Upholding the Australian Constitution Volume Eleven

Proceedings of the Eleventh Conference of
The Samuel Griffith Society

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Foreword

John Stone

The eleventh Conference of The Samuel Griffith Society was held in Melbourne, and this Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains the papers, and Dinner addresses, delivered to that Conference, together with the brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

Although, like all its predecessors, this Conference covered several themes, the impending Referendum to transform our Constitution to a republican one warranted some degree of concentration of the agenda on that matter. Similarly, the then possibility (now confirmed) of a second Referendum at the same time to insert a new Preamble into our Constitution gave grounds for covering that matter also.

As this Volume goes to press, the Parliament has finally agreed on the wording of the question to be put to the people on the Republic matter on 6 November next, namely: "An Act to alter the Constitution to establish the Commonwealth of Australia as a republic, with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament".

This so-called "compromise" proposal, the product of a parliamentary Joint Select Committee almost totally made up of republicans and a Cabinet seemingly incapable of standing by a principled position on almost anything, yields ground to the Australian Republican Movement's xenophobic demand that the people should simply be asked whether they want to "get rid of a foreign Queen". Moreover, while it retains the reference (also objected to by the ARM on the basis of its private polling) to the method of appointing a President, it is entirely silent on the even more important matter of the proposed new power of the Prime Minister to dismiss the President at any time, without any reason given, and without any effective sanction. As Professor David Flint, the National Convenor of the "No" campaign (and himself a member of the Board of this Society) says in his opening Dinner address, under this provision it will be easier for the Prime Minister to sack the President than to sack his driver!

The real malevolence of the dismissal power, however, goes far beyond the enormous enhancement which it would produce in the already excessive power of the Prime Minister of the day, serious though that consequence would be. By rendering the President subject at any time to instantaneous dismissal, it reduces him or her (to the extent that the bogus appointments procedure has not already done so) to the status of "the Prime Minister's poodle" – or, as has been said, makes him or her nothing more than another member of the Prime Minister's staff.

In thus rendering the President (unlike our present Governors-General) a mere creature of the Prime Minister of the day, the dismissal provision also effectively removes the "reserve powers" provisions from our present Constitution. On any future occasion on which the exercise of those powers might be surmised, the Prime Minister would be able simply to remove the President in advance of that occurring. Thus, although the Referendum Bill purports to retain those powers (while rendering them for the first time justiciable, itself an extremely worrying development), passage of the Referendum would have the effect, *in practice*, of erasing them from our Constitution. No wonder the ARM wants no mention of the dismissal procedures in the question; and no wonder they, and their journalistic

collaborators, were so enraged when the Minister for Workplace Relations, Mr Peter Reith, brought them so prominently into public view.

All that being said, I remain unrepentant in my view that the Republic referendum will not, in the event, pass the test of scrutiny by the Australian people. If I should prove wrong in that regard, Australia will enter the 21st Century a sadly diminished nation; one in which the money, and street-theatre techniques, of the ARM have prevailed over experience and common sense. We shall see.

If the Republic proposal is a constitutional turn-off, however, what can be said about its companion proposal for a brand new Preamble to a Constitution already nearly 99 years old?

The original proposal on this matter, emerging from the February, 1998 Constitutional Convention, was in the nature of an appendage to the main concerns of that gathering – namely, the proposal for a Republic itself. A new republican Constitution should, it was said, be accompanied by a new republican Preamble, which would express all manner of "feel good" thoughts – and, in the process, help to gather up some more votes for the ARM's republican constitutional camel when it came to the voting in the Convention itself.

In the outcome, we have a "stand alone" proposal which, if agreed in the referendum , will import into our Constitution, almost 99 years later, and irrespective of whether that Constitution becomes a republican one or not, a 152- word waffle which, if it were not being advanced with an apparently straight face by our Prime Minister and his Coalition parties, could only be described as a joke. That is indeed the view taken of it by Mr Michael Warby in his *Preambulations* paper. Unfortunately, however, as Sir Harry Gibbs points out in his magisterial contribution, *A Preamble: The Issues*, it is not really (or not only) a joke, but a potentially serious matter. Moreover, although this proposal also undoubtedly should be voted down, it is by no means clear that it will be; indeed, one of the chief arguments (sic) of its proponents has been, from the outset, that if we vote "Yes" for the Preamble we shall feel less regretful over a "No" vote for the republic. For myself, I can only say that the only appropriate response to both the politicians' Republic and, equally, the politicians' Preamble is a two-fingered one: "No" and "No". Again, we shall see.

These two matters aside, there is much else in this Volume to repay study. In particular, in his paper *Judicial Tidy-up or Takeover? Centralism's Next Stage*, Dr John Forbes provides a valuable follow-up, as witty as it is informative, to his earlier paper to the Society on the Federal Court; Malcolm Mackerras, against the background of the Senate voting procedures introduced almost 50 years ago, examines the complaints of the Liberal Party's "Senate reformers", and finds them characteristically lacking; while the Hon Gary Johns and his Honour, Justice Roderick Meagher of the NSW Court of Appeal, are in broad agreement that Bills of Rights, whatever their past history may have been, are nowadays chiefly an(other) instrument whereby the chattering classes seek to make their writ run judicially, in the face of the people's steadfast opposition to having it do so legislatively.

These, and other papers, contain a wealth of material which deserves to be widely read, and widely debated. It is to that objective that this Volume, like its ten predecessors, is dedicated.

The Republic Referendum: Mere Symbolism or Substantial Change?

Professor David Flint

Those who are defending our present Constitution in this referendum of 1999 believe that our fellow Australians, all of our fellow Australians, should not only have a vote on the republic. They should be entitled to an informed vote.

Now we are told that the change is only symbolic – that it is simple. Well, Mr Tom Keneally has let the cat out of the bag on that one. In November on Channel 9 he revealed what we all know: that what is being proposed is the most substantial change to our Constitution since Federation. And one which the patron of the Australian Republican Movement (ARM), Senator Murray warns, has the potential to give the Prime Minister absolute executive power.

The point is, the change is neither symbolic nor simple.

Let me look at the referendum question itself and then the model, the Keating-Turnbull Republic.

First the question.

The question in the Constitution referendum in 1999 will be whether Australians approve of a change to a republic in which the President is chosen by a two-thirds majority vote of a joint sitting in Parliament. But it ought really to add that he will hold that office only at the whim of the Prime Minister. This will not actually appear in the question. But as it will be unique in the world, it ought to be there.

The Australian Republican Movement – in its "Don't mention the war" vein – is attempting to portray the question as, "Do you agree that an Australian citizen (later admitted, Mr Turnbull to be actually named the President) should replace the Queen as Head of State with the same powers as the Governor General?" They want to exclude reference to the words "President", and especially "Republic", in the actual referendum question. When however this attempt attracted national ridicule, the ARM changed their version of the question to include first the word "President", and the next day (6 July) the word "Republic".

Nevertheless, these words are being avoided in the campaign. In the ARM campaign the referendum is portrayed as only being about having an Australian as Head of State. This is in fact the very question Paul Keating proposed putting to the people in a plebiscite which would have had no legal effect. Plebiscites are usually framed – as they were by both Bonapartes – in such a way as to mislead voters and to obtain the equivalent of a blank cheque on the Constitution. The latest example was the failed Quebec plebiscite.

Here we had an Australian example. It did not proceed when Mr Keating first proposed it because Australians for Constitutional Monarchy said supporters would be advised to vote "Yes", as we already had an Australian as Head of State. And at the very same time, the Keating Government was holding out to all the world that the Governor-General *was* the Head of State. Nevertheless, considerable resources have been put into promoting this message – both private and taxpayers'. It was the core theme of the Report of the Republic Advisory Committee and the core of the ARM's TV advertising campaign for the Constitutional Convention. No doubt it will be at the heart of a taxpayer funded "Yes" campaign in October.

This argument is spurious. It is used to avoid debating the actual question which is being asked in the referendum. In effect the ARM is giving the term Head of State a constitutional

meaning and application never before known in Australia. There is an "Alice in Wonderland" flavour about this. I am referring to Humpty Dumpty when he said, in a rather scornful tone, "When I use a word, it means just what I choose it to mean – neither more nor less".[1] Head of State, like the word republic, is a term which lacks precision.

The modern state, as we know it, emerged with the decline of feudalism in Europe. Most were once ruled by monarchs, kings or princes, who had removed themselves from the higher authority of the Holy Roman Emperor, or the Pope. Relations between states at this time essentially involved personal relations between monarchs, represented by ambassadors. When republics emerged, international lawyers came to use the term Head of State to cover both monarchs and presidents.

It is not possible to generalise about what are or should be the functions of a Head of State. This is because international law does not provide the answer. As Lord Slynn observed last year in the House of Lords:

"The role of Head of State varies very much from country to country….".[2]

One cannot generalise even about the name of the Head of State. He can be a King, President, Grand Duke, Emperor or Pope. And you can have more than one. Andorra had two, the Soviet Union, 24, revolutionary France, under the Directory, five. Today, Switzerland has seven. A Head of State can even change to a monarch from being republican head or vice versa, as has happened in France, Albania, Iran and Cambodia. A Head of State can be head of more than one country, as was the case in Hanover and Britain, and is the case now in Canada, New Zealand and the UK.

A Head of State can be almost purely ceremonial (Ireland) or the head of government (USA), or a powerful executive President "cohabiting" with a parliamentary Prime Minister (France). He may enjoy absolute power, as in various dictatorships. Hitler was a Head of State, Stalin never was. And, as we have seen, it is possible to have more than one.

Deciding who is a Head of State is very important. It determines who sits where at official banquets – who gets a 21 gun salute. Perhaps the most important point is that, as Heads of State are equal, no Head of State can sit in judgment on another. This is expressed in the principle *par in parem non habet jurisdictionem.* For this reason, a Head of State is normally immune from the jurisdiction of a foreign court. But there are now exceptions to this in extraordinary cases, as we have seen with General Pinochet. In the unlikely event that the Australian Governor-General were charged with an offence while travelling overseas, there is not a shadow of doubt that he would normally be immune from the jurisdiction as our Head of State.

