right to negotiate at a stage when it was not clear whether the claimants would ever make out a native title. The required factual basis for a claim of native title is now largely to be found in section 190B, subsection (5) of which calls for evidence that:

(a)the claimants have and their predecessors had an association with the area;

(b)traditional laws and customs giving rise to the claim are observed by the claimants; and

(c)the claimants have continued to hold the native title in accordance with those traditional laws and customs.

The language in which these requirements are stated reflects the extreme difficulty of identifying rights to be accorded to nomadic people who make no claim of possession. Presumably "association" would be satisfied by the periodical resort of the claimants or their ancestors to the land in question for hunting, food gathering or traditional practices. The notion of traditional laws and customs will obviously give rise to difficulties for, of their nature, they are not recorded, but the ingenuity of the supporting industries, as evidenced in Hindmarsh Island, will no doubt overcome this problem.

A much greater difficulty will be posed by s.190B(5)(c). What is meant by "holding the native title"? No doubt it will be contended that this means "claiming the native title", but the two are obviously not the same, particularly when there are rival claimants. Of course, the fact that the ancestors of the claimants were never in possession of identifiable land is where the whole problem started at the time of first settlement. Had they been in possession, then it was the duty of the Governors to respect their settled habitation. This problem has not gone away in the ensuing 200 years, and it never will.

The intention of the amending legislation is to confirm that grants of freehold and exclusive possession extinguish native title completely and permanently. Pastoral leases are to "suppress" native title for the term of the lease (including renewals) to the extent that native title is inconsistent with "primary production", an expression which is to extend to additional activities by way of diversification authorised by the relevant government, including "off-farm" activities. It is to be made clear by s.241 C that leases, licences and the like may be renewed or extended (even to perpetuity) without the involvement of native title holders provided the area is not extended. In relation, however, to mining leases, the right to negotiate is, it seems, to be maintained if the period of the lease is to be extended or rights thereunder are to be enlarged.[31]

Provision is to be made for State governments to provide alternatives to the former right to negotiate in relation to current and historic pastoral leases, subject to the requirements of s.43A of the Bill, which calls for the same procedural rights for native title holders as for others. The provisions appear to reflect concern about the possible impact of mining leases or acquisitions on native title. The ultimate authority is to be with the Minister for Aboriginal Affairs, and the criterion is to be that the development in question is "in the interest of the State", which will be defined to include social and economic benefit including that of the indigenous peoples. Compulsory acquisition for infrastructure and in towns and cities will remain exempt from the right to negotiate, but native title holders will be consulted in relation to the impact of the proposed development on them.

It is important to note that the new legislation imposes a more rigorous test for the establishment of native title by s.190B(7), which requires that at least one of the claimants has or has had a "traditional *physical* connection with some part of the land or waters claimed", or would reasonably have been expected currently to have such a connection but for things done by or under the authority of the Crown or the holder of a lease.

It is clear that the grant of a lease, or the exercise of the lessee's rights, are not in themselves factors which are to be regarded as excluding the requirement of traditional physical connection. Obviously the Parliament intends that *action*, either by the Crown or the grantee from the Crown, precluding traditional physical connection shall have occurred before the applicant is excused from showing that physical connection. It should be noted that s.190B(7) means that the Parliament has rejected the notion of spiritual connection with the land as a basis for native title, and has opted for the down to earth and at least manageable notion of impairment of the actual lifestyle of the Aboriginal people.

This, however, is not the end of the matter. By s.190D(1A), if the claim for registration is rejected, because s.190B(7) is not satisfied, the Federal Court may order the claim to be accepted if "*prima facie* at least some of the native title rights and interests claimed can be established" and a parent of one of the claimants, in the latter's lifetime, had the necessary connection with the land in question and would have maintained it but for things done under the authority of the Crown or a lessee: s.190D(4).

The legislation is intended to clarify the part to be played in the future by the *Racial Discrimination Act* 1974. The intention of the Parliament is that the *Racial Discrimination Act* cannot impair the validity of a statute of the Parliament of the Commonwealth affecting native title. It was established in *Western Australia v. The Commonwealth*[32] that the *Racial Discrimination Act* did not alter the common law relating to native title (that is, the common law

as declared by *Mabo No.2*). It did, however, by s.10 add to the common law rights of native title holders a statutory protection against discriminatory impairment of native title.[33] It is pointed out, however, that the *Native Title Act* protects native title holders against *any* impairment of their native title.

In conclusion, I offer the tentative opinion that the legislation will ultimately achieve something like an acceptance of *Mabo No.2* with all its faults. In other words, the invention of native title is obviously here to stay but is likely to be overridden by Crown grants. The right to negotiate is no longer intended to be never ending, and much of it is to be replaced by ministerial decision. It will be noted that this last feature would seem to indicate that the Parliament has despaired of the Courts in this area.

Putting aside the propriety, from a legal point of view, of the invention of native title in *Mabo No.2,* and the inconsistency of that essentially legislative exercise with the doctrine of separation of powers so dear to the hearts of High Court Justices, the most disruptive act of the High Court was the refusal of the *Wik* majority to accept the opinion of Mason CJ, Brennan and McHugh JJ that Crown grants completely override the newly invented native title. McHugh J is on record as saying that the invention might well not have been supported by himself and others had they realised that native title could survive Crown grants of freehold and pastoral leases, and that he had assumed that native title would apply only to alienated or vacant Crown land. The legislation recently before the Senate has restored a measure of sanity. The assumption made by the majority in *Mabo No. 2* was not unreasonable at the time, but the subsequent history of the native title invention has demonstrated to all who value the certainty of the judicial system how unwise legal adventurism can be. As to native title, it may fairly be hoped that the *Native Title Amendment Act* will, in its essentials, prove a workable solution of a judge-made imbroglio.

Endnotes:

1. 1 Legge 312.

2. (1975) 135 CLR at 438.

3. See *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 in which Dixon CJ concurred in the opinion of Windeyer J.

4. 175 CLR 1 at 71 per Brennan J, agreed in by Mason CJ and McHugh J at 15.

5. *Ibid.*, at 145-60.

6. See the judgment of Kirby J in *Wik* (1996) 187 CLR 1 at 250.

7. "A preferable description is 'traditional title' "; cf. *Mabo v. Queensland [No2]* (1992) 175 CLR 1 at 176, per Toohey J. The words "aboriginal natives" appeared in the Constitution, in s.127 (now repealed) and in colonial legislation. In the statement of claim and notice of appeal, the appellants refer to "Aboriginal title". However, such title rights are not confined to Aborigines. They extend to other indigenous peoples. The term "native title" has been used repeatedly in decisions of this Court and other Australian courts. It is now used in Federal and State legislation. It is therefore used throughout these reasons".

   (This paragraph is printed as a footnote to the judgment of Kirby J.)

8. (1996) 187 CLR 1.

9. (1992) 175 CLR 1.

10. *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439, per Isaacs J. See also Fry, *Land Tenures in Australian Law, Res Judicatae,* Volume 3 (1947) 158.

11. *Attorney-General (NSW) v. Brown* (1847) 1 Legge 312.

12. *Attorney-General (NSW) v. Brown* (1847) 1 Legge 312.

13. *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439.

14. *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 at 71.

15. *New South Wales v. The Commonwealth* (the *Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 438.

16. *Mabo [No2]* (1992) 175 CLR 1 at 29, per Brennan J.

17. See also Fry, *Land Tenures in Australian Law*, *Res Judicatae,* Volume 3 (1947) 158 CLR, at p. 158, citing *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439, per Isaacs J.

18. *Cherokee Nation v. Georgia* (1831) Peters 1; *Worcester v. Georgia* (1832) 6 Peters 515; *Menominee Tribe of Indians v. United States* (1968) 391 US 404; *Joint Tribal Council of the Pasamaquoddy Tribe v. Morton* (1975) 528 F 2d 370; cf. *Mabo [No2]* (1992) 175 CLR 1 at 135-36.

19. *Guerin v. The Queen* [1984] 2 SCR 335; (1984) 13 DLR (4th) 321; *Sparrow v. The Queen* [1990] SCR 1075; (1990) 70 DLR (4th) 385; *Delgamuukw v. British Columbia* (1993) 104 DLR (4th) 470; affirmed sub nom *R. v. Van der Peet* [1996]2 SCR 507; (1996) 137 DLR (4th) 289; *Apassin v. The Queen* [1995] 4 SCR 344; (1995) 130 DLR (4th) 766; cf. *Mabo [No2]* (1992) 175 CLR 1 at 131-35.

20. *In re the Ninety-Mile Beach* [1963] NZLR 461 at 468; cf. *Mabo [No2]* (1992) 175 CLR 1 at 137.

21. *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 256.

22. (1992) 175 CLR 1.

23. (1831) 5 Peters 1.

24. *Ibid.*. See per Marshall CJ at 14-15.

25. (1838) 6 Peters 515.

26. (1975) 528 F 2d 370.

27. (1995) 130 DLR (4th) 766, cited under note 19 *supra*.

28. (1984) 2 SCR 335.

29. *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 2 (1993), pp. 100-102.

30. *Ibid.,* pp. 103-4.

31. See at p.7 of the paper provided by Senator O'Chee, paragraph 10.

32. (1995) 183 CLR 373.

33. *Ibid.*.

Chapter Six

"Just tidying up": Two Decades of the Federal Court

Dr John Forbes

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such [State] courts as it invests with federal jurisdiction....."
>
> So states s.71 of the Constitution.

The Commonwealth existed for nearly three years without a single federal judge. It survived for another seventy years without the guidance of the Federal Court or the Family Court. Today we have forty-nine Federal Court judges[1] (about four-fifths of them, excellent as they may be, anointed during the regnal years of Messrs Hawke and Keating) and more than fifty Family Court judges, chauffeur-driven at public expense.

1903: The first federal judiciary

The High Court was not created by the Constitution but by the *Judiciary Act* of 1903. In a fulsome speech on 10 June, 1903 Attorney-General Deakin promised that the new court would protect the interests of the "less populous States".[2] Deakin had many prescient things to say about Federation but that was decidedly not one of them.

Deakin planned to begin with five judges so that "nearly every State" could be represented.[3] In the event the High Court began with three judges from just two States; ninety-five years later two States (Tasmania and South Australia) have never supplied a High Court judge.

Opposition came from Adelaide's Patrick McMahon Glynn. There was, he said, "nothing that justified" Deakin's belief that "the mental equipment of the High Court of Australia, which he idealises, ... [would] be superior to that of the State tribunals".[4] Henry Bournes Higgins of Melbourne agreed with Glynn, but three years later Higgins happily took a place on the Court.

Higgins predicted that arid jurisdictional problems would arise so soon as the Commonwealth, in pursuit of "some mystical notion", created another level of appeal above the long-established Supreme Courts.[5] Sir John Quick, a co-author of the first authoritative text on the Constitution, noted that since January, 1901 only twenty cases involving federal law had arisen, and the State courts had handled them very well.[6] But an intensely ambitious Isaac Isaacs, destined to join the Court in 1906, strongly supported the Bill. He assured honourable members that the High Court would be "an easily accessible tribunal". That was never quite true, but Isaacs could not be expected to foresee the High Court's monastic retreat to Canberra in the Barwick era, or its reduction of liberal rights of appeal to a system of "special leave", with the judges picking and choosing, with little explanation, cases in which they were inclined to develop or change the law.

Nor could Isaacs anticipate the wonders of long and sudden leaps of judicial legislation *à la Mabo*, but there was more than a touch of Edwardian hyperbole in his prediction that the new court would be "so high above political interference as to be free from the faintest breath of suspicion, and yet so close to the common life of the people as to feel the pulse-beat of their daily life".[7] Just ten years later William Morris Hughes, as Attorney-General and Prime Minister, would be able to influence appointments of no fewer than five High Court judges. One was the unhappy Albert Piddington, who resigned when it became public knowledge that he had assured Hughes of a predilection for centralism.[8]

But in 1903 Hughes evinced no enthusiasm for the creation of the High Court, arguing that it would soon begin tinkering with the Constitution:

> "This federal judiciary ... is to be created with an express purpose of ... continuing to develop the Constitution by methods of which the people had no knowledge when they accepted the instrument".[9]

Hughes was not the only parliamentarian who feared that the High Court would become a more prolific source of amendments than s.128 of the Constitution, according to which High Court judges have just one vote like the rest of us.

Edmund Barton, destined to be one of the first three members of the Court, spoke at great length in support of the Bill:

> "The federal judges should do this work not because they will be biased in favour of the [Commonwealth] but because, being responsible to the national Parliament [sic], they will take the national view. This does not mean the obliteration of States' rights ...".[10]

Barton could hardly have foreseen the modern explosion of the external affairs power.

No one seems to have envisaged a system of appointments to ensure that Commonwealth ministers or bureaucrats did not choose *all* the constitutional umpires. With the hindsight of ninety-eight years it may be seen that from their point of view the Founding Fathers' failure to do so was a grievous error.

On 24 September, 1903 the Parliament was told that the Chief Justice of Queensland, Sir Samuel Griffith, would lead the Court and that Prime Minister Barton and Senator O'Connor were leaving politics to join him. At long last Griffith transcended the little world of Brisbane's Edwardian bench and bar. He had it in mind for many years. In the 1870s and 1880s he bitterly opposed attempts to "amalgamate" Queensland's little legal profession, asserting that if the strict English division (or class system) of barristers and solicitors were not rigidly observed, Queensland barristers would lose status *vis a vis* their Melbourne and Sydney brethren and thus be handicapped in the race for a pan-Australian court to come.[11] In the 1880s Griffith was no doubt aware that in 1879 Victoria had tried to organise an "Intercolonial Court of Appeal".[12]

"Divided" professions such as those of Queensland, NSW and Victoria still harbour attitudes of superiority towards "amalgams" from other States, albeit more diplomatically than in days gone by. The "amalgamated" profession of Western Australia did not secure a High Court appointment until 1979 (when the Attorney-General happened to come from Perth) and the "fused" professions of Tasmania and South Australia still await their turn.

There are strong hints in the Parliamentary debate of 1903 that Griffith was in close touch with Barton and Deakin, and it is said that he "hovered around at gatherings of influential men for the two or three years before the court was established".[13] If so, he was neither the first nor the last judicial aspirant to court strategic patrons, judicial independence notwithstanding.[14]

Even better placed to keep their names before the selectors were Prime Minister Barton and his old friend Richard O'Connor. For each of those men an appointment to the new court offered welcome relief. Barton had collapsed in his office in August, 1903 and O'Connor, though only fifty-two, was in declining health. The court was effectively Griffith's; legal wits soon dubbed Barton the "concurrent jurisdiction" and the less talented O'Connor the "auxiliary jurisdiction".[15]

It should not be assumed that the status of the early High Court was that of the Dixon court, or even the High Court of today. In 1903 the Commonwealth was still distinctly a creature of the States, and the position of a State Supreme Court judge was one of prestige, security and remuneration beyond most people's dreams. Few appeals went beyond the State Full Courts, and the High Court could be bypassed in favour of the Privy Council. It is difficult to believe that Melbourne could not have supplied a judge in 1903 if its legal magnates had been anxious to do so. The nomadic life of the new court did not appeal to many lawyers of appropriate seniority. To Samuel Way, Chief Justice of South Australia, it would have been "... a step downstairs ... I should have been obliged to give up the Lieutenant-Governorship, the Chancellorship of the University

and ... tramp about the continent as a subordinate member of an itinerant tribunal".[16] It is not unlikely that the Chief Justices of Victoria and New South Wales felt the same.

In 1906 the number of High Court judges was increased from three to five, and in 1913 from five to seven, which remains the number today. Until 1920 a member of the High Court acted as President of the federal Arbitration Court, and for more than fifty years thereafter the rest of the federal judiciary was confined to the Territories, to Commonwealth industrial tribunals, and to a tiny Court of Bankruptcy.

The federal judiciary takes off

In the late 1960s Attorney-General Barwick canvassed the idea of a federal trial court. In 1968 his successor Nigel Bowen, later the first chief Judge of the Federal Court, introduced a Bill for that purpose.[17] However, nothing eventuated at that stage. While there was a constitutional command to create the High Court, the case for another federal tribunal was much less compelling. The State courts had administered federal laws for sixty years. They had applied the Commonwealth bankruptcy law since 1924, uniform divorce laws since 1960 and the Commonwealth *Crimes Act* since 1914.

In early 1974 the Whitlam government mooted a "Federal Superior Court" but the plan stalled in the Senate. A by-product of that defeat was creation of the Family Court to implement judicially — and in no small measure legislatively — Lionel Murphy's promise of a new heaven and a new earth in matrimonial disputes. The original idea was to make the divorce judges a division of the "Superior Court". Today's Federal Court incumbents may rejoice that this vision was not realised; it would have resulted in a long tail wagging an unhappy Federal Court quadruped. Later efforts to combine the two bodies were firmly resisted by the more status-conscious members of that institution.

The movement towards a much larger federal judiciary did not end with the birth of the Family Court. In 1976, barely one year after the Coalition vetoed the "Superior Court", it reappeared as a proposal for a "Federal Court of Australia". In the lower House the Bill was in the hands of Robert Ellicott, Attorney-General in the new Fraser government, who had recently rejected the "Superior Court" idea as an unwise and unwanted addition to an Australian court system that was already over-complicated.[18] However, Ellicott stressed that his Bill was less ambitious than the Whitlam-Murphy plan. There was no intention of weakening the status of the Supreme Courts. On the contrary, they would retain "the bulk" of the federal jurisdiction they had exercised for many years. And it went without saying that there would be no poaching on their fields of equity and common law.[19]

As often happens when politicians are faced with "lawyers' law", the debate on the *Federal Court Bill* was not lengthy, nor particularly lively or informative. Labour's only regret was that there would not be a more aggressive takeover from the State courts.[20] Anthony Whitlam, scion of the recently-departed Prime Minister, ridiculed the government's "timidity" and "the rooster-like boasting of an Attorney-General who is looking forward to a new nest for his well-feathered friends".[21] In January, 1993 Whitlam Junior accepted the Keating government's offer of a nest of his own in the Federal Court.

Just a little "tidying up"

In the upper House the *Federal Court Bill* was in the hands of Senator Durack. He was adamant that the new tribunal would be confined to "well-defined fields of federal law. It would not enter into any ... jurisdiction now exercised by State courts".[22] It was vital not to develop "two parallel legal systems ... [and to] preserve the status and jurisdiction of the Supreme Courts". The Bill was merely a little "tidying up operation" to collect in one tribunal of limited statutory jurisdiction the Commonwealth Industrial Court and a few "disparate jurisdictions" which had grown up over

the years, such as the Bankruptcy Court, which occupied one judge in Sydney and Melbourne while the States did the rest of the work.[23] There was no suggestion that the State courts did not efficiently deal with the federal matters they had been handling for seventy years. (Indeed, in 1998 the States are still conducting federal criminal trials that the commercially-oriented Federal Court does not deign to hear.)

Initially the Federal Court was staffed by ex-members of the Industrial Court (including Gerard Brennan J), one or two bankruptcy judges and a few judges of the Territory Supreme Courts. But the child born in modest circumstances would rise and rise anon. Soon after Ellicott and Durack delivered their *placebos,* Canberra began to expand its judicial patronage well beyond the High Court. By 1978 the Family Court alone boasted thirty-six judges. That institution was busily engaged in the creation of a self-contained world of jurisprudence, replete with various rules which the politicians debating the *Family Law Bill* did not envisage or preferred not to publicise. In the words of W M Hughes in 1903,[24] a lot of judicial "filling in" was going on, although we had to wait until 1998 for judicial activity quite so egregious as an order that a mother cease breast-feeding her child.

Within a year of Mr Hawke's ascension there were twenty-nine members of the Federal Court, including Michael Kirby, then chiefly a Law Reform Commissioner. By 1986 the Family Court numbered forty-six, and by 1988 the Federal Court contingent had expanded to thirty-two, an increase of 32 per cent in less than six years. The expansion of the Federal Court then abated for a while; it comprised thirty-four judges in 1993. But jurisdictional empire-building went on, and there was a leap to forty-five in 1995, Mr Keating's last full year in power — an increase of 33 per cent since 1994 and 250 per cent since 1976. When the Howard government took office the Family Court had over 50 judges and 8 less costly (non-chauffeured) quasi-judges, described as judicial registrars. All these ladies and gentlemen were offering, more or less efficiently and courteously, services which the State courts had previously provided as part of their general jurisdiction.

An empire is assembled

Law, of all vapours, is most apt to fill the space available. The Federal Court's initial empire-building depended on a few brief and vague sections of the *Trade Practices Act* 1974. As a means of annexing power, those provisions have served the Federal Court almost as well as the external affairs power, in High Court hands, has served the Commonwealth since 1983.

Section 52 of the *Trade Practices Act* states:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

A distinguished judge of appeal, in private conversation, described this provision as being "more like the terms of reference for a roving Royal Commission than a rule for legal adjudication". Just so. Readers may wonder whether search for the "misleading and deceptive" requires the panoply of wigs, gowns and copious documentation. They would of course be wrong; it is a tribute to professional ingenuity that a few ordinary words have accreted the pseudo-technical verbiage that fills many volumes of law reports. The *Australian Law Reports* series**,** which largely records the doings of the Federal Court, began in 1976. Already there are more than 150 volumes! A typical set of State Reports would take fifty to seventy years to grow so great. Lawyers often say, sadly or gladly depending on their brief: "There's authority for anything and everything in the Federal Court".

To the extent that we still have a rule of law, we are living mainly on legal capital accumulated in our traditional courts of law. Meanwhile new tribunals grow great on vague legislation and self-serving interpretations of their own powers. The result is an ever-expanding court system with the characteristics of uncertainty, politicisation and breadth of judicial

discretion. This may have one advantage: less risk of technical embarrassment for the more dubious graduates of pullulating law schools and their misleading and deceptive "assessments".

The new court and its clientele soon discovered that the "misleading and deceptive" mantra could cover many of the more lucrative (and hence higher-status) commercial cases which had been the central and exclusive business of the Supreme Courts since the Australian legal system began. But there was more to come.

Soon the Federal Court, abetted by the High Court, discovered a vague and highly convenient means of poaching civil cases based on State law. This was the doctrine of "accrued jurisdiction". According to this figment of federal jurisprudence, a State common law claim can be handled by the Federal Court if it is sufficiently "connected" to a federal matter (usually a trade practices claim), even if the federal claim fails.[25]

"Lifting oneself by one's own bootlaces" is a well-known metaphor. The "accrued jurisdiction" notion goes one better; even if the bootlaces break, the Federal Court still self-levitates. And who is the arbiter of "sufficient connection" and the genuineness of the federal claim? The Federal Court, of course, subject only to its elder brother the High Court.

One example must suffice. In 1983, when a Gold Coast real estate bubble burst, a seller sued a buyer for breach of an agreement to purchase a home unit. The action was classically one for the Queensland Supreme Court, and that was where the plaintiff filed his writ. But lawyers for the defaulting buyer filed a competing claim in the Federal Court, alleging that the seller had breached the *Trade Practices Act.* The Federal Court then held that the seller's common law claim was caught by its "accrued jurisdiction", and gave the buyer an injunction to halt the original Supreme Court proceedings.[26] The Federal Court's 1996-97 Report assures us that "cases arising under ... the *Trade Practices Act* 1974 still constitute a significant part of [our] workload".

By the early 1980s Senator Durack's little "tidying up" exercise had acquired a runaway life of its own; the house was being turned upside down. In September, 1987 the Federal Court gained control of tax cases, which the State courts had handled for more than ten years after the High Court shed most of its "original" (or trial) jurisdiction. Bankruptcy matters went the same way, although outside Sydney and Melbourne the State courts had done that work for sixty-odd years. In 1991 the Federal Court gained a large slice of company litigation, and in 1993 it was awarded exclusive jurisdiction under the *Native Title Act.*

The Federal Court's thirst for jurisdiction recalls the chaotic competition and jurisdictional claim-jumping among the unreconstructed English courts of the seventeenth and eighteenth Centuries. A national judges' meeting was told that Victoria's decision to follow NSW and Queensland in establishing a separate Court of Appeal was an effort to save some of its up-market commercial litigation. Some State courts damaged their cause by clinging too long to archaic rules of procedure.

A facile and predictable plea of specialisation would be beside the point. Three State courts have separate Courts of Appeal, while "full courts" of the Federal Court are *ad hoc* gatherings of any three of the forty-nine members thereof.

It is interesting that there has been no similar scramble to assume the unfashionable criminal work that increasingly arises under Commonwealth laws. The rigorous judicial duties in those cases are still left to the State courts. The States may well ask why the Federal Court does not condescend to "sit in crime", or to share its powers with juries, while it picks the eyes out of the commercial causes lists and monopolises the fashionable and unpredictable novelties of native title litigation.

Promoters of the Federal Court promised that it would never damage our Supreme Courts. The reality is now very different. The inexorable annexation of State judicial business and long-held federal jurisdiction has deprived the Supreme Courts of the cases in which the cleverest word-spinning is reputed to occur. According to the 1996-97 report of the Queensland Court of Appeal, its civil business is now a mere 30 per cent of its entire workload. When James Spigelman, former

assistant to Prime Minister Whitlam, consented to replace Murray Gleeson as Chief Justice of New South Wales, the lawyer-journalist David Marr exclaimed:

> "Why did Spigs want it? Once the Chief Justice of NSW was a great figure in the land ... [but] many of the really interesting cases now end up in the Federal Court ... The race [i.e. native title] battles will not be fought in his court".[27]

Does this change in the pecking order explain earlier retirements from State courts, lateral arabesques to the Federal Court by State judges who attract the federal eye, or the willingness of brave or bored State judges to serve on high-profile commissions to examine organised crime?

It has been said that social engineering feeds upon itself by demanding "solutions" which rapidly become problems, for which further "solutions" are then prescribed. If Mr Ellicott had maintained his mid-1970s opposition to the Federal Court idea there would probably have been no need for Byzantine "cross-vesting" laws in 1987. At the time J M Spender, QC told Parliament that the demand for that legislation arose "just after the Federal court system had been set up".[28] The constitutional validity of cross-vesting is now in the balance after an equal division of opinion in the High Court this year.[29] In any event, federal-State cross-vesting does not work fully and freely in each direction. Why not give the State courts an "accrued jurisdiction" with respect to federal matters which relate to actions within *their* normal jurisdiction?

Judicial review or second guessing?

The *Administrative Decisions (Judicial Review) Act* empowers the Federal Court to examine allegations of legal irregularities in decisions of Commonwealth officers and agencies with respect to Aboriginal councils and associations, child support, defence force discipline, export licensing, extradition, immigration, the Northern Territory land rights legislation, race and sex discrimination, the securities industry and various other topics, some of them highly politicised.

In May this year *The Australian Lawyer* noted with fashionable disapproval a complaint of the Minister for Immigration about Federal Court judges who, in his view, were "employing judicial activism in immigration and deportation matters ... re-interpreting and rewriting Australian law". No doubt the Minister had in mind the extraordinary *Teoh Case.* There, after the primary judge rejected a challenge by a convicted drug dealer to a deportation order, three of his brethren (Black CJ, Lee and Carr JJ) allowed Teoh to change his legal tune and to rely on two new points: (1) a United Nations' decree about "The Rights of the Child" which had never been carried into Australian law; and (2) the fact that in this country he had fathered ex-nuptial children by the *de facto* wife of his deceased brother. It was then held that Teoh had a "legitimate expectation", based on the UN document, that he would be allowed to stay in this country, although he (and the immigration officials) had never heard of "The Rights of the Child" until his lawyers belatedly discovered that pious document. The decision dismayed both sides of federal politics, but it was endorsed by a High Court majority comprising Mason CJ, Gaudron, Deane and Toohey JJ.[30]

For reasons including the highly discretionary character of much of its jurisdiction, and the *doppelganger* role of a number of its judges in the Administrative Appeals Tribunal (which is actually authorised to second-guess government decisions), the Federal Court's notions of judicial review tend to be less disciplined than legally they ought to be. There is a widening gap between its approach and that of our long-standing courts of common law. Accordingly, serious students of judicial review are more likely to be enlightened by Supreme Court decisions than by the lucubrations of the Federal Court.

The point is that judicial review (by a single judge) is supposed to be a narrower inquiry than an appeal, in the true sense, to a court of three or more judges. On judicial review, issues of fact are not to be revisited and the focus should be strictly confined to suggested errors of law. It is true that there is some room for manipulation by treating matters of fact as questions of "law", but generally State courts show due restraint and observe the vital difference between judicial review and second-guessing the original (non-judicial) decision-maker.

After all, this distinction is an aspect of the much admired separation of powers, designed to prevent the judiciary from becoming involved in politics and the work of the public service. Judges zealously invoke the "separation" when they believe that the legislature or the Executive is trespassing on *their* terrain. But in the High Court in 1990 Sir Anthony Mason felt bound to give the Federal Court a sharp reminder of the proper limits of judicial review.[31] When such a judicial imperialist rebukes judicial imperialism, the rest of us can but listen in a posture of deep respect.

Oddly enough, the grand libertarian sweep of cases like *Teoh* is not always to be seen when citizens' common law liberties are in question. There is a legal presumption that safeguards such as the privilege against self-incrimination can only be removed by the clear and unambiguous words of Parliament. But at least two Federal Court decisions have arrived, by tortuous and far from compelling reasons, at the conclusion that in certain federal statutes privilege has been "impliedly" abrogated.[32] When politicians and civil servants are not prepared to be candid about such things, it ill behoves the judiciary to complete their insanitary work for them. A young court in which the central government is a constant litigant (and its officers a fertile source of judicial preferment) should be especially careful of appearing executive-minded.

The Native Title monopoly

By 1993 the empire-building potentialities of the *Trade Practices Act* were on the wane. The new jewel in the imperial-judicial crown is a monopoly of property claims under the *Native Title Act.* Aborigines may make claims based on common law alone in State courts, but they will be few and far between.

It is remarkable that the States have so tamely accepted this situation. Recent amendments to the *Native Title Act* have restored State control of development applications with land subject to claims. Why not do the same with actions brought to *prove* such claims? After all, native title is not statute law of the Commonwealth; it is common law. The High Court said as much when it made its momentous discovery in 1992. Most of the land involved is State land. Native title is an aspect of land law, and that is quintessential State law. There simply is no reason why the twenty-two year old Federal Court should have the power over State lands that the *Native Title Act* has awarded to it.

The vague and discretionary character of much Federal Court jurisprudence engenders legal uncertainty and judicial activism. In its present state, the law of native title is made for trend-setting or self-important judicial legislators. Federal Court judges are appointed in a place, and by unknown people, remote from the main professional centres, and most of the present incumbents were selected by or for governments of one political complexion. Its membership intersects with that of socio-political agencies such as the Northern Territory land rights commission, which seldom if ever rejects a claim. Such institutions tend to be selected and "socialised" by the cause which created them. There are people who would relish the limelight of hearing native title cases, who attach little importance to the tradition that judges should eschew publicity-seeking and public political stances.

Native title cases should be widely distributed among judges appointed by various governments to our long-established courts of general jurisdiction. Just as it is easier for electors far from the practicalities of native title claims to be highly enthusiastic about them, it may be easier for peripatetic judges chosen in Canberra to endorse them. Students of native title should spend less time on speculative theory and more time observing those who are appointed to hear the crucial early cases, what they treat as credible evidence, and the orders that they make.

Let there be no illusions about where the main power resides. It will be exercised less by courts of appeal than by judges sitting alone. There is no more autocratic function than fact-finding by a trial judge. It must go badly and very plainly wrong before there is much chance of changing it on appeal. The vaguer and more opinionated the evidence — and evidence in native title cases will often be of that kind — the easier it is for judges of appeal to play Pontius Pilate

and intone: "We can see no basis for interfering with his Honour's findings of fact. He had the advantage of seeing and hearing the witnesses". Single-judge decisions about vast tracts of land will usually be the *alpha* and the *omega*.

A former Northern Territory land rights commissioner has already decided the Croker Island "sea rights" case, and the same gentleman dealt with the claim of the Yorta Yorta group to valuable land on the NSW-Victoria border; judgment in that case was reserved on 15 May, 1998. Press reports suggested that the Croker Island judgment was expedited to coincide with the climax of the Senate debate on the *Native Title Amendment Bill* 1998. According to a statement by counsel in a case of *Fejo* (now awaiting judgment in the High Court), the same judge is dealing with a novel claim to government-owned freehold land. Apart from French J (President of the Native Title Tribunal), a short list of judges involved in early native title cases of substance includes Olney, Carr and Lee JJ. In the end, native titles and related compensation will depend on the fact-finding of trial judges, and on settlements influenced by just how "special" their treatment of claimants' evidence is seen to be.

In its 1996-97 Report the Federal Court is keenly aware of the power it can wield under the *Native Title Act.* Thirteen *NTA* actions were lodged in 1994-95, another twelve in 1995-96, and a further eleven in 1996-97. In the latter period the Court also dealt with five native title matters by way of judicial review, and four appeals from the Native Title Tribunal. In the Kimberley region, evidence in a matter of *Ward* occupied twelve weeks, and the Court expects twenty such cases per annum from now on.

Will the Court find its true destiny as the hierophant of *Mabo* and *Wik,* which offer far greater scope for fertile imaginations than the "misleading and deceptive" formula? How often and how deeply will it draw upon intuitions of "contemporary values", or the views of a notional "international community"? As cases wend their leisurely way through the Federal Court, the empty vessel of native title will gradually be filled — but with what libation?

> "All of us know that the legal and political issues to be addressed are daunting. As it stands, native title confers vaguely defined rights on vaguely defined groups of people to undertake vaguely defined activities on vaguely defined pieces of land. And if you think it is any more concrete than that, you haven't tried to work through the issues involved".[33]

Lateral and vertical arabesques

There are two crucial omissions from modern homilies on judicial independence by Sir Gerard Brennan and others. One is the reflection that, if judges want politicians and public servants to respect judicial territory, judges should do their best to avoid legislating or acting as administrators in the name of judicial review. There is also a strange silence about the decline of the tradition that "justice without fear or favour" is best served by minimising promotions from one court to another and making it clear that one's first judicial appointment will in all probability be the last. Perish the thought that upwardly mobile lawyers will be encouraged to see their first "elevation" as just a step on an elite public service ladder.

Nevertheless, the Federal Court era has seen a remarkable proliferation of judicial promotions, lateral arabesques and intermingling of judicial posts with membership of sub-judicial tribunals. To their credit, Ellicott and David Jackson JJ simply left the Federal Court and returned to the Bar. One early appointee to the Family Court did the same, freely if not always fairly regaling friends with epigrams and anecdotes about "a ******* court and a ******* Act".

Mr G E (Tony) Fitzgerald stepped down from the Federal Court and soon afterwards received a Royal Commission, followed by two senior judicial appointments. Other performers of lateral or vertical arabesques are Sir William Deane (NSW Supreme Court, Federal Court, High Court), Michael McHugh (NSW Supreme Court, High Court), Michael Kirby (Industrial Court, Federal Court, NSW Supreme Court, High Court), Alistair Nicholson (Victorian Supreme Court, Family Court, Federal Court), Richard Cooper and Susan Kiefel (Queensland Supreme Court,

Federal Court), Jane Mathews (NSW District Court, NSW Supreme Court, Federal Court), C W Pincus (Federal Court, Queensland Supreme Court), John von Doussa (South Australian Supreme Court, Federal Court) and Margaret Beasley (Federal Court, NSW Supreme Court). Publicly funded and chauffeured cars (not generally available to State judges) are said to be one virtue of a sidestep to the Federal Court, and freedom from criminal work another. The status of annexed commercial work may be counted as a third.

How are these translations and elevations arranged? In this age of frantic self-promotion it is seldom that some guardian angel taps a quiet achiever on the shoulder to say: "Well done. Come ye to a higher place". Touting by judges or judicial aspirants is of course unthinkable, but an academic lawyer-cum-barrister with an eye for the main chance may have the answer:

> "It's at least as important to know the bureaucrats as the politicians. It's usually the bureaucrats who put up the names".

A culture of judicial promotion facilitates appointments of mediocrities and political friends to the higher courts. First confer some minor appointment which lawyers and other observers either do not notice or do not much care about. Then later, when people are used to hearing the favoured one called "judge", move him up a grade or two. How could a judge not be worthy to be made a judge again? It is a self-proving theorem.

By the mid-1990s the Federal Court was firmly if unofficially established as the waiting room for High Court hopefuls, although its jurisdiction is a patchwork of civil matters narrower than Supreme Court experience, "accrued jurisdiction" notwithstanding. Justices Brennan, Deane, Toohey, Gummow and Kirby moved directly or indirectly from the Federal Court to the High Court. Gaudron J held a minor federal industrial post before her appointment as Solicitor-General to a NSW Labor administration. The recent appointments of Chief Justice Gleeson from the NSW Supreme Court and Ian Callinan from the Queensland Bar are a temporary setback to Federal Court rights of succession, although it is an open secret that the vacancy filled by Callinan almost went to John von Doussa of the Federal Court.