In the law of the Commonwealth and the United States, the term Head of State is reserved *only* for international law matters and in diplomatic relations. To ascertain who actually is a Head of State, we are normally informed by the Department of Foreign Affairs of our country or of the foreign country. When the Governor-General travels overseas he is, and for long has been held out by our government, and received by foreign governments, as the *Australian* Head of State, as was the case with the visit in 1999 to Turkey by Sir William Deane. It is worth stressing at this point that the term is not one known or used in the domestic constitutional law of the UK, Australia, New Zealand, Canada or indeed the United States.

Incidentally, the first principal usage of the term in foreign constitutional law in the twentieth century seems to have been in Spain, where the office of King was vacant and Generalissimo Franco became *Jefe d'Estado*. Similarly, Maréchal Petain became *Chef de*

l'État (as well as *President de la République*) in Vichy France. Not precedents which one would have thought Australia should follow!

To confirm that the term Head of State is not used in and completely unknown to Australian constitutional law, reference may be made to the federal and all State Constitutions; the *Balfour Declaration*; the proceedings of the *Imperial Conference*, 1930 as they relate to the appointment of Governors-General; the *Statute of Westminster*, 1931; the *Statute of Westminster Adoption Act*, 1942; the *Royal Powers Act*, 1953; the *Royal Style and Titles Acts*, 1953 and 1973; and the *Australia Acts*, 1986. In no section of any one of these acts does one find the term "Head of State". Which clearly confirms it is *not* a term used or known in our constitutional law or practice. It is actually in the Referendum Bill, no doubt to give some legitimacy to the insertion of this term into the debate.

And just as the term Head of State is not used in our constitutional law or practice, nor is it part of everyday English.

There is no mention of "Head of State" in the many entries in the 2,000 odd pages of the First Edition of the *Macquarie Dictionary*, 1981. You'll find "loose-head", from rugby. And "head" meaning a ship's toilet. There's the colloquial use of the word for a drug user. "Head-hunting", "head boy" and "heading dog" are there. As is "head and shoulder", "lose one's head"! As are the now politically incorrect terms, "headmaster" and "head mistress". And under "State" there is "State aid", "States righter", the American "Statehouse" (which is not to be confused, it seems, with the New Zealand "state house", a private dwelling built and owned by the State!) There is "state-of-the-art", "statesman" and "stateswoman". But no "Head of State".

Dictionaries, at least those of the English language, reflect usage. And the plain fact is that neither Australians (at least until recently), nor the British, New Zealanders, Canadians or Americans use the term "Head of State".

In 1998, the *Daily Telegraph* (London) commissioned the Gallop Organisation Inc. to conduct an opinion poll. The poll is described as nationally representative of the population of Great Britain. Among the questions asked was the following: "Could you tell me who is Head of State in the United Kingdom at the moment". Only 56 per cent gave the correct response, 15 per cent thought Tony Blair was, and 27 per cent did not know![3]

This poll demonstrates that even in the United Kingdom, where there is no debate between republicans and anti-republicans about who is Head of State, there still is confusion about the term "Head of State".

There is an illogical aspect of the ARM argument that the Governor-General is not the Head of State. So all of the powers of the Governor-General – and nothing more – are to be transferred to the President. Then the President becomes the Head of State. They do not mention that under the Keating-Turnbull Second Republic the Queen's powers are not to go to the President.

This is a second deception – namely, that the Queen is to be replaced by an Australian President. She won't! The Queen is to be replaced by the politicians, and especially the Prime Minister. For this Republic is essentially a politicians' republic. If, as the ARM says, the Queen is the only Head of State, and her powers go to the politicians and the key power to the Prime Minister, why and how does the President become the Head of State?

Whenever it is argued that the question is about having an Australian as Head of State, it is but an echo of Mr Keating's plebiscite inviting us to give the equivalent of a blank cheque on the Constitution. This is testimony to the continuing influence of Mr Keating in this

debate.

But let us come now to the second part of my address, the so-called "bi-partisan model" for a republic which emerged from the Constitutional Convention – the model which even failed to command the support of the majority of all the delegates (only 73 votes out of 152).

The fundamental question for Australians in the coming referendum is whether this model is better than, or at least as good as, the present Constitution.

It is clear the last thing the ARM wants is a debate on the detail of the model. Mr Beazley says he would become "terribly depressed" if this debate were to be about the "minutiae" of the election of the President and the President's power.[4] The principal issue, he says, is about having an Australian Head of State and a republic. Whether or not we like the process that emerges, he argues we can deal with any problems down the road.[5] These mere details, he says, could be fixed up at future referenda! These details should not cloud the move to a more "mature" political system. But this is a Constitution, not a used car. Would anyone even buy a used car on this basis?

Let us look at the details of the model. How will the presidential candidates be nominated? How can he be removed? What are the President's powers? It begins with a nomination process so cosmetic that the shortlist can be completely ignored. It is worse than useless, as it will ensure that people of calibre who are willing to serve – unambitious achievers – won't let their names go forward.

Its sole purpose is to fool those who want to elect the President. Well, it didn't fool Ted Mack, Clem Jones, Phil Cleary or Martyn Webb.

The next stage in the process is for the Prime Minister to make a single nomination to a joint sitting. That nomination must be seconded by the Leader of the Opposition in the House of Representatives. The joint sitting must then approve the nomination by a two-thirds majority. This will normally require approval by the Opposition. This is presented as a good thing. It is not.

To believe that Opposition approval will be solely on the virtues of the candidate suggests a high degree of naiveté, and of unreality. That is just not how the political world operates. This is a world of deals and trade-offs.

Perhaps one of the best known deals was the Kirribilli House Agreement made before the 1990 election. Prime Minister Hawke agreed that after the election, and unbeknown to the electors, he would hand over the Prime Ministership to Paul Keating. Witnessed by TNT Chief Executive Officer Sir Peter Abeles and ACTU Secretary Bill Kelty, the agreement was kept secret. But when Mr Hawke changed his mind after the election, and Mr Keating went to the backbench to campaign against him, the agreement then found its way to the press.

The point was, of course, that the deal was of momentous public interest. The people thought they were electing a government to be led by Bob Hawke, not Paul Keating. It is either naive or deceptive to think that politicians will use the power to elect a President only for the purpose of choosing a President above politics.

In Australia the political deals and trade-offs surrounding the election of the President will not only be possible. They will be constitutionally entrenched.

Worse, the President will owe his office to these deals. He is just as likely to be a party to the deals.

As Ted Mack says, the President won't be one of us. He'll be "one of them".

We have yet to come to the third aspect of the way in which the Keating-Turnbull Second Republic will work. And that is the dismissal of the President.

Now most republics give the President a degree of tenure. Where he presides over a Westminster system, the President will ideally operate as a check and balance, an umpire and an auditor on the politicians. If she does not, then you have a system which leaves the same politicians in control of both the legislature and the Government – an excessive concentration of power.

Constitutional monarchs have proved best in this role, or in presiding over a system of Governors-General and Governors as in Canada. A Westminster President needs obviously to have a clearly defined role – that is, his powers should be codified – which can bring in the problem of justiciability. How do we know the precise boundaries of his powers without a court ruling on them? He also needs security of tenure, as does an executive President. Obviously, he should be removable for proven and serious breaches of the law or of his duties.

This is normally done through a three stage process of impeachment. First there is a formal charge, where the grounds to dismiss the President are clearly set out. So that this is not frivolously made, this usually has to satisfy, say, a House of Parliament, as in the United States, or a specified majority of Members of Parliament. This is, if you will, the committal stage. Then there is a trial; for example, before the Senate, as in the United States, or before a tribunal of five judges presided over by the Chief Justice, as in Singapore.

Finally, there is usually a vote in Parliament, or part of Parliament, almost always with a special majority (two-thirds in the United States, three-fourths in Israel and Singapore).

Under this second version of the Keating-Turnbull Republic, the President can now be removed without notice, for any reason or no reason, and without appeal. By the Prime Minister! The only additional step would be that the dismissal would need to be "approved" within 30 days. But not by a joint sitting of the Parliament, just the House of the Representatives! And in the unlikely event of the House not approving, what would happen? No one knows, except that the President would most definitely not be restored to office. The "consolation" is that he would be eligible for re-nomination! That is, his name could be considered by the President's Nomination Committee. The exclusion of the Senate from the "approval" process is sinister – especially where the President is dismissed to stop him from acting as Sir John Kerr did in 1975.

When I first read the Bill, I had a sense of foreboding. A chill.

And under the Bill now before Parliament, the Prime Minister can actually sack each Acting President until he gets the man or woman he wants. In any event, he will have such Deputy Presidents, with such powers as he wants, standing-by ready to do his bidding.

This is hardly a symbolic change. We have now a constitutional system which ensures the constitutional umpire and auditor is above politics. This is achieved through the Australian Crown, an institution with established conventions and practices honed over the two centuries of modern Australia. At the federal level it is found in the conceptual basis of federation – an "indissoluble federal Commonwealth under the Crown".

Both Keating-Turnbull republics suffer from the fundamental intellectual deficiency that while they would dismantle the Crown piece by piece, first federally and then at the State level, they offer nothing in its place. It is difficult not to come to the conclusion that the ARM just does not understand the role and nature of the Australian Crown. Not understanding, they wish to destroy that institution, without putting anything in its place –

except the absolute executive authority of the Prime Minister.

The proposition that the neutered office of President could be an adequate substitute for the Crown confirms an inability or unwillingness to accept the subtleties of the present constitutional arrangements.

This politicians' President will hold office at the whim of the Prime Minister. In fact, the politicians' President will be no more than the Prime Minister's pathetic poodle. But if he is cunning enough, he may try to remove a rogue Prime Minister first, and possibly throw the country into months of chaos. This is because the exercise of the President's powers will now be reviewable in the High Court.

Australians need to realise that no similar republic exists anywhere in the civilised world. No republic which makes it easier, as Reg Withers says, for a Prime Minister to sack the President than it is to sack his driver!

The very idea that the Prime Minister, who controls the Lower House, could sack the constitutional umpire, the constitutional referee and the constitutional auditor is an assault on the very basis of the Westminster system. It would make the Prime Minister more powerful than our wartime Prime Minister John Curtin was, or Ben Chifley was, or Robert Gordon Menzies was. Or, to their eternal credit, ever wanted to be. For all were constitutionalists. Just imagine. A future Australian Prime Minister – Mr Beazley, Mr Reith, Mr Costello, Mr Crean, Mr Evans – more powerful than any other Australian Prime Minister. More powerful than any Canadian, British, or other Commonwealth Prime Minister.

It is as if during a game of football, just when the referee is about to rule against him, the captain of the offending team could then send off the referee!

It is the genius of our tradition that we are demoncrats but we are also suspicious of potential abuses of power, even of power which is democratically granted. This is reflected in Mr Keating's Republic Advisory Committee, chaired by Mr Turnbull, which reported they had encountered an almost universal view that, regardless of the integrity of any Prime Minister, the Head of State should not hold office at the Prime Minister's whim, and must be safe from instant removal to ensure appropriate impartiality.

The need to protect the Head of State from arbitrary removal has particular force where the Head of State has discretionary powers which can be exercised adversely to the interests of the Prime Minister or the Government.[6]

The traditional view is most famously enunciated in Lord Acton's dictum, "Power tends to corrupt, and absolute power corrupts absolutely". Thomas Jefferson was once asked, "What has destroyed liberty and the rights of men in every government?" He answered, "The concentration of all powers into one body". And as we have noted, ARM patron Senator Andrew Murray warns that the Keating-Turnbull Second Republic gives the Prime Minister "absolute executive power".

When confronted with this, the proponents of the Keating-Turnbull Republic nowhere acknowledge their previous counsels against the President holding office at the Prime Minister's pleasure. Their knee-jerk reaction is to talk of the "mother of all scare campaigns". But, when pressed, they answer this critique in three ways – but thereby they accept that this fault exists. First, they say no reasonable person would behave so unreasonably. Then why risk giving him this extraordinary power? Then they say the Prime Minister will not be able to choose "the President's successor". This is wrong. Finally they claim this replicates the current system.

The strongest argument against the proposition that, under the current system, the Governor-General holds office at the Prime Minister's whim comes from Mr Gough Whitlam himself. He says the proposition is both "preposterous" and "ludicrous"!

In *The Truth of The Matter*, Mr Whitlam ridicules Sir John Kerr's fears that the Prime Minister would remove him by telephone. This fear was probably based on a flippant remark Mr Whitlam had made to Tun Razak in the Governor-General's presence:

"… To imagine that I could have procured the dismissal of the Governor-General by a telephone call to Buckingham Palace in the middle of the night – it was 2.00a.m. in London – is preposterous; to imagine that I would have tried to do so is ludicrous.

"…As to thinking it could be done by a telephone call, had I not, within that very month, had the experience of revoking Sir Colin Hannah's dormant commission as Administrator? That process took ten days. And, as I have stated, it was at Sir John Kerr's own suggestion that I, not he, should make the approach to the Queen".[7]

Mr Whitlam here refers to the removal of the Queensland Governor's "dormant" commission to act as Administrator of the Commonwealth. Sir Colin had publicly criticised the Whitlam Government, that is engaged in political controversy – an act normally thought to be incompatible with vice-regal status. And there is no guarantee that the Queen would immediately accept the advice. She has the time-honoured rights, according to Bagehot, to be consulted, to encourage and to warn. As Boris Johnson observes, the beauty of the Crown is that it is beyond the reach of the most grasping politician.[8]

It will, I think, be evident that to describe the proposed changes to our Constitution as symbolic is either an act of deception or one of ignorance.

You will be told tomorrow morning by Professor Craven that you had better vote for the Keating-Turnbull Republic because a worse model will be proposed later. This model will dare to propose that the people elect the President. It will, he will say, be a truly awful model. This argument assumes that, first the Parliament will put this truly awful model to a referendum, and then the Australian people will all lose their sanity and vote for it. Frankly, I prefer the view of Justice McGarvie – "Australians are a wise constitutional people".

On the basis of this argument, Winston Churchill should have surrendered to Adolf Hitler because Joseph Stalin was lurking in the wings. Well, Mr Chairman, Mr Churchill did not. He did his duty – as all constitutionalists will do theirs in this referendum.

That the Keating-Turnbull Republic would involve the removal of a significant check and balance on the power of the Prime Minister is a message which must be proclaimed loudly and clearly to the Australian people. It may well be that Australians wish to give more power to the politicians and to the Prime Minister. Frankly, I doubt it. But if they do, let them do so with the full knowledge of precisely what they are doing.

The Australian people have hitherto demonstrated, on constitutional matters, that they are a "wise constitutional people". As I said last year, Lord Falkland's dictum in the English civil war is a wise principle in matters relating to the Constitution:

"
If it is not necessary to change
It is necessary not to change."

Endnotes:

1. Lewis Carroll, *Through the Looking Glass.*
2. *R v. Bartle (ex parte Pinochet)*, House of Lords, 25 November, 1998.
3. *Weekly Telegraph*, 382, 18 November, 1998.
4. *The Australian*, 26 November, 1998.

5. *SBS News*, 27 January, 1999.
6. Report of the Republican Advisory Committee, Volume 1, p.77.
7. Hon Gough Whitlam, *The Truth of the Matter*, Penguin Books, Melbourne (1979), p.111.
8. *Weekly Telegraph*, 242, 13 March, 1996.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this eleventh Conference of The Samuel Griffith Society – our fourth here in Melbourne.

When the Board of Management was considering this Conference early this year, it was already obvious that, by the time it came about, we would probably not be far away from the long awaited referendum on the republic issue, and what had by then become the associated issue of a referendum on a new republican Preamble to our Constitution.

As members are aware, the central constitutional issue for this Society – the issue which originally led to its foundation in early 1992, and which has been at the heart of its concerns ever since – is federalism. As such, the Society has been concerned with the distortion, I would even say perversion, of our federal Constitution which has resulted from the ever-increasing growth of centralist power in Canberra. That growth has come at the expense of the wider dispersion of power which the framers of our Constitution – and those who approved it, the then people of the six colonies – intended.

Although, in recent years, the Society appears to have been seen in some quarters as having been established to combat the idea of a republic, that has never been the case. Indeed, we have a sprinkling (though I do not think it is more than that) of members who are themselves republicans of one brand or another.

To say, however, that the republic issue was not originally seen as central to our concerns is not at all at variance with saying, as I now do, that over the years it has become one of those concerns, and a major one at that.

One reason for that lies in our purpose to ensure, to the extent that we are able, that if changes are to be made in our Australian Constitution, "it is desirable that the widest range of thought and opinion should be canvassed before any conclusions are reached". Those words, which appear in our "invitation letter" to prospective members, were in fact penned by Sir Harry Gibbs himself, not long after he had agreed to my request to him to become our inaugural President.

The more specific reason why, over the years, the republic issue has loomed larger in our concerns is simply that, more and more, it has become evident that it is a barrow pushed by the centralists. One clue to that – though there are many others – is to be seen in the *dramatis personae* involved on the republican side, from the Hon Paul Keating on the one hand to the Rt Hon Malcolm Fraser on the other, each of them equally avid in their lust to place power in the hands of the Prime Minister of the day.

It has never been the practice of this Society to organize our Conferences around a single theme – other than, in a general sense, that federalist theme that I referred to earlier. Nor have we done so on this occasion. Nevertheless, with the onset of the referendum (or referendums) so imminent – only seventeen weeks away this day – it seemed appropriate on this occasion to focus a significant proportion of our proceedings on that issue.

As you all know, therefore, our program this weekend contains in all six papers (including our two Dinner addresses) devoted generally to this topic. Last night most of us heard the first of them – a brilliant address from the National Convenor of the No Republic Campaign, Professor David Flint, who, I am proud to say, is also a member of the Board of

this Society. Professor Flint's address was capped by an equally outstanding Vote of Thanks from Sir David Smith. Tonight we are also looking forward to an address by Dr Geoffrey Partington, who will lay out for us some of the strands of the web of kinship which, republicanism notwithstanding, continues to bind this country (in common with a number of others) to its essentially British, including of course Irish, past.

This morning, however, we are devoting four papers to this matter – two dealing with the proposed "model" for a republic to be put to us by way of referendum later this year, and two dealing with the associated question of a republican Preamble, which was originally intended to be put forward in a separate referendum at the same time, but whose precise status now appears somewhat uncertain.

The first of those papers will be given to us by Professor Greg Craven, who is well known to members of this Society for the series of lapidary papers which, over the years, he has delivered to our successive Conferences, usually on topics to do with the nature and workings of the High Court of Australia. Those papers, which in my view have been enormously influential, have placed us forever in his debt.

I say that because, as many of you will know, Professor Craven has now ranged himself on the side of those supporting a "Yes" vote next November. Indeed, he is a member of the officially appointed Committee, under the Chairmanship of Mr Malcolm Turnbull, to disburse the funds provided by the Government for the "Yes" campaign.

Now he will not be surprised to hear me say that his activities in that regard do not commend themselves to me. But that, of course, is all the more reason why we should hear the arguments which lead him to his present views.

Since I am personally chairing this morning's session, it seems appropriate that I should now conclude these introductory remarks, don my Chairman's hat, and formally introduce to you Professor Craven, which I now do, with pleasure.