A fair amount of "cross-dressing" also occurs. Federal Court judges often hold other appointments, not all of them quite compatible with judicial office. The most common "second hat" is presidential membership of the Administrative Appeals Tribunal, a body which revisits government decisions free from the disciplines of regular courts of appeal. At least three members of the court have brought the title "Justice" to the investigative and advisory post of Commissioner under the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act* 1976. A former judge-cum-Commissioner (John Toohey) wrote the most imaginative opinion in *Mabo*. His brethren have subsequently tiptoed away from some of its higher speculations.

Alistair Nicholson is a Federal Court judge and Chief Judge of the Family Court. Robert French is foundation President and keen promoter of the National Native Title Tribunal. Jane Mathews, who conducted the second costly inquiry into the Hindmarsh Island affair, is a Deputy President of the National Native Title Tribunal. Her Hindmarsh assignment ended when the High Court decided that it was so incompatible with judicial office as to be constitutionally invalid. According to the Federal Court's Internet page, Marcus Einfeld enjoys the most exotic "extras" — part-time appointments to courts in Dominica and the Eastern Carribean.

It is not suggested that all "outside" appointments are incompatible with judicial office. But they are uncommonly common in the Federal Court, and some of them relate to single-issue bureaux with socio-political agendas. Jack Waterford, editor of *The Canberra Times* and a man well placed to observe the Canberra-anointed elite, recently confided to a conclave of administrative lawyers:

> "The executive government can too often be criticised for putting into ... tribunals ... enthusiasts for the theory of particular legislation who are almost congenitally incapable of clothing their decisions with even a veneer of objectivity or impartiality. That some of the worst offenders are, for other purposes, members of the judiciary, and thereby invest their

decisions with the appearance of the authority of the courts, makes the problem even worse".[34]

What happened to judicial self-restraint?

The traditional self-restraint of judges in matters of politics and personal publicity is less pronounced in the Federal Court. While only a minority is involved, the events are frequent and florid enough to suggest that remote and discretionary adjudication is a heady cocktail.[35]

The extra-judicial utterances of Justice Michael Kirby (Industrial Court, Law Reform Commission, Federal Court, NSW Supreme Court, High Court) are so abundant that readers are left to gather blossoms as they please. One could begin by savouring a triumphant *conversazione* with impressionable law students on 23 May, 1997:

"I want to tell you how it came about that I was appointed [to the High Court]. ... As I was sitting there my Associate ... came in with a little yellow sticker. It had a note on it, 'Please phone Mr Lavarch' [a junior Brisbane solicitor, then federal Attorney-General] ... I knew my life had changed. From the President of the NSW Court of Appeal I was to become a Justice of the High Court ... I had previously thought that the time for my appointment to [it] had passed".

Was further promotion possible? "I ask you to note that two predecessors went on to become the Governor-General of Australia". Meanwhile, unspectacular toil on the High Court is "the price for the honour and glory of being the fortieth of the forty Justices in the history of the court". It was left to P P McGuinness to inquire: "When is he going to stand for political office"?

Justice Murray Wilcox joined the court in May, 1984. In October, 1993 his book *An Australian Charter of Rights* was launched by Michael Kirby. *The Australian* reported a concomitant "attack" on Australia's human rights laws as inadequate to prevent "discrimination" and a potential "international embarrassment". (The views of a notional "international community" are now standard weapons in domestic politics.) Wilcox was quoted as saying that "Parliaments and the common law [are] not doing their jobs". In particular, they did not do enough to extirpate racial and sexual discrimination or to protect homosexuals. Kirby agreed that Parliament was "spineless" in such areas.

There was a more spectacular Wilcox appearance in February, 1996 at the height of a federal election campaign. In what the national daily termed an "extraordinary intervention", the learned gentleman gave "a series of interviews" in which he roundly criticised the Coalition's plans to amend "unfair dismissal" laws. His Honour's contribution to the political hurly-burly provoked Peter Reith, MP to express his "absolute amaze[ment] that a Federal Court judge ... should deem it appropriate to make a political entrance into the ... campaign on behalf of the Labor Party".

In April, 1998 Wilcox presided at an appeal to the full Federal Court in the Patrick Stevedores - MUA litigation. It was an opportunity to rebuke journalists for mentioning the career of the trial judge (North J) as an advocate for trade union parties.

We have seen that the Family Court was originally intended to be part of the Federal Court. Under its first leader the new and highly discretionary divorce tribunal set about "developing" its Act with a will, finding implications that its sponsors did not foresee, or were astute enough not to mention in public or parliamentary debate.

Initially the new "family" law was presented as *sui generis* and largely independent of any pre-existing legal culture. However, a number of chastening experiences with the rules of natural justice,[36] and certain other setbacks, nudged it closer to the mainstream. One concession to tradition was the adoptions of wigs and gowns — a vesture, indeed, more elaborate than the Federal Court's, not to mention the High Court, which now arrays itself like the US Supreme Court, *sans* wigs, *sans* neckbands, and in fine republican style. Alistair Nicholson, second leader of the Family Court, made two unsuccessful attempts to enter Parliament before serving briefly as a judge of the Victorian Supreme Court. From there he moved to the Family Court, and in February,

1988, in what may have been a gesture of reconciliation by a self-consciously superior institution, he was given an additional commission as a judge of the Federal Court.

In August, 1993 Nicholson publicly attacked critics of the *Mabo* decision, and simultaneously lectured politicians about child poverty, a subject peripheral to his official duties. Four months later he was the subject of a "feature interview" in the national press, presenting him a trifle equivocally as "one of the country's most outspoken and controversial judges", regarded by his colleagues "as being something of a publicity hound". In February, 1995 all his political skills were needed to subdue a serious potential embarrassment for his court. A lady who became a member of it after brief and unremarkable stints as a junior barrister was the subject of an appeal for bias. The particulars of the allegation were (shall we say) unusual. An aggrieved litigant claimed that the judge was currently and intimately associated with a lawyer acting for the other party. Attorney-General Lavarch declined to break the official silence, merely endorsing Nicholson's expression of "utmost confidence in her integrity and competence".

Of course, something had to be done about it on appeal, but the most informative report of the matter remains an unofficial one in *The Sydney Morning Herald* of 23 February, 1995. The *Herald* noted later that:

> "…..what astonished family lawyers [at the time] was Nicholson's reaction. Before the appeal he circulated a letter to other judges expressing his full support and took no action against her".

In July, 1995 Nicholson embarked on the perilous seas of immigration politics when he condemned the detention of illegal entrants in "virtual concentration camps". Labor's Immigration Minister Bolkus, not known as a severe critic of immigration irregularities, accused his Honour of talking "emotional and sensationalist nonsense". A few months later Nicholson advocated the insertion into Australian law of a Torres Strait Islander custom whereby "half the children born on the islands are given [away] to extended family members". After all, he added provocatively, Aboriginal laws had been "treated with disdain" for more than 200 years. In the Brisbane *Courier Mail* a citizen deplored the prominence given to "bizarre and grotesque social theories of so-called reformers like Justice Alistair Nicholson" and the "omniscience of the socialist aristocracy".

In May, 1997 Pauline Hanson, MHR was well and truly on the political scene. *The Australian* and *The Sydney Morning Herald* reported that Nicholson, not content to leave anti-Hanson politics to people unhindered by judicial office, declared that her only appeal was to "bigots" and "disgruntled, dysfunctional people"; for good measure there was a reference to Nazi Germany. The press noted that "Nicholson's strident criticisms are the first made by a judge of the nascent One Nation party".

"Dysfunctional" is a psychological buzz-word among family law *cognoscenti,* and two years earlier Nicholson used it against a "fathers' group" which dared to question the fairness of his court. The critics were summarily dismissed as "dysfunctional, strident, unrepresentative and often irrational". A *Sydney Morning Herald* reader made so bold as to ask:

> "Why does Justice Nicholson feel compelled to be a political and social commentator, and not exercise the reserve normally associated with judicial officers? He should make up his mind to be either a judge or a politician".

Undaunted, Nicholson returned to the headlines in June, 1997 as an international critic of the Howard government's response to the Wilson-Dodson report on Aboriginal "stolen children". He told a family law conference in California that, if the government did not immediately and officially apologise, "the issue would smear Australia's international reputation". He went on to offer gratuitous legal advice on the country's liability to pay compensation. On the same occasion Mick Dodson, an author of the report, accused Australians of genocide.

That was too much for a normally indulgent media. On 9 June, 1997 the judge's political forays provoked hostile editorials in the Brisbane *Courier Mail* and *The Australian.* The latter had this to say:

> "[These statements] raise fundamental questions in John Howard's mind over the commitment by some members of the bench to the proper relationship between the government and the judiciary. [This judge is] on notice that the Coalition's patience is running out ... Concerns over Nicholson's behaviour have been raised by several senior government figures ... [convinced] that some judges are wilfully flouting the doctrine of the separation of powers in the interests of advancing specific political causes ... At the most senior levels of government there is a belief that some [federal] judges are having an each-way bet. ... In San Francisco this week Nicholson flagrantly broke the conventions ... Despite the low artifice of Nicholson's disclaimer, his remarks are clearly highly politically charged. .... Privately, senior government figures don't mince words about [him]. They make the point that the Family Court is an administratively troubled institution subject to breakdowns in community confidence. 'Perhaps Nicholson should stay at home and look after the shop', says one of the Coalition, 'instead of travelling half way round the world to launch an attack on government policy' ".
>
> The Brisbane editorialist was equally trenchant:
>
> "Only last month the Chief Justices of the State courts issued a statement defending the independence of the judiciary. ... In this climate it is impossible to understand why two senior federal judges [Nicholson and Sackville] have taken it upon themselves in recent weeks to make out of court statements which were essentially political ... Nicholson ... has no role as protector of children generally or of Aboriginal children in particular. While he said he did not want to get into politics that is precisely what he did by volunteering to discuss a highly contentious political issue. ... Australian federal courts are constitutionally unable to give advisory opinions. Their judges should not do so either, particularly on issues which could possibly come before their courts .... claims over stolen children and over native title may both have to be determined in the Federal Court".
>
> A week later *The Australian* revisited the subject:
>
> "The more often it is done the less newsworthy it becomes, but it may be the reputation of an impartial judiciary that suffers, not just a publicity-seeking judge".
>
> And elsewhere in the same issue:
>
> "Nicholson, whose newspaper file bulges with 'Chief Justice Hits Out' headlines, suddenly found himself out in the cold with many of his fellow judges and lawyers over his outburst ... [Even Justice] Kirby said it was 'better and wiser' for judges to leave such issues alone ... It is understood that Nicholson's staff were among the first people to ring Kirby's Canberra office on Thursday, seeking clarification [of that comment] ... Kirby maintained a discreet silence .... There are those in legal circles who now wonder whether his compulsion to speak out on issues other than those directly affecting the Family Court is beginning to devalue his utterances ... One side [is a] cherubic, snowy haired people's man ... The reverse side ... is steely, calculating and sometimes contemptuous".
>
> *The Sydney Morning Herald* returned to the fray:
>
> "It has been a rough year for Alistair Nicholson ... this time he may have gone too far. His recent attack on the Howard government for its failure to apologise to Aborigines has been condemned in newspaper editorials and has attracted widespread public criticism, perhaps most strikingly from Michael Kirby who warned: 'People elect politicians, not judges' ... An eminent Melbourne lawyer says: 'I got up the other morning and there he was again making headlines' ".

That was not the end of it. In May, 1998 Nicholson reappeared as "Victorian patron of Sorry Day", calling upon all courts that had been involved with "stolen children" to apologise copiously and forthwith. He did not say whether his own court was in the danger zone.

Ronald Sackville, a former university lecturer with excellent Canberra connections, was appointed to the Federal Court in September, 1994 soon after he produced another inconsequential report on defects in the legal profession. By June, 1997 he was at odds with the new federal government over public criticism of the Prime Minister's "Ten Point Plan" to amend the *Native Title Act.* It was, he said, "ambiguous and incomprehensible". This earned him a supporting role in editorials condemning Nicholson's San Francisco performance:

> "At the very least Sackville's comments are precipitate. At worst they are improper. ... Sackville's *Wik* commentary has prompted some in the government to remember that he was commissioned by ... [ex-Attorney-General] Lavarch to write the report that led to Lavarch's ministerial statement on access to justice. 'It's unlikely he's a staunch Coalition supporter', says one government official. ... [T]he behaviour of Sackville and Nicholson, in the government's eyes, invites such retaliation".

The public persona of Justice Marcus Einfeld is effusive and occasionally lachrymose in the style of a former Prime Minister. He has admirable if not always judicially-compatible connections with internationalist and "human rights" causes. In July, 1993, not content to leave the defence of *Mabo* to Sir Anthony Mason and sundry non-judicial enthusiasts, Einfeld unburdened himself to delegates at a National Baha'i Studies Conference. Australia, he declared, was at risk of being engulfed in "hate, racism and division" by people pursuing personal interests at odds with the High Court's innovation. Justice Brennan's efforts in *Mabo* were a greater contribution to Australia's progress than "any mining executive could ever hope to emulate". The next homily came in August, 1993. Australia was still rife with exploitation and inequality, and its parsimony in the matter of Aboriginal land claims was the "most truly damnable example of our failures in human rights".

It is not known how often his Honour will be rostered to hear cases under the *Native Title Act.*

August, 1993 seems to have been a time of more than usually intense socio-judicial concern. There was a flying visit to Toomelah, an Aboriginal community in north-western New South Wales. Readers of *The Australian* were treated to a large picture of the judge striding over a bridge arm in arm with Aboriginal women. Untroubled by back-country dust, and in vivid contrast to the desolate surroundings, his Honour was resplendent in double-breasted navy jacket, tie, slacks, and breast-pocket handkerchief. An attentive press corps which happened to be in the outback that day reported that the "outspoken Federal Court judge ... launched a scathing attack on politicians and business leaders for making 'outrageous racist' statements about Aborigines".

So impressed was the Brisbane *Courier Mail,* a stable-mate of *The Australian,* that it published an even larger picture of the crossing of the bridge by the sartorially splendid judge. Three weeks later Einfeld told an admiring student throng at the University of Western Sydney that many police were racists who should be never be allowed to have any contact with Aborigines.

At the Gold Coast in October, 1993 *Mabo* sceptics were due for further castigation. Eddie Mabo's name was "being darkened 'blacker than his skin' " by critics of the decision, including "two State Premiers" who were stirring up "xenophobia" [sic] by making outrageous misrepresentations.

In February, 1994 Einfeld captured the attention of a senior journalist, P P McGuinness:

> "Another notable political-judicial figure is Justice Marcus Einfeld of the Federal Court, who gives frequent speeches on political themes. He was a foundation member of the Human Rights ... Commission at the same time as being on the bench; that organisation was and still is deep into political activism and propaganda ... The danger is that if the whistle is not

blown on the likes of Kirby, Evatt and Einfeld it will not be long before one of them, or someone of similar inclinations, finds his or her way on to the High Court and makes a joke of the division of judicial and executive powers".

In March, 1995 the Einfeld message (enhanced by another posed photograph) was that the Australian government lacked the will to punish Nazi war criminals lurking amongst us. In the following July *The Australian* published results of a lawyers' opinion poll on "The Best and Worst of the Bench"; judges sitting without juries and in the absence of the press have lawyers and litigants more or less at their mercy. Justice Margaret White of the Queensland Supreme Court received high praise. There were no prizes for Mason CJ and Gaudron J of the High Court, or for the Federal Court's Einfeld and Anthony Whitlam JJ.

In August, 1995 Einfeld had to deal with a delicate politico-legal dispute. The Aboriginal and Torres Strait Islanders Commission (ATSIC) had a *contretemps* with another entity of undoubted political correctness, the federal Ombudsman, who had prepared a report sharply critical of ATSIC's handling of a project for the New Burnt Bridge Community near Kempsey (NSW). ATSIC won a temporary order forbidding publication of the report. But there was much publicity, and permanent suppression was not a political possibility. In March, 1996 it eventually saw the light of day. The proceedings commenced in September, 1992.

In October, 1995, *apropos de bottes,* Einfeld declared that Australians were still paying for the mistakes of bankers and governments in the 1980s. After an obscure reference to America's O J Simpson trial, we were exhorted "not to lose sight of the values which sustain us". Perhaps judicial abstinence from politics is one of them.

In January, 1997 there was an extra-judicial order to embrace cultural diversity, and amid ritual denunciation of Pauline Hanson, his Honour's "old friend" John Howard was warned that he must do a much better job of discrediting her cause.

In June, 1997 a highly excitable member of the National Native Title Tribunal attacked the government's proposals to amend the *Native Title Act* and was obliged to fall upon his sword. (For other adventures of the quasi-judicial gentleman see Volume 7 of this Society's *Proceedings* at page 117.) Einfeld J declared that the political outburst was perfectly acceptable. Clearly his brother French, President of the Tribunal, did not agree.

Six months later the Australian government was still a grievous disappointment to his Honour:

"We expect strong moral and passionate leadership ... Instead, we have witnessed blind following of every public opinion poll".

However, on Queen's Birthday, 1998 the same government, on behalf of a grateful nation, granted him another decoration. *The Australian* hailed a man who had "devoted a large part of his life to trying to make the world a better and fairer place". *The Sydney Morning Herald* was no less sedulous and offered another photograph in noble pose.

All this may be excellent and admirable in its own way, but is it a set of precedents which our best Chief Justices would approve? Perhaps it is only the remoteness of the Federal Court from the public that has prevented some of these events from doing more harm to perceptions of the judiciary. In May, 1995 *The Australian* observed with a discreet absence of detail:

"A significant number of learned fools sit on benches throughout Australia, as do demagogues, ideologues, and self-promoters ... let judges [concentrate on] judging".

A peculiarly remote institution

There is now widespread concern about the remoteness of governments and political parties from the people they purport to serve. We do not suggest that judges must be as accessible as politicians in marginal seats at election time, but they should have a real connection with the community and the legal profession. The looser and more discretionary law becomes — the more that the rule of law becomes the rule of judges — the greater the need for closer connections between judges and a

specific community. The Federal Court, after all, is essentially a trial court; indeed, it is less specialised on the appellate side than the Supreme Courts of New South Wales, Queensland and Victoria.

When a State government makes a "political" appointment, the profession and the Press tell us about it, even if nothing can be done apart from hoping that the government will be more responsible next time. No such discussion of a Federal Court appointment is ever heard, although seventy or more such appointments have been made since 1976. Some will say that this is a mark of perfection, but it stretches faith to breaking point to suggest that every appointment to that court would survive close professional scrutiny.

The first visible notice of a Federal Court appointment is often a belated and conventional eulogy in some professional journal. The glad tidings come as a *fait accompli* from Canberra, and too often the name of the anointed, when it filters through, leaves lawyers vaguely asking, "Who?" It is unlikely that a State government would imitate the appointment from Canberra backrooms to federal tribunals of a husband and wife with little experience of actual practice or the conduct of cases in court. For better or worse, our legal professions are concentrated in the State capitals; they can keep some sort of check on judge-making there, but not in the backrooms of Canberra.

The remoteness of central government is exponentially greater in the judicial branch than in the others. There is a reputable school of thought which seeks more transparent and consistent processes for judicial appointments, but Federal Court selections are made more remotely and more obscurely than most others in this country. Perhaps frequent disregard of the custom of political self-restraint is a symptom of a court too far removed from mainstream professional cultures.

None of this is to deny that in any court the *ad hoc* process of appointing judges advances some individuals who, whatever their academic ability, are so deficient in judgment, courtesy or common sense that one shudders at the thought of kith and kin at the mercy of their assessments of human nature and its affairs. But with State appointments, particularly in the smaller States, there is a better chance of regular *rapport* between the judiciary and the people in its power.

The Federal Court was imposed. There was no broad-based public or professional demand for it, and perhaps it is only the quiet gradualism of its empire-building that has averted serious questions about its place in the legal firmament. It symbolises rule from above, and a suspicion that people outside Canberra, and traditional courts, cannot be trusted to apply federal laws to the satisfaction of the federal elite.

The little tidying-up exercise of 1976 is out of hand. It is becoming harder and harder to find things around the legal house. On Brisbane's North Quay, the post-1976 judicial empire finds its physical expression in architecture which reminds one of the worst excesses of Mussolini Gothic or Stalin Baroque. If we really do need a Federal Court, it should be more like Peter Durack's naive painting of it twenty-two years ago — legally predictable, much smaller, and much less intrusive.

Endnotes:

1. Black (CJ), Northrop, Gallop, Davies, Lockhart, Beaumont, Wilcox, Spender, Gray, Burchett, Miles, Ryan, French, Einfeld, Foster, Nicholson, Lee, Olney, Von Doussa, Hill, O'Loughlin, O'Connor, Higgins, Heerey, Drummond, Cooper, Whitlam, Carr, Moore, Branson, Mathews, Lindgren, Tamberlin, Sackville, Kiefel, Nicholson, Finn, Sundberg, Marshall, Lehane, North, Madgwick, Merkel, Mansfield, Goldberg, Emmett, Finkelstein, Guidice and Weinberg JJ.

2. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p.589.

3. *Ibid.,* p.611.

4. *Ibid.,* p.626.

5. *Ibid.,* p.635.

6. *Ibid.,* p.650. Quick, LL D (Melbourne) was co-author with Sir Robert Garran of the *Annotated Constitution of the Australian Commonwealth* (1901).

7. *Ibid.,* p.733.

8. Hughes' machinations in this matter are outlined in G Fricke, *Judges of the High Court,* Hutchinson of Australia, 1986 at 59-61.

9. *Commonwealth Parliamentary Debates (HR)* (1903),Vol. 13, p.703.

10. *Ibid.,* p.812.

11. *Queensland Parliamentary Debates* (1874), Vol. 16, p.85; on the history, politics and polemic of the old professional class system, see J R Forbes, *The Divided Legal Profession in Australia,* Law Book Company, 1979.

12. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p. 592 (Alfred Deakin).

13. Fricke, *op. cit.,* p.11.

14. The writer has a vivid recollection of an aspirant for a federal judicial appointment in 1975-6, with little or no relevant practical experience, energetically lobbying at legal symposia at which he/she undertook a crash course on the legislation which he/she soon hoped to apply, augment and alter.

15. Fricke, *op. cit.,* pp.21, 25-27, 30, 34; R R Garran, *Prosper the Commonwealth*, Sydney, Angus & Robertson, 1958, p.170.

16. A J Hannan, *The Life of Chief Justice Way,* Sydney, Angus & Robertson, 1960, pp.216-217.

17. *Commonwealth Parliamentary Debates (HR),* Vol. 101, p.2110.

18. Quoted by A Whitlam, *ibid.,* p. 2539.

19. *Commonwealth Parliamentary Debates (HR),* Vol. 101, pp.2110-2111.

20. *Ibid.,* pp.2492, 2535 (Lionel Bowen).

21. *Ibid.,* p.2539.

22. *Commonwealth Parliamentary Debates (Senate),* Vol. 70, p.1953.

23. *Ibid.,* p.2473.

24. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p.703.

25. *Philip Morris Inc v. Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v. Muller* (1983) 152 CLR 570; *Burgundy Royale Investments v. Gold Coast Securities* (1987) 76 ALR 173.

26. *Stack v. Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

27. *The Freedom Rider's Supreme Court,* in *The Sydney Morning Herald*, 16 May, 1998.

28. *Commonwealth Parliamentary Debates (HR),* (1987), Vol. 153, p. 869. See also at 873 (Philip Ruddock and Family Court "overlaps".)

29. *Gould v. Brown* (1998) 151 CLR 395.

30. (1995) 183 CLR 273.

31. *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 341.

32. See for example *Stergis v. FCT* (1989) 89 ATC 4442 and *Australian Securities Commission v. Kutzner* (1997) 16 ACLC 182.

33. Paul D'Arcy (Senior Adviser, Shell Australia), *Beyond Wik — Making Native Title Work,* Policy, Vol. 14, No 2, Winter, 1998, p.35.

34. Jack Waterford, *Administering Administrative Law* in L Pearson (ed.) *Administrative Law: Setting the Pace or Being Left Behind*, AIAL, Canberra, 1997, p.92.

35. In order to spare the editor an even more onerous task the full references which relate to this part of the paper are omitted or briefly indicated in the text. They can readily be supplied.

36. On the Family Court and elements of due process see, e.g*., R v. Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Renaud; Ex parte CJL* (1986) 60 ALJR 528; *Patsalou v. Patsalou* [1995] FLC 92, 580. In *Patsalou* the Family Court persuaded itself that the judge mentioned in *The Sydney Morning Herald* of 23 February, 1995 (see later text) who, off her own bat, used several sociological articles on the "effect on children of interspousal violence" without giving the parties a chance to reply, did not draw any conclusions from them, so that natural justice was not offended. There is, after all, a precedent of sorts for such privately gathered "evidence" in *Mabo.*

Chapter Seven

The People of No Race

Dr Colin Howard, QC

The title I have given to my address today perhaps suggests the recent discovery in some remote tropical mountain range of a tribe of anthropoids who may or may not be a new species of human being; or perhaps a thriller about outcasts.

Would it were so, but I am afraid not. All it does is make a contrast with a paper which I wrote for this Society two years ago titled *The People of any Race*. That was an analysis of s.51(xxvi) of the Constitution, which confers power on the Australian Parliament to legislate with respect to the "people of any race for whom it is deemed necessary to make special laws".

Earlier this year John Stone rang me up and recalled that paper to my mind. In particular, he mentioned my concluding paragraph, in which I expressed the view that an express power to make racially based laws should have no place in an Australian Constitution and that s.51(xxvi) ought to be repealed. I also anticipated that, ironically, the very people who conceive themselves to be opponents of racism would oppose repeal.

What John asked me to do today was to take up where I left off last time and develop the case for repealing the "race power". I am happy to do so.

I will start by considering the opposition to repeal that can be expected. It is likely to come from two quarters: people of goodwill who underestimate the complexity of the subject; and what I call the racism lobby.

As to the former, the greater part of this paper will be concerned with the complexities, but before that it is worth reflecting on the underlying attitude that so often prevents rational discussion of the subject and, in so doing, drives people to adopt extreme positions.

A moment ago I used the expression "racism lobby". That was not a lapse. I said that quite deliberately, because it seems to me to be beyond doubt that there are plenty of people in this country who make a comfortable living out of deliberately exploiting what they claim to be against, which is hostile discrimination on racial grounds, or racism for short. These are the people I describe collectively as the racism lobby.

They are not confined to any one political point of view or any identifiable segment of the population. They buy into any issue that can be labelled racist for what they can get out of it. This is usually money, or power, but often also the self-satisfaction of claiming the high moral ground. Such people flourish because the concept of racism has been allowed to develop into a powerful tool of censorship, otherwise known in the vernacular as a motherhood issue.

That is not unusual. It is just that the subject matter changes from time to time. Galileo Galilei underwent torture merely for pointing out that the Earth is not flat. On the whole things have quietened down a bit, at least in the western world, since the great days of religious bigotry, but the same basic phenomenon flourishes.

Many of you will remember the long and dreary post-War period during which rational discussion of Communism was an invitation to personal ruin, especially in America. More recently, and right here, we have had to endure a lengthy period in which any suggestion that some children are brighter than others, and should be educated accordingly, was guaranteed to attract a storm of indignant abuse from the education lobby.

So it is now with the major phobia of the second half of the 20th Century, racism. We cannot talk about it without fear of personal retaliation, unless we confine ourselves to parroting disapproving dogmas. I will give you two close-to-home examples.

Not very long ago John Stone and I both attended a dinner at which the guest speaker was a distinguished archaeologist who has an encyclopedic knowledge of Australian rock art. Somewhere in the Kimberley region, or thereabouts, he inspected some rock paintings and concluded that they were not Aboriginal, but pre-Aboriginal by many thousands of years. The implications of this discovery seemed, and seem, to me to be enormous. The same thought evidently occurred to John, for when question time arrived he attempted (twice, I think) to elicit a response from the speaker along those lines.

The chairman, who was a distinguished professional in his own right, also a friend of mine, and the last person to be swayed by political correctness, ruled John's question(s) out of order as political. In so acting, I have no doubt that he was seeking to shield the speaker from possible embarrassment. Nevertheless I found it depressing, although understandable, that we are now in such a state of affairs that embarrassment can arise from so worthy and scholarly a cause.

My other example concerns my namesake, Mr John Howard, who of course differs from me in that he happens to be the Prime Minister, and Mrs Pauline Hanson. You will recall that when Mrs Hanson sprang her maiden speech in Parliament on an astonished country, Mr Howard was widely, and in my opinion very unfairly, criticised on the ground that he had not dissociated himself and his government firmly enough from Mrs Hanson's racist views.

I thought that was unfair, because Mrs Hanson was by then not even a Coalition MP, let alone a member of the Government, and the nature of her speech was such that Mr Howard would have been entitled to treat it as beneath contempt, unworthy of any response at all. As it was, he correctly observed, among other things, that distasteful though Mrs Hanson's views might be, she had a right to express them.

To my mind that demonstrated admirable restraint, not to mention clarity of thought, in a highly provocative situation. The significance of the event in the present context, however, is that the Prime Minister, no less, should be taken to task repeatedly because he declined the opportunity to make an inflammatory speech denouncing racism and, in particular, Mrs Hanson.

If Mrs Hanson had made the main focus of her address rabid and uninformed remarks about trade unions, it seems to me unlikely that Mr Howard's response would have attracted any comment at all. As it was, the widespread knee-jerk reaction illustrated yet again the formidable coercive power of the current *de facto* ban on discussion of racism.

The true ground of criticism of the Pauline Hansons of this world is not the subject matter of what they say but their manifest ignorance, their lack of any sense of proportion, and of course the unnecessarily offensive manner in which they are apt to express themselves. The fact that Mrs Hanson seems to have extreme views about race is not the point. She probably has extreme views about fish and chip shops as well, but nobody wants to censor them.

What I have said so far amounts to my first reason for advocating the repeal of s.51(xxvi) of the Constitution. The section operates to seriously discourage freedom of speech about a very important subject. It also seems to me, especially on its recent record in the native title context, to have been the vehicle for a great deal more discord than harmony.

The only two groups of people who have benefited in one way or another, usually materially, from the race power have been the racism lobby and, as usual, a small proportion of litigation lawyers. Not, of course, that I am blaming the latter for simply doing their job. It is an inevitability of life that much legal practice, just like medical and dental practice, depends on the misfortunes of others , even if it is only making a will. That, however, hardly seems a sufficient reason for actively promoting discord by means of s.51(xxvi).

I turn now to what I have termed the complexities of racially based laws. The most fundamental I need not deal with at length because it was the subject of my previous paper. It is that quite literally no-one, and specially not the High Court, knows what s.51(xxvi) means, because it is totally dependent on the concept of race, and nowadays nobody knows what that means either.

Our forebears a century or more ago, not counting enlightened scholars like Charles Darwin, had no problem. Race meant skin colour. Note that, contrary to modern preconceptions, that was actually a quite egalitarian concept. No distinction was drawn between colours. If it was necessary to distinguish between races who were the same colour, say Indians and Afghans or Chinese and Tibetans, secondary characteristics like language or geographical location might be added to the equation. Admittedly there does seem to have been a widespread perception that the darker you were the less white you were, but that, after all, was only logical.

There is in fact a reasonable argument that the modern phobia about racism is directed at the wrong target. The most cursory knowledge of history, and a quick look round the world at the present day, suggests that inter-racial strife in the 19th Century sense is not a problem. It is not a problem because the true causes of strife and oppression have nothing to do with race in the sense of skin colour or other determining physical characteristic.

Hutus and Tutsis are all the same colour, but that has nothing to do with their addiction to slaughtering each other whenever they have the opportunity. As in the former Yugoslavia, the relentless aggression feeds on ancient resentments, not race. The oppressive distinctions drawn in places as diverse as ancient Sparta, between Spartans and helots, and modern South Africa, between official whites and official non-whites, were not based on race for its own sake. They were simply structures created to enable a minority to monopolise power and wealth. In the spectacular South African case, so-called racial distinctions were openly adopted, and indeed carried to absurd lengths, but these were only machinery provisions which came in handy for creating the structure.

I am not for a moment indulging in the fantasy of supposing that there was not intense hostility along black versus non-black lines. Of course there was, as there invariably is when people from totally different backgrounds go to war with each other and the winners oppress and exploit the losers. In the case of South Africa, that situation was inherited from centuries of warfare and conquest, and nurtured by apartheid. Racial dissimilarities were not in themselves prime movers. As elsewhere, far more basic factors were involved.

I do not need to labour the point, but I should mention two other situations. One is the enduring legacy of slavery in the former British colonies which became south-eastern America. That too brought with it an oppressive distinction between black and white, with the difference only that in the end there were a lot more whites than blacks. But once again we find on closer inspection that the whole phenomenon did not originate in racial hostility for its own sake.

It originated in greed and commercial ambition. Slavery under various names is a very ancient institution, which has flourished in Africa as much as anywhere. The slave trade between West Africa and the Americas in the 17th and 18th Centuries was not a crusade against blacks because they were black. It was a sickeningly cruel commercial operation.

Lastly, there is the Nazi Holocaust. This is the major event, at least in modern times, which might be said to qualify as genuinely racially inspired, because its principal victims were tortured, enslaved and killed for no other reason than that they were Jews. That is true. It is also true that persecuting Jews is a long and disgraceful Central and East European tradition which history does not seem to me to satisfactorily explain. I can carry the matter no further.

That excursion into what seem to me to be the misconceptions involved in trying to explain human hostility by reference to the outmoded concept of race, exemplified by s.51(xxvi) of the Constitution, takes me to my second reason for advocating the repeal of that provision. This is that, as long as the race power is around, it will distract attention from the true causes of events to which it may be seen as relevant, and therefore also from consideration of the correct remedies.

As I said in my previous paper, the only way in which the nebulous and manipulable word "race" can be given precision is by accepting that in fact there is only one race, the human race, technically called *homo sapiens sapiens* to distinguish it from closely related earlier anthropoids

called *homo sapiens neanderthalensis*, *homo habilis* and *homo erectus*. If that be accepted as evolutionary fact, and I see no reason why it should not be, it means that s.51(xxvi) is meaningless and cannot support laws of any description, and for that reason too should be repealed.

A further reason is exemplified by a difference of opinion in the High Court which remains at the time of writing unresolved. This is whether s.51(xxvi) can operate only for the benefit of the so-called race to which the legislation applies. On the face of things there is not the smallest warrant for any such interpretation, because the subsection says nothing of the kind. It is moreover historical fact that the power was originally intended to be anything but beneficial.

Until altered by constitutional amendment in 1967, the race power could not support Commonwealth legislation with respect to Aborigines. The reason was twofold. On the positive side, the purpose of the power was to enable the Commonwealth to deal as it saw fit with what was seen as the "yellow peril", the perceived danger of the country being taken over by huge numbers of Chinese immigrants.

It seems to have been overlooked that if such a problem arose it could be dealt with under the immigration power. Perhaps the idea was that the Chinese who were already here would breed like rabbits and take the country over that way. Whatever the explanation, s.51(xxvi) originally had nothing to do with Aborigines.

All that the former exclusion of them signified was the negative decision not to remove legislative power with respect to them from the States. I note in passing that neither before nor since federation have the Australian Chinese shown any sign of breeding like rabbits or taking the country over. Like every other race-based apprehension, these fears were pure fantasy.

What is not fantasy is that what we now find exercising the High Court is the possibility of its giving its approval to a doctrine which would place a severe and entirely unwarranted restriction on the legislative power of the Parliament. As we have recently seen in the *Wik* debate, if s.51(xxvi) can operate only in favour of the people identified as a race, Parliament's capacity for amending the legislation is dramatically reduced.

All it would be able to do would be to add further benefits. It would be impossible to repeal the *Native Title Act* 1993, or even amend it in any way that diminished the benefits originally conferred, however urgently it required attention in the interests of other sections of the community. It is hard to believe that such an extraordinary doctrine could for a moment engage the attention of the High Court of Australia. It would make the race power unique in its gross distortion of both the legislative and the judicial functions.

That is my next reason for advocating the speedy abolition of s.51(xxvi). The situation we are now in is also an outstanding instance of the damage that fiddling around with race-based legislation can do, or at least threaten.

Race-based legislation usually claims a moral dimension which is often blatantly hypocritical. Malaysia and Fiji furnish current examples. Malaysian legislation confers employment preferences on native Malays, and in Fiji it is impossible for Fijian Indians to become a majority in Parliament, even though they are 51 per cent of the population. The Fijian situation may change as a condition of readmission to the British Commonwealth of Nations and the Queen's reassuming her Fijian throne.

The moral dimension involved does peculiar things to the way people think. I remember talking some fifteen years ago to a middle order member of the South African public service who had spent most of his professional life in the administration of the apartheid laws as they affected blacks. At that date apartheid was still going strong. I asked him what kept him in such a depressing occupation. He replied, in tones of positively overwhelming sincerity, that he and his colleagues did not regard their work as an occupation but as a calling.

All I could think of to say at the time was that that was a most interesting point of view which had never occurred to me. I nearly went on to ask him to which particular variant of the

Dutch Reformed Church did he belong, but decided that enough was enough. To this day I do not know whether his ludicrous sincerity was merely a pose or he actually did believe that he was doing God's work.

This aspect of race based legislation, the moral dimension, does not necessarily lead to hypocrisy. Our native title experience illustrates that. Although I have said already that there are plenty of people around who, in my opinion, are only too willing to exploit the situation in one way or another, I certainly do not believe that supporters of native title are by definition hypocrites. That would be a ridiculous proposition and not one that I would entertain for a moment.

What I am getting at is what I described a moment ago as the peculiar way in which racism seems to affect many people's habits of thought. I do not in the least doubt, for example, the personal sincerity of the six High Court Justices who created native title and upheld the *Native Title Act* 1993. I may perhaps be permitted to reserve my position on Mr Keating. He was after all a professional politician, and his sudden enthusiasm for republics and native titles, as opposed to French clocks and Siamese tables, may need no further explanation.

No, what struck me at the time, and still does, is the extraordinary character of much of the reasoning of the majority six judges in *Mabo v. Queensland [No.2]* (1992) 175 CLR 1. Its main characteristics, I am sure, are still familiar to everyone, particularly the truly remarkable version of our national history that they propounded, and the theory of inherited guilt. On that last point, I do not recall that they used that particular expression, but that is certainly what their view of the moral dimension amounted to.

To these oddities there can be added some unduly dramatic turns of phrase in the joint judgment of Justices Deane and Gaudron, and the wholesale departure from precedent on grounds which had, and have, nothing to do with the law of the land. The whole spectacle continues to astonish, especially when one reflects that the result was that our highest court went out of its way to create a racist law.

Surely that alone justifies the thought that the moral dimension of racist laws affects otherwise rational people in peculiar and unpredictable ways. That is my next reason for advocating the repeal of s.51(xxvi) of the Constitution.

Yet another arises from the very concept of a racist law. It is inherent in that concept that, if the law confers a benefit on a group identified as a race, by whatever characteristics are thought relevant, it simultaneously disadvantages everyone else. Exactly the same thing happens the other way round if the law is oppressive: everyone else is advantaged. If you have an elaborate structure like apartheid, you finish up with one group being advantaged by comparison with everyone else, another group which is oppressed by comparison with everyone else, and one or more groups in between who are simultaneously oppressed and advantaged depending who you compare them with.

It is high time that laws based on race be recognised for the irrational nonsense that they are. In saying that, I am in no way involving the good intentions or the moral dimension in which so much racial debate is immersed. I am simply pointing out that, as a basis for rational law making, race is of no utility whatever because it is inherently self-contradictory. An intended benefit along racial lines cannot exist in a vacuum, any more than can an intended oppression. Each immediately creates the other. Native title is no exception.

That is my next reason for advocating the repeal of s.51(xxvi) of the Constitution: that it is not, and can never be, a rational basis for making laws. A practical, as opposed to logical, consequence of that situation is a high likelihood that, contrary to the High Court's aspirations, such a power will promote discord in the general community rather than a somewhat mystical reconciliation.

I move now to my last separately identifiable reason for advocating the repeal of s.51(xxvi). This is that, as we have seen with native title, racially based laws are well capable of

encouraging separatist movements which demand independence. They are of course not in themselves the cause of such movements, which proliferate all over the world. The usual cause is actual or perceived oppression, but racist laws, whether well or ill intentioned, certainly encourage demands for independence.

Where the relevant laws are oppressive the motivation is obvious. Where, as with native title, the intent of the legislation is benign, it still encourages demands for independence, because at least a proportion of the beneficiaries will see the benefits as a good thing, but nevertheless merely the first step in a wider progress. The most vociferous advocates of this attitude are those who fancy themselves as latter day George Washingtons or Nelson Mandelas leading their people into a glorious future, which is all very understandable no doubt.

It does however have its downside, because there will also be a lot of people around who are not in the least pleased at the thought of dividing the country into two or more parts instead of leaving it intact. A spectacular example of what this sort of thing can lead to is the apparently endless civil war in Sri Lanka.

Now, I do not for a moment expect native title to lead to civil war in this country, or anything like it. But separatist sentiments do not have to lead to war, or even terrorism, to be unhelpful and productive of discord. Anecdotal evidence persists of the alarming extent to which remote parts of this country have apparently become “no go” areas for non-Aborigines since native title claims started to multiply.

I cannot personally vouch for the truth of such rumours, but I can and do say that I seem to have met a surprising number of people in the last few years who like taking bush holidays and have some very disquieting tales to tell. I believe it is unwise to simply dismiss these experiences as inventions, because an often belligerent sense of separate nationhood is a very natural consequence of a statute like the *Native Title Act*.

Whether it will ever develop into serious demands for a country within a country I do not know, but if s.51(xxvi) were not there, the likelihood would be that much less.

Chapter Eight

Importing Wooden Horses

Barry Maley

I am not the first speaker at our meetings to take as a theme the use, or misuse, of a mode of legal argument to reach conclusions congenial to the reformist ideals of the few at the cost of interpretive integrity, and confidence in the law, for the many.

I want to explore this tendency within the context of agitation by some for the entrenchment of species of human rights in this country. I will illustrate how ratified international human rights conventions have become a vehicle for the advancement of this tendency. And it seems to me, as an observer, that it is associated with rights enthusiasms in some sections of the judiciary in federal jurisdictions. I believe this is a more serious threat to our institutions than any failure to implement home-grown Bills of Rights or international human rights instruments.

In my opinion, some of these international rights conventions are flawed and dangerous. In some cases they would, if implemented, cause confusion and undermine existing rights which are fundamental to at least one of our institutions. I will later give some examples from the United Nations *Convention on the Rights of the Child.*

In thus reflecting on the effects of ratifying international conventions and importing their obligations, I was reminded of the Trojan Horse, a story or myth which, for over 3000 years of Western history, has stood as a warning against gullibility, subversion and folly. I would like you to bear in mind a few key features of the story.

You will remember that the abduction of Helen is said to have launched a Greek fleet in the direction of Troy, where the Greeks landed and laid siege to the city. But the Trojans, jealous of their independence, robustly and stubbornly foiled them for many years.

So, in desperation, the Greeks resorted to a stratagem. During the night, they pretended to abandon their siege. They put out their camp fires, struck camp, boarded their ships, put to sea, and waited out of sight.

Upon their departure, they left behind on the shore a massive structure in the form of a wooden horse, which piously bore a dedication to the goddess Athene. Our modern equivalent today would no doubt be a charter of human rights and an inscription calling for the elimination of all forms of discrimination.

The following morning the citizens of Troy gazed upon a deserted plain, occupied only by the solitary figure of the giant horse. As they came out to inspect it, the Trojans argued among themselves about its purpose and, in particular, whether it was a ruse by the Greeks. Some warned about Greeks bearing gifts, and the more sceptical drove a spear into its sides to see whether it might contain hostile invaders. But the Greek warriors inside, including the wily Ulysses, kept still and silent, remaining undetected.

Beguiled, fascinated, even flattered by what some took to be a gift in homage from the foreigners, the guardians of Troy accepted the horse and resolved to take it into the citadel. But it was so portentously large that part of the walls of the city had to be torn down to let it in. Having done that, the guardians took to their beds, leaving the horse within the city.

And you all know the rest of the story as, in the dead of night while all were sleeping, the flanks of the horse opened to release its burden of invaders who, joined by their compatriots now pouring through the opened gates, then set about destroying the city.

The rights movement and the courts

There are few more beguiling phrases than "fundamental human rights". It resonates with us, and mostly for good reasons. But, to the undiscriminating, it would seem that rights are always gifts to be embraced and incorporated. Especially so, in the view of many of our Platonic Guardians, when they are imported from the United Nations.

For example, in a recent lecture in the *Australian Senate Occasional Lecture Series*, Professor Hilary Charlesworth[1] of the Faculty of Law at the Australian National University, castigates those who are sceptical about U.N. committees bearing gifts of rights, and asks rhetorically: "Why should international principles be held at arms length"?

In a previous lecture in the same series, the Honourable Ms Elizabeth Evatt,[2] in recommending the *International Covenant on Economic, Social and Cultural Rights* as a model we should implement, declares:

> "Rights have to be turned into realities. For this we need to make provision for our courts, and in particular the High Court, to determine whether our laws, policies and practices comply with our obligations under the Covenant".

Professor Charlesworth and the Hon Ms Elizabeth Evatt are but two representatives of a rights movement in this country for which Professor Greg Craven,[3] in last year's Alfred Deakin Lecture, coined the term "the constitutional circle", to identify the more active participants of the movement in this country. By that term he meant "a broad combination of persons, pressure groups and institutions", which included many academics, lawyers, some politicians, and members of the media, whose instincts are deeply centralist and who are determined, in the face of the failure of referenda intended to entrench human rights, to achieve their ends by other means. Among those means are international human rights conventions and the High Court.

Let me illustrate judicial reflection on the employment of these means with examples, involving the U.N. *Convention on the Rights of the Child,* and other human rights conventions, which are drawn from the Family Court and the High Court.

Just over a year ago, the Family Court handed down a decision in a custody case[4] in which each of the contending parties sought to support their arguments by reference to the U.N. *Convention on the Rights of the Child.* Unusually, the federal Attorney-General appeared before the Court at the invitation of its Chief Justice.

As it turned out, the case was decided on grounds that did not involve the Convention. But the issues raised by reference to it were discussed by the Court. So here is the Family Court, quoting the High Court in *Mabo v. Queensland*:

> "The opening up of international remedies to individuals pursuant to Australia's accession to the *First Optional Protocol of the International Covenant on the Protection of Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights".[5]

Later on, in presenting a series of arguments against the Attorney-General's view that the *Convention on the Rights of the Child* could not be used to interpret the *Family Law Act* and, in particular, s.43 (c) which refers to the rights of children, the Court commented as follows:

> "Thirdly, even if the Convention had no such recognition other than ratification and s.43 (c) did not exist, it is our view that the Court could have regard to the Convention in accordance with principles outlined in *Magno's Case, Murray's Case,* and *Teoh's Case.* We do not accept the Attorney-General's submission that the *Family Law Act* constitutes, in effect, a code, or that s.60B is couched in such terms that it is unnecessary to look outside

it. Both the object and principles set out therein are expressed in broad and not exclusive terms such that extrinsic assistance may be necessary or useful to interpret them".[6]

And then, later on:

"Fourthly, we consider that UNCROC [the United Nations *Convention on the Rights of the Child*] must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends".[7]

Let us now look briefly at just a few of the Articles from this Convention which the Family Court believes must be given special significance.

The United Nations *Convention on the Rights of the Child*

At a superficial glance, the UN *Convention on the Rights of the Child* seems to be a document which any country would be glad to welcome. For example, the Convention's Preamble acknowledges:

"….that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".

Article 5 says, *inter alia*, that "States parties shall respect the responsibilities, rights and duties of parents". The Convention thus seems very conventional, and simply to articulate a traditional view of the family's customary responsibilities and prerogatives.

But — to pursue my allegory — when the flanks of this particular horse are opened, some alien baggage topples out which is anything but conventional. And I'm sure you won't be surprised when I tell you that it comprises "rights talk" of a very modern kind.

Article 12 requires, *inter alia*, that government:

"…..shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

Our five-year old grand-daughter has, very capably, formed the view that chocolates are very good for her, and she has no hesitation in eloquently expressing that view publicly; and we all give her view due weight in accordance with her age and maturity. The problem is that we disagree with her view that chocolate, always and in every circumstance, is good for her. Whose view should prevail; and who should be the judge?

More seriously, would high school students be permitted, without restraint, to express their views freely in all matters affecting them within the school? And have recourse in law if they consider that the Article has been breached? It would seem to follow that they should.

And so, the same Article 12 goes on to say that, for the purposes of the Article:

"…..the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

It is clear that the Article envisages separate representation of the child in such proceedings, and the making of judgments by persons other than the child's parents or teachers or others acting *in loco parentis.*

But since the Article also abandons the objective age criterion of competency, how is a judgment to be made by a court or tribunal or Children's Commissioner, about whether a given child is "capable of forming his or her own views", and how is "due weight" to be measured "in accordance with the age and maturity of the child"? It would seem that the Article opens up considerable scope for conflict and challenge between children, parents, and others. It significantly qualifies the right of fit parents to guide and direct their children by making it subject to external scrutiny and possible veto.

Article 13 of the Convention guarantees to the child rights of freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice".

This would seem, absolutely, to constrain parental supervision of what a child may say, hear, read or see, irrespective of a parental judgment that to do so may cause harm, distress or emotional disturbance to the child. Nor does it seem to take any account of the harm one child might do to another in exercising such rights.

It puts parents in the position of acting irresponsibly if they do not act to prevent such things happening, or of being accused of acting oppressively if they do. Similar difficulties could arise elsewhere, such as in schools or other situations where parental delegates are in charge of children.

Article 14 requires that national governments "shall respect the right of the child to freedom of thought, conscience and religion". Here, however, it goes on to say that:

> "States parties shall respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child".

Leaving aside the subjective judgments that a court may be required to make about "evolving capacities", the inclusion of a reference to parental rights here reinforces the significance of its deliberate omission from the previous two Articles.

Otlowski and Tsamenyi,[8] writing in the *Australian Journal of Family Law* in an article which recommends implementation of the Convention, nevertheless acknowledge:

> "Inevitably however, the formal recognition of the rights of children does entail some tension with the rights of parents, as well as bringing into question the role of the state in intervening in family relationships".

That's putting it mildly. It is also worth noting that, with one exception in the Articles I've quoted from, there is no mention of parental rights or prerogatives that might qualify the absoluteness of the children's rights which are proposed.

Article 15 requires participating governments to "recognize the rights of the child to freedom of association and to freedom of peaceful assembly". Again, there is no mention of parental rights of guidance and control to restrain a child from associating with whomever he or she wishes, no matter how unsuitable or dangerous the parents may believe that association to be.

Article 16 provides that:

> "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation....".

What would constitute arbitrary interference with privacy by a parent? The nature of parenthood is such that the role could scarcely be carried out without constant intrusion into a child's "private" affairs. One can imagine many, many situations where responsible parents have a duty of protection and guidance in a variety of personal, medical and sexual matters that might be considered "private". Could their attempts to do so be construed as "arbitrary interference", and be subject to veto by external authority if petitioned to do so by a child acting through an advocate appointed by the state?

The overall gist of the Convention in a great many respects, therefore, is that children's interests are under threat, and that the primary source of the threat is from their own parents. Hafen and Hafen, in the *Harvard Journal of International Law,*[9] quote an official United Nations document which describes the U.N. *Convention on the Rights of the Child* as promoting a "new concept of separate rights for children, with the Government accepting [the] responsibility of protecting children from the power of parents".

Implementing the Convention

One might think that responsible authorities would express caution about implementing the Convention and the absolutist character of many of its recommendations; but there is no shortage of influential voices urging that the Convention should be legislatively implemented by the federal Parliament right away.

For example, in a recent joint report, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have spoken enthusiastically of the Convention's recognition "that children, as members of the human family, have certain inalienable, fundamental human rights",[10] and they have demanded that:

> "... the Commonwealth should use its external affairs power to ensure that UNCROC's [United Nations *Convention on the Rights of the Child*] obligations are complied with".[11]

In other words, these guardians of rights have no compunction about steam-rolling the States into submission.

They are supported by many associations, senior academics, and prominent lawyers, such as former Victorian Human Rights and Equal Opportunity Commissioner, Ms Moira Rayner. In a chapter of a book on children's rights published by the Australian Institute of Family Studies, she conjures a vision of the Convention recruiting Big Brother to look over the shoulder of the family. She says:

> "We must look outward to the community, which must take responsibility for ensuring that the family fulfils its proper role.....
>
> "The only way in which this may be achieved well is on the basis of universal human rights for all human beings".[12]

In other words, since children are human beings they should enjoy the same rights as the adults responsible for their care, and the state's role is to oversee family affairs to ensure this. There is no suggestion here that full adult rights for children may, in some degree, be incompatible with meeting parental duties of care, protection and guidance for children. But this, of course, is typical of the absolutist cast of much rights talk of this kind.

The present federal government has so far shown no inclination to legislate on the Convention, but we cannot be sure that future governments will refrain, so long as the Convention remains unrepudiated and unreservedly accepted as an international instrument.

Legal and familial implications

Ratification of an international Convention by the federal Executive does not mean that its articles become the law of the land. They must be implemented by specific legislation in order to achieve that. Nevertheless, ratification alone has some important legal implications.

There is, for example, the common law principle or presumption that the Parliament intends, in all its legislation, that its international obligations shall be observed. Accordingly, where existing domestic law is ambiguous or indeterminate, and where a term or Article of a ratified Convention speaks relevantly to the case at issue and is not inconsistent with existing law, the term or Article of the Convention may be used to clarify or interpret the law.

In addition, ratification of a Convention may carry implications for administrative decisions. For example, Article 3.1 of the U.N. *Convention on the Rights of the Child* places an obligation on States Parties to accept the best interests of the child as a primary consideration in administrative and other decisions. Accordingly, in the *Teoh Case,*[13] the High Court found that ratification of the U.N. *Convention on the Rights of the Child* raises:

> "…..a legitimate expectation, absent statutory or executive indication to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a 'primary consideration' ".

Consequently, if an administrative decision-maker proposes to make a decision inconsistent with that legitimate expectation, procedural fairness requires that the persons affected should be told and given an opportunity to argue against the taking of such action. In the *Teoh Case* this "legitimate expectation" had not been met, so the administrative decision to deport Teoh was overturned.

It should be noted that the Teoh case purports to do no more than establish a procedural right. It does not mean that the Articles of the Convention can be enforced. I say "purports", because my layman's reading of a recent case in the Federal Court[14] suggests that we are moving in the direction of converting a procedural rule into substantive law. That is a matter I won't pursue here.

However, the High Court's findings in the Teoh case, and its administrative implications, caused a great flurry in Canberra. The Labor Government — which, of course, had ratified the Convention in the first place — hastily drafted the *Administrative Decisions (Effect of International Instruments) Bill* 1995, which I understand has not yet been passed.

The purpose of that Bill is to provide that ratification of an international treaty or convention imposes no obligation on the government of the day to observe its provisions for domestic purposes. The contradiction and incoherence in the attempt to do this is obvious. The purpose of ratification is to undertake international obligations along with whatever domestic consequences they might entail, yet the purpose of the Bill is to avoid those domestic consequences.

One might disagree on occasions with the distinguished jurist, the Hon Ms Elizabeth Evatt, but she is surely right when she says of this:

> "This comprehensive rejection by the Government of any obligation to respect the principles of a treaty it has entered into puts it in a Janus-like position, promising the international community that it will comply, while telling the Australian people that they cannot count on its doing so". [15]

In other words, one set of guardians is telling us that we've acquired a truly fine Wooden Horse, but another set is saying: "for God's sake let's get the damned thing out of the citadel".

That may be difficult. The wall was breached to get it in but, as we shall see, some of our courts seem determined to keep it tethered in place.

Much more could be said about the doubtful contents of the Convention; not least the raft of welfare and redistributive rights or entitlements it proposes.

But, from the perspective of the internal integrity of family life, the Convention is likely to have the effect of setting children's rights in potential conflict with the customary prerogatives of fit parents. Where the Convention does speak of parental rights and duties, it implicitly defines them as obligations to ensure that their children's rights will be made effective.

The children's rights that matter are their claims upon parents and other adults for the care, education and guidance that promotes the competent maturity necessary for enjoying adult rights. But if we undermine the parental authority necessary for that development, we work against the interests of children. Rather than joining the Family Court in celebrating this Convention, it is a gift horse we should look carefully in the mouth.

Rights talk and reformist jurisprudence

Let me now return to the theme of the connections between rights talk and a mode of judicial thinking and interpretation which seems to me to be a threat to democratic process and confidence in the law.

I found one passage from the Family Court's discussion of the issues raised by the case referred to earlier, especially revealing. In support of the view it was taking, the Court quoted a statement by Sir Anthony Mason, as follows:

> "True it is that a convention does not embody rules of international law. But the *Convention on the Rights of the Child* has attracted widespread international acceptance. 178 nations have acceded to it. And why should the principle that the provisions of a ratified but unincorporated convention do not form part of the law of the land forbid judicial formulation of the common law by reference to the convention if it enjoys widespread acceptance, including acceptance by Australia? The point of the principle is that it denies the status of domestic law to a provision in an unincorporated convention. But the provision will achieve that status if it is incorporated into domestic law by statute. And the provision may contribute to the development of a principle of domestic law if the judges draw upon it for that purpose".[16]

There could hardly be a better illuminated signpost than that, pointing the way forward to implementing rights, without the messy inconvenience of public and parliamentary scrutiny. Our curial Ulysses is showing a common law path through the democratic wall, and the Family Court takes note. All that remains is for the court to drag the Horse into the citadel.

And, unblushingly, all of this is supposedly in the service of human rights. And justified, it seems, because the Convention concerned has been greeted with widespread acceptance; including acceptance by some of the most repressive and cynical regimes on this earth. Sir Anthony's observation ignores, for example, the refusal of the United States Senate to ratify the Convention, and the reservations which have been declared by several western European countries and the Vatican.

We are driven to ask ourselves what view of the law, of rights, and of justice, underlies the cast of mind revealed here.

Six years ago, Professor Mark Cooray in front of this Society quoted Sir Anthony Mason writing in 1987.[17] Sir Anthony's words then were that the courts have a responsibility "to develop the law in a way that will lead to decisions that are humane, practical and just". Professor Cooray commented on this as follows:

> "Such a formulation provides a slippery slope for judges. Judges will have vastly different conceptions of what is humane, practical and just".

And, indeed, Sir Anthony's remark neatly instances the slippery slope which has come to bedevil courts in the English-speaking world in this century.

It is typified in the way Sir Anthony coalesces and conflates, in a single formulation, two elements in our conception of justice which need to be distinguished; two elements which our history and traditions brought to realisation in the functions of two separate, two deliberately separated, institutions — the courts, and the Parliament.

Justice may be said to comprise two things. On the one hand, in its substance, as just or ethically acceptable laws; and, on the other, in the procedures and traditions intended to ensure faithful and intellectually defensible interpretation of those laws, and prompt and certain delivery of justice according to established law.

The substance of the law is determined by the common law, the people in Parliament assembled, or by referendum. The function and duty of the courts is to oversee the processes of interpretation and enforcement of the law so established.

It is, of course, in the nature of things that people will disagree about the ethical character and desirability of particular laws; and therefore whether they consider them just. What are we, or judges, to do if we consider established law to be unethical, inhumane, unpractical, and unjust?

Must ordinary citizens, despite their objections, obey such a law; whereas a judge may so use his position to develop the law in a way that will, in his view, lead to decisions that are "humane, practical and just"? Even if that means abandoning the delivery of justice according to law?

In other words, should the law be respected as much by the judge in his role as interpreter and upholder of the law as by the citizen in his ordinary behaviour? And do both conspire, in their different ways, to destroy the law when they refuse to acknowledge its authority?

It seems to me that the delivery of justice according to law insists, and democratic legitimacy insists, that we must answer "yes" to both questions.

These, then, are the tendencies I observe that come with reformist jurisprudence and zeal to smuggle in rights unauthorised by the people and their democratic instruments. And the danger is this.

If courts, especially courts from which there is no appeal, aspire to conjure decisions to serve private ideals and a higher purpose than delivery of justice according to law, they make us subjects of an exercise of power that is no less arbitrary because it issues from the courts, no less repugnant because the motive might be benevolent, and no less suspect if it is done in the name of human rights; because the foundation of liberty and human rights is the constraint of the arbitrary.

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12. Rayner, Moira, *Self, Self-esteem and Sense of Place,* in *Citizen Child: Australian Law and Children's Rights*, Australian Institute of Family Studies, Melbourne, 1996, p.53.

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15. Evatt, *op. cit*., p.4.

16. Family Court of Australia, *op. cit*., 10.19.

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Chapter Nine

Federal Renewal, Tax Reform and the States[1]

Professor Brian Galligan

Designing the fiscal provisions of the Constitution was one of the most difficult and, for many commentators at that time and today, the least satisfactory parts of Australia's constitutional design.

Our previous Prime Minister, Paul Keating, championed the virtues of maintaining the Commonwealth's fiscal dominance. In rejecting proposals for sharing the income tax base with the States, Keating claimed that the fiscal primacy of the Commonwealth, or "vertical fiscal imbalance", to use technical jargon which has become current usage, was a design feature rather than a fault of the Constitution. Keating argued:

> "It is not a design fault, and does not require remedying. It was deliberately built into the Constitution by the founders, developed by successive national governments and by the High Court, and bequeathed to us today as something we should prize and fight to keep, rather than something we should throw away in the name of federal-State cooperation. The founders gave to the new Commonwealth the duty to collect the excise and customs, then the main taxes, and return the surplus to the States. The founders forbade States from imposing their own excise taxes, and at that time there was no income tax".[2]

Prime Minister Bob Hawke's New Federalism had entailed reviewing, with a view to redressing, vertical fiscal imbalance through returning some share of the income tax base to the States. For State Premiers, this had been a *sine qua non* of the Special Premiers' Conference process, and a joint Commonwealth and State working party had been examining options. The proposal supported by the State Premiers was relatively modest: the States were to get six per cent of the income tax base in exchange for an equivalent reduction in Commonwealth grants. No variation would be permitted for three years, but after that time the States could vary the income tax rate; and the Commonwealth would remain responsible for administering the national collection scheme.

Keating eventually endorsed "a new partnership" with the States, but insisted that there would be no change to the Commonwealth's uniform taxation, which he called "the glue that holds the federation together".[3] The opposite was asserted by Russell Mathews, the doyen of Australian federal financial relations and an architect of fiscal equalisation. In the inaugural *Russell Mathews Lecture* sponsored by the Australian National University's Federalism Research Centre in May, 1994, in which he praised the system of fiscal equalisation, Mathews said:

> "Australia has one of the most highly centralised, inequitable and inefficient taxation systems of any industrialised country. The equalisation system has to operate within a system of extreme vertical imbalance as between the Commonwealth and the States. Failure to address the problem of vertical imbalance is threatening the stability of the horizontal equalisation system".[4]

In the centenary decade of the making of the Australian Constitution, it is appropriate to review the design of this most contentious part of the Constitution.

Constitutional design

The fiscal parts of the Constitution caused the Australian founders the most difficulty. The single most troublesome issue, which almost caused the breakdown of both federation Conventions, was the power of the Senate over money bills. Even before the Conventions were under way, devising

a common tariff for colonies which championed diverse free trade and protectionist policies was considered the most challenging issue, and was widely billed as the "lion in the path" of federation. This was the way in which James Service, ex-Premier of Victoria, flagged the tariff issue and related fiscal policy at the beginning of the 1890s decade of constitution making:

> "Probably the first question, and the most difficult, which the conference will have to decide, is that referring to a common tariff, or the question of a common fiscal policy. Now I have no hesitation whatever in saying that this to me is the lion in the way; and I go further and say, that the conference must either kill the lion or the lion will kill it. I think a national Constitution for Australasia without providing for a uniform fiscal policy, would be a downright absurdity".[5]

The tariff issue: Slaying the lion

To the extent that a common tariff was Service's lion in the path of federation, it was dealt with surprisingly easily. There soon developed a robust consensus to create a national customs union by giving the Commonwealth an exclusive power over customs and excise. National sentiment aside, this was for many the central purpose of federation — abolishing the colonial border customs houses and setting up a national economic union based on the low but sure ground of commercial free trade within Australia.

"Intercolonial tariffs, and coasting trade" had topped the list of federal matters requiring the national assembly proposed by Wentworth's Constitutional Committee as early as 1853.[6] During the next half century, intercolonial tariffs and trade were leading agenda items for subsequent federation forums. The Australian consensus that emerged, despite sharp differences between protectionist Victoria and free-trading New South Wales over the appropriate purpose and level for a national tariff, was forcefully stated by Robert Garran on the eve of the 1897 Adelaide Convention:

> "But one mode of taxation — duties of customs and excise — must be given to the federal Parliament exclusively. One of the great objects of Federation is to throw down the border custom-houses, and allow perfect commercial freedom from one end of Australia to the other. This will make it impossible for each State to keep its separate provincial tariff against the outside world; seeing that a tariff fence, to be of any use, must be a ring-fence. Scientific protection on the Victorian sea-board would be a farce whilst the New South Wales ports were open and the Murray bridges free. There must, therefore, be one fiscal policy for Australia, and it must obviously be controlled by the federal Parliament. Duties of customs and excise must be imposed and collected by the Commonwealth alone, subject, of course, to the condition that such duties shall be uniform throughout the Commonwealth, and that there shall be no internal customs barriers between the several States of the union. Exclusive federal control of the customs is necessary for the basis of a commercial union without which federation would be a mockery. Complete internal free trade, combined with such external fiscal policy as the Federal Parliament shall determine, is the only possible basis for an effective Federation".[7]

Garran was, in effect, expounding the outcome of the earlier 1891 Sydney Convention which, in the 1891 draft Constitution, had given the Commonwealth Parliament:

> "…..sole power and authority ... to impose Customs duties, and duties of Excise upon goods for the time being the subject of Customs duties, and to grant bounties upon the production or export of goods".[8]
>
> This was reworked by the 1897-98 Convention as an "exclusive" power to read:
>
> "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive".[9]

The 1897-98 tinkering was hardly an improvement. By broadening the notoriously imprecise "excise" category through breaking the nexus with "goods for the time being the subject

of Customs duties", this later Convention magnified new obstacles and introduced new dangers that were better dealt with in 1891, as Deakin concluded as if foreshadowing the future treatment of this section in the High Court.[10]

Federal finances: Dividing the carcass

If slaying the tariff lion was easy, dividing up its carcass was fiendishly difficult. The more intractable part of the tariff problem was devising satisfactory fiscal arrangements for dealing with the consequences of making customs and excise an exclusive Commonwealth power — in other words, distributing the Commonwealth surplus which would result. Subsequent historians and commentators have been highly critical of the framers' obsession with, and resolution of, this matter. The historian J A La Nauze dismissed Service's early concerns as the "paper tiger of intercolonial fiscal jealousies".[11]

In a recent account, Cheryl Saunders endorses Higgins' negative dismissal of his peers' handiwork in fiscal design as "a general and unholy scramble". In Saunders' view:

> "Considered purely from the standpoint of a federal system, the financial arrangements between the Commonwealth and the Australian States are bizarre. The moneys raised in taxation and other charges by each level of government do not even approximate their respective constitutional expenditure responsibilities. The circumstances in which the actual division of tax powers has come into existence has precluded and continues to preclude any attempt to match types of taxation to the capacity and goals of the level of government by which they are imposed. No adequate framework for co-operation and consensus between the levels of government exists".[12]

The first point that needs to be made in response to such criticisms, particularly La Nauze's dismissal, is the substantial difficulty of the issue. Federal finance was singled out by Garran on the eve of the second round of Constitution-making in 1897 as being "perhaps the most difficult of all questions connected with Australian Federation".[13] Once it was clear that the 1897 Adelaide session had been successful in producing a basic draft for the Constitution, in effect by reworking the 1891 draft bill, the financial sections became the most difficult and contentious matters for the subsequent Sydney and Melbourne sessions. Before considering why that was so, it is worth recalling that the prime difficulty up to this point at both the 1897 Adelaide meeting and the earlier 1891 Sydney Convention — in fact, the real lion in the path of federation — had been the financial powers of the Senate.

The founders created a Senate of virtually co-equal strength to the House of Representatives except that it could not initiate or amend money bills, although it could recommend changes to them and exercise an overall veto. In other words, the Senate was denied the power to develop and fine-tune fiscal policy which, for reasons of preserving responsible government, was left solely with the House of Representatives. The design of the Senate complements that of the fiscal provisions which, in effect, left the long term shape of revenue distribution for Parliament to determine. At this point it is important to keep in mind that the founders' debate over distributing the surplus from customs and excise took place within the context of a re-negotiated "historic compromise" that settled the Senate's financial powers.

Why all the fuss about financial provisions? And was it just a "paper tiger" of intercolonial jealousies as La Nauze claimed? The answer is suggested by the state of colonial finances that were set out in detail by T A Coghlan, New South Wales Government Statistician,[14] giving the revenue and expenditure sides of colonial budgets as well as capital spending and debt payments. Coghlan's tables showed that, for 1886-87, the proportion of taxation in the total revenue of the colonies was 52 per cent, compared with 20 per cent for net operating surplus from railways and tramways, 17 per cent from sale of public lands, and 11 per cent from other sources, including an operating surplus from posts and telegraphs.

Customs and excise was the main component of taxation and yielded 75 per cent of the total. Income tax was very small by comparison, amounting to only 6 per cent of total taxes or 3

per cent of total colonial revenue, and varied considerably between colonies, with Queensland and Western Australia having no income tax at all. Transfer of customs and excise to the Commonwealth would clearly produce acute vertical fiscal imbalance, since it accounted for three-quarters of taxation revenue. This would be exacerbated for some colonies, namely Victoria and South Australia, by the Commonwealth's taking over posts and telegraphs, which generated surpluses in those colonies. It is obvious that federation with a common tariff would destroy the fiscal independence of the colonies by plucking out the heart of their tax base.

Nor could there be any easy basis for distribution of the customs and excise surplus after covering Commonwealth outlays, because of colonial differences. Western Australia and Tasmania, for very different sorts of reasons, presented particular problems. Western Australia, a relatively new colony experiencing a gold mining boom, had extremely high revenue generated by tariffs equivalent to three times the Australasian average, as well as high expenditure on government services. Western Australia's total revenue and expenditure per capita were nearly three times the national average.

Tasmania, at the other extreme, was virtually a basket-case, with a restricted tax base and modest public expenditures of only 4 pounds per head, compared with 20 pounds per head in Western Australia and 7 pounds per head for the national average. Just as importantly, New South Wales was sufficiently different from the other colonies, with relatively low reliance on customs and excise — it had a high revenue tariff, but restricted to a small number of items, mainly intoxicants — and abundant revenue from the sale of public lands.

The colonies also differed markedly in their levels of debt servicing and capital works. Western Australia had only 9 per cent of its total expenditure going to debt servicing, whereas Tasmania had 45 per cent, and South Australia and Queensland more than 35 per cent. With intoxicants providing a significant part of the colonial tax base, it was also significant that Western Australia's thirsty settlers and miners consumed three times as much liquor as Tasmanians and twice that of New South Wales people.

With such substantial differences in the structure of colonial budgets, the task of devising a distribution formula for returning surplus customs and excise revenues to the States was well nigh impossible. The surplus from a national tariff had to cover reimbursements to the colonies-cum-States to compensate them for surrendering this revenue source, as well as meeting the expenditures of the Commonwealth.

But what should be the basis for such reimbursements? Basically, there were two formulas between which the troubled founders wavered: distribution on a *per capita* basis, or distribution on a contribution basis. Each alternative would have had a major impact on the financial positions of the colonies.

Per capita distribution was simple, but out of the question for Western Australia, which would lose nearly two-thirds of its pre-federation revenues. Tasmania would also have a major deficit problem and have to be bailed out by the Commonwealth, or otherwise the national tariff set considerably higher than would be agreeable to New South Wales. Even without that, the people of New South Wales, a low tariff colony, would be slugged for almost double their colonial payments to support what was clearly an unacceptable scheme.

Distribution of the surplus on the basis of contribution, or handing back to each State the balance of revenue collected on goods consumed by the people of that State, would produce rather different, but equally unacceptable, results and involve complex book-keeping arrangements. According to this method, Western Australia would be little affected. New South Wales, on balance, would likewise not be seriously affected, although the people of that State would be paying higher tariffs but getting most of it back in grants. Under this formula, however, Victoria, South Australia and Tasmania would be left with large shortfalls in State revenues.

There was no ready formula that would in any way approach some criterion of Pareto optimality. After much to-ing and fro-ing, the founders stitched together a short-term

compromise that confined aspects of contribution and per capita distribution, as well as making special terms for Western Australia. This was contained in ss. 81 to 105 of the Constitution. There was still a problem because, whichever way the deal was cut, Tasmania would fare badly.

To allow the Commonwealth to provide special assistance for Tasmania and perhaps other States, the ubiquitous s.96 was added to enable the Commonwealth to make financial grants to any of the States on the terms and conditions it saw fit. Better to allow for the Commonwealth to provide special assistance for one particular State, parsimonious New South Wales insisted, rather than have a rigidly uniform system which would require a higher tariff to ensure the fiscal viability of the weakest member of the federation. In view of the extent of diversity among the colonies, which was reflected in their quite different budgetary requirements, the fact that an agreement could be reached and the Constitution adopted was a considerable achievement.