The Republican Debate and the True Course of Constitutional Conservatism

Professor Greg Craven

Introduction

It is customary to begin any presentation with mandatory remarks of gratitude for having been invited to speak. However, on this occasion, these remarks are all the more sincere, in view of the fact that it is highly unlikely that I will say anything that those in this gathering will want to hear. As it is the hallmark of intellectual debate to invite the uncongenial and court the unpalatable, the Board of the Society undoubtedly is owed congratulations for so unprepossessing a choice of speaker.

I feel that these prefatory and pacific compliments are highly advisable, in view of the fact that what follows is an entirely unapologetic and uncompromising defence of the "referendum" or "Convention" model for an Australian republic. Indeed, I intend to compound this heresy by going on to argue that support for the referendum model undoubtedly is the position that should be adopted in the upcoming debate by any thoughtful constitutional conservative who genuinely wishes to preserve intact Australia's existing constitutional genius.

In this connection, I feel that it is incumbent upon me to make clear from the very beginning the general constitutional position from which I will be arguing. I flatter myself of few things, but among those rare crimes that I do not believe plausibly may be imputed against me are any based upon a charge that I am a constitutional radical, a constitutional adventurist, or one so infected with "Founding Fathers syndrome" that I desire to re-create the Constitution in my own god-like image. No-one who has read me or heard me in the past – and among those so afflicted will be a number of the members of this Society – reasonably could believe any such imputations.

On the contrary, I have always – for my sins – been type-cast as "constitutional conservative", although I believe the more pungent description applied to me at a number of Australian law schools is "rabid constitutional reactionary". This is an appellation that leaves me unmoved. If the belief that Australia has an outstanding Constitution, which is to be preserved alike from the vain meddling of the High Court and the depredations of assorted academic vandals qualifies one for such a description then, indeed, I am a rabid constitutional reactionary. Indeed, were it possible to be decorated for suicidally conservative constitutional impulses, then I undoubtedly already would have been awarded the Sir Garfield Barwick Cross (third class) by the common disapprobation of the Australian academic community.

Undoubtedly, the professor doth protest too much, but there is a purpose to this apologia. To this end, I freely acknowledge that on the present republican issue, as on any other, I may be mistaken in my analysis, which is the common lot of the constitutional commentator. However, what simply cannot be argued is that this analysis does not proceed from a reasoned constitutional perspective that is thoroughly and undeniably conservative in its genesis. What this illustrates is the simple truth that continued support for the Monarchy is not the only constitutionally conservative position that may be taken within the Australian republican debate. This is a fundamental point, and one that should lead all conservatives to

seriously consider their position on the November referendum: put simply, to be a constitutional conservative and a monarchist are not one and the same thing.

My approach in this paper will be, first, to essay some brief definition of "constitutional conservatism" in an Australian context. I will then attempt to isolate the main features of what might be termed the "rational" case against the Monarchy. It may be observed here that there are any number of "irrational" arguments against the Monarchy's continuance, but what will be concentrated upon here are those which are solidly based in reason.

Critically, the paper will go on to consider the consequences of the failure of the projected republican referendum later this year. It is this issue of the consequences that will ensue from such a failure that is absolutely critical to the formation of an appropriate attitude to that referendum. The conclusion of this paper on this point will be that the collapse of the November referendum will in all probability lead, in the short term to medium term future, to an Australian republic in which the Head of State is directly elected.

This conclusion will lead the paper on to a detailed examination of direct election, where it will be concluded that the alteration of the Australian Constitution to embody such a method of appointment for the Head of State ultimately would involve the utter destruction of Australia's existing constitutional order, and thus (it hardly need be said) would be entirely inconsistent both with any general notion of constitutional conservatism, as with the precepts underlying the most commonly put arguments for the retention of the Monarchy.

Following upon this rejection of direct election will be a brief defence of the referendum model, together with a rebuttal of some of the principal arguments made against that model.

Finally, the paper will conclude that the only means by which Australia's outstanding constitutional system may be preserved is via its translation intact from a monarchical to a republican constitutional setting, a translation which only may occur through the success of November's referendum.

Constitutional conservatism

The first question here is as to precisely how the term "constitutional conservatism" may be defined in an Australian context. At the very least, a constitutional conservative will display two characteristics. Firstly, he or she will admire Australia's constitutional system as one of the finest in the world; and secondly, will be prepared to argue and work for its retention. It should be noted that what is, at first blush, a relatively low threshold for inclusion in so august a company in practice excludes a great many of Australia's most prominent – or at least most obvious – constitutional authorities. These authorities typically display a profound distaste for Australia's constitutional system, with its unfashionable emphasis on federalism, States' rights, and parliamentary sovereignty, and tend to favour the fundamental re-moulding of that system along the lines of a rights-based, centralising judicial supremacy. Such a description aptly comprehends a large majority of Australia's constitutional academics, as well as a number of former and present Justices of the High Court, and a wide variety of lesser, associated legal luminaries.

Critically, however, adherence to a position of constitutional conservatism in an Australian context (and doubtless in any other context) does not involve the proposition that one is opposed to any constitutional change whatsoever. No constitution, with the possible exception of that of the ancient Medes and Persians, can remain static indefinitely, in the sense that it "altereth not". A constitutional structure which cannot contemplate significant alteration in response to changing circumstance eventually must come to the point of unavoidable collapse when the weight of altered conditions proves too great for the rigid

constitutional superstructure to bear.

Endless examples of such a phenomenon may be given, ranging from the ensured destruction of the *ancien régime* through its own intransigence in the years leading up to the French Revolution, to that of the collapse of the Soviet party dictatorship in the late 1980s. Consequently, the difference between the constitutional conservative and the constitutional innovator is not that the conservative will countenance no change. On the contrary, even the most reticent constitutional conservative will recognise the need for constitutional change from time to time. Rather, the essential difference between the conservative and the innovator in an Australian constitutional context is that the constitutional conservative is determined to preserve, not the incidents and detail of the constitutional order, but its fundamental essence; while the innovator favours transforming change to its basic fabric.

Understood in this manner, change in fact plays an important role for the constitutional conservative. He or she will be prepared to contemplate change, even significant and far reaching change, provided that such change is necessary to defend the constitutional order in essence. In other words, a constitutional conservative will be prepared to dispense with less important and fundamental elements of the Constitution in order to preserve its fundamental public truths.

There is nothing novel in these propositions. For example, anyone familiar with the work of Edmund Burke cannot but be struck by his strong awareness that constitutional conservatives must be prepared to contemplate changes of form in order to be able more effectively to transmit basic constitutional values into the future.

Few better instances of this could be put forward than the British monarchy itself. That institution has evolved from a feudal monarchy (Henry II); to an absolutist Renaissance principality (Henry VIII); to a politically participative nineteenth Century monarchy (Victoria); to a strictly constitutional monarchy in our own times(Elizabeth II): but the principle of monarchy always has been maintained, throughout these seemingly dramatic changes in the manner in which that principle has been expressed.

In much the same way, the British Parliament has evolved from a feudal council (fourteenth Century); to a gathering of property (eighteenth Century); to an institution of popular democracy (nineteenth and twentieth Centuries): always maintaining its character as a representative parliamentary assembly. The genius of the British Constitution thus has lain not in a refusal to change, but rather in an ability to make continually relevant basic governmental values through a willingness to alter the constitutional prism through which they are reflected.

Such thoughts lead us inevitably to the position of the Monarchy within the Australian constitutional order. Here, it has to be acknowledged – whether regretfully or not – that the *institution* of the Monarchy simply does not go to the heart and soul of the Australian Constitution, but rather to its outer garments. Perhaps the easiest manner in which to demonstrate this potentially unpalatable truth is to compare the Monarchy to just a few of the features of the Constitution that do indeed comprise Australia's constitutional essence.

Thus, by way of example, consider the institutions of parliamentary government; the rule of law; and federalism. Each of these is vastly more basic to the continuance of the Australian Constitution than the Monarchy, and each will survive its abolition unmarred. To adopt this position is not to insult the Monarchy, but merely to acknowledge that, at heart, it historically has comprised an immensely useful exercise in constitutional symbolism, but nothing more. In a sense, it has occupied a position rather analogous to that of the jumper of

a football club: a genuine emotional attachment undeniably is involved, but be the club itself fundamentally sound, replacement of that symbol will not lead to diabolic catastrophe.

The general conclusion in the present context must be, therefore, that on a proper understanding of Australian constitutional conservatism, the Monarchy may be dispensed with if this proves necessary in the interest of preserving the wider constitutional order as such. In other words, a simple truth of constitutional conservativism in its Australian manifestation is that the Monarchy is not an end in itself. Rather, it merely is one means towards the fundamental end of preserving our unique constitutional order. This is an absolutely vital point, and one not understood by a significant number of monarchists. Put simply, the Constitution is more important than the Monarchy which it contains, and correspondingly, conserving that Constitution is more important than conserving the Monarchy to a true constitutional conservative. What this means in the context of the present referendum is that a constitutional conservative must see his or her primary duty as lying not to the Monarchy or the Monarch, but to the Constitution.

Perhaps the most poignant underlining of this truth that the Monarchy ultimately is a player, but not the star in the drama of the Australian Constitution, is to note just how simply it is eliminated from the Constitution in textual terms by the present referendum Bill. Upon reading that Bill for the first time, I was astounded – and even a little saddened – to see with what ready facility of drafting the Monarchy could be consigned to the realms of constitutional history, and could not help but compare this scenario to that which would apply were one to be engaged, for example, in the abolition of federalism, where it literally would be a case of ripping the Constitution in two, and then throwing both parts away. The reality is that the Australian Constitution will comfortably survive the demise of the Monarchy, as one would expect of one of the truly great constitutions of the world.

The rational case against monarchy

The question considered here is the threshold one of why one would wish to remove the Monarchy from the Australian Constitution. It cannot be denied that some silly arguments have been advanced in favour of the abolition of the Monarchy, just as a great many silly arguments have been put forward to justify its retention. My personal favourite among republican *non-sequiturs* is that which runs along the lines that the abolition of the Monarchy will produce some cornucopia of international trade as Asian nations rush to upgrade their commercial relations with a republican Australia. This is not a matter worthy of serious debate. Of course, there are arguments in favour of the retention of the Monarchy which are positively comic in their lack of logic – for example, that without the personal restraining influence of Her Majesty the Queen, Australia immediately will descend into the black depths of savage dictatorship. To this, I always reply that if Her Majesty, doughty as she may be, is all that stands between us and totalitarianism, then we may as well bring out the brown shirts now.