The financial sections: What was done

The complicated story of the making of the fiscal provisions of the Constitution, ss. 81 through 105 which make up Chapter IV, has been well documented by Cheryl Saunders,[15] so can be briefly presented here. As Josiah Symon put it in 1897, the financial question was "the hardest nut to crack", and achieving justice all round for the colonies seemed a task beyond "even an archangel from heaven".[16]

The Finance Committee was the least satisfactory of the specialised committees, producing an incomprehensible report that led to unseemly brawling among its members when its recommendations were debated on the floor of the Convention. Within the Committee, the wily George Reid, Premier of New South Wales and "master of the convention at Adelaide", according to Deakin, totally outmanoeuvred Turner, his stodgy Victorian counterpart:

> "…..the whole scheme elaborated by Turner was upset by Reid, who rollicked in this privacy as a hippopotamus might if he climbed into a ferry boat and was determined to upset it unless given his own way".[17]

With no obvious solution available, there was a strong push by some delegates — Downer, for example, at the Sydney and Melbourne Conferences — to leave the whole matter for Parliament to work out after federation. But others like Higgins, and representatives from colonies that would be most affected, did not regard that approach as any solution at all. The outcome was a compromise of specification for the shorter term according to a blending of contribution and *per capita* formulas, but then leaving fiscal distribution open-ended in the longer term for Parliament to determine.

The Constitution incorporated a variety of treatments for the initial periods of phasing in and bedding down the national tariff and consequent distribution of surplus to the States. Immediately on federation the collection and control of customs and excise passed to the Commonwealth.[18] For a period of ten years only, one quarter of the net revenue generated could be spent by the Commonwealth, according to the "Braddon" clause.[19] The balance had to be paid to the States, or applied towards payment of State debts taken over by the Commonwealth and provided for by s. 105. The Commonwealth was obliged to impose a uniform tariff within two years,[20] and as soon as it did, the two key provisions for fiscal union, exclusive Commonwealth power over customs and excise[21] and absolute freedom of trade, commerce and intercourse among the States,[22] would take effect.

The distribution of the surplus to the States was highly specified for the two periods up to the imposition of a uniform tariff and for five years thereafter. For the first of these periods the Commonwealth was obliged to pay the surplus to the States, calculated on the basis of contribution or source of revenues less (a) any expenditure of the Commonwealth incurred in a department taken over by the Commonwealth in the particular State, and (b) a proportion of other Commonwealth expenditure calculated on a proportionate population basis.[23] For the second period, during the five years after a uniform tariff, the same formula was to apply, with the additional refinement of taking account of relevant duties in the State where the goods were

consumed rather than collected.[24] After that five years, it was left for Parliament to "provide, on such basis as it deems fair".[25]

Several important additional clauses rounded out the Chapter. An exception was made for Western Australia, which was allowed to phase out its own lucrative tariffs over five years.[26] The Commonwealth was empowered "to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit" by s.96. Curiously, this section was notionally tied to the Braddon clause term of a period of ten years after federation, but then left entirely for Parliament to determine. Section 105 provided for take-over of State public debts "as existing at the establishment of the Commonwealth", a restriction that was struck out by a 1910 referendum. (This whole section was subsequently superseded by embodying the 1929 agreements on taking over State debts in the Constitution.) Finally, there was provision for the ill-fated Inter-State Commission.[27]

The financial provisions incorporated in the Constitution entailed acute vertical fiscal imbalance by transferring the main tax base, customs and excise, exclusively to the Commonwealth and requiring a uniform tariff. During the short term, the Constitution specified formulas for both the vertical and horizontal carve up of the revenues generated, but for the longer term that was left for the Commonwealth Parliament to decide. Special provision was made to allow a phased adjustment by Western Australia, the State most affected by a uniform national tariff, but in addition the Commonwealth was given a completely open-ended power for financial or, indeed, any other form of assistance. Thus, in effect, the long-term provisions gave the Commonwealth Parliament absolute discretion and maximum flexibility to determine surplus revenue distribution, although it needs to be kept in mind that a powerful Senate was an integral part of the Commonwealth Parliament.

What was intended

Given that the Constitution did not specify allocation of surplus revenues for the longer term, the question naturally arises as to what the founders intended. More particularly, did they deliberately build in vertical fiscal imbalance, as Paul Keating has asserted, or did they intend the development of matched revenue and expenditure sources and responsibilities for the Commonwealth and the States? There are two obvious ways this might have been brought about. The first was by the Commonwealth's taking over colonial debts, as was provided for by s.105 of the Constitution. The second was through the States' boosting their revenues by increasing direct taxes, especially income tax.

Intentionality is a slippery concept at the best of times, but even more so for a protracted constitutional convention of diverse individuals making compromises on particular drafting provisions after broad-ranging debate. All that we can be sure of is what was actually done. We can only say with certainty that the founders collectively, and the Australian people in ratifying the Constitution, intended what was actually specified: namely, that the Commonwealth was to have an exclusive power over customs and excise; that, with this exception, taxing powers were concurrent; that the method for dividing up the surplus from customs and excise was highly specified in the short run; but that subsequently it was left for Parliament to determine. The Commonwealth's taking over State debts was not intended in this strong sense, but such an eventuality was favoured by some and provided for. The second alternative, of the States' substituting for the loss of customs and excise by increasing their direct taxation, was also provided for, in that the States were given concurrent tax powers, but again this was not mandated.

In sum, the fiscal provisions of the Constitution are characterised by maximum concurrency, in giving both the Commonwealth and State governments access to all tax bases except customs and excise, and minimal specification for revenue-sharing in the longer term.

In a sense, therefore, Keating is quite correct in claiming that vertical fiscal imbalance was built into the Constitution by the founders. It was, however, built in as a consequence of making customs and excise an exclusive Commonwealth power, and not as a principle. Nor was it considered a good thing in itself, with leading delegates and commentators warning of the potential danger of leaving such a surplus in the hands of a national Treasurer. These concerns were, however, secondary to the primary purpose of securing a customs union. Nor was the design skewed towards fiscal centralisation in the longer term, as Keating has claimed, but left highly unspecified and to be determined by future actors. In other words, vertical fiscal imbalance of the kind that Keating champions was not intended by the founders, but nor was it precluded by the Constitution.

Evaluation

It is a natural tendency in evaluating institutions to test them against personal preferences, and to praise or disparage them depending on whether they are in accord or not. But this is an unsatisfactory yardstick, since institutions have to accommodate divergent preferences at any one time and dynamic changes over time. Hence, general principles or criteria are required.

Three fairly obvious ones that most would subscribe to are implementability, robustness and reflexivity. *Implementability* is a practical norm concerned with the capability of the institution's being put into practice. This is an obvious requirement for a constitution, but one often ignored by armchair critics and reformers. *Robustness* is the ability to continue functioning when circumstances change from those originally envisaged. *Reflexivity* has to do with the fact that self-conscious individuals operate institutions, and can learn from their mistakes, internalise norms, manage complexity and adapt to change.

The fiscal sections of the Australian Constitution meet these three criteria reasonably satisfactorily. Despite the acknowledged difficulty of the task, interim arrangements for the distribution of the surplus from customs and excise were blended in such a way that all the colonies were sufficiently satisfied to enable federation to go ahead. But no attempt was made to specify the longer term in ways that might have jeopardised flexibility and robustness.

Constitutions which are built to last centuries must be highly unspecific. It was better to leave the distribution of future Commonwealth surpluses to politics within an institutional arrangement which provided an adequate process. This was done by specifying, and thereby limiting, the Commonwealth's powers, and establishing a strong High Court to oversee jurisdictional boundaries, and by injecting the federal principle into a bicameral national legislature with equal State representation in the Senate.

History has demonstrated shortcomings in these institutions, but it is highly unlikely that much more could have been prudently done. More specialised institutions to handle fiscal issues might have been established, as some modern critics prefer, but the fate of the Inter-State Commission, which was included in the Constitution to deal with inter-State trade matters, suggests that secondary institutions lack robustness and ought not to be entrenched in the Constitution.

Robustness was strongly linked with the principle of reflexivity for the Australian founders, who put a good deal of weight upon the good sense of those who would operate the system. The lack of specificity for continuing fiscal arrangements and, except for the Inter-State Commission, specialised institutions of intergovernmental relations, is only one example of this. Other hard issues, such as the rivers question, which required balancing the rights and claims of river navigation and irrigation, could not be settled once and for all, so were left for sorting out by future politics and judicial review.

The prime instance of relying on reflexivity entailed the compromise over the Senate's fiscal powers referred to earlier, where no fail-safe mechanism was provided for deadlocks over supply bills. In working such a system, the founders trusted, political actors in the Anglo-Australian tradition, like themselves, could be expected to reach a compromise rather than

push the system into breakdown. Reflexivity is one of the key principles of Australian constitutional design, but probably the most neglected among Australian constitutional critics, perhaps because of the influence of a literalist legal mindset which would prefer to have everything spelt out.

Finally, I want to look briefly at a rather different set of principles, namely *fairness, finality, elasticity* and *coordinacy,* proposed by Robert Garran in 1897. According to Garran, "the conditions which a perfect system of federal finance should satisfy" were:

> "(1) be fair to all the States — not only at the date of union, but in view of their probable growth and other contingencies; (2) be so far final as to offer no encouragement to constant tinkering or agitation for 'better terms' on behalf of one State or another; (3) be nevertheless so far elastic as to be adaptable to changing conditions; (4) reduce dealings between the federal government and the State governments to the narrowest and the simplest possible basis".[28]

As Garran himself noted, finality and elasticity were inconsistent, but he argued that both were necessary and recommended some "golden mean" which would avoid the extremes of either. Garran's principle of reduced dealings between governments, which I have called coordinacy, is linked with finality.

Fairness, in Garran's view, had mainly to do with horizontal sharing of surplus among the States, of which he wrote:

> "It is only by finding a basis of apportionment which will be fair to each State in the proposed Federation that an acceptable scheme of union can be reached".[29]

Obviously, the Constitution which was subsequently produced did not meet Garran's finality and coordinacy principles for the longer term, since the arrangements were largely unspecified and highly concurrent. Nor was fairness assured. Thus, according to the Garran view, the fiscal sections of the Constitution were not well designed.

The alternative, and in my view preferable, view is that reflexivity is far preferable to finality in the design of constitutional arrangements. That puts the onus on the ongoing political process to devise appropriate institutions of fiscal federalism.

Vertical fiscal imbalance

Unfortunately, since the Second World War, when the Commonwealth ousted the States from income tax, Australian fiscal arrangements have been severely distorted by vertical fiscal imbalance (VFI). The Commonwealth raises the lion's share of revenue, and the State and local sector is heavily reliant on grants. The State and local sector raises only about a quarter of total public sector revenue yet spends about a half, being dependent on Commonwealth grants for the balance. At the same time the State and local sector is responsible for the bulk of public debt; and delivers most of the public services which are people-intensive, such as education, health and policing, employing about three-quarters of all those in public sector employment.

In 1997-98, total Commonwealth grants to the States were just over $30 billion, with $14.7 billion or 48 per cent of the total being "tied grants" or Specific Purpose Payments (Table 1).

From the 1970s the Commonwealth expanded its colonisation of State policy jurisdiction through tied grants. More recently, this has been reflected in the Commonwealth's sub-categorisation of payments as being "to" and "through" the States. For this latter category of payments, the State governments act as post-office boxes for other bodies, mainly universities, non-government schools and local governments. This has given the Commonwealth a very substantial presence in areas of social policy which would otherwise come within the States' jurisdiction.

Table 1
Commonwealth Payments to States 1997-98 and 1998-99
($ billion, estimates)

	1997-98	1998-99
General Revenue Assistance	16.7	17.1
Specific Purpose Payments		
- To	11.2	11.3
- Through	3.5	3.6
	14.7	14.9
Gross Payments to States	31.4	32.0
Less State Final Contribution(a)	0.6	0.3
Total Commonwealth Payments to States	30.8	31.7

(a) Agreed at 1996 Premiers' Conference as a contribution to Commonwealth fiscal deficit reduction program.

The problems with VFI are well known, so need be mentioned only briefly here.[30] Broadly, it induces irresponsibility on the part of both Commonwealth and State governments, as well as dependence and grantsmanship on the part of the States.

Vertical fiscal imbalance leaves the Commonwealth awash with money for which it has no need or policy purpose, inducing it to invent novel programs and generally expand Commonwealth spending for political and bureaucratic purposes. The large Commonwealth Departments of Education and Health are monuments to this tendency. Moreover, when times are tough, rather than prune its own expenditure, the Commonwealth is prone to cut grants to the States in vital policy areas of State jurisdiction for which it has no direct political responsibility. State grants tend to be used as a balancing item in Commonwealth budgets and an obvious source of savings.[31]

The centralisation of revenue-raising in Australia has been supported in the post-War period as being essential to the Commonwealth's capacity to manage the national economy and to preserve equity and efficiency in the overall tax system. These claims have less salience with the demise of Keynesian macro-economics, and in any case such a high degree of VFI is unnecessary for whatever macro policy the Commonwealth might engage in.

The Commonwealth has been reluctant to surrender its fiscal capacity to influence State spending because of the supposed risk of the States undermining Commonwealth macro-economic policy objectives. However, the Commonwealth does not need to control anything like 40 per cent of the funding of State outlays to achieve the degree of influence over State decision-making that it currently has. A system which forces the States to accept greater responsibility for funding their spending from adequate, independent revenue sources is likely to invoke more critical scrutiny of State decision-making by voters, the media and financial markets.

Current VFI arrangements are corrosive of State integrity and responsibility. The States acquire large proportions of their revenue from grants, and fund a proportionate amount of their spending on essential policies from grant dollars. For example, in 1997-98 Victoria derived 42 per cent of its total revenue from Commonwealth grants, with $2.6 billion or 43 per cent of the Commonwealth grants being tied to specific purposes. Those purposes are shown in Table 2 (over). The dependency of smaller States on Commonwealth grants is of course much larger.

Such dependency encourages grantsmanship on the part of the States, or the art of wheedling money out of Canberra, rather than fiscal propriety in funding their own expenditures largely from their own taxes. The system encourages the States to be profligate in spending cheap

grant dollars. By the same token, the States can be caught out in adequately funding necessary programs when the Commonwealth decides to cut funds for its own purposes. It is simply implausible to expect the Commonwealth to have the States' best interests at heart in dictating the ongoing terms and conditions of intergovernmental fiscal relations which it controls.

During the 1980s the States were forced to become some-what less dependent on Commonwealth grants and rely more heavily on their existing tax sources, many of which are narrowly based and inefficient, such as financial transfers, or socially corrosive, such as gambling. State revenue comes from numerous small taxes, fees and fines, as Victoria's own source revenue indicates in Table 3 (below). Victoria has actively promoted gambling, which contributed $1.2 billion to State coffers in 1997-98, equivalent to 15 per cent of the State's own source revenue.

Table 2
Commonwealth Specific Purpose Grants to Victoria by Agency
($ million, estimates)

	1996-97	1997-98
Grants for Government Programs: Current		
Education	417.5	447.5
Human Services	1601.5	1597.7
Infrastructure	0.1	6.2
Justice	141.2	64.8
Natural Resources and Environment	24.1	21.3
State Development	9.6	3.3
Treasury and Finance	101.7	5.9
Total Current Grants	2295.7	2146.7
Grants for Government Programs: Capital		
Education	104.5	95.6
Human Services	278.2	263.1
Infrastructure	139.4	86.6
Natural Resources and Environment	4.7	0.9
Treasury and Finance	0.4	0.1
Total Capital Grants	527.2	446.2
TOTAL SPECIFIC PURPOSE GRANTS	2822.9	2592.9

Source: Victorian Department of Treasury and Finance*: Forward Estimates 1997-98*, p.391.

To sum up, the excessive centralisation of Australia's fiscal federal arrangements enhances the Commonwealth's steering capacity over macro-economic policy. Whether macro-economic steering is practically feasible, given the lags in information combined with constitutional and political inertia, is another matter. Its monopoly over income taxes gives the Commonwealth both the means and the inclination, because of the realities of politics and interest groups, to intrude into key policy areas that would otherwise be solely under State jurisdiction. On the States' side is a corresponding fiscal dependency on the Commonwealth, with consequent lack of responsibility for financial management and an impaired control over policy responsibilities. For the overall system that means a mismatch of fiscal and policy responsibilities for both levels of government, and greater participation by both in many policy areas.

Two broad alternatives for redressing aspects of vertical imbalance were canvassed in the series of Special Premiers' Conferences in the early 1990s. One was to return a proportion of income tax or tax points to the States together with the policy responsibility, as the Canadians did for joint-cost programs in the 1960s. The other was to switch the specific purpose grants to general purpose grants, thus leaving fiscal centralism intact but removing the Commonwealth

from specific policy areas. Keating's accession to the prime ministership, however, derailed the process.

Keating was committed to a view of fiscal centralisation that has strong roots in traditional Labor thinking and motivated Ben Chifley, who was the prime architect of post-War VFI. This view is based on assumptions of Commonwealth superiority for steering the national economy, combined with a distrust of the States. The alternative is a federalist view, which holds that the States ought to have increased fiscal independence and responsibility to enable a greater say in determining policies that affect them. Although the centralist position lacks any coherent defence, given the demise of macho macro-economic management pretensions, there was little apparent commitment to its reform by the Howard Liberal-National Party government until its recent shock decision to give the States all the proceeds of the proposed Goods and Services Tax (GST).

Table 3
Composition of Taxes, Fees and Fines for Victoria
($ million, estimates)

	1996-97	1997-98
Pay-roll Tax	2123.9	2189.6
Taxes on property:		
Land Tax	407.0	427.0
Stamp Duty on Financial Transactions:		
Land Transfers	727.5	727.5
Marketable Securities	145.0	150.4
Other Property Stamp Duty	142.7	151.6
Estate, Inheritance and Gift Duty	0.1	0.1
Financial Institutions Duty	319.0	324.6
Debits Tax	263.5	260.6
Financial Accommodation Levy	15.7	13.4
State Deficit Levy on Rateable Properties(a)	0.5	0.5
Taxes on the Provision of Goods and Services:		
Levies on Statutory Corporations	317.5	333.0
Gambling Tax – Private Lotteries	299.0	282.9
Gambling Tax – Electronic Gaming Machines	589.4	657.4
Gambling Tax – Casino	138.4	174.4
Gambling Tax – Racing	118.1	120.0
Gambling Tax – Other	6.8	4.1
Taxes on Insurance	334.5	342.0
Motor Vehicle Taxes:		
Vehicle Registration Fees and Taxes	406.4	402.5
Stamp Duty on Vehicle Transfers	350.1	371.6
Drivers' Licences	35.5	20.8
Road Transport and Maintenance Taxes	29.3	29.2
Franchise Fees:		
Petroleum	522.3	425.4
Tobacco	623.6	648.2
Liquor	164.8	169.3
Electricity	161.0	171.6
Other Taxes on the Use of Goods and Services	14.4	16.1
Total Taxes	8256.0	8413.8

(a) Now collected by the Commonwealth.

Source: *Victorian Budget Estimates 1997-98*, p. 364.

There is of course one aspect of VFI that is constitutional, and can only be fixed by constitutional change or, preferably, sensible reinterpretation of the relevant clause of the Constitution by the High Court. That is the inability of the States to levy taxes on the sale or production of goods, or, more broadly speaking, a GST.

The States are precluded from levying such a tax, which is common in other federations, because of the High Court's too broad interpretation of "excise duties" which, according to the

Constitution, is an exclusive Commonwealth power. Whereas the Constitution links "duties of customs and excise" in s.90, the High Court has cut it loose and given it a scope and meaning that exceeds economic reason and interpretive sense. According to the High Court's overblown rendering, excise extends to any tax on the production or sale of goods. This was confirmed as recently as 1997 in *Ha and anor v. NSW*,[32] but only by a narrow four-to-three majority.

The better decision in that case was the strong minority dissent led by Justice Dawson. As the dissenting judgment points out, the purpose of s.90 was the sensible and moderate one of protecting the common external tariff and preventing the States from engaging in "discrimination of a protectionist kind against interstate goods". It was not to restrict the revenue-raising capacity of the States, nor to secure an exclusive revenue base for the Commonwealth.

In reaching such a view, the dissenters were influenced by an authoritative statement by Chief Justice Sir Samuel Griffith in one of the earliest cases decided by the High Court, *Peterswald v. Bartley*.[33] It is worth quoting here as a corrective to the current debate over republicanism and the Constitution, as well as the meaning of excise duty:

> "Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word 'excise' had a distinctive meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States', the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax".

Unfortunately, the *Ha Case* made VFI considerably worse, by correcting one of the absurdities of the High Court's previous decisions that allowed States to levy taxes on cigarettes and fuel provided they called these "franchise fees" and calculated the amount on the sales of the previous period. But in refusing to budge from its too-broad rendering of excise, the Court has swept all GST taxes into the Commonwealth's exclusive domain. Even though the Commonwealth immediately worked out an arrangement for collecting the taxes at issue and returning them to the States, VFI was formally increased because this arrangement depends on the good will of the Commonwealth.

Postscript: Howard's GST as a solution

Shortly after this paper was inititally delivered, Prime Minister Howard announced his long awaited tax reform package, including a new Goods and Services Tax (GST) of 10 per cent on most goods and services, with the proceeds going to the States and Territories. Food and, importantly, services are included in the GST base while health, education, childcare, local government rates and water and sewerage are excluded. The GST replaces the wholesale sales tax and a host of small State taxes — debits tax, stamp duties on a range of financial and commercial transactions including mortgages, and bed taxes, which New South Wales has recently introduced.

The surprise was that the GST is to be collected by the Commonwealth but all of the proceeds handed over to the States. This was unexpected, because it was not the result of any hard bargaining on the part of the States, nor even of consultation between the Commonwealth and the States. Rather, Prime Minister Howard and Treasurer Costello devised the scheme in strict secrecy, informing State Premiers just before public release of the policy. Previously neither Howard nor Costello had shown much interest in federal issues, and no commitment to the reform of fiscal arrangements.

This was no doubt a clever strategy to win the support of outspoken State Premiers, especially Jeff Kennett from Victoria and Richard Court from Western Australia, who had insisted that fiscal imbalance be tackled as the price for their supporting the Howard tax reform package.

Other powerful interest groups, including the Business Coalition for Tax Reform and the Australian Council of Social Service, had also backed such reform.

The proposed change is being touted by Howard and his supporters as "the most significant change to federal-State relations in 50 years".[34] Labor critics, including the New South Wales and Queensland governments, have criticised the measure for further increasing VFI and making the States "administrative agents" of the Commonwealth.[35] The measure does entail a bold and sweeping change to federal fiscal arrangements, giving the States a broad based tax with substantial growth potential as the economy grows. And it is a sound tax move because it replaces a growing host of inferior taxes on commercial transactions. Some oppose any GST-type tax as regressive or unnecessary, while others, including ACOSS with reservations, support the introduction of such a tax because it broadens the tax base.

Technically, the proposed GST does exacerbate VFI because it is a Commonwealth tax that only the Commonwealth can levy. Howard and Costello have gone to great lengths to claim this will be in effect a States' tax that cannot be altered without the unanimous consent of all Premiers, and of course the Senate as well. They insist it is to be a States' tax collected on their behalf by the Commonwealth.

This is an ingenious arrangement, since it does give the States a broad-based growth tax while at the same time leaving the Commonwealth with the final say. Whatever the force of the "gentleman's agreement" requiring unanimous agreement by all the States, the Commonwealth retains the whip hand. My own view is that it is a major practical device for redressing part of the nest of problems inherent in VFI, while at the same time strengthening the Commonwealth's formal fiscal dominance. And of course its implementation is subject to Howard's winning the election, which is likely to be a close call, getting the consent of all the Premiers, including the Labor ones — that should not be too difficult, despite their rhetoric — and having a Senate that the government will most likely not control pass the tax reform package.

If all of that occurs, the reform will have gone some way to reforming fiscal federalism. The next and more significant step will be to restore to the States their legitimate income taxing power, and to give them a proportion of the income tax base sufficient to fund most of their other expenditure needs.

Endnotes:

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16. *Ibid.,* quoted at p.149.

17. Deakin, Alfred, *op. cit.,* p.81.

18. *The Australian Constitution,* s.86.

19. *Ibid.*, s.87.

20. *Ibid.,* s.88.

21. *Ibid*., s.90.

22. *Ibid*., s.92.

23. *Ibid*., s.89.

24. *Ibid*., s.93.

25. *Ibid*., s.94.

26. *Ibid.,* s.95.

27. *Ibid.,* s.103.

28. Garran, R R, *op. cit.*, p.161.

29. *Ibid.,* p.168.

30. See, for example, Walsh, C, *Federalism Australian-style: Towards some new Perspectives*, in *Taxation and Fiscal Federalism: Essays in Honour of Russell Mathews,* Brennan, G, B S

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Chapter Ten

Beneath Deakin's Chariot Wheels: The Decline of Australia's Federation

Alan Wood

If the tariff question was the lion in the path of Federation,[1] then the financial arrangements for the new Federation were an equally fearsome beast. In the end they were resolved in a way that the States believed, wrongly, preserved their financial dominance and their independence.

The allusion in the title of this paper is to a familiar and very early recognition of what the States had really signed up for — Deakin's observations on the future of the Federation written for the London *Morning Post* on — some might say appropriately — April Fool's day, 1902. Although the "chariot wheels" reference is familiar, I would like to quote Deakin in full, if only to defend my choice of title:

> "As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the Central Government. Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortune will follow; and finally even the greatest and most prosperous will, however reluctantly, be brought to heel. Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the States and the Commonwealth. The Commonwealth will have acquired a general control over the States, while every extension of political power will be made by its means and go to increase its relative superiority".[2]

I note that at the Society's last Conference, Professor Bhajan Grewal objected to this view of Deakin as an Antipodean Cassandra:

> "Contrary to Deakin's assertion, the Constitution of Australia did not establish a dysfunctional federalism…Australia's federalism became dysfunctional after the Second World War for two reasons. The exclusion of the States from income taxation in 1942, which Deakin could not have anticipated in 1902, and the High Court's interpretation of excise duties in subsequent years, which again he would not have known about, together created the extreme degree of revenue centralisation".[3]

Professor Grewal is too harsh. Deakin's essential point — that the Commonwealth would use every opportunity to extend its financial, and hence political, power — is plainly right. Nor does he say that the Constitution is the means by which the Commonwealth's "authority" will be established. It is no more than a permissive framework. Rather, he said this would be accomplished by the power of the purse. That his prescience did not extend to the *Uniform Tax Case* of 1942 or *Parton v. Milk Board* in 1949 is neither remarkable nor relevant. The Commonwealth has acted essentially as Deakin anticipated it would.

Indeed, the Commonwealth did not waste much time. One provision of the Constitution was that the Commonwealth should return to the States any surplus revenues it collected in the first 10 years of Federation. In 1908 the Commonwealth legislated to pay any surpluses into a trust account, avoiding any obligation to pay them to the States. The Constitution also mandated that for 10 years after Federation, and thereafter until the Parliament provided otherwise, at least 75 per cent of the Commonwealth's customs and excise revenue should be passed back to the States. The Commonwealth terminated the arrangement immediately the mandatory 10 years had expired.

As it started, so it has gone on, taking advantage of opportunities presented. Clearly the most significant opportunity *was* the Second World War, when the Commonwealth seized income tax from the States and was upheld in doing so by the High Court. Ominously for the States, the Court not only held the Commonwealth's income tax legislation valid under the defence power of the Constitution for the duration of the War, but also under the normal powers of the Commonwealth in times of peace.

Income tax had comprised about 60 per cent of the States' tax base immediately before the War. With its takeover by the Commonwealth in 1942, the States' share of total taxation revenue fell from 50 per cent to 10 per cent. That has since been rebuilt to around 20 per cent, a painful process involving resort to a number of very inefficient, distortionary and inequitable taxes such as Financial Institutions Duty (FID), the Bank Accounts Debits Tax (BAD)and various stamp duties. You may notice that I do not mention Pay-roll Tax in this list. It is neither a likely, nor necessarily a desirable, candidate for abolition.

The States' revenue raising efforts were dealt a further substantial blow last year in the *Ha & Hammond Case,*[4] which continued a line of High Court judgments from *Parton*[5] in 1949 (although, for this audience, I should acknowledge the influence of Dixon's earlier 1936 judgment in *Matthews v. The Chicory Marketing Board*) that have denied the States access to consumption taxes. The *Ha* judgment stripped some $5.2 billion from the States' already narrow revenue base.

The result of this cumulative attack on the States' tax base has been an extreme degree of "vertical fiscal imbalance" (VFI), much higher than in any comparable federation. Following *Ha,* the Commonwealth now collects 76 per cent of all taxation revenue (80 per cent if we exclude local government), while accounting directly for only 56 per cent of total expenditures. The States raise 20 per cent of total tax revenue but are responsible for 40 per cent of outlays.

All of this is fairly well known to anybody who has taken an interest in Commonwealth-State financial relations and their implications for the federation. However, there are two other aspects of history that should be considered for the sake of completeness. These are the Commonwealth Grants Commission and s.96 of the Constitution.

The Grants Commission was appointed in 1933 to assess the amount of special grants from the Commonwealth to the States, and Mathews and Jay, in their history of fiscal federalism, comment on its significance as follows:

> "The significance of the Grants Commission's procedures is that they introduced, for the first time in a federation, the concept of approximately equal treatment for all citizens irrespective of the State they lived in. In terms both of the obligations for taxation and claims for administrative and social services, the net effect was intended to approximate the situation that would have existed in a country with a unitary government. The concept has thus had far-reaching consequences in extending Commonwealth responsibility *vis-à-vis* State responsibility and State independence".[6]

This is overstating the significance of the Grants Commission, because it is in fact possible for there to be a wide range of variation in taxation and expenditure choices by individual States. This is confirmed in the Grants Commission's own reports. The Grants Commission ensures that each State Government has the financial ability to provide a similar standard of services, but the States are not compelled to provide a uniform percentage of their budget to specified service areas, or make any particular level of tax effort. However, on a broader level the Commission's activities do contribute to uniformity and a blurring of responsibility — two important problems of the federation.

Professor Wolfgang Kasper, writing in the different but related context of restraining the opportunism of political agents, observes that:

> "Ensuring the same living conditions throughout the country, irrespective of location, resource endowment and political behavior, cannot, however, be an objective of policy if

one wants administrative creativity and power control. This objective is the equivalent of income redistribution: it stifles self-reliance and competition".[7]

As for s.96, originally a last-minute attempt to ensure the financial safety of the States, it provided the Commonwealth with a powerful means to undermine State independence through the ability to grant financial assistance to any State "on such terms and conditions as the Parliament thinks fit". This has been exploited in various ways, notably through Specific Purpose Payments, or "FAGS (Financial Assistance Grants) with tags" as they are referred to by State Treasuries. How significant the Commonwealth's ability to make grants conditional is in practice is open to debate. The States certainly see them as further eroding their independence, but their significance has been queried by a former Commonwealth Treasury official with long experience in Commonwealth-State relations, Mr. Des Moore, in a paper to an earlier conference of this Society.[8]

However, since my topic today is, in effect, Tax Reform and the States, I won't pursue these issues further. This brief history is simply intended to establish the extraordinary decline in the financial independence of the States since Federation, as measured by their ability to fund their own expenditures and, to a lesser extent, determine their spending priorities. A former Premier of Queensland, Mr. Wayne Goss, has gone so far as to describe this process as *de facto* abolition of the States.

If this is an exaggeration, it is not a very great one. Mr. Goss warned that there was a real problem developing in the constitutional structure of Australia:

> "Public debate talks of a new Australian nation by the year 2001 — I suspect the *de facto* abolition of the States will be complete by then. While some may cheer the demise of the States, the relevant question is whether this is the way to do it. Is it a good policy result to have the States finished off in the sense of having no real power or independent role, but with six Parliaments and administrations still constitutionally alive and locked into the structure? I believe it would be a poor result, because it would leave Australia with a constitutional and administrative structure in conflict with the reality, leading to inefficiency, a lack of accountability and duplication of administration. Inefficiency, with six irrelevant Parliaments and sets of State laws; a lack of accountability to a public increasingly confused as to who was responsible for outcomes…the course we are on leads to *de facto* abolition of the States, with the logical result of the States becoming a dead weight in the baggage of our constitutional make-up. As that becomes a reality, the danger is that the States will become a real impediment to an efficient and competitive nation".[9]

Of course, Mr. Goss was talking about more than taxation matters. The Premier of Western Australia, Mr. Richard Court, produced a comprehensive account of the steps in increasing the power of the central government in a document called *Rebuilding the Federation*.[10] But the loss of revenue raising capacity is at the heart of the decline in Australia's federation, and it is this that needs to be reversed if we are to reinvigorate it.

What is to be done?

Speaking to the Liberal Party in Perth recently, the Prime Minister, Mr. John Howard said he didn't believe that:

> "…..we can go on any more with a taxation system where the relations between the Commonwealth and the States are so profoundly out of balance and so screamingly in need of reform and change".[11]

Addressing reform of Commonwealth-State financial relations is principle "e" in the Prime Minister's five principles for tax reform announced in August, 1977 in the wake of the *Ha Case.* Those of you acquainted with the alphabet will have immediately realised that this makes it the last on the list, but perhaps we shouldn't read too much into that. So what will the Federal Government do to give effect to its commitment to reform? We will know the answer in a few

days,[12] so what I propose to do today is set up a framework against which this aspect of the Howard Government's tax reforms can be judged.

There are two alternatives open to the Commonwealth that would give the States substantially increased revenue capacity. These are *revenue sharing* and *base sharing*.

Revenue sharing is where the States receive an agreed share of a tax, or group of taxes, raised by the Commonwealth. *Base sharing* means the States independently access a tax base used by the Commonwealth.

Both these methods have been used in the past. For example, for eight years between 1976-77 and 1984-85 revenue sharing (of the proceeds of the personal income tax) replaced financial assistance grants to the States. Since Federation various tax bases have been shared by the Commonwealth and the States, including income tax, land tax, death duties and taxes on tobacco, liquor and fuel. However, there are currently no shared tax bases.

Of the two reform options, the only one that offers the prospect of restoring greater financial responsibility to the States, which is crucial to rescuing the federation, is base sharing. The principal reason for saying this should be obvious. Revenue sharing, no matter how it is dressed up — for example, as a legislatively guaranteed share of revenue — leaves the States dependent on the Commonwealth. History shows that, whatever the Commonwealth promises, it can, and in all probability will, be reneged on at some point in the future.

To replace existing State transactions taxes and franchise fees with a "guaranteed" share of a Commonwealth revenue stream would extend the proportion of revenue raised by the Commonwealth to over 80 per cent, and if abolition of pay-roll tax were to be included, well over 80 per cent. Such a gross fiscal imbalance offends profoundly against the most fundamental fiscal principle of a federation, namely that "the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants", to quote Alexander Hamilton in *The Federalist Papers*.[13]

The Intergovernmental Relations Division of the Treasury Department of Western Australia (that such a division should exist speaks volumes about the current condition of the federation) has produced a comprehensive discussion of the pros and cons of revenue sharing and base sharing.[14] It examines the alternatives against eight criteria: Compliance and administration costs; stability of arrangements; States' revenue requirements; accountability; efficiency; equity; State flexibility; and Commonwealth national responsibilities. I intend to compress the discussion and combine some of these criteria, but I commend the discussion paper to you.

Compliance and administration costs

Compliance and administration costs are lower under a revenue sharing arrangement. But a properly designed base sharing system can minimise any additional costs. Due to the High Court's interpretation of s.90, base sharing means sharing the income tax base. When the Commonwealth took over income tax in 1942, the system was a complex and inefficient one. There were 22 separate State taxes on incomes, definitions of taxable incomes varied from State to State, and taxpayers deriving income from more than one State had to submit separate State tax returns. None of these problems need apply with any new base sharing arrangement.

Stability of arrangements

As I have already observed, history suggests any revenue sharing arrangement is unlikely to be an enduring one. The WA Treasury is surely right when it concludes that it is too much to ask the Commonwealth to be the guardian of the States' interests as well as its own. Entrenching revenue sharing arrangements in the Constitution is a possible solution, but one with small chance of success. However, provided any State share of the income tax base is raised under State legislation, there are greater prospects of stability in the arrangements under base sharing.

States' revenue requirements, accountability and VFI

The need for the States to have revenues that match their expenditures is central to a functioning federation. Not only has the Commonwealth dominated the revenue base since World War II, but it has also steadily reduced general purpose grants to the States, both as a share of GDP and as a share of its tax revenue. This has increased the resort by the States to bad taxes to rebuild their revenues.

Nor is this the only potential distortion of revenue sharing. Revenue sharing arrangements based on a fixed share of Commonwealth tax revenues mean that any change in the Commonwealth tax rates flow through to the States, for good or ill. Such arrangements can also, if limited to one tax such as income tax or a GST, provide an incentive for the Commonwealth to exploit non-shared taxes. Base sharing, with the States free to adjust tax rates (within limits) under State legislation, provides far more autonomy and hence greater ability to raise the revenues needed to meet demand for services. It also makes the connection between demanding more services and higher taxes clearer to State taxpayers. Accountability is a central issue in restoring vitality to Australia's federation and is inseparable from the revenue sharing arrangements that apply.

The current extreme fiscal imbalance reduces the accountability of both the Commonwealth and State governments, as is generally recognised, although not by the Commonwealth Treasury. In the current issue of Budget Paper No.3, *Federal Financial Relations 1998-99*, Treasury argues that vertical fiscal imbalance has its virtues. It cites three:

- There are considerable advantages for Australia as a whole, from both an economic and an administrative perspective, from the maintenance of a national taxation system.
- A "certain level" of VFI is also necessary if the Commonwealth is to distribute payments to the States for horizontal fiscal equalisation.
- The provision of grants to the States in the form of Specific Purpose Payments is a means for the Commonwealth to pursue its policy objectives in areas where the States are the primary service providers.

None of these justifies the current extreme, indeed unique, level of VFI in Australia. Treasury also addresses the issue of accountability. It asserts that:

> "…in practice, State governments are accountable for their budgetary decisions at the margin. The States raise around 58 per cent of their total revenue, and increases in State expenditures have to be financed largely through increased State taxation. Financial market scrutiny also has a bearing on a government's accountability for its spending decisions".[15]

This is an argument about State incentives to be efficient and not waste money on unwanted services. It is largely irrelevant to VFI, because it ignores the lack of Commonwealth accountability, the ability of States to cost-shift to the Commonwealth and the extreme degree of VFI in Australia. Base sharing is clearly the superior alternative under this criterion.

Efficiency

Public finance literature offers two opposed views on the efficiency of revenue sharing versus base sharing. The first is that financial self-reliance increases efficiency through the operation of competitive federalism. The opposed view is that there are efficiency-distorting externalities when States have taxing powers. These include inefficient location decisions by firms and individuals because of differing State fiscal capacities, and the argument that vertical fiscal competition (between the Commonwealth and the States) can lead to overtaxing, while horizontal competition (between the States) can lead to undertaxing of mobile factors. In practice this is an issue of good tax design and not an argument against base sharing.

Equity

Under a tax base sharing arrangement, tax competition can lead to a less progressive tax structure, but this is also a tax design issue, which I return to in the next section. Inequity may also arise if some States cannot match the fiscal capacity of others. As I have indicated earlier, the extent to which this should be compensated for is a debatable issue. However, under present arrangements any move to base sharing would undoubtedly be accompanied by continuation of the Grants Commission process of fiscal equalisation.

State flexibility

As the WA Treasury discussion paper notes, there is a large issue here about the type of federation Australians want. To what extent do they believe that variations between States — reflecting different community choices — should be part of the federation? While they have traditionally accepted wide variations in taxing and spending among the States, it is hard to know to what extent this reflects choice, as opposed to ignorance, apathy or lethargy. However, I believe that in a healthy federation, competitive federalism and the variety it brings is a crucial feature. It provides scope to respond to different community choices, provides competing models of service provision and funding, a greater capacity to respond to change, and to recognise the differing needs of different States more efficiently than a centralised system.[16] A base sharing system plainly provides more scope for this desirable flexibility than revenue sharing can.

National responsibilities

This is the last resort of the centralist . It is claimed that allowing the States access to the income tax base will undermine the Commonwealth's ability to manage the national economy and income redistribution and welfare. On economic management, the claim is often made that the modern economy could not have been envisaged by the Founding Fathers, and requires a greatly expanded role for the central government. In fact, there is no reason why tax base sharing need have any impact at all on the Commonwealth's ability to conduct macro-economic policy. The extent of any imaginable base sharing would not interfere with the conduct of fiscal policy, and monetary policy is unaffected. Arguably it could enhance the conduct of economic policy by providing greater flexibility to manage differences in economic cycles between States. As for redistribution, this too is a tax design issue, to which I now turn.

How would income tax sharing work?

Twice in this decade the States have agreed on a method for sharing the income tax base with the Commonwealth, as they did before 1942. The first occasion came out of the Special Premiers' Conferences, the first of which was held in Brisbane in October, 1990. The Premiers and then Prime Minister Bob Hawke came close to agreement on a State income tax that would have been initially set at 6 per cent, but the process was sabotaged by Mr. Paul Keating as part of his challenge for the leadership.[17] The second occasion is this one, where submissions have been put to the Commonwealth for a State income tax that would "piggyback" on Commonwealth income tax as part of its tax reform package. The proposal is that the Commonwealth would vacate part of the income tax field, to make room for the States without an increase in the overall level of income taxation. The following details come from the submission of the Western Australian Government to the Commonwealth, but it reflects the agreed position of the States.[18]

First, how much money are we talking about? Commonwealth grants to the States in 1997-98, after adjustment for the so-called fiscal contribution by the States to the Commonwealth Budget, and the Commonwealth s.90 safety net payments to compensate the States for the loss of franchise fees on tobacco, fuel and alcohol, totalled $33.8 billion. Full elimination of VFI would thus require an increase in the tax-raising capacity of the States of nearly $34 billion.

The States recognise this is unachievable, and in any case support retaining some level of Commonwealth grants for horizontal fiscal equalisation purposes (or the smaller States would not have signed off on the proposal) and their desire to retain some Specific Purpose Payments "to address special needs". So the proposal is to replace FID and BAD, business stamp duties and stamp duties on motor vehicle transfers, the s.90 payments put in place after *Ha,* and a reduction in Commonwealth grants of $12 billion.

Replacement of the transactions taxes and stamp duties would cost $5.4 billion, replacement of the s.90 safety net payments $5.2 billion, and with the proposed reduction of $12 billion in Commonwealth grants, would require State access to the personal income tax base (corporate income tax would be the preserve of the Commonwealth under the proposal) of $22.6 billion.

There is no constitutional barrier to this proposal, since the States have the power to access the income tax base. It would, however, require the co-operation of the Commonwealth, given the High Court's endorsement of the Commonwealth's right to blackmail the States into not levying separate income taxes by threatening to cut grants and refusing to make room in the income tax base. Nor does the proposal pose any insurmountable problems in theory or practice, provided it meets certain design requirements.

The key requirements are:

- No increase in the overall tax burden, to make it politically palatable, as well as being desirable on other grounds. This means the Commonwealth makes room for the States in its income tax base by reducing its marginal income tax rates. To illustrate, the current Commonwealth marginal rate on incomes between $20,700 and $38,000 is 34 per cent, and on incomes over $50,000 is 47 per cent. Under the States' proposal, the new Commonwealth marginal rates would be 22.67 per cent and 31.33 per cent respectively, and the State rates would be 11.33 per cent and 15.67 per cent respectively, piggybacking on the Commonwealth rates. This would preserve the progressivity of the income tax and not interfere with the Commonwealth's ability to deliver personal income tax cuts. The States would fix these rates for an agreed period of time, after which they would be free to vary their marginal rates, but all States would set rates on a consistent basis.
- The tax base would be the Commonwealth's, and the States would be unable to vary this base via State rebates or exemptions. This gets around the complexity problem that applied before World War II.
- Tax collection would be by the Commonwealth tax office, using a single tax form for both Commonwealth and State components. In order to ensure that the State component of the tax was visible and within the control of the States, each State would introduce its own income tax legislation, and there would be separate identification of the Commonwealth and State imposts on assessment notices, pay slips and group certificates.
- There would be a simple and uniform residence test to determine liability for State tax, and the States would only tax individuals.
- There are some other minor details, but these are the main ones, and show that allowing States back into the income tax base is quite feasible. That begs the big question, of course: will it happen?

The politics of tax reform

In a recent speech to a conference on reform of Commonwealth-State financial relations, Victoria's Treasurer, Mr. Alan Stockdale, acknowledged that the decline of the federation's finances was not just the Commonwealth's fault:

> "For much of the history of our Federation , States have been happy to allow the Federal Government to progressively take over revenue-raising responsibilities, in return for greater grants from Canberra".[19]

He went on to claim that this tradition had been reversed, but has it?

Consider the last Premiers' Conference in March this year. I had written an article that appeared in *The Australian* on the Tuesday before, warning of the decline of the federation and suggesting that, because of the importance of tax reform to its renewal and the limited time available, the Premiers should demand of Howard a special meeting on the issue. When I arrived in Canberra the night before the Conference I discovered that the article had been widely read by Premiers and State officials, who assured me that they had arrived at a common position on a State income tax, and that it would be strongly put to the Commonwealth the next day. Knowing from long experience that hanging around outside Premiers' Conferences can be a frustrating business, I spent the morning at the Australian National University and went to Parliament House at midday. To my amazement, the Conference was over. The Premiers had walked out in a stunt over health funds. Tax reform had not been discussed.

I ran into the Prime Minister in the corridor a few minutes later. He was angry and puzzled by the States' behaviour. He had been prepared for a genuine discussion of tax reform, indeed expected one, but the States would not get another chance. Nor have they.

It is truly said that you cannot help those who will not help themselves. There will be no State income tax in Thursday's tax package, despite the Prime Minister's talk of a "screaming" need for change. Instead, a version of revenue sharing will be offered via the GST. If the States accept it, the process of *de facto* abolition of the States will be virtually completed.

This is a test of their integrity and resolve the States cannot avoid. In particular, Victoria's Premier, Mr. Jeff Kennett, Mr. Bob Carr in New South Wales and Mr. Richard Court in Western Australia and/or their Treasurers are on the record declaring the unacceptability of revenue sharing as a solution to the problem of fiscal imbalance and the reform of federal-State finances. If this is all they are offered, then they should openly and vigorously oppose this aspect of the tax package. If the States accept it, the process of *de facto* abolition of the States will be virtually completed.

Of course, it is only too possible that the tax package will never make it into legislation, either because John Howard loses government, or because government itself becomes such a dubious exercise in the post-election Parliament. I venture to suggest that this parlous state of affairs has not a little to do with the decay of the Australian federation. The phenomenon of Hansonism is in an important respect its product, with its expression of a feeling of powerlessness and irrelevance. Re-invigorating the federation must be a crucial part of the process of national renewal.

Postscript

A former Australian Prime Minister, Mr. Paul Keating, once remarked at a Premiers' Conference that he would hate to get caught between a State Premier and a bucket of money. Mr. Keating, a centralist, conducted his own relations with the States on the cynical "bucket of money" principle. In fairness, it must be said that in doing so he was continuing in a long and dishonourable tradition of Commonwealth-State relations. We now know that Prime Minister John Howard proposes to do the same, although he would like us to believe the opposite.

As predicted, the States will not be given access to the income tax base. Instead they are to be "given" the new GST as a States' tax. For those, like this Society, concerned with the alarming degree to which Australia's federalist Constitution has been subverted by centralist governments in Canberra and the High Court, the proposed reform should be seen as little better than fiscal fraud.

It is true that the States will have access to revenue from a broad-based growth tax, for as long as the arrangement lasts. This is not an insignificant qualification. Revenue sharing has been tried before, and was abolished when Canberra decided the States were doing too well out of it. The new arrangement, described by the Prime Minister as an historic change in relations between the Commonwealth and the States, and by the Treasurer as the best financial deal the States have had since uniform taxation came in as a temporary measure during the Second World War, actually

increases the extent of vertical fiscal imbalance — the cancer eating away at the federation. As much was acknowledged by Victoria's Premier and self-declared champion of the States' case for reform, Mr. Jeff Kennett.[20]

The GST is not a State tax. It is a Commonwealth tax, with the rate set by Canberra, with the States unable to alter it, and with Canberra able to change the arrangement by putting legislation through a federal Parliament that has shown itself to be no defender of the States. Even before the GST is introduced it comes with a raft of conditions attached, and while it will replace the general revenue assistance grants to the States, this is not quite the gift it seems. According to Commonwealth Budget Paper No. 3, in 2000-01, when the new tax package is to be introduced, general revenue assistance grants will total $18.6 billion , while Specific Purpose Payments will total $15.8 billion. The latter will continue — at the whim of the Commonwealth. Thus Canberra still has a substantial lever over the States' spending programs, and one it can use to dictate policy.

The decline of the federation continues, as Deakin foresaw, with the States increasingly constitutional relics bound to Canberra's chariot wheels. If it is ever implemented, and for as long as it continues, the gift of GST revenue to the States will make them even less accountable for their revenue raising and probably, therefore, even less responsible in their spending decisions. Australia's federation is in a terminal condition, but as long as expedient State Premiers and a cynical Commonwealth are prepared to play the "bucket of money" game, then like a patient on life support whose vital functions have ceased, it will continue to offer the semblance of life.

Endnotes:

1. The expression was used by a former Victorian Premier, James Service, at a Constitutional Conference in February, 1890. Quoted in R.L. Mathews and W.R.C. Jay, *Federal Finance,* reprint of the 1972 edition by Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997.

2. Quoted in *Federal Finance, op. cit.,* p.41.

3. B.Grewal, *Economic Integration and Federalism: Two Views from the High Court of Australia* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 9 (1997), pp.130-131.

4. *Ngo Ngo Ha & Anor v. State of New South Wales &0rs* and *Walter Hammond & Associates Pty Limited v. NSW & Ors* (1997) 71 ALJR 1080.

5. *Parton v. Milk Board (Vic),* 1949.

6. *Federal Finance, op. cit.,* p.5.

7. Professor Wolfgang Kasper, *Property Rights and Competition: An Essay on the Constitution of Capitalism,* The Centre For Independent Studies, Policy Monograph 41, 1998.

8. Des Moore, *Duplication and Overlap: An Exercise in Federal Power* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 6 (1995), p.37.

9. Wayne Goss, *Re-inventing the States,* 2020 Vision Conference, 19 September, 1994.

10. Richard Court, *Rebuilding the Federation: An audit and history of State power and responsibilities usurped by the Commonwealth in the years since Federation,* February, 1994.

11. John Howard, *Address to the Western Australian Division's 49th Annual Conference,* 25 July, 1998.

12. This paper was delivered four days before the Howard Government presented its tax reform proposals on Thursday, 13 August.

13. *The Federalist Papers, No.XXXII,* quoted by Sir Harry Gibbs in his introduction to *Reshaping Fiscal Federalism in Australia,* Neil Warren (ed.), Australian Tax Research Foundation, Conference Series No. 20.

14. *Revenue Sharing or Tax Base Sharing? Directions for Financial Reform of Australia's Federation,* Treasury Department of Western Australia, Discussion Paper, June, 1998. The New South Wales Treasury has also been active in this area, as a sponsor of two conferences on fiscal federalism. The first, in 1997, led to the volume quoted above, *Reshaping Fiscal Federalism in Australia.* The proceedings of the second, in June, 1998, will be published as *State Taxation: Repeal, Reform or Resignation?*

15. Commonwealth Budget Paper No. 3, *Federal Financial Relations 1998-99*, p.15.

16. There is certainly ample evidence that both individual Australians and firms are prepared to shift across State borders in response to differing tax and regulatory regimes. For example, the move of retirees to Queensland when it abolished death duties, and the registration of firms in the Australian Capital Territory to avoid or reduce stamp duties. It may also be significant that no referendum to change the Federation in any basic way has ever been successfully proposed, as Professor Campbell Sharman suggests. See *Agenda,*Volume 5, Number 3, 1998.

17. A brief account of the 1991 proposal is given in the speech by Mr. Wayne Goss, *op. cit.*.

18. Government of Western Australia, *Submission from Western Australia on National Tax Reform and Reform of Commonwealth/State Financial Relations,* May, 1998.

19. Alan Stockdale, Treasurer of Victoria, speech to ATAX conference on *A State Tax Reform Package,* June 11,1998.

20. At a press conference called to promote the Howard Government's tax package Mr. Kennett said:

> "What we have is… what is being offered is certainly better than we have now. We have greater revenue certainty, although it does increase the States' financial dependence on the Commonwealth. In other words, it doesn't address the issue of VFI. *In fact it may even make it worse*. But having said that we think the deal is substantially better." (Emphasis added).

The bucket of money again.

Chapter Eleven

Ten Advantages of a Federal Constitution

Professor Geoffrey de Q. Walker

Introduction: The New Age of Federalism

Worldwide interest in federalism is greater today than at any other time in human history.[1] The old attitude of benign contempt towards the federal political structure has been replaced by a growing conviction that it enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and diversity, creative experimentation and liberty. "Political leaders, leading intellectuals and even some journalists increasingly speak of federalism as a healthy, liberating and positive form of organization",[2] writes a leading Canadian authority. With the move of South Africa towards a federal structure, all the world's geographically large countries are now federations with the exception of China, and even that country has become a *de facto* federation by delegating more and more autonomy to the provinces, as well as allowing Hong Kong semi-independent status as an autonomous region.

The same trend is apparent in countries that are not so physically large. There was scarcely any question in the minds of East Germans that, on their release from captivity, they would rejoin the nation as the five federal states *(Lander)* that had been suppressed by Hitler and later by the Communists. Belgium, which had previously lived under a unitary constitution modelled on Britain's, became a federation in 1993.

The few remaining highly centralized democratic nation states, such as the United Kingdom, France, Spain, Sri Lanka and Italy have all faced major crises of secession or devolution. Spain has had to relax its grip on the provinces as a result of pressures in the Basque country and Catalonia. Northern Italy has a vigorous separatist movement. France has established regional councils with legislative power, though what the people really want is the return of *nos belles provinces*. The United Kingdom has been slowly disintegrating for over a century, with the sometimes violent struggle for Home Rule gaining strength in the 1880s, the independence of Ireland in 1921 followed by Scottish and Welsh nationalism, and by civil war in Northern Ireland. The current government is now taking grudging steps towards a semi-federal structure. Sri Lanka's British - designed unitary structure has had catastrophic results that might have been avoided if the Tamil regions had possessed some degree of self-rule under a federal arrangement.

Whereas in 1939 a Harold Laski could declare that "the epoch of federalism is over", it would be truer to say, as the new millennium approaches, that unitary government has proved unstable and that we are in fact entering the "Age of Federalism".[3]

One reason for this favourable reassessment is the ending of the great confrontation between liberal democracy and tyranny that lasted from 1914 to the fall of the Berlin Wall in 1989. Democracy's success in that conflict removed one of the main justifications for centralized government, the need to maintain an economic structure that could be mobilized. While the collapse of the Soviet Union and its empire has undermined the appeal of all authoritarian, centralizing ideologies, the spread of human rights values has called in question all traditional forms of elite governance, and created increasing pressure for genuine citizen self-government. The general wariness towards utopian ideologies has also helped in the sense that federalism is not an ideology. It is a pragmatic and prudential compromise, intended to meet both the common and the diverse preferences of people by combining shared rule on some matters with self-rule on others.[4]

Economic change has been a factor too. An increasingly global economy has unleashed centrifugal economic and political forces that have weakened the traditional nation state in some

respects and strengthened both international and local pressures. The spread of free markets has stimulated socio-economic developments that favour federalism : the emphasis on autonomous contractual relationships, recognition of the non-centralized nature of a market economy, consumer rights consciousness, and the thriving of markets on diversity rather than uniformity.

Related to this are advances in technology that are causing the optimum size of efficient businesses to shrink, and models of industrial organization with decentralized and flattened structures involving non-centralized interactive networks.[5] A further reason is the observable prosperity, stability and longevity of the main democratic federations : the United States, Canada, Australia and Switzerland. Together with New Zealand and Sweden, they are the only countries to have passed more or less intact through the furnace of the twentieth century.[6] (The United Kingdom fails to qualify because of Ireland's secession.) But while Sweden and New Zealand are unitary states, not federations, they account even today for only 12 million people between them. It should also be noted that no federation has ever changed to a unitary system except as the result of a totalitarian takeover.

Throughout the world conferences, seminars and special purpose organizations are now being put together to study and debate federalism as a liberal political ideal. In Australia, valuable work on this concept has been done by a number of scholars, and by bodies such as the Centre for Independent Studies, the Australian Institute for Public Policy and, of course, The Samuel Griffith Society.

Within the Australian political-intellectual clerisy, however, attitudes to federalism range from viewing it as a necessary evil to, as one recent work puts it, "waiting for an appropriate time in which to abolish our spent State legislatures".[7] There are several reasons for this dismissive, even hostile view of our constitutional structure. One is the lingering influence among intellectuals and the media of the ideologies of bureaucratic centralism which, though discredited in the real world, are still able to evoke powerful myths in the minds of those who do not place a high value on the lessons of experience. The influence of British academic writings has in the past also been a source of centralist prejudice, as the British intellectual establishment has been anti-federalist since at least the days of A.V. Dicey. Another reason is a kind of pseudo-pragmatism expressed in casual one-line assertions about the costs of a federal division of power. This attitude not only fails to consider the costs of the alternative but, more importantly for present purposes, it takes no account of the positive benefits of the federal model.

To some extent these attitudes are understandable. The pattern of constitutional interpretation followed by the High Court over most of this century has consistently tended to favour the expansion of Commonwealth power at the expense of the States. This has made it increasingly difficult for the States to perform their proper role, so that the advantages of constitutionally decentralized government are more and more difficult to identify and evaluate. This factor was highlighted when the recent High Court decision invalidating state retail taxes[8] provoked a renewed chorus of calls for the abolition of the States.

Again, federal and State governments have been able to create a kind of political cartel by the increasing use of uniform "national" legislation and by heavy reliance on special-purpose grants. These developments have the effect, and probably the purpose, of denying to the people the opportunity to make comparisons between different models of legislation, taxation and spending.

To the extent that the one-sided nature of the public debate on federalism stems from the lack of information about, and recent experience of, the proper working of a federal system, it may be useful to draw together and articulate in one place the main points on the other side of the argument.

We should start by defining the term "federation". Decades of debate have not produced a universally accepted formula, but the list of characteristics put forward by Professor Watts of Queen's University, Canada, will serve:

- two orders of government, each acting directly on its citizens, a formal distribution of legislative and executive authority, and allocation of revenue resources between the two orders of government, including some areas of autonomy for each order;
- provision for the representation of regional views within the federal policy-making institutions;
- a written supreme Constitution not unilaterally amendable and requiring the consent of all or a majority of the constituent units;
- an umpire (courts or referendums) to rule on disputes between governments;
- processes to facilitate intergovernmental relations for those areas where responsibilities are shared or overlap.[9]

A key element in this definition is the requirement of a written Constitution. Other forms of governmental decentralization which exist only as a matter of central government policy, and can be restricted or abolished at any time, such as the regional assemblies of France, cannot be regarded as federal systems. At least in theory, Australia comes within Professor Watts's definition. What, then, are the advantages of such a system?

Advantages of a federal system:

1. The right of choice and exit

When we think of political rights in a democracy, those that first come to mind are usually the right to vote and the right of political free speech. While they are indeed crucial, an equally important and more long-standing right is the liberty to decide whether or not to live under a particular system of government, the right to "vote with one's feet" by moving to a different State or country.

That this is a political right is obvious from the events leading up to the fall of the Soviet Union. The Communist governments were the only regimes in history ever to suppress that right almost completely. The Soviet authorities well knew that if their subjects should ever seize or be granted that right, the Communist system would instantly collapse. And that, of course, is what happened.

The citizen in a liberal unitary state who is dissatisfied with the national government may of course leave and go to live in another country. But these days it is becoming harder to obtain a permanent resident visa for the kind of country to which one might wish to emigrate. Globalism notwithstanding, immigration is increasingly unpopular with voters the world over.

In a federation, however (including a quasi-federal association such as the European Union), there is complete freedom to migrate to other states. A federal structure allows people to compare different political systems operating in the same country and to give effect to those comparisons by voting with their feet. This process of comparison, choice and exit has occurred on a massive scale in Australia, especially during the eighties and early nineties. During those years Australians moved in huge numbers from the then heavily-governed southern States to the then wide open spaces of Queensland.[10]

The freedom to leave has been recognized as a political right longer than perhaps any other attribute of citizenship. Plato's dramatized account of the last days of Socrates has the philosopher restating the principle in context:

> "[A]ny Athenian, on attaining to manhood and seeing for himself the political organization of the State and its Laws, is permitted, if he is not satisfied with [them], to take his property and go away wherever he likes".[11]

In the seventeenth century, Thomas Hobbes wrote of the consent of the governed as embodied in the willingness of the citizen to live under a particular government and respect its laws. That tacit consent gave legitimacy to a ruler even before the advent of modern democracy[12] — indeed, it was the only form of political legitimacy available at that time.

A federal Constitution therefore operates as a check on the ability of State and Territory governments to exploit or oppress their citizens. This function did not appear in the first of the modern federal Constitutions (that of the United States) as a matter of conscious design — it is merely a happy by-product of the system. None of the early commentaries discuss the value of federalism as a check on state power. Nevertheless, it is clearly an inseparable consequence of any federal structure.[13]

According to Professor Richard Epstein of the University of Chicago, the freedom of individual choice among governments in a federation is one of the most effective of the usual safeguards against governmental excesses, the others being the full separation of powers and a legally enforceable Bill of Rights. The special merit of the right of exit is that it is a self-help remedy, simple, cheap and effective.[14]

Some other American commentators argue that it is the most effective of the three safeguards.[15] Judge Robert Bork, in support of this view, points out that the division of power between federal government and States is the only constitutional protection of liberty that is neutral, in the sense that you can choose to move to the State that protects the particular freedoms you cherish most, regardless of whether they are specifically protected by the Constitution or find favour with judges.[16] At the very least, one must agree with Gordon Tullock's conclusion that: "The addition of voting with your feet to voting with a ballot is a significant improvement".[17]

So when centralists give federalism the disparaging label "States' rights", they are obscuring the fact that it is above all the *people's* right to vote with their feet that is protected by the constitutional division of sovereignty in a federal system. (The States themselves — if one means by that their governments — have, on the contrary, shown an increasing willingness to surrender their rights to the Commonwealth.)[18]

This beneficial feature of federalism has two limitations, however. One is that it gives existing residents no protection for assets that cannot be moved, such as land or licences.[19] The New South Wales Parliament exploited this limitation spectacularly in 1981, when it legislated to confiscate all privately-owned coal deposits in the State without giving the owners a right to compensation.[20]

The effectiveness of exit as a remedy is also limited by the number of States. The fewer States there are, the fewer the choices, and the greater the opportunities for governments to collude on taxes, spending priorities and other areas of law or policy that are important to the citizen. The small number of States in Australia, as compared with ten Provinces in Canada, twenty-three Swiss cantons and fifty American States, makes collusion more likely and more effective.[21] This is analogous to the problem of the small number of firms in some Australian industries in the early days of economic competition policy under the *Trade Practices Act*. As under that Act, therefore, the relatively small number of choices makes it all the more important to preserve and expand such potential for competition as the number of competitors allows.

2. The possibility of experiment

The British constitutional scholar James (Viscount) Bryce in 1888 published a monumental treatise on the United States that became the standard reference manual at Australia's federal conventions.[22] The fact that it is known to have been assiduously studied and constantly cited by the delegates makes it a valuable guide to the understanding and the intentions of Australia's Founders. In his appraisal of the American system Bryce identified among the main benefits of

federalism "the opportunities it affords for trying easily and safely experiments which ought to be tried in legislation and administration".[23]

This is the same point as Justice Brandeis was making in his famous statement that:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with dangerous consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".[24]

In other words, the autonomy of the States allows the nearest thing to a controlled experiment that is available in the sphere of law-making and government policy. Being closer to the workface, State governments are in a better position than the national government to assess the costs as well as the benefits of particular policies as revealed in this way. Not only that, but the possibility of competition among States creates incentives for each one to experiment with ways of providing the combination of public goods that will maximize the welfare of a majority of its voters, and perhaps attract people and other resources from other States.[25]

All this is particularly important in times of rapid social change. As Karl Mannheim pointed out, "every major phase of social change constitutes a choice between alternatives",[26] and there is no way a legislator can be certain in advance which policy will work best. For example, *de facto* relationships have attracted legislative attention recently because society has no experience in dealing with them on the present scale. Which is the best policy: the interventionist, paternalist approach of the New South Wales *De Facto Relationships Act* 1984, or the common law libertarianism of Queensland and Western Australia? The only way to be certain is to observe what happens in practice under each approach. The evidence produced by comparing the results of different policies in different States may force a modification of the approach, provided that the legislature is open to rational persuasion.

Besides making experiment and comparison possible, a federal system also makes it harder for legislatures to avoid or dismiss evidence that undermines the approach they have taken. The results of experience in one's own country are less easily ignored than evidence from foreign lands.

That is another reason why ideologues tend to be hostile to federalism. Hardly a week passes without some activist group lamenting the "inconsistent" (the term being misused to mean merely "different")[27] approaches taken by State laws to current social or economic issues, and calling for uniform "national" legislation to deal with the problem. Behind these calls for uniformity lies a desire to impose the activists' preferred approach on the whole Commonwealth, precisely so that evidence about the effectiveness of other approaches in Australian conditions will not become available. Unless experimentation can be suppressed, the activists cannot isolate their theory from confrontation with contrary evidence.[28]

The *Family Law Act* 1975 is an example of a law that has been insulated from feedback in this way. Seldom has an Australian law been as consistently controversial, both as regards its substance and its administration, as Lionel Murphy's federal legislation in this vital field.[29] A good case can be made for uniform divorce laws, rather than the separate State laws that existed before 1959,[30] but in this case uniformity has been purchased at a cost that many Australians still regard as too heavy. If evidence produced by alternative contemporary approaches had existed, some salutary adjustments might have been made.[31]

Not only may suppressing the possibility of experiment be too high a price to pay for uniformity, but the uniformity itself may be an illusion. The federal *Evidence Act* 1995, intended to be re-enacted by all the States, was promoted with the claim that uniform legislation was needed to put an end to the "differences in the laws of evidence capable of affecting the outcome of litigation according to the State or Territory which is the venue of the trial".[32] The Act certainly

does away with some legal differences, but in most cases it does so by granting the trial judge a discretion whether to admit the evidence or not.

As Justice Einstein of the New South Wales Supreme Court has pointed out, the exercise of these discretions is not normally reviewable on appeal. Consquently, the result of the legislation is a substantial extension of the powers of individual trial judges in matters of admissibility.[33] So instead of eight different State or Territory laws capable of affecting the outcome of a case, we now have, in effect, as many different evidence "laws" as there are trial judges. Besides adding greatly to the uncertainty of the law, this represents a major transfer of discretionary power from the private sphere to the public sector, in this case the judicial arm of government. Since to date only New South Wales has adopted the Act, it remains open to the other States to experiment with reformed evidence laws (uniform or not) that do not suffer from those defects.

Neither uniformity nor diversity is an absolute value in itself. Sometimes the gains from nationwide uniformity will outweigh the benefits of independent experimentation. This will usually be the case in areas where there is long experience to draw on, such as defence arrangements, the official language, railway gauges, currency, bills of exchange, weights and measures and sale of goods. But experimentation has special advantages in dealing with the new problems presented in a rapidly changing society, or in developing new solutions when the old ones are no longer working.

3. Accommodating regional preferences and diversity

Unity in diversity. The decentralization of power under a federal constitution gives a nation the flexibility to accommodate variations in economic bases, social tastes and attitudes. These characteristics correlate significantly with geography, and State laws in a federation can be adapted to local conditions in a way that is difficult to achieve through a national government. By these means overall satisfaction can be maximized,[34] and the winner-take-all problem inherent in raw democracy alleviated. Professor McConnell illustrates the point with this example:

> "[A]ssume that there are only two States, with equal populations of 100 each. Assume further that 70 per cent of State A, and only 40 per cent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each State, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A".[35]

Government overall thus becomes more in harmony with the people's wishes, as Professor Sharman explains:

> "[F]ederalism enhances the range of governmental solutions to any given problem and consequently makes the system as a whole more responsive to the preferences of groups and individuals".[36]

Paradoxically, perhaps, a structure that provides an outlet for minority views strengthens overall national unity. Without the guarantee of regional self-government, Western Australia, at least, would not have joined the Commonwealth. The State has a long-standing secession movement that has revived in recent years. If that guarantee were by some means abolished, the West might secede, perhaps taking one or two other States with it. Wayne Goss, when Premier of Queensland, was making essentially this point when he warned that abolishing the States, even *de facto*, could fracture the unity of the nation.[37] Federalism thus has an important role, as Lord Bryce observed, in keeping the peace and preventing national fragmentation.[38] It is far from impossible that if the British had adopted a federal structure, as many reformers in the last century urged,[39] the Irish might have preferred to stay in the United Kingdom (or the "Federal Kingdom" as it might then have been) and a century of strife might have been avoided.

Cultural differences in Australia. Though the fact is often overlooked in Canberra and Sydney, there are attitudinal and cultural differences between the Australian States. These differences are sometimes quite marked, and not only in Queensland, despite the tendency of some southern commentators to view the State as a pathological aberration. "It should be recognized", writes former Chief Justice Green of Tasmania, "that although relatively speaking the Australian population as a whole is fairly homogeneous, each State and Territory has different laws, values, history, economic profiles, electoral and parliamentary systems and court systems".[40]

Some commentators see regional socio-cultural diversity as the only possible explanation and justification of federalism. This leads to the assertion that the regional differentiation of social characteristics in Australia is not sufficiently pronounced to warrant a federal structure. The borders between the States are purely arbitrary, it is argued, so the States lack a genuine social basis.[41] Those propositions are unfounded, for reasons succinctly expressed by Professor Sharman:

> "To begin with, a sense of political community can exist quite independently of social differences between communities. Geographical contiguity, social interaction and a sharing of common problems all tend to create a feeling of community, whether it is a street, a neighbourhood or a State. The chestnut about the arbitrary nature of State boundaries is not only wrong as a geographical observation for many State borders — deserts, Bass Strait and the Murray River are hardly arbitrary lines — but fundamentally misconceives the nature and consequences of boundaries. Drawing political borders on a featureless plain is an arbitrary act, but once drawn, those lines rapidly acquire social reality".[42]

To Sharman's list of the natural boundaries between the States one could add the Queensland border ranges, which mark the beginning of the eastern tropical and sub-tropical zones, and the factor of sheer distance between the urban settled areas, a feature perhaps more marked in Australia than in any other country. Despite the wonders of modern communication, if people are really to understand and empathize with one another, they still need to meet and talk face to face. So it could never be said here, as Lord Bryce said of America, that "The states are not areas set off by nature", with only California having genuine natural frontiers, the Pacific and the Sierra Nevada.[43] Yet in America the States have undoubtedly become real political communities in the way described by Sharman, including the arbitrarily-drawn "quadrilateral" States west of the Mississippi.

Less can be better. The argument that Australia is too homogeneous to be a federation also runs into the problem that federalism plainly works best when socio-cultural differences are not *too* great or too territorially delineated. Multi-ethnic federations are among the hardest to sustain.[44] The United States has had no serious secessionist movement since 1865 because, although it is a land of unbelievable diversity, the areas occupied by competing minorities do not correspond closely with political boundaries. For example, there is no State, or group of States, that is overwhelmingly black, or American Indian, or Jewish, or Catholic or Asian.

The same is true of language, ethnic and religious differences in Switzerland, to a lesser extent.[45] The Swiss Constitution, however, has the added advantage that its citizen-initiated referendum system makes it virtually impossible for politicians to engage in fear-based manipulation of regional or other differences.

Contrast Canada, where most of the French-speaking population is concentrated in Quebec, which in turn is overwhelmingly francophone. The results are obvious. Similar tensions caused Singapore, which is almost entirely Chinese, to secede from the Malaysian federation.

In this light, Australia's relative socio-cultural homogeneity is an argument for, not against, a federal structure.

Isolating discord. Federalism's tolerance for diversity has the further advantage of preventing the national government from being forced to take sides on matters of purely regional concern. This is consistent with the axiom of modern management science that problems should so far as possible be dealt with where they arise. As Lord Bryce put it:

"…..the looser structure of a federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a contest of national magnitude".[46]

For example, the Northern Territory's voluntary euthanasia legislation became a national political issue because, as a Territory enactment, it could be overridden by a Commonwealth Act.[47] Had the issue arisen in a State, there might still have been a nationwide debate, but the federal government would not have been directly involved.

Subsidiarity. In Europe this principle is called "subsidiarity", and it is now enshrined as a fundamental guiding principle in the European Union treaties.[48] Article 3b (2) of the European Community treaty defines subsidiarity as meaning that the Community shall take action "if and only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community". Obviously, much will depend on how this piece of treatyspeak is applied in practice, but the principle's adoption is credited with saving the 1991 Maastricht agreement.[49] Public misgivings over the centralizing ambitions of the French president of the Commission at the time, Jacques Delors, might otherwise have blocked any further progress towards European integration.

4. Participation in government and the countering of elitism

A federation is inherently more democratic than a unitary system because there are more levels of government for public opinion to affect.[50] The great historian Lord Acton went further, saying that in any country of significant size, popular government could only be preserved through a federal structure. Otherwise the result would be elite rule by a single city:

"For true republicanism is the principle of self-government in the whole and in all the parts. In an extensive country, it can prevail only by the union of several independent communities in a single confederacy, as in Greece,[51] in Switzerland, in the Netherlands, and in America, so that a large republic not founded on the federal principle must result in the government of a single city, like Rome and Paris; or, in other words, a great democracy must either sacrifice self-government to unity, or preserve it by federalism".[52]

De Tocqueville was making the same point more broadly when he wrote that democracy works best when it proceeds from the bottom up, not from the top down, with the central state growing out of a myriad of associations and local governments.[53] Decentralized government makes people a little more like active participants than passive recipients; it produces men and women who are citizens rather than subjects, and gives government a greater degree of legitimacy.