The real argument against the retention of the Monarchy is relatively straight-forward, and indeed elegant, whether or not one ultimately is persuaded by it. Certainly, just as the case for monarchy cannot simply be laughed off as mere crankery by republicans, neither can reasonable monarchists dismiss the core case of Australian republicans as fanciful.

The starting point of what might be termed “sophisticated republicanism” is the acknowledgment that the Monarchy has held a unique place within Australia’s constitutional structure. Thus, our Constitution – mercifully – is a highly practical one, composed overwhelmingly of politico-legal nuts and bolts: its provisions deal with

structures, not aspirations, and operate upon real constitutional objects, such as Parliaments, States, federal relations, judicial powers, and so forth. Strikingly, the Monarchy is the only element of the Constitution which is fundamentally symbolic. It exists, not as some logically unavoidable practical component of Australian constitutionalism – the one thing that the present republican debate amply illustrates is that the range of potential constitutional options in relation to a nation's Head of State are almost infinite – but as a powerfully symbolic presence floating above (or perhaps across) the entire document. Like it or loathe it, the Monarchy is our only constitutional institution which is essentially symbolic in character, and none the less important for that. The real question is what we are entitled to demand of constitutional symbols, and whether the Monarchy can meet those just claims.

It seems to me that the very minimum thing which we may demand of symbols, constitutional or otherwise, is that they be true. In other words, in the case of constitutional symbols, these must embody or reflect basic truths about the constitutional, cultural and political system to which they relate. Consequently, the question which plausibly may be asked of any constitutional symbol is, what constitutional truths it purports to convey, and whether those constitutional truths are indeed valid in respect of the polity to which they relate. What, then, are the basic "constitutional messages" conveyed by the Monarchy?

The answer is that if the ubiquitous hypothetical man from Mars were to observe the "Australian" Monarchy, he undoubtedly would discern immediately within it two fundamental features. The first is that it is in origin, personnel, culture and location profoundly British. The second, is that it is hereditary in character, in the sense that the Monarch is chosen as a matter of birth, rather than by any process of selection, popular or otherwise. Thus, no amount of polite constitutional fiction can disguise the fact that the Queen of Australia is indeed not an Australian, does not reside in Australia, and does not reign through any positive endorsement by the Australian people. The critical question therefore must be whether the basic truths of Australia are indeed reflected by these basic truths of the Monarchy, and whether these truths plausibly may co-exist within the Australian Constitution, which itself embodies our nation's fundamental "constitutional truth"?

The answer to both these questions hardly can fail to be "No", whether that syllable is uttered in a resounding shout, or with a regretful shake of the head. It is true, we once were British. It also is true, that we once were profoundly comfortable with the notion of our hereditary monarchy. But the fundamental reason for the rejection of the Monarchy in the Australia of the twenty first Century is that we overwhelmingly are not comfortable any longer with these two non-truths. Australians do not now consider themselves "British", much as they may feel gratitude for the British constitutional heritage that we enjoy; and do not, by and large, feel any closer relationship to the United Kingdom than they do, say, to the United States of America.

Likewise, the degree of constitutional pre-determination embodied in being an "Australian Briton" having evaporated, we no longer view the principle of hereditary position embodied in the Monarchy with anything other than real discomfort. These conclusions safely may be reached of the vast majority of Australians of Anglo-Celtic descent and no particular political ideology, without even seeking to rely upon changes to the ethnic composition of our population, or resorting to claims that the Monarchy encapsulates the values of a British class system antithetic to Australian sensibility. The brutal conclusion must be that, for

Australia, the symbolism of the Monarchy no longer is true, yet that symbols must be true to have any right to survive.

In reality, however, the position is rather worse than this. It is not merely the case that the British Monarchy no longer is true for Australia; worse, we know that it is not true. The consequence is that Australians no longer believe in the Monarchy. We may tolerate it; we may refrain from actively attacking it; we may even feel a certain amused resignation towards it. But the continued existence of a constitutional organism cannot be justified by the claim that we do not sufficiently detest it that we are prepared to take to the streets. On the contrary, the subsistence of a constitutional symbol, particularly a symbol as important as the Monarchy, only may be justified by a strong, positive, popular belief in its relevance.

Moreover, the situation in this respect is deteriorating. As one who has invested a considerable amount of time and effort over the years in attempting to bolster the claims of a failing Monarchy, I have been made painfully aware that it is almost impossible to conduct a serious conversation on the subject with the overwhelming majority of younger Australians: they scarcely are aware of the Monarchy's existence, except as a casual irritant.

Further compromising the status of the Monarchy is the fact that the last ten years of republican argument, regrettably or not, has done its work – the Monarchy has been seriously and permanently destabilised. Moreover, the effects of this active destabilisation have been exacerbated by the personal miseries of the members of the House of Windsor, which have had the disastrous effect of demystifying, as well as demoralising the monarchy.

Observing the course of dynasties throughout history, it often has occurred to me that monarchies can survive being perceived as murderous or treacherous, but they cannot, it seems, survive being humorous. One major practical difficulty in the entire republican debate from a monarchist point of view is that, to a large proportion of the Australian population, the House of Windsor has become a very funny monarchy indeed. The interaction of this factor with the anti-monarchical campaigns of such bodies as the Australian Republican Movement has had a devastating effect upon popular support for the Monarchy in Australia.

The consequent reality is that the Monarchy is not so much being killed, as that it is dying under its own steam. Indeed, it often seems the case that the Monarchy already is dead, and that what we really are arguing about is the nature of the funeral service. This is a conclusion which gives me no great personal satisfaction, but it is the essence of conservatism, constitutional or otherwise, that it faces and deals constructively with reality, rather than protests shrilly against an unchancy fate.

Such a classically conservative reaction is rendered all the more imperative by the fact that the recent republican debate has not merely destabilised the Monarchy. One further tendency of that debate has been to seriously undermine the status of the Constitution as a whole. This has occurred, inevitably, because the Constitution contains the Monarchy, and attacks on the Monarchy therefore have a natural tendency to develop into attacks on the Constitution as such. Thus, far too many people are inclined to believe that a Constitution which contains a "horse and buggy" Monarchy must itself be a "horse and buggy" Constitution. The effect of this phenomenon has been that the Constitution is beginning to suffer from what might be termed a "constitutionally transmitted disease", acquired through its congress with the Monarchy.

This is a fundamental reason why I am prepared to support the abolition of the Monarchy. It often is said of the Monarchy – so often that I, among many others, am sick to death of it –

that “if it ain’t broke, why fix it?”. The answer is that the Monarchy is indeed broke, firstly because it is not true, and secondly because it threatens to compromise the legitimacy of the entire Constitution.

In this connection, I somewhat wistfully recall that I used to state my position upon monarchy and republic along the following lines. First, that I accepted, in principle, that a good republic was better than a good monarchy. Second, and obviously, that a good monarchy was better than a bad republic. I would go on, thirdly, to assert that what we had was a good monarchy, and finally, to argue that I therefore would not agree to a republic until someone could show me one that was equally good. I now say with genuine regret that I no longer believe that what we have is a good Monarchy. This is not because the Monarchy failed to be, throughout most of its history, a benevolent constitutional influence within Australia. Rather, it simply is because I do not believe that a dead Monarchy ever can qualify as a good Monarchy, and today – as opposed to when our Constitution was written – the Monarchy is as dead in the hearts and minds of the people of Australia as Queen Victoria. This sorry conclusion leads me on to consider the question of the likely chain of events were the present republican referendum to fail.

Consequences of a failed Referendum

It is an obvious truth that one cannot intelligently determine which way one will vote in the November 6 referendum without considering the likely results of failure of that referendum in the wider context of Australian constitutional politics. This quite obviously is the case, as one will not be able to determine the advisability of a “Yes” vote at the referendum unless one can contrast the consequences of such an affirmative response with the practical consequences of the referendum’s rejection. Strangely, this approach sometimes is said to be inadmissible, on the grounds that any attempt to extrapolate a result from a failed referendum, other than the immediate continuation of the Monarchy, would involve little more than constitutional crystal ball gazing and vague speculation. In fact, such censures are nonsense, and self-deceptive and irresponsible nonsense at that.

In reality, all assessments as to how one should vote in the November referendum rely absolutely upon one’s understanding of what will occur if the referendum fails. Thus, for example, even a conventional monarchist will be inclined to vote “No” on the precise basis that he or she subscribes to a view of the future which posits that, if the referendum be lost, the Monarchy will continue into the indefinite future. This, however, is a fatal misassumption. The basic truth of the November referendum is that if the Convention model for a republic fails, the Monarchy will in no sense emerge as a “winner” in the ensuing constitutional fracas. It is this perception on my part that the Monarchy cannot win the upcoming referendum, even in the event of an overwhelming negative vote, that fundamentally colours my entire attitude to that referendum, and which needs to be elaborated here.

The starting point in this discussion must be to recall my previously expressed view that the Monarchy is in irreversible political, social and constitutional decline. The practical question in such circumstances must be, if this referendum fails, will Australian republicanism simply go away? Will the Australian people magically repent of their republican dalliance, and revert to their former allegiance, or at least the former allegiance of their parents? Clearly, such a scenario never will come to pass. On the contrary, republican sentiment will be just as strong as ever, precisely because the underlying impetus for that sentiment will remain just as intense as ever, and indeed, inevitably will intensify.

The only difference that will be made to the existing constitutional equation by a failed referendum will be the increased frustration that will be felt by the large majority of Australians in favour of some form of republic.

This brutal reality is starkly underlined by the fact that, if the Convention model is defeated at the referendum on November 6, it will be because people have been convinced, by the "No" campaign or otherwise, that they should reject that model, not out of any preference for the Monarchy, but on the basis that any Australian republic should be one which includes a directly elected Head of State. This undoubtedly will be the message that will lie at the heart of arguments of opponents to the Convention model during the referendum campaign, whether it is expressed overtly by direct electionists, or covertly by disguised monarchists through such disingenuous phrases as, "It's not a republic we're opposed to, just the model". This hardly is surprising, as virtually every opinion poll indicates that this is precisely the point upon which the Convention model is most vulnerable, rather than to any ringing appeal to save an ailing monarchy.

In short, if the referendum fails, it will fail not because people have voted for the Monarchy, but because they have voted in favour of a more radical form of republic. In these circumstances, how can it possibly be imagined that the Monarchy will emerge rejuvenated from a failed referendum, or that republicans will re-commit to the Monarchy? On the contrary, what will emerge from a bitterly fought referendum campaign will be a Monarchy even more savagely traduced and damaged than presently is the case. The Monarchy will not swagger, but rather will limp out of the referendum, not a victor, but a mortally wounded and fundamentally compromised short-term survivor. The painful question must be, therefore, as to what really is the likely chain of events after a failed referendum.

The broad answer already has been given: the Monarchy will emerge from a failed referendum at least as weak, but probably far weaker than presently is the case. Correspondingly, general republican feeling in Australia will be at least as strong, and very likely – fuelled by a profound sense of frustration – will be even stronger. The one fundamental change that will indeed occur will concern the internal politics of the republican movement.

The constitutionally conservative republicans who have supported the Convention model – the Turnbulls, Robbs, Holmes a Courts, Vizards, Wrans and – alas – Cravens, will emerge fatally wounded. Their conservative model will have been rejected at referendum, and undoubtedly the popular and media hindsight will be that this rejection was richly justified, on the basis that these excessively cautious republicans arrogantly insisted upon offering the people the wrong model: that is, that their sin lay not in being republicans, but in failing to support direct election. Correspondingly, and critically, the hand of direct electionists will be enormously strengthened. If the November poll fails, they inevitably must emerge as the true winners of a referendum which ultimately will have been conducted upon the lines not of, "Vote for the Queen", but rather, "Don't vote for *this* republic".

What will occur then? The answer is that Australia will be faced with an undiminished republican movement that has been handed, partly by the votes of constitutionally conservative monarchists, squarely to the direct electionists. The republican movement, now thus radicalised, will square off with a fatally wounded monarchy. The virtually inevitable result will be direct election, not immediately, but perhaps in five, ten or twenty years. However long this catastrophe may take, it will happen eventually, simply because it is not possible to foresee any other plausible outcome.

Of course, as was mentioned above, some monarchists are inclined to ignore such an eventuality on the convenient basis that it is too remote to contemplate, or perhaps more realistically, that it may well occur after their practical involvement in constitutional affairs has been terminated by reason of physical infirmity or actual demise. Yet conservativism surely is about the laying of secure foundations for the future and the far-away, and this particularly is true of constitutional conservatives, whose boast it is to see past the transitory imperative of the moment, towards the necessity to provide lasting and effective constitutional order into the future.

All of this leads to the crucial conclusion concerning the appropriate stance to be taken by a thoughtful constitutional conservative at the up-coming referendum. Any such stance has to be based on the one brutal reality of that referendum: there is no vote which even conceivably can secure the continuance of the Monarchy. Rather, the choice is starkly republican. One can either vote "Yes", in favour of the conservative republican model being put to referendum; or one can, by voting "No" to that model, vote in favour of a republic which embodies the constitutionally radical option of direct election at some indeterminate remove. Of course, a delicious irony in this situation is that many constitutional conservatives undoubtedly will be misled into voting "No" to the referendum model under the belief that they are preserving Australia's existing constitutional system, when in actual fact, they will be signing its death warrant.

Naturally, I repeatedly have asked myself whether there is any alternative scenario which could develop out of the failure of the November referendum. The only possibility which I can foresee – and it is a slender one – I would regard as being almost as horrifying as that which I already have sketched. Under such a scenario, the failure of November's republican referendum would see Australia move into a situation of indefinite and de-stabilising constitutional stalemate. Within that stalemate, a substantial majority of the electorate would be broadly "republican", but would be split between supporters of some conservative model along the lines of that produced by the Convention, and the supporters of the various versions of direct election. There also would exist a significant minority of monarchists.

What then would occur would be that the monarchist component of the polity would combine with whichever republican model was unfavoured with referendum status at the relevant time to defeat any proposal which might be put to the electorate. The result would be that Australia would become the unhappy captive of a constitutional system which had at its heart, not a constitutional consensus, but rather a basic disagreement. In a sense, we would on this point vaguely resemble the Canadians, who cannot decide whether they are a cohesive English speaking polity, or a bi-lingual and diverse federation, and instead oscillate dangerously between these two poles. However one chose to view the matter, nothing could be more disastrous for the constitutional stability or national unity of this country than for it to become an untreatable constitutional schizophrenic.

Of course, one question that quite legitimately might be raised concerning this analysis would be why the adoption of the referendum model would prevent Australia from subsequently moving on to the adoption of direct election, the fundamental deficiencies of which will be considered in the next section of this paper. The answer to this question is simple. The effect of a victorious referendum in November would be to cement in place nothing more than a republican version of our existing constitutional system. Any close student of Australia's history, and particularly its constitutional history, readily will accept that once so decisive an action had been taken, the present republican issue would have

been to all intents and purposes resolved. As at Federation, the Australian people solemnly would have made up their collective mind on an issue of basal importance, and once that had occurred, any attempt to alter fundamentally a resolution that had so decisively and democratically been reached would be doomed to ignominious failure.

In short, the success of the referendum model would mean that the issue of republicanism will not return, at least in our lifetimes. In this sense, and perhaps ironically, adoption of the model would represent the ultimate victory of our present constitutional system, rather than the defeat bewailed by so many monarchists. The victory of that model would see the successful translation of our constitutional system from a monarchical to a republican setting, but with its essence utterly unchanged. To put the matter rather more romantically, we would have ditched the Monarchy to save a republicanised Crown.

The Republican Debate and the True Course of Constitutional Conservatism (Continued)

Professor Greg Craven

The disaster of direct election

Clearly, the whole of this analysis concerning the ultimate effect of a failed referendum on November 6 directly or indirectly assumes that the re-constitution of Australia as a republic with a directly elected Head of State would comprise some form of constitutional catastrophe. Otherwise, there could be no occasion for this high anxiety concerning the coming about of precisely such an eventuality. Naturally, those Australians who genuinely favour direct election of a Head of State – what might not inaccurately be termed the "radical" wing of the republican movement – fiercely dispute such a conclusion. Rather more surprisingly, however, some monarchists also seem to be remarkably tolerant of the possibility of direct election, and even to articulate it as their preferred second option – above the Convention model – assuming the retention of the Monarchy to have been proved impossible. It is one of the chief objects of this paper to suggest that such a position on the part of monarchists represents nothing more nor less than stark constitutional nonsense. No proper understanding of our existing constitutional arrangements conceivably can lead to the conclusion that the institution of a republic embodying direct election of a Head of State represents an outcome even remotely consistent with their continuance.

Perhaps the fundamental feature of our existing constitutional arrangements as they touch upon such concepts as the "Head of State", the "Sovereign", the " head of government" or any other corresponding notions is the strict division it effects between "legitimacy" on the one hand, and "power" on the other. That is, under our Constitution, there is achieved a fundamental divorce between the organs of practical power and the repositories of fundamental legitimacy. Ultimate legitimacy, in the sense of constitutional dignity and prestige, reposes in the Crown; while ultimate power or political capacity resides with the parliamentary executive, and in particular, the Prime Minister.

The result of this division is critical to our constitutional system. Through its operation, it simply is not possible for the beneficiaries of political power to enlist in aid of any of their programmes total legitimacy. Consequently, no exercise of political power, and no political authority, however pervasive, also may present itself as enjoying untrammelled legitimacy and constitutional prestige. This is a vast virtue in a constitutional system, and one highly productive of the continuance of such endangered constitutional species as democratic government and the rule of law.

The position thus achieved usefully may be contrasted with situations in which ultimate power and ultimate legitimacy have been combined in one person or one institution, as in the case of the Emperor Napoleon under the First French Empire, and Adolf Hitler within Germany's Third Reich. Crucially in the present context, it is precisely this same division between legitimacy and power that is observed and enshrined in the model being put to the referendum in November. Thus, practical power will continue to reside with the parliamentary executive, as personified by the Prime Minister, while national legitimacy, as expressed in the notion of a Head of State, will be located with the President, as succeeding jointly to the position and prerogatives of both Her Majesty and the Governor-General.

It is the fatal effect of direct election that it immediately and inevitably combines these two never-to-be mixed streams of power and legitimacy. The very fact of popular election inevitably will produce a Head of State who not only represents the apex of constitutional

legitimacy, but who also has real claims to the influence and exercise of power. This is not a matter of speculation or guesswork. Any President who, by virtue of his or her election, commands the direct support of the majority of the Australian people, must unavoidably have a genuine practical and moral claim to political authority, as well as to political legitimacy. Given this, such a President will be impelled by the simple logic of his or her office towards the substantive exercise of power.

Thus, for example, what of the position of a President elected by a massive majority of the Australian population who was faced with a Bill which he or she genuinely believed to be morally repugnant? Imagine a President whose political persuasion was to the left of centre, faced with a Bill passed by a conservative Parliament that drastically narrowed the concept of Native Title in a manner utterly inconsistent with his or her own perception of the national interest. How could anyone realistically imagine such a potentate acting otherwise than in accordance with his or her inevitable self-vision as the democratic embodiment of the national will, and acting to veto such a Bill? The confidently myopic assertions of direct electionists that such a scenario is an exercise in constitutional fantasy merely serve to underline the depth of their misunderstanding of the logical imperatives that must attend a Head of State whose very election irrefutably demonstrates their national support.