The fall and rise of political elitism. This more deeply democratic aspect of federalism is especially important at a time when elitist theories of government, albeit clothed in democratic rhetoric, are once again in vogue. The struggle between the idea of government by the people and government by an elite is as old as the Western political tradition itself. In fact, political philosophy was founded on this controversy: Plato's *The Republic* was largely his criticism of democracy in the form in which it was practised at Athens. In its latest manifestation, the conflict between elitism and democracy explains modern politics more satisfactorily than the traditional division between left and right.[54]

Elitism has been dominant throughout most of history. The democracy that exists today in countries influenced by the Western tradition is only two centuries old, a legacy of the French and American revolutions. When united with the English traditions of liberty and the rule of law, democracy has produced not only an unprecedented measure of individual freedom but also a huge and unsurpassed increase in the material well-being of the masses.

Despite democracy's success, elitism has never conceded defeat. Throughout the nineteenth Century, critics assailed the belief that the common man could govern as being contrary to

experience and an absurdity. One after another, new theories were advanced to justify rule by a select few, on technocratic grounds, on the basis of some romantic "superman" mystique, or by reason of a supposed historical inevitability. In the twentieth Century those theories brought forth the twin poisoned fruit of Communism and Hitlerian national socialism.

The defeat of those two monstrosities through the heroic efforts and sacrifice of ordinary men and women has not brought democracy final victory. For the 1960s saw the sprouting of a new hybrid of the old Platonic plant that has now grown to a position of dominance.

This is a model of government that lies somewhere between the traditional poles of democracy and elitism, a model in which the power of an enlightened minority would help democracy to survive and progress. The several variations of this model have come to be known as the "theories of democratic elitism". The late Christopher Lasch deplored this "paltry view of democracy that has come to prevail in our time" as reduced to nothing more than a system for recruiting leaders, replacing the Jeffersonian ideal community of self-reliant, self-governing citizens with a mechanism for merely ensuring the circulation of elites.[55]

The new wave of elitism has gained added momentum from the trend towards globalization. The growth of a global consciousness is no doubt a good thing, but the other side of the coin is that it has opened the way for unrepresentative bodies such as the United Nations and its agencies to implement an elitist agenda under the pretext of promulgating "international norms".[56] International relations circles have acknowledged this problem and given it the label "democratic deficit", but no steps other than cosmetic measures have been taken to overcome it.

Free speech for all, or the few? The new elitism, and the characteristics of the groups it has brought to power, have been explored by Lasch, Thomas Sowell, Jeffrey Bell, Robert Nisbet and others,[57] so there is no need to detail them here. One striking example of how these theories have worked in Australia should be noted, however, if only to show their ominous practical consequences.

From the 1970s onwards, elitist politicians have repeatedly attempted to instal an elitist version of the doctrine of free speech, under which the government would decide which political issues would be admitted to the public forum, and by whom they would be debated. In August - September, 1975 the Whitlam federal government proposed a scheme whereby newspapers would be granted (or deprived of) a licence to publish by a special government body on the basis of whether or not they were meeting the needs of the "community".[58] The wave of public fear generated by this blatant attempt at political censorship was a major factor leading to the 1975 constitutional crisis, though it is never mentioned in media accounts of those events.

The next attempt was the *Political Broadcasts and Political Disclosures Act* 1991, promoted by Senator Nick Bolkus, which prohibited all political advertising (paid or unpaid) on radio or television in the period leading up to an election. Blocks of free air time were to be allocated to approved parties by a government-appointed panel. The Act was overturned by the High Court in one of its best-ever decisions,[59] but Senator Bolkus and his academic supporters remain on the offensive. Recently the Senator has advanced a new proposal based, not on direct prohibition as in 1991, but on a *de facto* takeover of political debate by nationally funded elite bodies. "[T]alk is cheap," he writes. "Real freedom of speech is about resourcing durable institutions within society that can present alternative views, critique government policy, and review government decisions".[60]

No doubt, if given the opportunity, Senator Bolkus will seek to put his revised vision into effect. If he succeeds, his view of public political debate as "cheap", ill-informed and unenlightened, could be self-realizing. It was Christopher Lasch, following William James, who perceived that our search for reliable information is itself guided by the questions that arise during argument about a given course of action. It is only through the test of debate that we come to understand what we know and what we still need to learn.[61] Exclude the people from political debate and you deny them the incentive to become well informed.

With democracy's victory obviously only half complete, we must continue to defend all available supports for popular government. As elites will resist any new outlets for public opinion,[62] it is all the more important to protect the inherently more open and democratic political texture afforded by our federal system.

Creative controversy. In one sense, as Campbell Sharman points out, federalism's more open texture will produce political conflict, "but it does this only as a reflection of the increased opportunity for individual and group access to the governmental process — such conflict is clearly highly desirable". Federalism, he explains:

> "…..simply makes visible and public differences which would occur under any system of government. It is nonsense to think that problems would disappear if Australia became a unitary state, and there would be few who would argue that the politics of bureaucratic intrigue is preferable to the open cut and thrust of competitive partisan politics in the variety of forums provided by a federal structure".[63]

The interrelation of government bodies, then, is as much of a problem in unitary states as in federations. Gordon Tullock observes that relations between Arizona and New Mexico are much less unfriendly than those between the federal State Department and the CIA.[64]

On the basis of democratic values alone, therefore, we should not allow the elitists to talk us out of federalism. Its greater opportunities for popular participation are a major political end in themselves. They foster a sense of responsibility and self-reliance.[65] They lead to better-informed public debate. And, as Lord Acton said, they "provide against the servility which flourishes under the shadow of a single authority".[66]

5. The federal division of powers protects liberty

Barrier of our liberty. We saw above how a federal structure protects citizens from oppression or exploitation on the part of State governments by allowing them the right of exit, to vote with their feet by moving to another State. But the diffusion of law-making power under federalism is also a shield against an arbitrary central government. When Thomas Jefferson declared that "the true barriers of our liberty in this country are our State governments",[67] he meant that the Constitution's "vertical" separation of legislative powers between Congress and the States performed a function similar to the "horizontal" separation of powers between legislative, executive and judicial arms of government. Lord Bryce likewise affirmed that "federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen".[68]

The imperfections of human nature meant that no-one could be trusted with total power; in Lord Acton's words, all power corrupts, but absolute power corrupts absolutely. Power therefore had to be dispersed. Good government, as Montesquieu had observed, also required that people should be unafraid, and concentrations of power give rise to apprehensions that they will be used tyrannically. By dividing sovereignty, the federal division of powers reduces both the risk of authoritarianism and the apprehension of it. "Liberty provokes diversity," Acton remarked, "and diversity preserves liberty by supplying the means of organization".[69] The States therefore also help to preserve freedom, because they can rally citizens to the cause of freedom, helping to overcome the organizational problems that otherwise might cause national usurpations to go unchallenged by the "silent majority" of citizens.[70]

The States help to preserve judicial independence and impartiality as well. The existence of independent State court structures prevents a national government from filling all the courts in the land with judges believed to be its supporters. Even the late Geoffrey Sawer, an eminent constitutional lawyer but definitely no federalist, had to concede the value of a federal structure as a safeguard of liberty.[71]

That this aspect of the federal compact has not attracted much attention or comment in Australia is probably a function of history. Newcomers from Europe have often remarked that

Australians are too complacent about their freedom because they have never had to fight for it. That is not quite true, at least as regards external threats; from 1941 to 1945 Australians were defending their liberty in the most direct way possible. But the perception is generally correct in relation to internal threats. After the Australian colonies in the 1850s "erected what were for the time advanced democratic political institutions",[72] democratic progress followed a course that was smoother than anywhere else in the world. There was no turbulent formative period comparable to the American revolutionary era, which seems permanently to have sensitized Americans to infringements of their freedom. Australians received no inoculation of that kind. That they should have come to take their freedom for granted was to some extent understandable.

Recent assaults. But a succession of federal government attacks on civil and political rights over recent decades make such nonchalance now quite unjustifiable. First there have been the already noted attempts to restrict political debate in the media. Then Malcolm Fraser's retrospective tax legislation, which broke the constitutional convention against *ex post facto* law-making, and led in due course to the widely-criticized practice of "legislation by ministerial fiat".[73] Proliferating quasi-judicial tribunals took politically sensitive areas of law away from the ordinary courts so as to deprive accused persons of due process, subjecting them to rulings by tribunals whose members were appointed precisely because they were known not to be impartial.[74]

One of the most dramatic challenges to liberty was the *Australia Card Bill* 1985, which would have required citizens to carry a government number recorded on an identity card. Among its many other consequences, this legislation would have reversed the constitutional presumption that it is for the government to justify its actions to the people, not the other way around.[75] Further, the whole concept of responsible government born of the 1688 English revolution, under which the executive government is responsible to Parliament, has been made a legal fiction by modern party discipline. It was finally buried in 1993 when Paul Keating announced that ministers, including the Prime Minister, would no longer be available to answer questions in the House, but would attend on a roster basis This move stemmed from Mr Keating's earlier-expressed view that Question Time "is a courtesy extended to the House by the executive branch of government", and did not reflect any right that Parliament might have to demand an account from the political Executive.[76] The Executive's counter-revolution against the 1688 settlement was thus largely complete.

Then we have seen the manipulation of the media through the government-funded National Media Liaison Service and the use of threats and intimidation against individual journalists.[77] The Kirribilli Agreement, in some ways Australian democracy's lowest point, showed that government leaders could with impunity conspire to deceive the electorate about the fundamental matter of who was to lead the government after the election.[78] Finally, there is extensive evidence of systematic ballot-rigging, on a scale sufficient to have altered the outcome of at least one recent federal election.[79] The Joint Standing Committee on Electoral matters, on the basis of that evidence, recommended some obvious changes to the electoral laws, such as requiring proof of identity for enrolment and voting, but the government Bill embodying those reforms has been blocked by the Opposition in the Senate.[80]

Especially arresting is the fact that all these attacks on liberty have occurred, not during a war or similar calamity that might have excused or explained some of them, but in a period of peace and general prosperity. A country with a recent record like that has no reason to assume that its freedom is secure. In particular, it has much to fear from any further concentration of government power.

Recent experience shows, therefore, that contemporary Australia needs the federal division of power, not just in the weakened form left by successive pro-centralist decisions of the High Court, but in something like its intended sharpness, as a check on the arrogance of central power. Federal politicians have shown themselves no more immune to human failings than their State counterparts, but more dangerous because of their monopoly powers in key areas, the support of a

huge, pro-centralist bureaucracy, and the fiscal stranglehold that the High Court has bestowed on them.

Even in its present battered condition, Australian federalism has shown its value as a safeguard of liberty. For example, Premiers and other State political leaders helped to organize the opposition to the 1991 political advertising ban. The New South Wales government was a plaintiff in the successful High Court challenge to the legislation, the most important milestone in the progress of Australian democracy since Federation.

An end in itself. In a properly working federation, a national government seeking to implement a uniform policy in an area where it has no constitutional power must learn to proceed by negotiating and seeking consensus, not by *diktat*, bribery or menaces.[81] It must learn to evaluate the costs as well as the benefits, to consider the evidence against its theories as well as in favour.[82] Government by consensus can not only be more efficient, it can also be an end in itself, as Professor Sharman explains:

> "[I]t should be noted that national governments have a strong preference for imposed solutions rather than negotiated ones. While it may be frustrating for a national government to acquire the consent of six other governments for some uniform scheme of legislation, this says nothing about either the desirability of the finished product or about the virtues of compromise and accommodation as inherently desirable characteristics of the governmental process".[83]

6. Better supervision of government

Decentralized governments make better decisions than centralized ones, for reasons additional to the spur of competition provided by the citizen's right of choice and exit.[84] There are two main reasons for this.

Lower monitoring costs. Lord Bryce found that "the growth of order and civilization" in the United States had been aided by the fact that State governments were more closely watched by the people than Congress could have been.[85] For the same reason, "It deserves to be noticed", he continued, "that, in granting self-government to all those of her colonies whose population is of English race, England has practically adopted the same plan as the United States".[86] Leaving aside the Victorian view of the "English race", the point is a good one, as the rationale behind power devolution to the then British colonies is often overlooked. It contrasts with the French pattern of colonial self-government, which was, and still is, to permit the colonies to elect members of the National Assembly in Paris, while administering the colonies simply as overseas departments of France.

The closer supervision of State governments is a function of lower monitoring costs. There are fewer programs and employees, and the amounts of tax revenue involved are smaller. Citizens can exercise more effective control over government officials when everything is on a smaller scale.[87] Large governments encourage wasteful lobbying by interest groups engaged in what economists call "rent-seeking", the pursuit of special group benefits or privileges. Rent-seeking is easier in large than in small governments, because it is harder for ordinary citizens to see who is preying on them. The lower information costs at the lower echelons make it easier to spot the deals made with interest groups at the State government level.[88] Further, the more liable to abuse the powers involved, the more important it is that they should be decentralized, according to Professor Calabresi:

> "[I]t often makes sense to lodge dangerous and intrusive police powers over crime and over controversial social issues in the States, where government officials may be monitored more easily by the citzenry".[89]

The general observation about the freer flow and readier absorption of information about State government is borne out by the Australian scene. Most of the content of the major Australian newspapers relates to State and local matters. The national dailies have much smaller

circulations than their State-based rivals, and successive attempts by the Australian Broadcasting Corporation to adopt a national format for its news and current affairs programs have failed.

In that case, then, how to account for the financial disasters of the Victorian, South Australian and Western Australian governments in the late 1980s? Here, it seems, the central problem was not federal structure but media behaviour. Information about the looming disasters existed but, largely because of the political leanings of reporters, editors and producers, it was not passed on to the public. Paul Keating as Treasurer attacked Melbourne's *The Age* for having covered up the Victorian government's evolving financial debacles,[90] and others have made similar charges about the ABC and the press in the three affected States. But the same kind of thing was also happening in Canberra. The difference was that the federal government was not content to rely on political predispositions, but resorted to threats and reprisals against media organizations and individual journalists.[91] (More on this later).

Coping with size. The greater ease of supervising State government is a function of the broader proposition that a physically large country without a federal system is ungovernable. Jefferson was emphatic that the United States, which in his day was only a fraction of its present size, was "too large to have all its affairs directed by a single government".[92] In our own time, even a centralist like Geoffrey Sawer had to admit that in Australia, geographic factors make a good deal of devolution of powers inevitable.[93]

Lord Bryce thought this factor of special importance in a new country:

> "It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen, to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more natural and spontaneous way, than can be expected under a centralized government….."

and the spirit of self-reliance among those who build up new communities is stimulated and respected.[94] Federalism also relieved the national legislature of "a part of that large mass of functions that might otherwise prove too heavy for it". The "great council of the nation" thus had more time to deliberate on those questions that most closely affected the whole country.[95]

A less obvious result of dividing a large country into States with some commonality of socio-cultural attitudes is given by Professor Calabresi. He argues that State governments may be able to enforce criminal laws and regulations of social mores less coercively than the national government, because of the lower costs and greater ease of monitoring citizen behaviour in a smaller jurisdiction than in a continent-sized commonwealth:

> "The greater congruence of mores between citizens and representatives in State governments may in turn produce greater civic-mindedness and community spirit at the State level".[96]

This might offset the decline of public spiritedness at the national level,[97] which in Australia is linked with the palpable public antipathy towards Canberra (most notably in the outlying States) and the Commonwealth Parliament, especially in the days when the tone of debate was set by Mr Keating.

7. Stability

Stability is a cardinal virtue in government. Stable government enables individuals and groups to plan their activities with some confidence, and so makes innovation and lasting progress possible.

Political stability is much valued by ordinary people because they are the ones likely to suffer the most from sudden shocks or changes of direction in the government of the country. A stable polity is in that sense more democratic than an unstable one, other things being equal. This, as Carl Friedrich pointed out, is a function of the political prudence of the common man, who finds stability the best framework in which to think out matters of great weight in an environment shot through with political propaganda.[98]

Stability is obviously a high priority with the Australian people. This can be seen from their widespread practice of voting for different parties in each of the two Houses of Parliament, thereby denying the government a free hand in passing whatever legislation it likes. Based on the voters' profound distrust of the career politician, this practice reduces the destabilizing potential of transient majorities in the lower house.

Professor Brian Galligan supports this assessment with his observation that the traditional literature on Australian politics has exaggerated the radical character of the national ethos, while at the same time overlooking the stabilizing effect of the Constitution.[99]

What is the source of this stability? The federal compact, Professor Galligan continues, deals in an ingenious way with the problem of the multiplicity of competing answers and the lack of obvious solutions by setting government institutions against one another:

> "The shape of the nation is as much the product of the interaction and clash of competing ideas and institutions as it is of any intentional order or national consensus. That is particularly and deliberately so for a federal system of government that breaks up national majorities and sets government institutions against one another".[100]

And the people prefer it that way, as their votes in constitutional referendums show.

The result is that while, in a federation, sweeping reforms are more difficult, they are also less likely to be necessary. Successive federal governments have encountered more frustrations in their efforts to restructure the economy than their counterparts in the United Kingdom and New Zealand, but the Australian economy was not in such dire need of restructuring. The nation's federal system had effectively prevented earlier governments from matching the excesses of collectivism attained in pre-Thatcher Britain[101] or the bureaucratic wilderness of "Muldoonery" in New Zealand. Opinion polls in those two countries show that most people consider the reforms made by the Thatcher and Lange governments to have been beneficial, but the process was a stressful and destabilizing one. In New Zealand it led to public pressures that resulted in substantial changes to the whole system of parliamentary representation.

The stability that federalism promotes also has a valuable flow-on effect in the political consciousness of the people, according to Lord Bryce. It strengthens "their sense of the value of stability and permanence in political arrangements. It trains them to habits of legality, as the law of the Twelve Tables trained the minds of the educated Romans".[102] In this way federalism tends to become a self-reinforcing system almost with a life of its own. [103]

8. Fail-safe design

Besides acting as a brake on extreme or impetuous action by the national government, federalism cushions the nation as a whole from the full impact of government blunders or other reverses. Lord Bryce likened a federal nation to a ship built with watertight compartments:

> "When a leak is sprung in one compartment, the cargo stowed there may be damaged, but the other compartments remain dry and keep the ship afloat".[104]
>
> Professor Watts uses the more modern fail-safe analogy:
>
> "The redundancies within federations provide fail-safe mechanisms and safety valves enabling one sub-system within a federation to respond to needs when another fails to. In this sense, *the very inefficiencies about which there are complaints may be the source of a longer-run basic effectiveness*".[105]

In this way federalism makes it harder for any one group of politicians to ruin the entire economy at once. The deadly mixture of corporate statism with public sector expansion on borrowed money that undid Victoria, South Australia and Western Australia in the 1980s was also the fashionable policy in Canberra at the time. It might well have been comprehensively extended to the whole country if the constitutional power to do so had existed. Had that happened, Australia might not be weathering the Asian economic storm as well as it is.

For the same reasons, damage control can bring results more quickly when the impact of an economic mistake or misfortune can be localized in this way. The three States that were devastated in the 1980s have now recovered from their tribulations. In their reconstruction processes they were able to borrow policies that had proved successful in other States: fiscal policy from Queensland, privatization and reform of government business enterprises from New South Wales, scaling back the public sector from Tasmania.[106] Repairing the damage done by a policy error in an area where the Commonwealth has a monopoly, such as monetary policy, seems to take longer, however. The crippling inflation ignited by Treasurer Frank Crean's 1973 federal Budget has only recently been brought under control, almost a generation later.

One should therefore not assume that a healthy national economy requires, or will even be assisted by, comprehensive macro-economic and micro-economic control from the centre. Economists increasingly take the view that the role of national governments is best confined to establishing general rules that set an overall framework for market processes (the economic order),[107] and that centralized fiscal control creates a "fiscal illusion" by disguising the true cost of public services and making government look smaller than it is.[108] In this way it perpetuates the "collectivist hand-out culture in public finance".[109]

The economic columnist Padraic P McGuinness maintains that it is quite practicable to devolve tax and fiscal policy powers to the States, because under a unified currency it is not possible for one State to conduct an inflationary fiscal policy by running budget deficits for very long. There is no good reason, he writes, for Canberra to deny to States the possibility of divergent policies with respect to the overall level of revenue raising and spending. Most of the powers the Commonwealth exercises in relation to economic policy are not only unnecessary, but positively counter-productive:

> "In fact, the need for central macro-economic policy is largely the product of over-regulation and mistaken micro-economic policies".[110]

9. Competition and efficiency in government

Like all other human institutions, governments if given the chance will tend to behave like monopolists. In Australia it has taken firm constitutional constraints to prevent the federal government from restricting political broadcasts so as to abridge the public's opportunities to compare political policies and personalities.[111] A government that can restrict comparisons and prevent people from voting with their feet is in the position of a classic single-firm monopolist, and can be as inefficient and oppressive as it likes. The paradigm case is the former Soviet Union.

Government of the people, for the governors. Inefficiency in government usually takes either or both of two forms. One is a tendency to higher tax rates, which is obvious and easy to detect. The other, less obvious, has been identified and extensively described by the economists who have developed the "public choice" model of government that has achieved wide acceptance in recent years.

This model is based on the proposition that government agents (elected representatives and public servants) act from the same motives of rational self-interest as other people. It predicts that government programs will be administered so as to minimize the proportion of the program's budget that is actually received by the intended beneficiaries, with the remainder — the surplus —being used to further the interests of the administrators. Those administering, for example, a program to pay money to the poor will minimize the revenues directed to the needy, and use the surplus to expand the administering bureaucracy, improve staff gradings and pay for overseas conference travel.[112] The politicians in charge will use the surplus to acquire added powers of patronage through opportunities to appoint their supporters to boards, committees and specialist tribunals.

A government that enjoys monopoly power is able to generate such a surplus for discretionary use by officials and politicians.[113] An often-cited illustration of this is Australia's set

of federal policies designed to benefit the Aboriginal people. The States also have Aboriginal assistance programs, but these have not attracted the same kind or degree of criticism, perhaps because a higher proportion of the funds are being used for their intended purpose.

Another example is Australia's public university system. In the days when they were administered by the States, the universities were efficient bodies with the "flattened" management profile so admired today. A dean's administrative duties seldom took as much as a day per week, and even vice-chancellors were part-time officials who spent much of their time on teaching and research. Commonwealth involvement consisted mainly of funding Commonwealth scholarships, which were available to any student who did better than average in the final school examinations. As a result, fully 70 per cent of students went through their tertiary education paying no fees at all.

The transformation began in 1974 when the Commonwealth assumed financial control over the universities, relying on the conditional grants power in s.96 of the Constitution. Access to the proceeds of the Commonwealth's monopoly over income taxation generated a revenue surplus which, as the public choice model predicts, was increasingly used to expand the bureaucracy, both in government and in the universities themselves. Finally, the Dawkins revolution converted higher education into a total command economy administered from Canberra.

The vastly increased paperwork demands of a vastly expanded Commonwealth department generated multiple new layers of career bureaucracy in the universities — not only vice-chancellors, deputy vice-chancellors, pro-vice-chancellors, directors and co-ordinators, but also full-time deans, deputy deans and heads of department. At a university with which I am familiar the ratio of teaching academics to administrative staff sank to 0.6 to 1. In other words, there were substantially more full-time bureaucrats than teaching staff, a disturbing fact that several senior academics tried unsuccessfully to bring up for debate.[114] Nearly all students now pay fees, building up large debts through the HECS system. Academic salaries in real relative terms are a little over one-third of their level in the 1960s.[115] And when the university budget has to be cut, it is the teaching academics, not the administrators, who bear the weight of the retrenchments.

On the other hand, research in Australia and abroad shows that competitive federalism, by creating a competitive market for public goods, provides consumer-taxpayers with their preferred mix of public goods at the lowest tax price.[116] Though the composition of the tax/service bundles may vary, the proportion of revenue that is appropriated for the purposes of the bureaucracy and politicians is less because no government is able to exact a surplus from its citizens.[117] Competition, coupled with the right of exit, also makes it harder for states systematically to favour particular regions while imposing the costs on other regions.[118] Overall, competition gives governments an incentive to improve their performance in all areas, including the law. Judicial appointments are more likely to be made on grounds of merit rather than political affiliations, because a court system that is seen to be unpredictable or biased is a factor in business decisions on where to establish plants or headquarters.[119]

The efficiency gains from competitive federalism are not significantly reduced by the smaller size of State governments. There are few economies of scale in government except in the areas of defence and foreign relations, nor are large organizations necessarily any better at dealing with complex problems than smaller ones.[120] As Gordon Tullock points out, the Cray is the world's most complex computer, but the Cray company is not a particularly large computer company. Further, he continues, many of the functions carried out by national governments are not complex, notably the distribution of health and social welfare payments, which is the largest single portion of their work. The actual provision of health services, for example, is quite complex, but that is performed by smaller organizations such as hospitals or medical practices. The part of the operation that is centralized is the simplest portion.[121]

Even in highly centralized governments, a great many decisions must be made at a low level.[122] All Commonwealth departments of any size maintain offices in the State capitals where most of the core work is done, and which enjoy varying degrees of semi-autonomy.

The duplication issue. This leads to an issue that often arises in discussions of efficiency in a federal system: the question of duplication. This can be vertical (that is, overlap between federal and State government activities) or horizontal (duplication as among the States themselves). As to the vertical type, the fact that there is a Commonwealth department of health and a State department of the same name does not necessarily mean they are duplicating one another, any more than the State office of the Commonwealth department of social security is necessarily duplicating the work of its own head office in Canberra. They may be dealing with different aspects of the problem. The federal department of health may be wholly or partly unnecessary, in the sense that it is performing a task that would be better left to the forces of competition, but it is not necessarily duplicating a State function.

To the extent that there is actual duplication, it seems to stem in the main from the Commonwealth's entry into areas in which it has no legislative power, such as education, as a result of pressure from special interest groups such as the teacher unions. The constitutional vehicle for this has been the making of Commonwealth grants which, under the High Court's extremely wide interpretation of s.96, are subject to extensive conditions amounting to detailed, day-to-day regulation. The remedy lies in a more balanced reading of s.96, which, as its wording makes clear, was intended as a largely transitional measure of relatively minor importance. In the educational sphere, a proper interpretation of s.96 would allow the Commonwealth to play a useful role in, for example, interstate co-ordination, educational research and the development of comparable standards, at much lower cost than the authoritarian and counterproductive interference seen in recent years.

A common criticism based on vertical duplication is that, with two sets of politicians, State and Commonwealth, Australia is over-governed, and that it would be more efficient to dispense with the lower tier.

In 1996 Australia had 576 State parliamentarians.[123] That is not a huge number when compared with the 378,700 people employed in government (not counting those engaged in education, health care or social welfare, or working for government corporations), or with the nation's 878,800 managers and administrators. But it is unrealistic to suppose that abolishing the States would lead to a net saving of those 576 positions plus their support staffs.

Centralists always suggest replacing the six States with "regions", somewhere between 20 and 37 in number.[124] This structure would require the appointment of regional governors, prefects, sub-prefects, *Gauleiter* or what have you, together with support staff. France's regions are administered by an elite *corps préfectoral,* a highly-paid class who live like diplomats in their own country, with official residences, servants and entertainment budgets. Sooner or later, as in France, our national government would be forced to create elected regional assemblies, between 20 and 37 in number. By then, any savings would long since have evaporated. As matters stand, the 38.3 per cent of GDP that Australia allocates to general government expenditure is lower than the United Kingdom's 44.1 percent or France's 52.0 per cent.[125] Six sets of State parliamentarians thus look like quite an efficient arrangement.

A variant of the vertical duplication argument is the simple assertion that Australia's population is just too small to support six State governments. Some comparisons may be helpful here. In 1788 the population of the thirteen American States was 3 million, significantly less than Australia's population in 1901. By 1832 it had risen to 15 million,[126] but probably did not match Australia's current population of 18 million until about 1840. Switzerland, that land of supreme efficiency, has 5.5 million people for its 23 cantons. It is a more decentralized federation than Australia, with even some defence functions being performed by the cantons.

Horizontal duplication may to some extent be unavoidable because of the sheer size of the country. That aside, however, Professor Wolfgang Kasper of the University of New South Wales - ADFA answers the point :

> "All competition requires a degree of duplication, but the reward is that the deadweight loss and the monopoly rents of the 'government cartel' disappear. New, productive ideas about public administration are generated. The [duplication] argument is no different from any defence of monopoly and cartels. Nor is it intellectually more respectable because administrators and not businessmen are involved in rigging the market ...[D]uplication within rival State and local governments will serve the constructive purpose of enhancing the contribution of government to economic growth and citizen welfare".[127]

In the days of the old Telecom government monopoly, the opponents of competition argued that if its monopoly were removed, call charges would rise and service would decline because of the costs of duplication. The opposite has happened, and Telstra today is scarcely recognizable as the same corporation as the surly monster of old.

10. A competitive edge for the nation

Often overlooked, even by advocates of economic federalism, is the value of competition among the States as a means of enhancing the international competitiveness of the nation as a whole. In other contexts this principle is quite a familiar one. It is, for example, the basis on which international sporting teams are selected. Out of the deliberately encouraged rivalry between local, regional and State teams emerges the squad that will represent Australia in the Olympics or other international event. No other means of identifying the best possible national team has ever been seriously suggested. Competitive federalism harnesses this principle, which Australia has used with unequalled success in the sporting field, to the goal of earning a better standard of living for all.

That this principle applies to the economic sphere can plainly be seen from the case of China, which emerged as a world economic power only after it became a *de facto* federation by devolving wide economic policy-making powers to the provinces.

A local example can be found in the Australian road transport industry. After the High Court's interpretation of s.92 of the Constitution swept away most of the regulatory structure that had impeded its development, Australian trucking rapidly earned the nation the reputation of having the world's most efficient system of long-distance road transport.[128] It has been used as a case study and model in the deregulation of road transport throughout the world. Trucking in fact became one of our first multinational industries, with Australian companies making inroads in some of the world's most competitive markets, including North America.

Facilitating the selection function. Professor Kasper argues that federations have a real advantage in discovering rules and devices that assist international competitiveness. He proposes four conditions for enabling competitive federalism to perform this selection role most effectively:

1. The principle of subsidiarity mentioned above, under which tasks should be administered centrally only when there are proven welfare gains from centralization, as when a diversity of rules leads to unnecessarily high transaction costs — for example, if there were different weights and measures in each State.
2. The "rule of origin", which means that a product or service is automatically accepted throughout the country if it is deemed acceptable on health, safety and other grounds in the State in which it was produced. At present, Professor Kasper argues, we have excessive and unsystematic regulation because there is a cartel of regulators who are unchecked:

   > "Under a rule of origin, State and local governments that want to attract industry will compete with one another to develop the best possible set of regulations. This will put a competitive check on the regulators".

   A State that prescribed poor safety standards that hurt consumers would soon lose its attractiveness to industry, which would seek certification by a State with appropriate standards.

3. Assignment of tasks under the Constitution is clear and explicit. At present, Canberra has usurped tasks far beyond those granted to it in Chapter I, Part V of the Constitution in areas such as education and industry regulation. This, Professor Kasper argues, has created overlap and duplication that impose unnecessary compliance costs and lessen Australia's international competitiveness.
4. Fiscal equivalence: each level of government should finance its assigned and chosen tasks with the funds it raises. The beneficiaries of a public service should as far as possible be identical with those who are asked to pay for it. This would eliminate inefficient compromises, "fiscal illusion", free-riding and much political conflict. States would have an incentive to create their own, growing tax bases by pursuing far-sighted policies and competing for mobile resources. If the present vertical fiscal imbalance were eliminated, governments and the voters who elect them would have to live with the long-term consequences of their tax and development policies.[129] A similar point was made by Lord Bryce, who added that this would strengthen the sense of responsibility and spirit of self-reliance of the people.[130]

A race to the bottom? Professor Kasper deals with the most likely criticisms of his proposal,[131] but there is one objection which is sure to be pursued strongly and merits further attention. It is the proposition that the "rule of origin" would induce States to compete by lowering industry standards to the detriment of the public. This is the "race-to-the-bottom" argument, which has been used to justify, among other things, the uniform Corporations Law.

In answering this objection, one may begin by pointing out that the Commonwealth has the undoubted power under s.51(i) of the Constitution to set minimum standards of health, safety and integrity in interstate and overseas trade. The exercise of those powers can be a legitimate part of its role of setting the basic framework for the economic order.

A State that wished to prescribe more stringent standards would need to consider carefully whether the evidence genuinely justified that step. If it did, producers in that State might actually gain a competitive advantage from the legislation. For example, if South Australia were to ban the use of genetically-engineered soya beans in processed food, and research actually showed that the beans were bad for you, local processors could advertise interstate that their products were 100 per cent free of the offending vegetable and so reap extra sales among health-conscious consumers. If the ban were not empirically justified but stemmed from food-faddist paranoia, the government and the voters who elected it would have to accept the consequences in reduced economic activity and job opportunities.

Professor Richard Espstein evaluates the race-to-the-bottom argument specifically in relation to corporation laws and finds it to be flawed. He points out that the protection individual investors receive under a system of federalism derives from their ability to withhold their consent. If the rules facilitate the exploitation of shareholders, initial investors (including institutional investors with great sophistication) will demand at incorporation more favourable terms to compensate them for the added risks they are asked to assume. Noting that businesses announcing an intention to shift their state of incorporation to Delaware (the State that pioneered simplified incorporation laws) see significant advances in the value of their shares, he concludes that the exit right offers incentives for States to find the right mix between contractual freedom and State regulation. As regards creditors, he considers it likely to be only the rare situation in which incorporation in a particular State would benefit shareholders as a group but at the same time subject outside creditors (who otherwise benefit from the increased asset cushion) to greater risks than they would otherwise face:

> "If most shareholders are risk averse, it is unlikely they will support, even by a simple majority vote, any reincorporation in another State that increases the volatility of their holdings, the scenario most likely to prejudice any creditors".[132]

Other scholars who have examined the race-to-the-bottom thesis in environmental and commercial law have likewise concluded that it lacks empirical foundation.[133]

The truth about railway gauges. No discussion of governmental competition and efficiency in the Australian federation can overlook the old reproach that Australia's mixture of railway gauges is a consequence of the federal system. As the main rail networks were completed decades before federation, presumably the argument is that if a unitary Constitution had been adopted in 1901 we would not have had to wait until now to have merely the mainland State capitals linked by standard gauge; or that, if a unitary system had been adopted earlier (much earlier), the differences would never have come about in the first place.

The argument does not withstand scrutiny. The United Kingdom too had a variety of gauges, the 7 foot broad gauge being particularly widespread in the densely-populated south. But most of the non-standard track was converted by the 1880s. In fourteen working days in 1872, 380 kilometres of double track, including pointwork in stations, were converted without stopping the traffic. The 690 kilometre main line from London to Penzance via Bristol was narrowed to standard gauge in a single weekend. The United States in 1861 had 20 different gauges, but all were standardized within two decades. In July, 1881, 3,000 workmen converted the entire 885 kilometres of the Illinois Central southern lines by 3:00pm on a single day.[134]

Obviously our federal structure cannot account for the fact that, over a century later, most of Australia's non-standard rail networks are still unconverted. The answer, as Gary Sturgess has suggested, probably lies in the fact that Australia's railways were from the outset government-owned.[135] In the absence of the profit motive, the most powerful motivation in the world of economic affairs is the desire for the quiet life.[136]

Conclusion

All human institutions are imperfect and open to criticism. But for a framework of government that has created a new nation and given it external security, internal peace, stability, progress and prosperity throughout the most violent, turbulent century in human history,[137] Australia's federal Constitution has been subjected to an inordinate amount of negative comment. Reasons for this were suggested earlier, but the chief obstacle to balanced appraisal today is the failure of the main opinion communicators to consider the advantages of federalism.

The debate has focused exclusively on its disadvantages, and has generally taken the form of assertions repeated so often as to become accepted as facts. Minor inconveniences have been given an inflated importance by critics who, in Professor Galligan's words, "did not appreciate the powerful liberal rationale that underpinned this ingenious system of government"[138] and failed to consider the costs and disadvantages of an alternative system. Nor has it occurred to them that the "horse and buggy" constitutional model of 1901 might be more serviceable and environmentally friendly than the "Model T Ford" version that has dominated the constitutional highways since the 1920 *Engineers' Case.*[139]

That the benefits outlined above are not being fully achieved at present results from the current imbalance between centralization and decentralization, uniformity and diversity, co-operation and competition. Lord Bryce's "watertight compartments" have been punctured and the ship is listing towards centralized uniformity, denying the people the benefits of competitive federalism and bringing government cartelization, inefficiency and elitism.

Australian federalism can begin to realize its full potential if all three branches of Commonwealth government take into account the benefits of experimentation, diversity and multi-level democratic participation. They must recognize that competition and co-operation both have their place in a federation. The judiciary obviously has a crucial part to play here.

The United States Supreme Court, in a series of decisions over the last five years, has called a halt to sixty years of centralist jurisprudence, declaring that the federal division of powers is part of constitutional law, is there for a purpose and must be respected.[140] In similar manner, the High Court could usefully revisit the extreme[141] interpretations of constitutional provisions such as s.51

(xxix) (external affairs)[142] and s.90 (excise duties),[143] that have crippled the working of the decentralized political structure called into being in 1901.