Of course, some Australians would respond to this prospect of a Presidential behemoth with undisguised glee – at last, a champion of the people to outface the despised politicians. Two points must be made in response to this high constitutional naiveté. First, consistently with what has been said above, it quite simply is not a response which plausibly may emanate from the mouth of a constitutional conservative – monarchist or republican – who purports to value a basic separation between constitutional legitimacy and practical political power.

Secondly, and much more generally, such a position ignores the thundering reality that the existence of a directly elected Head of State automatically would engender massive constitutional instability by juxtaposing two independent executive authorities – the President on the one hand, and on the other, the Prime Minister as head of the parliamentary executive – each fully seised of a plausible claim to political primacy. Given the inevitable character of an elected presidency, as explored above, no other result would be conceivable than one that embodies a more or less continuous struggle for executive primacy. In short, Australia would be opting for a constitutional settlement where the 1975 crisis became the programmed outcome, rather than the occasional glitch.

Naturally, this outcome is rendered all the more certain by the inevitable interaction between the election of a Head of State and our country's established system of party politics. Political parties inevitably would be highly desirous of fielding their own candidate in a Presidential election and securing that candidate's election. This would be for the simple reason that they would thereby secure a guaranteed friend in Yarralumla, and what is more, a friend who could be relied upon to exercise his or her vast theoretical powers in a positive manner when the "right" party was in government, and in a "responsible" manner whenever barbarian forces occupied the Treasury benches.

Worse still, the reality is that the major political parties would be the only organisations in Australia who would have the necessary financial, media, administrative, and organisational skills necessary to conduct a successful Presidential campaign. The inevitable result must be that direct election not only would produce a President programmed toward the exercise of his powers in defiance of uncongenial ministerial advice, but also would ensure that the office of President became a political prize, and one that therefore unavoidably would be

occupied by a politician or a political instrument.

Inevitably, therefore, the very existence of a directly elected Head of State, enjoying both constitutional legitimacy and an irrefutable claim to influence affairs, must be highly productive of debilitating constitutional instability. Significantly, this conclusion is not affected by any argument to the effect that such a President effectively might be confined within strict constitutional limits through the comprehensive codification of his or her powers – and, crucially, the codification of the conventions traditionally associated with the exercise of those powers – and the removal of all but the most ceremonial of functions.

In the first place, the codification of conventions (and in particular of the conventions of responsible government) would involve the virtual re-writing of the Constitution, and would raise enormous questions as to the unpredictable effects of such an exercise in constitutional transformation. Secondly, even were one to contemplate in principle so massive an exercise in codification, it practically would be impossible for Australians to agree upon the direction such a codification would take. Thus, for example, towards what end are we to codify the powers of the Head of State in connection with the dismissal of a government unable to guarantee supply due to the actions of an intransigent Senate? On such an issue, politicians, constitutional lawyers and Australians generally divide instantly into two irreconcilable camps. Finally, even in the inconceivable event that all constitutional powers successfully could be codified, the interference of an elected Head of State in political affairs still could not be precluded. For example, what would be the impact of the intervention of an elected President, theoretically powerless, who nevertheless appeared on nationally broadcast television and radio to formally denounce the actions of "his" government as immoral and repugnant? The answer must be that such an intervention would precipitate an immediate constitutional crisis, but we surely do not propose to codify the President's power of speech, nor could we successfully so do, even were that outcome to be desired.

Of course, some point to other constitutional systems, most notably that of the Republic of Ireland, which allegedly have successfully combined strong representative government with a directly elected Head of State. However, to each of these foreign republics which have been posited as offering potential models for Australia, one or both of two disqualifications invariably apply. Either it is the case that they are non-parliamentary systems with executive Presidents, such as the United States of America; or they comprise systems that rely for their efficacy upon cultural, social, historical and political traditions fundamentally different from those which apply in Australia, as is the case with Ireland.

The conclusion therefore must be that direct election, through its merging of the streams of legitimacy and power, represents an utter repudiation of the principles underlying our existing constitutional system, principles which would be translated into a republican form under the referendum model. It follows, therefore, that direct election is an option which no true constitutional conservative conceivably could support, either as their model of choice, or as some form of second preference in the event of the failure of the Monarchy. It thus is singular, to say the least, to hear some monarchists and purported constitutional conservatives solemnly put forward direct election as the most preferable form of republic. It is a little like a fastidious breeder of St Bernards saying that if he cannot have his usual noble beast, then his second preference is for a mongrelised dingo. One can only hope that this tendency represents a certain perverted *realpolitik* in the lead-up to the referendum campaign , rather than an utterly irresponsible attitude of *après moi le déluge*, according to

which if one's beloved monarchy is to go down, then it may as well take the entire Constitution with it.

A modest defence of the Convention model

This is not the occasion to rebut in detail every argument that has been raised against the Convention model for a republic. There are too many such arguments, some having a certain initial plausibility, and requiring careful treatment and explanation, others too silly to dignify by disputation. All that will be attempted here will be to deal with some of the more significant objections, and these more by way of example than exhaustion. The general point to be made by way of introduction, is that as with any argument for or against a given constitutional position, arguments directed against the referendum model must as a matter of intellectual integrity be assessed critically and not credulously, regardless of the depth of one's attachment to the Monarchy.

Thus, suggestions that the largely republican Commonwealth of Nations would rush to expel a republican Australia, or that the referendum model is likely to produce a Hitlerite dictatorship are plain silly, and should be rejected as such. After all, if one heard a republican putting forward arguments of comparable inanity, such as the proposition that monarchies inevitably lead to tyranny, put forward by reference to the reigns of the Queen's Tudor ancestors and the careers of Caligula and Nero; or that the Queen, as supreme commander of the armed forces of the United Kingdom, might one day order an assault on Sydney, one would react with contempt, and rightly so. Thus, foolish monarchist arguments should be treated as foolery in the same way as inane republican arguments are to be rejected as inanity.

As already has been noted in this paper, the fundamental objection to an Australian republic is perhaps summarised in the much used catchcry, "If it ain't broke, don't fix it". Likewise, the simple riposte to this glib assertion of ruddy constitutional good health already has been made. The Monarchy is indeed "broke": it is "broke" because it is symbolically untenable; it increasingly is divisive; and it is becoming a focus for wider constitutional dissent. Above all, the monarchy certainly is "broke" if an attempt to retain it will result only in the victory of direct election, which will see the utter destruction of our Constitution and all who sail in it. All in all, monarchists will have to do a good deal more to demonstrate the continuing utility of the monarchy than to make the sweeping and implausible assertion that, in spite of the debate that is raging about it, the Monarchy represents unequivocal constitutional perfection in all its aspects.

One interesting attempt by monarchists to move beyond the realms of crude panegyric has been their argument that the Governor-General, and not the Queen, is Australia's Head of State. This argument is centrally directed towards neutralising the chief perceived deficiency of the monarchy, that the Queen – as Australia's generally supposed Head of State – is not an Australian citizen. I must confess to a certain wistful fondness for this line of argument, for the uncomplicated reason that I myself, at a time when I was searching futilely for props with which to bolster the Monarchy, desperately sought to persuade myself and others that the Governor-General was indeed Australia's Head of State. Yet the argument ultimately suffocates in its own atmosphere of utter unreality.

So long as the Governor-General is appointed by the Queen, albeit upon immutable Prime Ministerial recommendation, and so long as the Queen undeniably represents the clearly recognisable apex of Australian constitutional prestige and legitimacy, it is quite implausible to argue that her constitutional creature, the Governor-General, is our nation's

Head of State. What is more, no average Australian could be expected to swallow any mystical formula to the contrary. As Andrew Robb memorably has remarked, the Governor-General undoubtedly qualifies as the vice-roy and the vice-captain, but skulking dimly in the deep shadow of his Royal progenitor, never, ever as the thing itself.

The attempted justification of the constitutional monarchy as functionally perfect often is bolstered by a vague and generic argument that every conceivable form of Australian republic would be so inherently uncertain in detail, operation and utility that their establishment could not even be contemplated as a matter of simple public prudence. This is not constitutional conservatism, but constitutional paranoia.

Our forefathers successfully transformed our country from six disparate colonies into one great federation, importing along the way, elements of the Constitutions of the German Empire, the United States of America, Canada and the Swiss Confederation. While not every result of Federation was predicted, its overall success hardly is open to doubt, nor can the factual achievement of the general vision of the Founders be disputed. The conversion of Australia into a republic is an enterprise so vastly more modest in conceptual scale than the conversion of the Australian Colonies into a cohesive federation, that the comparison of the two processes is positively embarrassing. To suggest, therefore, that the very notion of the republicanisation of the Australian Constitution is inherently impossible and beyond our collective constitutional wit is quite implausible.

Perhaps the next most common argument in favour of the retention of the Monarchy, again already touched upon in passing, is that without the Monarchy our constitutional order inevitably must move towards tyranny and decay. The central idea here is that the Monarchy is the keystone of our constitutional order, and that without it, that order necessarily will collapse.

It is hard to imagine a grosser insult to the Australian Constitution, nor one that sits more uneasily in the mouths of those who would claim themselves as that Constitution's greatest admirers, than the charge that our entire, magnificent constitutional system would be rendered helpless and bereft if deprived of the less than Herculean protection of the Monarchy. The defence of Australian constitutional democracy, as encapsulated in and presided over by its Constitution, cannot by the wildest stretch of the imagination be said to depend entirely or principally upon the subsistence of the Monarchy. On the contrary, it has to be accepted that such other vestigially important institutions as the rule of law, parliamentary and responsible government, federalism, the independence of the judiciary, separation of powers, the common law and freedom of the press all operate inexorably in defence of that order. It is the merest pretence that these institutions suddenly will fail or be fatally compromised simply because the Monarchy is replaced by a republic that reflects the Monarchy's own essential constitutional truths.