Voters should refuse to accept further centralization of authority unless the benefits of greater Commonwealth power can be shown to outweigh the costs. Nor need people be too awed by claims that centralization is "vital" for the resolution of some current "crisis". Exaggerating a problem, or even engineering a crisis so as to create a clamour for something to be done, and then stepping forward with a prepared solution that further concentrates power and curtails freedom, is a time-honoured tactic of certain centralists.[144]

Some adjustments in thinking will be required under a true system of competitive and co-operative federalism. State governments will need to shoulder full responsibility for their own spheres of action and not seek to shunt the hard issues down the line to Canberra. In the general population, some individuals may at first be disconcerted by the wider range of choices available to them. It has happened before. When the old price cartels and monopolies were starting to break down under the *Trade Practices Act* 1967, there were some consumers who actually complained about the advent of discounting because prices were no longer uniform. Eventually they realized that by shopping around a little — that is, by taking responsibility for their own lives and choices — they could enjoy a significantly higher standard of living than before. The same process will take place when the current political cartel begins to crack.

Those who contrast the veneration with which Americans view their 1788 Constitution with the alleged apathy of Australians towards theirs overlook the fact that for the first hundred years of its life the United States Constitution was intensely unpopular in a way that the Commonwealth Constitution has never been during its own first century.[145]

Nevertheless, an awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognizing that, in a properly working federation, government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one. And if, as is often said, the pursuit of truth in freedom is the essence of civilization, this "liberating and positive form of organization" has a special contribution to make to the progress of humankind.

Endnotes:

1. S Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez* (1995) 94 *Michigan Law Review* 752, 756; R Watts, *Contemporary Views on Federalism,* in B de Villiers (ed.), *Evaluating Federal Systems,* Dordrecht, 1994, 1, 5. See generally D Shapiro, *Federalism: A Dialogue,* New York, 1995.

2. Watts, *op. cit.,* 4.

3. Calabresi, *op. cit.,* 757. See A Marr, *Ruling Britannia: The Failure and Future of British Democracy,* London, 1995.

4. Watts, *op. cit*. 5; Walker, *Initiative and Referendum: The People's Law,* St. Leonards, NSW, 1987, ch. 1; Watts, *op. cit.,* 7-8.

5. *Ibid.*, 5.

6. See DP Moynihan, *Pandaemonium: Ethnicity in International Relations,* Oxford, 1993, 10-11, 175-76. Moynihan lists countries that have not had their form of government changed by force since 1914, whereas I am also taking into account violent changes in government systems and significant losses of territory since 1900 as well. Thus Moynihan would include not only the United Kingdom but also South Africa. The latter does not meet my definition because its form of government was changed by force in 1902 (following Britain's victory in the Boer War) and might not now meet Moynihan's because the transition to majority rule was at least partly the result of force.

7. G Maddox, T Moore, *In Defence of Parliamentary Sovereignty,* in M Coper, G Williams (eds), *Power, Parliament and the People,* Annandale, NSW, 1997, 67, 82.

8. *Ha v. New South Wales* (1997) 71 ALJR 1080.

9. Watts, *op. cit.,* 8-9.

10. M Bell, *Internal Migration in Australia 1981-1986,* Canberra, 1992, 296; same author, *Internal Migration in Australia 1986-1991: Overview Report,* Canberra, 1995, 57.

11. Plato, *Crito,* in *Plato: The Last Days of Socrates,* H Tredennick, H Tarrant trs., London, 1993, 88.

12. T Hobbes, *Leviathan,* Cambridge, 1991, *e.g.,* 149-51.

13. R Epstein, *Exit Rights Under Federalism* (1992) 55 *Law and Contemporary Problems,* 147, 150.

14. *Ibid.,* 165.

15. Calabresi, *op. cit.,* 789-90; R Bork, *The Tempting of America: The Political Seduction of the Law,* New York, 1990, 53.

16. Bork, *loc. cit.*.

17. G Tullock, *The New Federalist,* Vancouver, c. 1994, 34.

18. Thus, Victoria has referred its power over industrial relations to the Commonwealth, and John Fahey, when Premier of New South Wales, was minded to do likewise. In 1996 Premier Robert Carr proposed referral of State powers in relation to firearms.

19. Epstein, *op. cit.*, 154ff.

20. *Coal Acquisition Act* 1981 (NSW). After years of public protest, partial arrangements for compensation were made and some coal deposits were restored to the owners. The issue is currently the subject of litigation: *Durham Holdings Pty Ltd v. New South Wales,* NSW Supreme Court No. 30033 of 1998.

21. P Grossman, *Fiscal Federalism: Constraining Governments with Competition,* Perth, WA, 1989, (vi), 31.

22. J La Nauze, *The Making of the Australian Constitution,* Melbourne, 1972, 19, 273.

23. J Bryce, *The American Commonwealth,* Indianapolis, 1995 (first published London, 1888), Volume 1, 315.

24. *New State Ice Co v. Liebmann* (1932)285 US 262,311.

25. Calabresi, *op. cit.,* 777; Tullock, *op. cit.*, 122.

26. K Mannheim, *Essays on the Sociology of Culture,* London, 1956, 169.

27. E.g., *Consumer Wise,* Department of Industry, Science and Tourism, Canberra, September, 1997, 2; O Morgan, book review, 14 *Policy* No.2, Winter, 1998,54. "Inconsistent" means that two laws are not merely different, but that it is impossible to obey one without breaking the other, or that one law takes away a right conferred by the other: *Western Australia v. Commonwealth* (1995) 183 CLR 373,253; *R. v. Credit Tribunal; ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563. Thus there is no "inconsistency" between a speed limit of 110 km/h in one State and 100km/h across the border.

28. T Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles,* New York, 1987, 208-10.

29. See G Walker, *The Rule of Law: Foundation of Constitutional Democracy,* Melbourne, 1988, 293, 439.

30. The first federal divorce law was Garfield Barwick's *Matrimonial Causes Act* 1959, but the changes it made in relation to existing State laws were trivial when compared with those in the *Family Law Act.* The 1959 Act worked well in practice and was not controversial.

31. Australian pro-family groups are starting to advocate the introduction of something similar to Louisiana's "covenant marriage" laws, under which couples can choose a more binding form of marriage under which divorce would be available only on grounds rather more liberal than those in the *Matrimonial Causes Act* 1959 (see n. 30 *supra*). State legislation introducing such a system as an alternative to the *Family Law Act* no-fault regime might arguably be valid under s. 109 of the Constitution if couples could select it only by making an active choice. See *A Stealth Anti-Divorce Weapon,* in *American Bar Association Journal,* September, 1997, 28.

32. Australian Law Reform Commission, *Interim Report No. 26,* Canberra, 1985, para. 211.

33. C Einstein, *Reining in the Judges? An Examination of the Discretions Conferred by the Evidence Acts 1995*, NSW Bar Association, October, 1995, 19. The paper was delivered shortly before Justice Einstein's appointment to the bench.

34. Calabresi, *op. cit.*, 775.

35. M McConnell, *Federalism: Evaluating the Founders' Design* (1987) 54 *University of Chicago Law Review,* 1484, 1494.

36. C Sharman, *Governing Federations*, in M Wood, C Williams, C Sharman (eds), *Governing Federations: Constitution, Politics, Resources,* Sydney, 1989, 1,4.

37. *Weekend Austalian,* October 22-23, 1994: *Abolition of States a danger to unity: Goss; The Australian,* September 21, 1994, *Define State powers or risk their loss.*

38. Bryce, *op. cit.*, 308-09; Calabresi, *op. cit.*, 770.

39. Bryce, *op. cit.*, 310. For a recent viewpoint on this issue see S Jenkins, *The Australian,* July 10, 1998, *Ulster must be allowed to grow up.*

40. G Green, *The Concept of Uniformity in Sentencing* (1996) 70 ALJ 112, 118. There are apparently only seven homogeneous countries with no border problems: Demark, Iceland, Japan, Luxemburg, the Netherlands, Norway and Portugal: Moynihan, *op. cit.,*72.

41. Sharman, *op. cit.,* 5-6.

42. *Ibid.*, 6.

43. Bryce, *op. cit.*, 369.

44. Watts, *op. cit.*, 10.

45. Calabresi, *op. cit.*, 770.

46. Bryce, *op. cit.*, 309.

47. *Rights of the Terminally Ill Act* 1995 (NT), overriden by *Euthanasia Laws Act* 1997 (Cth).

48. *The Subsidiarity Principle* (1990) 27 *CML Review,* 181; T Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle* (1994)14 *Yearbook Eur. L.,* 203; G Cross, *Subsidiarity and the Environment* (1995)15 *Yearbook Eur. L.,* 107.

49. Schilling, *op. cit.*.

50. J Bell, *Populism and Elitism: Politics in the Age of Equality,* Washington, 1992, 78; see generally Hon John Wheeldon, *Federalism: One of Democracy's Best Friends,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), 189.

51. Presumably Acton is referring to the Achaean League in antiquity, the earliest known federation.

52. Acton, *Nationality,* St. Leonards, NSW, 1997 (first published London, 1862), 3-4.

53. F Fukuyama, *The End of History and the Last Man,* London, 1992, 218; A de Tocqueville, *Democracy in America,* New York, 1966, *e.g.,* 61, 225, 482-83; R Hancock, *De Tocqueville on the Good of American Federalism,* in P Lawler (ed.), *De Tocqueville's Political Science: Classic Essays,* New York, 1992, 133-53.

54. J Bell, *op. cit.*, 3.

55. C Lasch, *The Revolt of the Elites and the Betrayal of Democracy,* New York, 1995, 76.

56. See B Robertson, *Economic, Social and Cultural Rights: Time for a Reappraisal,* Wellington, New Zealand, 1997, 51, 60-61; R Kemp, *International Tribunals and the Attack on Australian Democracy,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 4 (1994), 119; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* Canberra, 1995.

57. Lasch, *op. cit.;* J Bell, *op. cit.;* T Sowell, *op. cit.*; same author, *The Vision of the Anointed,* New York, 1995; R Nisbet, *Twilight of Authority,* New York, 1975; Walker, *op. cit. supra* n. 29, ch. 9.

58. *The Sydney Morning Herald,* August 9, 1975.

59. *Australian Capital Television Pty Ltd v. Commonwealth* (1992)177 CLR 106.

60. M Duffy, N Bolkus, *Was dissent stifled under Labor?,* in *The Australian,* June 11, 1998. For the views of one of Senator Bolkus's academic supporters, see H Reynolds, *The Australian,* September 25, 1996: *Unrestrained and Dangerous.*

61. Lasch, *op. cit.*, 170.

62. J Bell, *op. cit.*, 89.

63. Sharman, *op. cit.*, 6.

64. Tullock, *op. cit.*, 112.

65. Bryce, *op. cit.*, 300, 311.

66. Acton, *op. cit.*, 13.

67. Letter to ALC Destutt de Tracy, *Thomas Jefferson: Writings,* New York, 1984, 1241, 1245.

68. Bryce, *op. cit.*, 311.

69. Acton, *op. cit.*, 13.

70. Calabresi, *op. cit.*, 786.

71. G Sawer, *Modern Federalism,* New Edn, Sydney, 1976, 153.

72. R Gollan, *Radical and Working Class Politics,* Melbourne, 1960, vii.

73. G Walker, *The Law that Wasn't There: Retrospectivity Becomes Routine,* in *Australia and World Affairs,* No. 5, Winter, 1990, 47.

74. G Walker, *The Tribunal Trap,* in *Australia and World Affairs,* No. 8, Autumn, 1991, 53. The High Court restored some legal rigour to this area in *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 69 ALJR 191.

75. G Walker, *Information as Power: Constitutional Implications of the Identity Numbering and Identity Card Proposal* (1986)16 *Queensland Law Society Journal,* 153.

76. J Uhr, *Parliament,* in B Galligan, I McAllister, J Ravenhill (eds), *New Developments in Australian Politics,* Melbourne, 1997, 68, 72; *House of Representatives Debates,* November 24, 1988, 3206. The Howard government abolished the roster system in 1996, but it could be revived by a future government.

77. M Steketee, *The Press Gallery at Work,* in J Disney, J Nethercote (eds), *The House on Capital Hill: Parliament, Politics and Power in the National Capital,* Canberra, 1996, 195, 198-99, 210. The National Media Liaison Service was abolished by the Howard government in 1996, but there is nothing to prevent a future government from reviving it.

78. It is not clear if the agreement was specific about how soon after the election Hawke would step down, but Keating's interpretation was apparently that the changeover would begin to be implemented as soon as business resumed after the poll was declared. After five months had passed since the election, Keating concluded that Hawke had reneged: M Gordon, *A True Believer: Paul Keating,* St Lucia, Queensland, 1993, 86-7, 89, 111, 161.

79. C Copeman, Amy McGrath (eds), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging,* Kensington, NSW, 1997, 29-44, 107-130.

80. *Electoral and Referendum Amendment Bill (No.2)* 1998.

81. Conditional grants under s. 96 often have this character. See *The Australian,* October 9, 1990: *Cabinet may force road laws on States*.

82. In an interesting parallel development, Finn J of the Federal Court has held that a statutory research body has a legal duty to consider all the evidence: *Tobacco Institute of Australia v. National Health and Medical Research Council* (1996) 142 ALR 1, 71 FCR 265.

83. Sharman, *op. cit.*, 4.

84. Calabresi, *op. cit.*, 777.

85. Bryce, *op. cit.,* 314.

86. *Ibid.*.

87. Calabresi, *op. cit.*, 777-78.

88. Tullock, *op. cit.*, viii-ix.

89. Calabresi, *op. cit.*, 778.

90. *The Australian,* August 29, 1990.

91. Steketee, *op. cit.*, 195, 198-99.

92. Letter to Gideon Granger, *Thomas Jefferson: Writings, op. cit.,* 1078.

93. Sawer, *op. cit.*, 112.

94. Bryce, *op. cit.*, 311.

95. *Ibid.,* 314.

96. Calabresi, *op. cit.*, 778.

97. *Ibid.*.

98. C Friedrich, *The New Belief in the Common Man,* Boston, 1942, 135.

99. B Galligan, *Politics of the High Court,* St. Lucia, Queensland, 1987, 15,12.

100. *Ibid.,* 25,251.

101. Britain's postwar nationalization program went much further than Australia's, extending not only to coal mines and steel mills but even, at one stage, to the travel agency Thomas Cook & Son and a furniture removalist, Carter Paterson & Pickford.

102. Bryce, *op. cit.*, 362.

103. Galligan, *op. cit.*, 25.

104. Bryce, *op. cit.*, 313.

105. Watts, *op. cit.,* 22, emphasis added; Sawer, *op. cit.,* 124.

106. Alan Wood, *The Australian,* August 2, 1994: *Our Federation at a Crossroads.*

107. W Kasper, *Competitive Federalism: May the Best State Win,* in G Walker, S Ratnapala, W Kasper, *Restoring the True Republic,* St Leonards, NSW, 1993, 55, 63.

108. Grossman, *op. cit.*, 14.

109. Kasper, *op. cit.*, 60.

110. PP McGuinness, *The Australian,* October 31, 1990: *Federalism's Hypocrites*.

111. See sub-heading 4 above.

112. Grossman, *op. cit., 7.*

113. *Ibid.,* 11.

114. This figure included some administrative staff who really are needed for a university to operate, such as those working in enrolments, examinations, registry and, of course, salaries. On the other hand, it excluded academics in the faculties and departments, such as deans and department heads, who are wholly or partly exempt from teaching and examining because of their administration load.

115. In the 1960s a senior lecturer salary was roughly on a par with that of a District Court or County Court judge. Now it is just over a third of that level, even though the judge's real salary itself fell during the inflation of the '70s and '80s.

116. Calabresi, *op. cit.*, 775; Grossman, *op. cit.*, chs. 3 to 6.

117. *Ibid.,* 9-10. Vertical competition in federations can also improve governmental efficiency: A Breton, *Towards a Theory of Competitive Federalism,* 3 *European Journal of Political Economy,* Nos 1 and 2, 1987, 263-329.

118. Calabresi, *op. cit.*, 779.

119. It is well known in commercial law circles that New York is losing ground to London as a financial and corporate centre, partly because of England's more stable and predictable contract law — a result of the English courts' willingness to uphold *bona fide*, lawful contracts.

120. Tullock, *op. cit.*, ch. 7.

121. *Ibid.*, 95.

122. *Ibid.*, 99.

123. *Yearbook Australia 1997,* Canberra, 1997, 34.

124. *Could this be Australia's new Constitution?* The *Australian Business Monthly,* November, 1992, describes Mr Ken Thomas's plan for 37 regions, each one under the direction of a kind of management committee.

125. K Coghill, MLA, *The Australian,* May 26, 1993: *Benefits may be illusory*; *OECD Economic Outlook* 53, June, 1993, Table R15, 215.

126. Bryce, *op. cit.*, 3.

127. Kasper, *op. cit.*, 67.

128. See *e.g.*, S Joy, *Unregulated Road Haulage: The Australian Experience*, in Webb and McMaster (eds), *Australian Transport Economics,* Sydney, 1975, 383.

129. Kasper, *op. cit.*, 60, 62-5. On the other hand, Professor Sharman considers that vertical fiscal imbalance is not necessarily the problem it is often said to be; *op. cit.,* 8-9.

130. Bryce, *op. cit.,* 300, 311.

131. Kasper, *op. cit.*, 66-69.

132. Epstein, *op. cit.*, 152-53.

133. R Revesz, *Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation* (1992) 67 *New York University Law Review,* 1210; R Winter, *Private Goals and Competition Among State Legal Systems* (1982), *Harvard Journal of Law and Public Policy* 127.

134. J Simmons, *The Railway in England and Wales 1830-1914,* Leicester, 1978, 47; A Vaughan, *Railwaymen, Politics and Money,* London, 1997, 191-92; J Stover, *American Railroads,* Chicago, 1961, 154-56.

135. G Sturgess, *Taking Social Capital Seriously,* in A Norton, M Latham, G Sturgess, M Stewart-Weeks, *Social Capital: The Individual, Civil Society and the State,* St. Leonards, NSW, 1997, 49, 62.

136. Monopoly power is more likely to manifest itself in inefficiency and lack of innovation than in above-normal profits: G Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy,* Melbourne, 1967, 155.

137. The number of people per million of population killed in war or civil strife in the twentieth Century was found by the sociologist PA Sorokin to dwarf that for each of the previous twenty centuries, even on his initial calculations that only used data up to 1925 and thus took no account of World War II; P Sorokin, *The Crisis of our Age,* New York, 1941, 212-17.

138. Galligan, *op. cit.*, 25.

139. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920)28 CLR 129. The "Model T" metaphor is from Calabresi, *op. cit.*, 779.

140. *New York v. United States* (1992) 505 US 144; *United States v. Lopez* (1995) 514 US 549; *Printz v. United States* (1997)117 S Ct 2365; *Seminole Tribe of Florida v. Florida* (1996)116 S Ct 1114; and arguably *City of Bourne v. Flores* (1997)117 S Ct 2157. See generally C Massey, *The Tao of Federalism*, (1997) 20 *Harvard Journal of Law and Public Policy,* 887.

141. Justice Dixon in *R. v. Burgess, ex parte Henry* (1936) 55 CLR 608, 669, described as "extreme" the Evatt doctrine on the external affairs power later adopted by the High Court in *Tasmania v. Commonwealth*, below.

142. *Tasmania v. Commonwealth* (1983)158 CLR 1; *Victoria v. Commonwealth* (1996) 70 ALJR 680.

143. *Ha v. New South Wales* (1997) 71 ALJR 1080.

144. An alleged crisis of tax evasion was the main pretext for the Australia Card proposal; see Walker, G, *Information as Power ....., op. cit.*. The card was not introduced, but little more was heard about the tax evasion crisis.

145. P Smith, *The Constitution: A Documentary and Narrative History,* New York, 1980, describes the tensions that appeared from the outset over central power (306, 471) that led Chief Justice Marshall to write in 1832 that "our Constitution cannot last" (394). By the 1850s the Union was in its "death throes" (425). The Constitution came under attack again in the early twentieth Century as an archaic document impeding social progress (17, 86). Originally, some of the makers of the 1788 Constitution had favoured abolishing the States altogether (115, 128, 133), something not one of the delegates to the Australian federal conventions (including the Labor delegates) advocated.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

We have again cause to be grateful to the contributors of the papers delivered at this Conference; they have as usual made a significant contribution to the discussion of some of the most important constitutional issues of the day. I would not do justice to the speakers if I were to attempt to recapitulate or summarise what they have said, but I shall allow myself the indulgence of commenting very briefly on some of the main issues that have been discussed.

The first of those issues — the question of the possible conversion to a republic — is an unrewarding one. Our constitutional system requires reform in many respects — some of which have been pointed out at this Conference — but the change to a republic is not one of them. It is quite unnecessary to make that change and therefore, as has been well said, it is necessary not to make it.

One aspect, which is sometimes overlooked or discounted, is that it is impossible to foresee all the consequences of change. Two clear examples of that truth have been mentioned at this Conference — the disruptive effect of the attempted constitutional reform in Canada, and the apparent surprise of some judges at the effects given in *Wik* to their judgments in *Mabo*. Indeed, it is not mere fantasy to suppose that some of our present social discontents and discord may be traced, at least in part, to the decision in *Mabo*.

The legislation designed to modify the legal consequences of *Wik* has been wrongly stigmatised as a racially discriminatory interference with fundamental native rights, whereas in truth some amending legislation was necessary to rectify the anomalies, injustices and uncertainty caused by the *Native Title Act* 1993, particularly after the decision in *Wik*. Only time will tell whether the amending legislation recently passed will achieve its aims.

Another issue which, unlike the first, is of critical importance, is the question of preserving and strengthening the Federation. The arguments in favour of maintaining a federal system in Australia put to us by Professor Walker are overwhelming, but they are little understood by the general public, and are apparently incomprehensible to many of the bureaucrats and politicians in Canberra.

A number of speakers have pointed out the way in which our federal system has been grievously weakened, in particular, by the effect given to the external affairs power, which, as presently construed, enables the Commonwealth Parliament to legislate about anything if it can find an international instrument to support the legislation, and by the growing erosion of the taxing power of the States and their increasing need to rely on conditional Commonwealth grants. We must surely agree with the statement of Mr Alan Wood that the need to reinvigorate the Federation is overwhelming.

One of the many incidental symptoms of the decline of the federal system has been the accretion to the Federal Court of jurisdiction that could equally well, or perhaps in some cases better, be exercised by the Supreme Courts of the States.

A further question of principle discussed was the disposition shown by some judges, at least until recently, to give free rein to their reformist tendencies, and to develop the law in reliance on what they conceive to be the fundamental standards acceptable in modern society rather than on legal principles. One of the many examples of this tendency was the way in which some judges have ignored the plain and unambiguous words of the race power, and the history of that power, which shows that the words mean exactly what they say, and have written into the paragraph the unusual and inconvenient qualification that the power can be used only beneficially.

The difficulty about giving effect to the standards accepted by right thinking people is that there is often violent disagreement as to what those standards are. The undemocratic suggestion

that judges should remedy the omissions of the legislatures can be answered best in the words of that very distinguished judge Lord Reid, who said, "Where Parliaments fear to tread, it is not for the courts to rush in".[1] The judicial role is not a legislative one.

It remains for me to thank all those who have written papers, or otherwise have contributed to the debate, to thank again those responsible for organising the conference, and thank you all for attending.

Endnote:

1. *Shaw v. Director of Public Prosecutions* (1962) AC 220 at 275.

Appendix I

Occasional Address

Aboriginals and Australian Apologetics

Professor Kenneth Minogue

So-called indigenous peoples have become a rising power in modern politics. They are reported to number about 250 million, and the United Nations is working on a draft declaration of their rights. They are widely scattered over the globe, and constitute a highly miscellaneous set of people, but perhaps the main thing to say about them is that they are tribally organised. Their unity for political purposes lies basically in the fact that they have been conquered or pushed aside, usually but not invariably by Europeans, in the course of the Western takeover of the Americas, Australia, New Zealand, Pacific Islands and other places. Their claim to special rights arises partly from the belief that they are the original inhabitants of the areas in which they are found today, but the active promotion of indigenous peoples as a political concept began with the Black Power movements of the 1960s. They are the conceptual progeny of such ideas as oppression and exploitation.

The result has been that in the politics of the Anglophone countries, indigenous peoples have established themselves, like the victors in wars, as those to whom reparation is owed. They are beneficiaries of changes in the law, and are the recipients of special legal rights. They have even been set up as exemplars of a way of life superior to the hectic industrialism of the West.[1] Above all, perhaps, they have become the custodians of a curious kind of moral sentiment among White Europeans, one that requires purging by apology. They deserve more philosophical attention than they have so far received. I want to explore some features of the Aboriginal case in Australia.

I. Points of view

The framework in which the drama of the indigenous has been played out is the answer that Europeans give to the question: What is the significance of tribal peoples? One powerful answer has been the progressive doctrine that Western civilisation is superior to all other ways of life, the end towards which all must converge. This doctrine has in the last generation caused embarrassment as being arrogant and Eurocentric. It has been largely replaced by the relativist doctrine that cultures, like species, all have a unique value, and that sustaining them is a matter of human rights. One implication often drawn from this view is that all judgments are culturally determined, and hence no culture can validly judge another.

The progressive doctrine of superiority stood on several legs. The most obvious was scientific and technological superiority. Another was that the West had a vocation to spread religious truth to the rest of mankind. And a third was the moral conviction that detestation of slavery, belief in human rights, freedom and democracy, rejection of caste systems, of cannibalism and the inferiority of women, along with a variety of other moral convictions, made Western standards the exemplars for mankind. The first leg remains intact, but is by no means uncontested. The second is in intellectual circles regarded as absurd, and replaced by an ecumenical theology in which all religions are merely local variations of a universal respect for the numinous. And the third leg is not only intact but capable of remarkable mutations, as we shall see.

The doctrine that all cultures are equal is a messier intellectual product than the doctrine of progress, partly because nobody really quite believes it, and partly because it requires recourse to a

variety of questionable analogical moves. The basic point is, of course, that human beings can probably live satisfying lives in terms of almost any culture they have produced, though in Western terms some (such as the Ik) certainly look thin and horrible, while some social locations in many cultures (most generally, it is often said, of women) are hardly enviable.

What this relativism cannot accommodate is the difference between a culture and a civilisation. To have a merely oral culture and thus to be technologically locked closely into one's environment necessarily limits one's point of view. By contrast, civilisations with written records, covering a variety of experiences in terms of different logics of explanation, are unmistakably superior in achieving a large number of effects, and it happens that everybody wants to enjoy these effects. The language of political correctness has rejected such terms as "primitive", but the realities it covered are constantly before our eyes.

Australia and New Zealand have recently become test beds for these theories. Maori and Aboriginal cultures are often juxtaposed against the modern West on terms of equality. Cultural centres of impressive scope (if one discounts an unreal element of patronising) have been set up to persuade us that tribal ways of life are on all fours with our own practices. Yet when, say, we learn that the Jawoyn tribe in the Northern Territory have been using fire as a "management tool" for thousands of years, we are forced to realise that the Jawoyn, in following their traditions, quite lacked the concept of a "management tool" and the whole, perhaps corrupt, European flexibility of mind that goes with it. That, indeed, is why tribal technology has so limited a range.

Everything to do with Aborigines has thus become a subject of overriding interest in Australian life in a way seldom true in the past. And the main participants in the resulting dialogue can be grouped in three sets.

The first is the great majority of the Australian population, who seldom meet an Aborigine and have till recently given the matter little attention. Most are mildly benevolent, a few might pejoratively be described as somewhat intolerant "rednecks".

Secondly, we must distinguish within that Australian population an intellectual elite, strong in universities and the media, who are peculiarly sensitive to international changes in moral sensibility.

Third are the Aborigines themselves, perhaps 2 per cent of the Australian population. Some live indistinguishably from other Australians, others remain nomadic and traditional, but in Aboriginal politics, the running is made by those covered by special government programmes, and the community activists who claim to speak for them.

To talk of superiority in this context is to ruffle sensibilities; it is for many people unwarrantably judgmental. Nevertheless, there is no doubt that the incoming Anglo-Celts were superior to the Aborigines in numbers, in firepower, and certainly in the conviction that they had a destiny to spread through the country and civilise it. This was, in many respects, a contest between the ill-matched, and there is nothing morally more unhealthy in human affairs than such a disparity of power. The brutality of the newcomers was compounded by the spread of disease and the heedless destruction of the environmental conditions for a nomadic life. It is to the consequences of this situation that the current power of indigenous peoples responds.

II. What sort of a problem?

The problem of the indigenous peoples is, at first glance, one of how government ought to act. The problem isn't new. The British government, in its instructions to Captain Phillip in 1788, urged that natives should not be molested.[2] The same view was taken by the Colonial Office about Maori in the instructions to Captain Hobson in New Zealand in 1840. In both cases, however, determined settlers bent on making their fortunes were negligent of the welfare of Blacks, who were largely swept aside, if, indeed, they were not raped or killed. Nonetheless, the problem remained, changing its form as Australia matured: what to do about them ?

The instinctive response was to accommodate them to the modern world. Missionaries particularly were concerned to teach them the true faith, along with Western dress codes and some of the skills necessary for modern life. They were to be assimilated. It turned out that this was difficult. Many did not respond because, we might suggest, tribal life is closely regulated by custom, and therefore lacks the individual springs of action necessary in modern life. Custom is all. The Arrarnta (or Aranta) tribe, it seems, does not have words for "please" or "thank you", presumably because tribal reciprocities are so firmly fixed in place as to allow little room for spontaneity. They are not familiar, we learn, with the either/or distinction.[3] These are not differences that will respond to a little education in Western ways.

Not all indigenous peoples have had quite the same experience. Maori, for example, as an aggressive and energetic set of people, took to Christianity so successfully that they were soon creating their own heresies, and exhibited considerable trading initiative.[4] The Aborigines, by contrast, often seemed lost in their dream world. In both cases, however, conquest, disease and cultural disparities took their toll, leading to rapid decline. Some Whites in the late nineteenth Century came to the conclusion that each set of people was doomed eventually to die out.

The twentieth Century presents a complex story in which the thesis of Aboriginal disappearance – either by cultural or biological assimilation – disappears. Protection gives way to assimilation, and assimilation to the complex new situation of the late twentieth Century in which the relationship between White and Aboriginal has to be created anew in the context of legal changes and a powerful moral concern by the White population about the failures and brutalities of much of the earlier policies.

None of the current policies is without its critics, or its drawbacks. And its most extreme is the critical view that the whole encounter between Whites and Aboriginals is a mistake. The entire history should never have happened at all. Indigenous peoples ought to have been left undisturbed in their environmental paradise. But this is not only to say that one aspect of the problem – namely Australia and New Zealand – should never have come into existence; it is also to exempt indigenous peoples from the human condition altogether.

III. The moral dimension

The question of policy involves morality: what would be best for the indigenous peoples themselves? It will already be clear that there is no determinate moral answer to that question. And in public policy, the moral question is far from being the only consideration. In any case, what is best for the Aborigines is merely one among the moral elements at stake. When we act, we reveal what we are, or what we think we are. Morally, therefore, we must discard policies that would reveal us to be the sort of people we do not wish to be. To consider indigenous people in moral terms thus raises two distinct questions: firstly, what is best for the Aborigines? Secondly, what polices are morally acceptable to other Australians, as self-conscious moral beings who wish to reveal themselves as rational, considerate, generous, etcetera? It is important to observe that these distinct dimensions of morality will not necessarily generate the same policies.

A simple and familiar example makes this distinction clear. Parents seeking to be kind and considerate sometimes fail to guide or discipline their children when such guidance would be the best thing. That sometimes it is necessary to be cruel to be kind is a well known moral paradox which points up this important split in the moral life. And the distinction is important in this case because it reveals the fact that what we call "morality" is, like all other aspects of human life, subject to misuse or corruption. Hypocrisy is one obvious example, some uses of casuistry illustrate another. But various moral corruptions are common. Moral highmindedness can in families become an instrument of tyranny, or it can be used merely as a way of parading one's own moral sensibilities.

In Australia, the Aboriginal question has been remarkably moralised, leading at the extreme to the accusation that Australia is guilty of genocide. This is my main concern, but first I must sketch the realities on which this charge is based.

IV. The Aboriginal experience

At a high level of abstraction, we are dealing with a tragedy, classically defined as the encounter of right against right. Two people clashed and one was largely destroyed. But at the moral level, this experience consisted of a myriad of individual and group encounters in which people with guns disposed of people with spears. Many Aborigines were shot, women raped, and they were often treated with the contempt the powerful have for the powerless. For nearly a century, many Aboriginal children who were partly white were taken from their parents, and either fostered or put in orphanages, many run by Christian denominations. Some children no doubt prospered, but there was plenty of abuse and exploitation. These are the "stolen children" of Sir Ronald Wilson's recent report,[5] the episode which above all has provoked the movement towards collective apology from White to Black.

The story is not one of unrelieved gloom. Some of the settlers behaved well towards Aborigines, and the civic assumption that all are equal before the law had not been entirely abandoned. Governor Gipps in 1839 forced a retrial of those involved in the Myall Creek massacre of Aborigines, a particularly nasty example of brutes running amok. Seven Whites were convicted of murder and hanged. In this century, a few notable political actors, including Sir Paul Hasluck, battled against widespread indifference to help the Aborigines. But no one doubts that the overall story is a terrible one, and many thought so at the time. The adoption of half caste children is a more ambiguous case, partly because the circumstances were varied, and partly because modern societies find a variety of reasons for removing children from their parents. Today's opinion condemns the policy, no doubt rightly, and the colloquial description of "stolen children" builds that condemnation into this name. But the issue is complicated by the fact that no alternative policy seems plausible.

What is it that has made these issues real in Australian politics today, whereas they were little considered in the past? Part of the answer is to be found in the High Court judgments in the *Mabo* and *Wik* cases, which raise further questions of justice: namely, the validity of the Anglo-Celtic dispossession of Aborigines in order to build modern Australia. International currents of thought have given a new urgency to these questions. And Sir Ronald Wilson's report has raised such passions as the demand that the Prime Minister should apologise to the Aboriginal peoples. His refusal to do so did not prevent May 26, 1998 being celebrated (if that is the word) as "National Sorry Day" by some people. But the most dramatic expression of this emerging moral sentiment has been the charge that Australia's treatment of the Aborigines constitutes a case of genocide.

V. The genocide question

Indigenous peoples in their more extreme moments have a weakness for dramatising their sufferings by invoking the idea of genocide and the experience of the Holocaust. A remarkably intricate, indeed casuistical argument on this issue has been made by Raymond Gaita.[6]

Professor Gaita agrees that the system of fostering Aboriginal children out of their native surroundings is not to be identified with the Holocaust, which has commonly been taken as the paradigm case of genocide. His delicate conceptual surgery repudiates[7] the idea that he is actually defining so complex a thing as genocide. He recognises that it would be absurd to compare the Australian adoption practices with the Holocaust, but he still wants to retain "genocide" as the appropriate term to describe the Australian practice:

> "For some time, perhaps until the early fifties and in some States, the absorption program expressed the horrifyingly arrogant belief that some peoples may eliminate from the earth peoples they hold in contempt. Enactment of that arrogance is always an evil, whatever the degree of its brutality, and the concept of genocide makes that perspicuous. The concept reveals how a denigratory racism becomes transformed into an evil of a different and more serious kind when it expresses an intention to rid the earth of people who are the victims of racist contempt".[8]

In order to get genocide into the picture, Gaita must (like the U.N. definition of this term) dissociate the concept from the actual killing of a set of people. He agrees that it is a "fact of inestimable moral importance that the murder of Aborigines in pursuit of this policy was unthinkable, even to eugenic theorists". This is true, he agrees :

> "However, it does not show that Australia was not guilty of the same crime that was committed by nations in which mass murder was not only thinkable, but also chosen as the means to realise a genocidal intent". [9]

Remove the uneasy double negatives from this and "Australia" is there in the dock. Gaita has a weakness for litotes, and cancelling out negatives is an important part of breaking through to his meaning.

The philosopher of science Imre Lakatos used to characterise what he called "degenerating research programmes" as using evidence-evading machinery he referred to as "monster barring" and "concept stretching". By a "monster" he meant any kind of refuting evidence, and the Holocaust functions as a "monster" in Gaita's argument because it is so remote from Australia's treatment of the Aborigines as to threaten his indictment. And the concept of genocide has to be stretched to accommodate any policy of assimilation, which Gaita then proceeds to analyse as derived from a single mindset involving racism and contempt.

This argument is not science, of course, but it is also not philosophical. It uses philosophical procedures in the service of a forensic purpose, working away to identify a complex historical passage of events with a concept – but one which he delicately prefers not actually to define. The term "genocide" has on various occasions been used by indigenous spokesmen to refer to all cases where a tribal child is assimilated to European culture, something which would (possibly, but I am not certain, *pace* Gaita) put the teacher of English on about the same level as the Nazis. There is, therefore, something deeply casuistical (in the pejorative sense) in exploiting such a prefabricated emotional charge.

Professor Gaita is keen to distinguish and reluctant to define, something which makes him a slippery target, but certain defects of his argument can I think be made clear. One of them results from his addiction to the idea of racism. He is a kind of Witchfinder-General of this particular charge, sniffing it out wherever a politician or a political party fails to fall into line with his judgments. It is all done with an apparatus of philosophical detachment which does nothing to conceal the flashes of political animus which surface in the argument. The Coalition gets clobbered, along with those who take a different line on the Demidenko question.[10] The basic objection to this ploy is that attributing bad motives to opponents evades the issue, but it is worth making some remarks on an idea that seems inescapable in discussing the Aboriginal question.

"Racism" is the most lethal charge in the current rhetorical armoury. It is accorded the status of explaining all violent acts of persecution. Dogmatism in its use, and a certain insouciance about its meaning, seem justifiable because it expresses a possibly beneficent anxiety that the slightest relaxation of our cultural guard would unleash uncontrollable prejudice on the world, for the psychological model assumed is that the concept and the hatred are logically and causally inseparable. Keeping the idea under control is the only way to inhibit the conduct. The routine invocation of Pauline Hanson in Australian journalism currently seems to serve just this monitory purpose, and attribution of racism to an act or opinion is enough to kill a question stone dead.

Since the term is so useful, righteous defenders of social inclusiveness prefer to keep their definitional options open.

Is racism a theory, such as Hitler's, about the respective biological characteristics of distinct races? Is it the theological belief, once held by the Dutch Reformed Church and others, that Blacks are descended from Ham and divinely punished for the way he treated his father Noah? Is it a sentiment rather than a belief, involving rejection of, or contempt for, or hatred of, or simply unease in the presence of, people recognised as different? The term is in fact used, often with sledgehammer effect, to cover all of these and many other phenomena.

On this complex phenomenon I need make only two comments. The first is that "eugenics", the theory of improving mankind by breeding for a better race, was before Hitler a widely entertained, even respected theory, commonly found in socialist circles, and that while the vacuousness of the term "race" is now widely recognised, advances in genetic engineering virtually guarantee that new versions of it will continue to surface. So much nonsense is currently talked about genes causing one human defect or another as to make this a sure bet.

The second point is that feeling collectively superior to other people is the commonest of all infirmities of the human mind. Professor Gaita pretty obviously feels profoundly superior to the people he calls "racists", and he also has a category of "decent people", which suggests a mob of indecents beyond the argumentative pale so far as he is concerned. In general, we may say that nothing but a pretty heavy dose of the Christian virtue of humility can even begin to check this disposition.

Fortunately, there are so many potential inferiors around that we can usually find pretty harmless outlets for what Thomas Hobbes brilliantly analysed as "vainglory". Unfortunately, the programme of pacifying the world by railing against racism is so much a failure that xenophobic antipathies seem, if anything, to be increasing rather than diminishing. Among current collectivist absurdities may be counted the fact that the Scots increasingly detest the English, and they have no need to invoke the concept of race in order to understand their own sentiments. The Australian disdain for the Poms could hardly be called racist, but it is not always just a jolly jape. Indeed, under Paul Keating it seemed to be a powerful directive of federal policy.

That many Australians feel superior to Aborigines is undoubtedly true. Whether they construe this sense of superiority in terms of race will depend on what general ideas are current in their environment. These days they might as easily ground it in the concepts of culture, or morality, or they might eschew such abstractions and merely point with contempt or derision to some of the features of Aboriginal life they dislike – the drunkenness of many, the incapacity to manage income, and the squalor in public housing from kinship reciprocities among Aboriginal tribes.

We may agree, indeed, that feeling superior to others is a rather unsophisticated emotion, and those who want to improve the relationship between Aborigines and Australian Whites have sought to transform contempt into understanding by setting up cultural centres, and writing books expounding the view that Aboriginal culture is a remarkable adaptation to its environment and has many characteristics which we ought to admire.[11] We may admire the motives and sympathise with that intention, however odd some of the results may be.

We had better recognise, however, that from the no doubt limited perspective of the surfer on the beach, Aborigines are a pretty incompetent lot, who are difficult to help. A great deal of thought has gone into the question of what public policy towards them ought to be, without producing any very successful result. Large numbers of Aborigines live rather miserably on welfare at the margins of country towns, having lost their tribal integrity without gaining much skill in managing the demands of life in the Australian economy. Part of the reason for this may well be the impatience (the "racism") of the white Australians they encounter, but part of it lies in the very nature of the encounter itself.

In these circumstances, the adoption policies of the various State governments in this Century cannot be regarded as irrational or incomprehensible. If racism is a theory about nature, these policies were in significant respects the opposite of racist, since they assumed that a different "nurture" would rescue at least half-caste children from an upbringing which doomed many to futility and an early death. We recognise that taking children from their parents on this ground is wrong (or "unacceptable", as the relativists would say), but the idea that it is racist is a piece of denigration which is unnecessary, irrelevant and in some cases false. Currently there is concern about large numbers of children who were similarly removed from poor families by British agencies and sent to live in Australia, New Zealand and Canada. Here too, where race is a marginal issue at best, we find that the activist, problem-solving character of modern Europeans, their search for a kind of improvement, distinctly overreached itself. What should be remembered is that social policy is particularly susceptible to changing fads and fashions, and that all too often such policies operate in the shadows, away from critical appraisal.

VI. The question of apology

If Australians committed genocide, what should they do about it? The answer is that they must wipe the slate clean by an apology, but the very formulation of the question has its problems. Australians? Many Australians will rush to insist that they had nothing at all to do with this policy. Poor fools, they will soon find themselves entangled in responsibility as the result of certain moves in this moral chess-game which are familiar from the paradigm Holocaust case. The direct fault of racist contempt for Aborigines can be switched to one of apathy, and ignorance will not be accepted as a defence. As Professor Krygier remarks in his Boyer Lectures, what we now know makes "it impossible now, if it ever was, to remain both ignorant and innocent. For some forms of ignorance are culpable and so are some forms of innocence".[12] Here then is how "some Australians" can be converted into "Australians", and all Australians brought within this singular movement of moral emotion.

As ever, Professor Gaita illustrates best how to tighten a hair shirt around your average Australian *homme moyen sensuel*. There is, he believes, primary guilt attaching to the actors, but also a secondary guilt — arising from the inaction of the ignorant:

> "Most Australians did not know the facts contained in *Bringing Them Home* . . . We did not know *because* [my italics] we did not care enough. We did not care enough because the humanity of Aborigines was not fully present to our moral faculties. The reasons for that are not different in kind from the reasons why Isdell [sometime Protector of Aborigines in Western Australia] could say that he 'would not hesitate for one moment to separate any half-caste from its mother'. The racism expressed in both is merely more virulent in the second".[13]

Ah, yes! racism again. It seems inescapable, even in Australians who never gave Aborigines a thought.

Reconciliation requires a national apology, and this, no less than the charge of genocide, flows into Australia on currents of international thought. The Prime Minister of Australia has refused to make an official apology (though, like everyone else, he is clear about the moral judgment to be made on much of the treatment of Aborigines), but this did not prevent the festival of national Sorry Day, with its apparatus of sorry books, tearfulness and a minute's silence. How should we judge this project?

An apology is a relatively low level piece of western manners and morals. It lubricates everyday life. Its commonest use is to deal with some relatively minor offence, which the sufferer often cancels with some such remark as "Don't mention it". Where really serious offences have been committed, however, an apology is inappropriate, unless, indeed, it is not positively offensive. For a killer to apologise to the parents of the child he has killed is absurd; the issue goes far beyond an apology, and the implicit demand for forgiveness attaching to an apology is an

outrage. The offender's self-revulsion might well involve remorse and repentance, but these relate the individual to conscience, or perhaps to God. Apologies lubricate the machinery of everyday life, but to invoke them for this kind of offence shows moral insensitivity to the same degree as the idea of a "sorry day" reveals a tin ear in the matter of language.

But who, we may ask again if we continue this line of thought, is being sorry for what? When academics such as Robert Manne, in his columns in *The Australian*, or Professor Gaita, support the idea of an apology, who is apologising for what? Neither of these enthusiasts for cleaning the moral slate has done anything at all to Aborigines.

One obvious move, as we have seen, is to inflate the concept of responsibility. We become, in one way or another, responsible for all the bad things going on in our society. The Good Samaritan merely happened upon the victim of the robbers, but the duty of the citizens of what has been called a "decent society" is to comb the streets day and night in search of such victims of poverty, racism, bad adoption practices and anything else that becomes a social problem. And the switch, at this point, from "moral" to "social" is highly significant. This view may not quite assume that, if we all became socially or morally hyperactive, we could reliably make society perfect, but it comes close to basing moral responsibility upon the presumption of omnipotence. We might call this the inverted omnipotence move. An assumption of our omnipotence renders us helpless before this moral steamroller.

There is a second way of qualifying the actual innocence of these vicarious undertakers of collective guilt. It consists in saying that, since we take pride in the Australian national heritage, we must in all consistency experience shame for the bad things they did. This is quite an ingenious ploy in the cause of showing that we are all in some sense guilty, but it won't stand up to a moment's thought. What *is* our relationship to our national traditions? What in fact is our national identity? In some ways this is a profound question, but we may limit ourselves to that part of it about which we are reflective at any given time, and the basic point is that it is highly selective, and commonly subject to simplifying abstractions. One might be proud of Australian matiness, without worrying about the fact that some Australians are unfriendly and snobbish. Pride in ancestry is pride in some supposed (and sometimes imaginary) essence. It is quite unaffected by the base acts done by ancestors, because acts are always excludable when one is thinking in terms of essences.

VII. The slide from the moral to the political

An odd feature of these arguments for Australian national guilt is that they come wrapped up in a curious moral and intellectual vanity. Raymond Gaita decorates his *Quadrant* argument with recording his "bafflement over" the "astonishing silence" of those he describes as "on the right" to engage seriously in argument. Robert Manne tells us that since the publication of the "Stolen Children" Report, "there has been a distant rumble of dissent from the right but not sustained argument".[14] There is, then, both a claim to superior moral and intellectual seriousness combined with a highly political assumption that the lines of disagreement must be between left and right.

When one political tendency – in this case specified merely as "the left" – identifies itself with absolute moral rightness, as in the movement whose arguments we are considering, then we find ourselves in the presence of ideology strictly so called: namely, a mobilising political appeal masquerading as a moral or philosophical truth. The "left" has supposedly nothing less than morality itself. This kind of absolutism is not only false, but politically unconvincing. The modern world is full of political wolves in moral sheep's clothing. The so-called "ethical investment" movement, for example, is a political lobby passing itself off to gullible people as just ethics, doing the right thing, goodness in action. The spread of such politicised ethics obviously provokes a central question: namely, amid all this conspicuous pseudo-ethics, is Australian society notably less full of cowardice, dishonesty, treachery, avarice and the rest of the vices?

A moral argument about the inescapable guilt of all Australians leads us back to the public world, in which moral arguments cannot be entirely conclusive. For one thing, moral considerations lead in different directions; for another, it is no business of governments to do justice though the heavens fall. Their business is to prevent the heavens falling. But in the case of indigenous apologetics in Australia, we are not dealing with a pure moral issue. For the equation is complex. On the one side, we have a set of largely innocent individuals bent on making an apology for the sins of their collectivity; on the other, a set of people whose claim to an apology rests in large part on the sufferings of their ancestors, and whose demand for an apology is primarily the first move leading on to the receipt of financial compensation. The concrete situation is that morality rapidly slides into economics and politics.

A purely moral discussion, and an understanding in purely moral terms, emphasises many dreadful things done in the past, but also sentimentalises the present. I do not know what the "tariff" (as they horribly say in criminal law) would be for raping, stealing and killing. In other words, terrible things were done to Aborigines, and possibly benefits ought to be given to them now, but there is no way in which these two things can be rationally connected.

It may seem that I am missing the point. The point, some have claimed, is that the apparatus of apology is basically emotional; its point is to bring comfort to pain. If this is true, of course, the moral case falls away and we are into therapeutics. But I suspect that the psychological dynamics are likely to be very different. It may be that Aborigines will be comforted, will put away their resentments, and march confidently into the future. Some may do so, no doubt. But on my reading of human nature, as the hangover from the tearfulness of May 26 wears off, and Aborigines find themselves in much the same condition as before, they are likely to take the apology as a final admission of something they have always known: in the famous words of Xavier Herbert, that all Australians are bastards. The apology proves it. Relations are difficult enough anyway; this is not going to improve them.

My argument is, then, that the hurricane of national self-abasement sweeping over us is a very odd phenomenon in the moral and political world, and it is worth speculating (for it can be no more than that) on what it amounts to.

VIII. The Australian dimension

We are dealing with collective self-accusation, complicated by the fact that the hands that beat the breast are not the hands that committed the offence. This situation is part of a wider tendency in which the critical drive of Western civilisation turns into a kind of rage that human beings, and especially Europeans themselves, should have fallen so far short of perfection.

Australians share in this, but they sometimes exhibit a highly specific form of it. Australia was founded by outcasts from Europe, who might have been expected, having suffered rejection, to have responded by rejecting in turn the evils of (in particular) the Britain from which they came. They might have built a comradely society in the South Pacific, free of the snobberies and inequalities of the old world. Instead, they have created a marvellously successful version of modern Anglophone life, with the usual equipment of conflict and material affluence. The treatment of Aborigines fits easily as a chapter of this indictment.

More generally, one might observe that there is in Australia a striking elite/mass split. Many university-educated Australians disdain the philistinism of the Ocker, and have in the past despaired at the obtuseness of a population which kept returning Menzies to power and refusing to support referenda extending federal powers. The concept of "cringe" as a form of national self-criticism is an example of this propensity. Cultural cringe has now been partnered by Asian cringe.

Many Australians find Australia a dull place. It is prosperous and suburban, and low in *Angst*. DH Lawrence felt that it had not been irrigated by blood in the way the United States had — a curiously misguided belief to hold less than a decade after Gallipoli. But the reference structure within which the Aboriginal question is considered suggests something like a desire to play out the

agonies of more romantic countries. The echo of the Holocaust almost suggests that Australians want skeletons of their own in the cupboard, and the tearfulness of National Sorry Day shows that Australians, always fast learners, have mastered the art of public sentimentality as pioneered in the grief for the death of Princess Diana.

A related feature of this situation is that university educated Australians seem to be abnormally sensitive to moral currents emerging from international organisations. If a U.N. committee declares a right, then the path of virtue has been clarified for us, and the federal Government signs up to it, whatever may be the costs to the Australian Constitution.

IX: A phenomenology of collective apologetics

The French have an expression: *Qui s'excuse, s'accuse.* In excusing oneself, one points the finger back at oneself. In collective apologetics, we have the reverse: it is precisely by accusing oneself (as part of a collectivity) that one succeeds in excusing oneself (because one has exhibited the appropriate moral sensibility). Others must join in on pain of being revealed as morally obtuse, if not worse.

Morality is not, however, merely a set of rules for doing the right thing, nor is it just the practice of those rules. It is also a domain in which imagination and interests come into play, and it can be used, as we have seen, to produce a variety of effects. It can, in other words, be corrupted, like any human activity. It can be made to subserve quite different purposes. For morality is an abstraction almost inseparable from its context. It is a peculiarly Western abstraction, where it has been detached from custom and religion, in which it floats in most civilisations, and this is partly the reason why morality is, as it were, "spoken" in a variety of idioms.

The Catholic moral idiom is, with us, slightly different from the Protestant. In some cultures, morality is marked by a striking fastidiousness.

"Par delicatesse
J'ai perdu ma vie".

wrote the French poet. This is a different idiom from that of the Australian, who would sacrifice his life, but not for something as ineffable as *delicatesse*. Australians tend to have a robust attitude to life, and would do the right thing without fussing. They would tend to correct past errors in action, *ambulando* as it were, without breast beating. For all the Celtic blather in Australia, there is quite a lot of the English stiff upper lip, and never more so than in deriding the "whingeing" of the Poms.

Australians are not in general much inclined to interfere in the lives of others on the basis of mere good intentions. Most would have read *Portrait of a Lady*, but would instinctively suspect Ralph Tuchett imposing his good intentions so fatally on Isobel Archer. The specific corruptions of moral scrupulosity do not come naturally to Australians. And that is why the appearance of this curious collective form of moral passion in Australia requires explanation. It is, at the very least, a remarkable cultural phenomenon.

Not that Australia is unique. Canada, New Zealand and the United States exhibit the same symptoms. Like all other states, they began in conquest, and now a conception of justice is being invoked in an effort to cancel out that very fact. Even the basis of that conquest — namely, a superiority of the conquerors over the conquered — is often denied on the ground that all cultures are equal. That argument itself, of course, is part of this same self-accusing culture. The paradox is that the demand for justice, for a cancelling of what has happened since 1788 when the British "invaded" Australia, is, at its logical extreme, a demand for the non-existence of the very people making the demand. Sawing off the branch on which you sit isn't in it. This is nihilism.

Nor is this implication, namely, that the apologisers themselves ought not really to be there, the only thing paradoxical about the elite view of native peoples. Consider the fact that people who regard their own religion – Christianity – as a set of implausible superstitions, go on to

define the religious beliefs of tribal peoples as a "culture" and accord them the most fawning respect.

I suggest that there is something sickly and disoriented about repudiating everything one is, out of allegiance to an abstract doctrine. Let me emphasise that the thing I am criticising is the apologetic interpretation of the Aboriginal experience, and the judgment that it is the only possible response for Australians. There is no disagreement about the moral judgment that should be made about the events in which Aborigines were raped, killed, dispossessed and so on. I have some reservations about the "stolen children" question, but there is no doubt that taking children from unwilling parents and separating them for life is bad. Is the only possible response the kind of collective moral mobilisation demanded?

Again, we must look to our roots. Western civilisation has exhibited over the last few centuries a persisting sense of its own corruption. The French *philosophes* found the imperfection in kings, priests and aristocrats, Marx in commerce, Hitler in the Jews, and nationalists in a variety of oppressors. And one rising theme in that sequence has been that the evil of the West lies in the very structure of political organisation itself – the fact of sovereign states.

The basic structure of this theory of our corruption is relatively clear because it is very old: the world we inherit is bad, but *we*, the critics, the rejecters, are, precisely because we are taking the collective guilt on our own shoulders, the remnant who may well save us from a deserved destruction. This has been the mind-set of Gnostics down the ages, and a quite different, though perhaps more familiar form, is the Calvinist doctrine of the Elect.

The question thus becomes: what is the road to election, to salvation? The best clue is which entities are fingered as the agencies of corruption. Others have pointed the finger at capitalists, priests, aristocrats, other races, etcetera, but in this case the guilty party is nothing less than Australia as a state. And that suggests the corresponding basis on which the accusation is made: that of a moral freemasonry, representing humanity against its tribal manifestations in modern political life.

Again, it is the indispensable Gaita who supplies us with the solution. He observes that Senator Herron attacked Mick Dodson, an Aboriginal spokesman, for accusing Australia of genocide at an international conference. Dodson was taken to have been "badmouthing" Australia, a charge which Gaita rebutted by remarking:

> "Herron failed to see that an international forum is the obvious place to take an accusation of genocide. It is the international crime *par excellence* because it is a crime against humanity, an offence against human kind". [15]

In reading this, we learn why Gaita is so keen to pin a genocide rap on Australia: it is because genocide springs the issue out of the domestic into the international realm. In part, his keenness to move the issue into this sphere might be ascribed to the Holocaust model of moral virtue in our century: namely, the admiration for those people who exhibited their moral courage by rejecting their own state and appealing to the international world on the basis of moral conviction.

There are indeed occasions when it becomes one's duty to appeal beyond the state to a higher court, though they have seldom arisen in Anglo-Saxon liberal democracies in this Century, and some who took this line — such as the Communist agents who thought that the Communist movement was the supreme allegiance in a world of corrupt nation states — made a dire and miserable mistake. Beyond politics and morality there is a higher sphere of decision, studied by Machiavelli and others, in which actions are beyond good and evil, and can only be judged by their consequences. This was the case with reason of state; it is also the case with appeals out of the state which has protected and nurtured us to international bureaucracies. It is perhaps necessary, in desperation, but not to be resorted to lightly.

Internationalism, or what I have elsewhere called "Olympianism"[16] is one of the most powerful salvationist movements of our time. Internationality is for many of the educated the last best hope of a better world. But it is no part of my argument to explore these particular illusions.

The mobilisation of collective shame is thus part of a wider concern with internationalising human life, and it has, as a movement, a charming simplicity in that all that it demands, initially, is right opinion. The demands it makes on individuals are no more demanding because the individual's repentant sentiment functions to put pressure on governments to act.

Kant was pessimistic about the possibilities of building anything straight from mankind's crooked timber, while Christians wrestle with original sin, but here we have the ideological theory of evil, which attributes all bad things to false doctrines such as racism, consumerism, sexism and so on. To be good requires merely thinking the right thoughts, and one's orthodoxy may be worn like a peacock's tail as a proof of righteousness. The universities are full of these ideological peacocks playing politics. Whether they are, as a result, good people, is another question.

X. Conclusion

In returning to the problem of indigenous peoples, we must thus recognise that the problem is ours no less than that of the Aborigines. Apology is no real help to them, for they have their own lives to live and must find ways of coming to terms with their condition. Perhaps we should help them, but only "perhaps" because some of our helping has been in the past, and no doubt will be in the future, self-defeating. Certainly it is the case that saturating indigenous peoples in a mist of self-referential Western sympathy is merely one way in which *we* use them for the luxury of our own self-regard. There are many cases where doing nothing is harder than joining in approved postures.

Vote of Thanks

During the course of the dinner which followed Professor Minogue's address, the Hon Peter Coleman delivered a vote of thanks, as follows:

I am probably the only one in this room who went to Sydney University with Ken Minogue. It was the post-War 1940s and Ken was well known as a student journalist. He published everywhere, including in one of those fugitive student newspapers — something called *Heresy* — set up to combat the neo-fascist oppression of the Vice-Chancellor, the Registrar, and the Yeoman Bedell. Another journalist who published in that newspaper went under the name of Jesus Chutney. That was the ambience.

Then, suddenly, Ken disappeared. Word got around that he had fled to Odessa! Yes, Odessa! This was at the height of the Cold War. Surely he was not a spy! The truth was less romantic, although still remarkable. Having graduated, Ken had combed the waterfront looking for a job, any job, on any vessel that would take him overseas. He had finally found work — as a cabin boy — on a tub heading for the Black Sea.

He didn't stay in Odessa long, and soon popped up in London, where he was reported to be a leading spirit in the London literary world, and to be publishing short stories in a range of publications with names such as *The Star*.

Soon he found a niche — almost a home — at the London School of Economics. There was only one problem. Such was the international standing of Sydney University that its B.A. was not considered good enough to justify enrolment for a Master's degree at the LSE. Ken had to do his Bachelor's degree all over again. Needless to say, he did it brilliantly.

In due course he was appointed a teacher at the LSE and never looked back. He turned out a series of influential books, beginning with *The Liberal Mind* in 1961 up to *Conservative Realism* last year.

He has also made a name as an adviser to governments. It began in the late 1960s after the student riots at the LSE, when Ken presented a paper to a Select Committee of the House of Commons set up to look into these events. The paper became the basis of Ken's book *The Concept of a University*.

It was in this capacity as adviser that we have heard him tonight, in his paper on *Aboriginals and Australian Apologetics.*

We can date fairly precisely when our present preoccupation with indigenous people began. It was about 30 years ago. I remember very vividly my own first brush with the new approach. It was in 1970 at an international conference in Virginia.

In one session an academic, with a light in his eye, stood up to tell us about a new idea whose moment had come. It was an extension of old ideas of equality. We all knew and accepted the once unsettling ideas of equality before God, or equality before the King (the law), or equality of opportunity.

But there was now a new expression of equality that would dominate or at least flourish in the coming era. It was the idea of the equality of prestige of all cultures.

As the speaker developed the idea, you could feel the resistance in the room. Was it not ridiculous to pretend that Greco-Roman culture — which was ours — was to be equal in prestige to the culture of Hottentots or Eskimos or (closer to home) Papuans or Aborigines! But that is what he was telling us.

It was traumatic. We took pride in the glories of Greece, from which we derived our culture and which we wanted to pass on to everyone else, including to indigenous peoples. Western philosophy as a footnote to Plato was our paradigm of culture. Who was the Eskimo Plato?

It was only a few years later that a famous American novelist and Nobel laureate, Saul Bellow, actually asked, with heavy irony: "Who is the Papuan Proust?" Bellow thought he had disposed of the matter. But the public controversy was ferocious. After the critics had, metaphorically, kicked him around the streets for several blocks, Bellow apologised!

This was the new idea we had to learn. It meant more than the sort of exhibitions we began to see in our ethnological museums about Aboriginal medicine, or land management, or even painting. It meant, or was taken to mean, that our Greco-Roman heritage of logic and intellectuality had nothing to offer the Aborigines. Indeed, we had much to learn from their spirituality.

Equality of prestige of all cultures has political consequences. Equality before God mandated the end of slavery. Equality before the King and the law meant that all murderers must hang, whether they were rich or poor, black or white. Equality of opportunity demanded schools for all, including Aborigines (and perhaps sometimes required that Aboriginal children be fostered out to give them a chance in life). So the equality of prestige of all cultures brings us the Waitangi Tribunal in New Zealand, and gives us *Mabo* and *Wik* in Australia.

The debates have still a while to run. But we are lucky to have Ken Minogue to guide us through them. I urge everyone to re-read his paper of tonight, but also to read his companion book *Waitangi: Morality and Reality*. They constitute Ken's Memorandum of Advice to us and to our governments on policy towards indigenes. He covers all the main issues, but I particularly draw your attention to his conclusions in *Waitangi*.

There are four of them. He urges a time-limit to negotiations. He opposes constitutional changes that would give permanent and special legal privileges to any section of society. He calls for all indigenous organisations to be self-governing and self-financing. Above all, he asserts the common citizenship — rights and duties, privileges and responsibilities — of all.

These conclusions apply primarily to New Zealand. But they have an obvious Australian point. They may not be the last word, but they are grounded in both *Morality and Reality*.

Ken Minogue has brought characteristic scholarship, insight and wit to our discussion. It is with great pleasure that I move a vote of thanks to him for doing so.

Sydney, N.S.W.
4 May, 1998

Endnotes:

1. A formidable general argument will be found in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, 1995. And Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s*, Auckland University Press, Second Edition, 1997 is a notable piece of moral philosophy arising from one of the most notable cases of indigenous politics.

2. See, for example, Max Griffiths, *Aboriginal Affairs: A short History 1788 - 1995*, Kangaroo Press, Kenthurst, NSW, 1995, p. 20.

3. Pastor Paul Albrecht, *The Nature of Aboriginal Identity* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 9 (1997), p. 165.

4. I have discussed the Maori case of indigenous revival in *Waitangi: Morality and Reality*, New Zealand Business Roundtable, Wellington, 1998.

5. *Bringing Them Home*, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Commonwealth of Australia, 1997.

6. *Genocide and Pedantry*, in *Quadrant*, July-August, 1997, p. 141; and *Genocide: The Holocaust and the Aborigines*, in *Quadrant*, November, 1997, p. 17.

7. Thus on p.20 he hopes that his discussion will identify something fundamental to genocide which will "show why the absorption programmes were sometimes genocidal in a sense which *rightly* attracts the obloquy the term has acquired through association with more terrible examples". I have italicized "rightly" here because it seems to signify that "stolen children" and "Holocaust" victims are in fact to be accorded the same response, something which much of his article denies.

8. Gaita, *Quadrant*, November, 1997, *op. cit.*, p. 21.

9. *Ibid*, p. 22.

10. Consider, for example: "It is difficult to know how much of the manifest irritation with Jews that surfaced during the Demidenko debate was the expression of anti-Semitism. I believe that little of it was, at least insofar as it was expressed by the intelligentsia. Others, *quite reasonably*, have thought differently". (Raymond Gaita, *Not Right*, in *Quadrant*, January-February, 1997, p.46). The whole suggestion of the passage, especially the phrase I have italicised, is that racism was roaring away, but Gaita delicately incorporates a posture to indicate that it is not, quite, he who has spoken.

11. See very notably, for example, Geoffrey Blainey, *The Triumph of the Nomads*.

12. Martin Krygier, *Between Fear and Hope: Hybrid Thoughts on Public Values*, ABC Books, Sydney, 1997, p. 82.

13. Gaita, *Quadrant*, July-August, 1997, *op.cit.*, p. 45.

14. Robert Manne, *The Rights and Wrongs of an Attack on Stolen Children Report*, in *The Age*, 2 March, 1998. He is concerned in this column to attack Ron Brunton's *Betraying the Victims*.

15. Gaita, *Quadrant*, July-August, 1997, *op. cit.*, p. 44.

16. *Olympianism and the Denigration of Nationality*, in Claudio Veliz (ed.), *The Worth of Nations*, Boston University: The University Professors, 1993.

Appendix II

Contributors

1. Addresses

The Hon Rob BORBIDGE, MLA was educated at Ararat (Victoria) and Overberg (South Africa) High Schools and entered the Queensland Parliament in 1980 at the age of 26 as the National Party Member for the seat of Surfers Paradise. During 1987-89 he was successively Minister for Industry, Small Business, Communications and Technology; Industry, Small Business, Technology and Tourism; Police, Emergency Services and Corrective Services; and Tourism, Environment and Conservation. After a brief period (1990) as Deputy Leader of the Opposition, he served as Leader of the Opposition (1991-96) until, following the Mundingburra by-election in early 1996, he became Premier of Queensland. Following the Coalition's defeat in the June, 1998 election he was re-elected as leader of the National Party and Leader of the Opposition.

Dr Barry MALEY has degrees from the University of Sydney and the Australian National University. He was Senior Lecturer in behavioural science in the Faculty of Commerce at the University of New South Wales before taking up, in 1989, his present post of Senior Fellow at the Centre for Independent Studies, Sydney, where he is presently directing one of the Centre's major research programs in the social policy area. He has held visiting appointments at Oxford, Cambridge, the University of California (Los Angeles) and the Institute of Commonwealth Studies, London. He is the author of many professional journal articles and monographs, as well as several books on family policy and environmental issues, and is presently exploring some of the social and policy implications of international conventions ratified by the Australian government.

Professor Kenneth MINOGUE was born in New Zealand and, after arrival in Australia, was educated at Sydney High School and the University of Sydney (BA Hons, 1950) before continuing his studies at the London School of Economics. Appointed to a teaching position there in 1956, and becoming Professor of Political Science there in 1984, he taught at the LSE until his retirement in 1995. Apart from numerous articles both in scholarly journals and elsewhere, he has published a number of books, including *The Liberal Mind* (1963), *The Concept of a University* (1974), and *Politics: A Very Short Introduction* (1995). In 1986 he produced for the British Broadcasting Corporation a six-part television series on free market economics, *The New Enlightenment*, which was repeated on Channel 4 in 1988. His study of the Maori question, *Waitangi: Morality and Reality* (1998), provides a refreshing new look at New Zealand's problems in that area.

2. Conference Contributors

The Hon Peter CONNOLLY, CBE, QC was educated at St. Joseph's College, Brisbane and St. John's College at the University of Queensland. After having served in the AIF during 1939-46, he was admitted to the Queensland Bar in 1949 and was a Member of the Legislative Assembly for Kurilpa in 1957-60. He became a Queen's Counsel in 1963, President of the Australian Bar Association in 1967-68 and President of the Law Council of Australia in 1968-70. From 1977 to 1990 he served as a Judge of the Queensland Supreme Court and, since his retirement from that post, has served as a Judge of the Court of Appeal of Kiribas.

Dr John FORBES was educated at Waverley College, Sydney and the Universities of Sydney (BA, 1956; LLM, 1971) and Queensland (PhD, 1982). He was admitted to the New South Wales Bar in 1959 and subsequently in Queensland and, after serving as an Associate to Mr Justice McTiernan of the High Court, practised in Queensland as a barrister-at-law. He is now Reader in

Law at the University of Queensland Law School, and has published texts on the History and Structure of the Australian Legal Profession, Evidence, Administrative Law and Mining and Petroleum Law. In recent years he has become one of our foremost experts on the law of native title.

Professor Brian GALLIGAN was educated at Downlands College, Toowoomba and at the University of Queensland (B Com, 1970; B Econ, 1972) and Toronto (MA, 1975; PhD, 1978). After qualifying as an accountant in Brisbane, his studies in Toronto were followed by teaching posts in Political Science at La Trobe University (1979-82), the University of Tasmania (1982-83) and the Australian National University (1984-92). In 1992 he became Professor of Political Science at the ANU and Director of its Federalism Research Centre, before moving to a Chair in Political Science at Melbourne University in 1995, where he now heads the Centre for Public Policy. He is the author of numerous articles and books, including *Politics of the High Court* (1987) and *A Federal Republic: Australia's Constitutional System of Government* (1995).

Ian HOLLOWAY was educated in Halifax, Nova Scotia before taking degrees at Dalhousie University, Halifax (BSc, 1981; LLB,1985) and the University of California, Berkeley (LLM, 1992). After admission to the Nova Scotia Bar in 1986, and practicing there, he served as Associate to the Chief Justice of the Federal Court of Canada (1992-93) before moving to Australia in 1993. Now an Australian citizen, he lectures in the Faculty of Law at the Australian National University, Canberra. He is the author of many articles in professional journals and elsewhere and attended, as an advisor, the Constitutional Convention in February, 1998.

Dr Colin HOWARD, QC was educated at Prince Henry's Grammar School, Worcestershire, and at the University of London and Melbourne University. He taught in the Law Faculties at the University of Queensland (1958-60) and Adelaide University (1960-64) before becoming Hearn Professor of Law at Melbourne University for 25 years (1965-90). He was awarded his PhD from Adelaide University in 1972, and in 1973-76 was General Counsel to the Commonwealth Attorney-General. He now serves as General Counsel to the Victorian Government Solicitor, while remaining a practising member of the Victorian Bar. Perhaps best known for his constitutional expertise, he specialises also in commercial and administrative law, and has published a number of texts for both lawyers and laymen. In 1996 he became a Queen's Counsel.

Dr Suri RATNAPALA was educated in Colombo, Sri Lanka, undertaking his first degree (LLB) at the University of Colombo. Before migrating to Australia in 1983 he served as a Senior State Counsel in the Attorney-General's Department of Sri Lanka, where he was involved in drafting that country's republican Constitution. He completed his LLM degree at Macquarie University (1983-87) and his PhD at the University of Queensland, where he has taught since 1988. He is now Reader in Law there and co-editor of the *University of Queensland Law Journal*. He is the author of numerous articles in professional journals and a number of other publications, including *Welfare State or Constitutional State?* (1990), *The Illusions of Comparable Worth* (1992) (with Gabriël Moens), and *Mabo: A Judicial Revolution* (1993) (co-editor).

David RUSSELL, RFD, QC, was educated at Brisbane Grammar School and the University of Queensland, where he graduated as BA (1971), LLB (1974) and LLM (1983). He was admitted to the Queensland Bar in 1977 and has since practised in that and other jurisdictions as a barrister-at-law, becoming Queen's Counsel in 1986. He has lectured at the University of Queensland and published numerous articles in professional and other journals. He has for many years been actively involved in the Taxation Institute of Australia, serving as its President (1993-95), and is a director of several companies. He has been a member of the State Management Committee of the Queensland Branch of the National Party since 1984, Senior Vice-President (1990-95) and President (1995 to date). Since 1990 he has also been a Vice-President of the National Party of Australia.

Sir David SMITH, KCVO, AO was educated at Scotch College, Melbourne and at Melbourne and the Australian National Universities (BA, 1967). After entering the Commonwealth Public

Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. He lives in Canberra, where he is now very involved in both scouting and in musical activities. In February, 1998 he attended the Constitutional Convention in Canberra as an appointed delegate.

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, DC (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post — and from the Commonwealth Public Service — in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. In 1996-97 he served as a member of the Defence Efficiency Review into the efficiency and effectiveness of the Australian Defence Force.

Professor Geoffrey de Q WALKER was educated at a number of State High Schools and the Universities of Sydney (LLB, 1962) and Pennsylvania (LLM, 1963 and SJD, 1966). He was admitted to the New South Wales Bar in 1965, and practised both there and in industry before becoming an Assistant Commissioner with the Trade Practices Commission (1974-78). He has taught law at the University of Pennsylvania (1963-64), the University of Sydney (1965-74) and the Australian National University (1978-85), before becoming, in 1985, Professor of Law (and, in 1988, Dean of the Faculty of Law) at the University of Queensland. In 1996 he retired from that post to resume private practice in Sydney. He is the author of four books and a large number of articles on a variety of legal topics, including in particular citizens-initiated referendum systems.

Alan WOOD was educated at Sydney Boys High School and the Australian National University (BA, 1968). After initial employment with *The Australian Financial Review* in Canberra (1964-69) and as that newspaper's European correspondent (1970), he became Economics Editor of *The Sydney Morning Herald* and (concurrently) *The National Times* (1970-75). Between 1975 and 1987 he was a principal of the highly respected economics consultancy firm, Syntec Economic Services, before resigning to become National Economics Editor of the Seven Television Network. He returned to the print media in 1990 with *The Australian*, of which he is now Economics Editor and an Associate Editor.