It is true, of course, that the Monarchy is closely intertwined with some of these institutions, notably parliamentary and responsible government; but its removal need have no real or practical implications, so long as the Monarchy is replaced by constitutional institutions which directly reflect its own operations. Thus, for example, responsible government will continue to subsist, regardless of whether a government is commissioned by a President appointed pursuant to the mechanisms provided for under the referendum model, or by a Governor-General appointed by the Prime Minister via the formal device of Royal designation. Similarly, the Australian judiciary will continue to be independent, whether its judges are commissioned by a Governor-General and royal State Governors, or by a

President and republican State Governors.

Critically, both within the current republican controversy and within any wider debate over Australia's constitutional future, it needs to be understood by monarchists and republicans alike that politicians and other potentates do not obey the law purely because they are terrified of, impressed by, or respect Her Majesty. Such a view is ludicrously naive. Significant individuals and institutions abide by the precepts of our constitutional system because they themselves are part of a complex constitutional psychology that is itself a product of a rich and diverse century of self-government, to which process the Monarch has been practically irrelevant, existing rather as a matter of peripheral constitutional romance.

Of course, the office of Governor-General has been highly relevant in practical terms within the Australian constitutional equation, but not as any true representative of constitutional monarchy. Rather, the significance of the Governor-General has lain in his functioning as a surrogate – though regrettably not a plausible substitute – Head of State. Depressingly for the monarchist position, it is precisely these real and substantial functions of the Governor-General that will pass intact and unaltered to a President. Only the tattered fiction of a potent Monarch will pass away.

A further, and highly prevalent argument against the referendum model has been that it will transfer power to politicians, and in particular, to the Prime Minister. This argument, which quite cynically seeks to enlist the widespread prejudice of Australians against their parliamentarians, has a number of aspects.

The first concerns the proposed mechanism for the appointment of the President. Some critics of the model claim to consider it outrageous that the Prime Minister will possess an effective veto over the choice of a President, by virtue of the fact that he or she will be the only person with the power formally to put forward a candidate for appointment by a joint sitting of Parliament. This criticism frankly is incredible, so long as it emanates from the mouths of those who support the present constitutional monarchy. Under that Monarchy, the Governor-General – the monarchists' pseudo-Head of State – undeniably is appointed as a matter of hard fact by the Prime Minister. The Prime Minister makes a "recommendation" to the Monarch, who constitutionally is bound to accept that "recommendation", even if he or she personally disagrees with it, as seems to have been the case in 1930 with the recommendation to King George V that Sir Isaac Isaacs be appointed.

The most that is conceivable, and this remotely, is that the Queen might raise some polite objection to a particular appointment, which a Prime Minister would be utterly free to ignore, doubtless with equal politeness. Understood against this real, as opposed to imaginary constitutional background, the sole effect of the referendum model is actually to restrict, rather than to enlarge or fortify Prime Ministerial choice. Thus, whereas a Prime Minister practically is unrestricted in any formal constitutional sense in the appointment of a Governor-General, a Prime Minister seeking the appointment of a President under the Convention model will be required to obtain the cross-party support necessary to achieve the success of his nomination through the prescribed mechanism of attaining a two-thirds majority of a joint sitting of the Commonwealth Parliament.

A corresponding objection relates to the power of the Prime Minister under the referendum model to dismiss a President. It should be noted at the outset that this power of dismissal is mutual: far from being some supine constitutional victim, the President is as able to dismiss the Prime Minister as the Prime Minister is able to dismiss the President. Again, however, the most fruitful course of inquiry is to compare the position that would apply under the

referendum model with that which presently applies – as a matter of reality, rather than decorous fantasy – under the constitutional monarchy.

Within our existing constitutional arrangements, the Governor-General is in all practical respects readily dismissible by the Prime Minister through the simple mechanism of the Prime Minister issuing the appropriate advice to the Queen. In functional terms, this is precisely the same position that will apply under the referendum model: that is, the tenure of the monarchists' own purported Head of State, like that of the future President, ultimately is dependent upon the Prime Ministerial will. The only conceivable difference as between the Monarchy and the referendum model for a republic on this point is that, under the existing Vice-Regal arrangements, there might be some short delay before the Queen inevitably acted upon Prime Ministerial advice. This might be thought, in an undeniably small way, to impose some restriction upon the implementation of a Prime Minister's designs, although the plain truth is that, were a Prime Minister to insist upon virtually instantaneous dismissal, the Queen would be in no better position to resist this, than any other constitutionally binding advice.

However, it also must be noted that under the referendum model, a Prime Minister who dismisses a President will be required to submit that action for ratification by a vote of the House of Representatives, something which presently need not be done even in the case of the most controversial sacking of a Governor-General. For all the constitutional rhetoric that customarily is deployed concerning the domination of Parliament by the Executive, a formal constitutional requirement that a Prime Minister solemnly account for his actions in relation to the Head of State before an open sitting of Parliament must impose a strong element of public and political accountability in respect of any Presidential dismissal. Thus, to suggest that the removal of the Head of State under the referendum model involves some chasmatic departure from present practice, together with an unprecedented hazard of dismissal through the exercise of unbridled political discretion, is an exercise in high constitutional dissimulation.

Two further points may be noted concerning the criticisms of the model's provisions in relation to dismissal of the President. The first relates to the already mentioned mutual dismissibility of President and Prime Minister, which has led to claims that the model embodies an unacceptable danger that the two principal functionaries of the Executive branch of government might play "constitutional chicken" with one another, racing to be the first to produce a notice of dismissal from their pocket. One obvious, and somewhat puzzled response to this argument, is that this alleged constitutional deficiency precisely replicates the present arrangements that subsist between Prime Minister and Governor-General, with the consequence that it hardly may be claimed as some peculiarly unattractive trait of the referendum model, particularly by supporters of the Monarchy. A further response is that this feature actually has proved to be highly desirable within the context of our current constitutional arrangements, in the sense that it provides for a balance of powers between the Governor-General and Prime Minister that operates to prevent precipate action on either side. The fact that there has been only one dismissal of a Prime Minister, and no dismissal of a Governor-General, would seem strongly to support this line of argument.

The second point that must be acknowledged in this connection is that it is somewhat bizarre to hear purported constitutional conservatives waxing lyrical on the horrors of the Head of State being subjected to an effective form of dismissal. As a matter of objective history, it was precisely the necessity for such a ready procedure of dismissal that was one

of the principal rallying cries of conservative constitutionalists at the 1998 Constitutional Convention. Perhaps most notably, the former Governor of Victoria, the Hon Richard McGarvie, clearly expressed the position of constitutional conservativism when he powerfully argued that a Head of State whose tenure was utterly beyond the reach of the parliamentary Executive, and who consequently was immune from all fear of dismissal regardless of any inappropriate political interventions which he or she might undertake, inevitably would become a rival for power with both Prime Minister and Parliament. Such rivalry would fatally compromise our existing system of parliamentary, responsible government. Far from being some ghastly blot on the constitutional parchment, therefore, the appropriately straightforward procedures for the dismissal of the President contained in the referendum model represent perhaps the greatest victory achieved so far by the forces of constitutional conservatism in the moulding of the form of an Australian republic.

Another, rather multi-faceted argument against the Convention model is that the nominations process which it contains would not, as a matter of practice, produce an appropriate Head of State. For example, it sometimes is urged that desirable candidates for the office of President will not present themselves, on the basis that the nominations process will "leak like a sieve", and that respectable Heads-of-State-in-waiting would not choose to have their names bandied about like those of common office-seekers.

In most respects, this argument displays a certain naivety. In the first place, there always and inevitably is speculation as to the appointment of any important constitutional officer. Thus, as any lawyer gleefully will tell you, vast and variably informed anticipation surrounds the appointment of every High Court judge, and undoubtedly will continue to surround such an appointment so long as lawyers are prone to gossip, which is to say, for ever.

Similarly, there virtually never has been an appointment in recent times to a Vice-Regal position at either Commonwealth or State level that has not been accompanied by media speculation as to the most likely and plausible candidates. A second, and rather more brutal point, is that if persons are not prepared to contemplate the high service of their country simply because their pride might be wounded were it to become known that they had been an unsuccessful candidate, then such individuals almost certainly do not possess a sufficient sense of civic obligation to render them suitable to serve as Head of State.

More generally, some critics of the referendum model have claimed that the model inevitably will produce a low quality President. The main line of argument which seems to have been advanced in support of such a view is to the effect that the requirement that a presidential nomination gain bi-partisan support, as follows necessarily from the stipulation of the Referendum Bill that a two-thirds majority of a parliamentary joint sitting be obtained for a President's appointment, will produce clandestine back-room deals between political parties, which in turn will lead to the appointment of unimpressive, politically compromised candidates.

However, a different and vastly more realistic way of viewing the same process is to regard its salient feature as being the entirely wholesome change that no longer will a Prime Minister be in the position of a winner who takes all through his unilateral appointment of a Governor-General, but rather must produce a presidential candidate broadly acceptable to a wide range of Australian opinion. It is difficult to the point of perverseness to see this as a retrograde step in relation to the appointment of a Head of State. On the contrary, a formal constitutional requirement that Australia's Head of State not be appointed simply as the

creature of the ruling political party of the day is a major point in the model's favour.

An argument that requires rather more consideration is that which maintains that implementation of the referendum model will involve the destruction of the centuries old constitutional conventions which are critical to the continuance of our system of responsible government. Once again, however, there is less to this argument than meets the eye. Fundamentally, the referendum model for a republic closely imitates and reflects our existing constitutional arrangements, and indeed, its entire rationale is based precisely upon this fact. Crucially, in its deep adherence to and encapsulation of established constitutional practice, albeit in a republican translation, the model precisely replicates the underlying constitutional psychology upon which the conventions of our Constitution are based. Particularly notable here is the manner in which the provisions of the Referendum Bill rehearse and enshrine the whole of the apparatus of Australian responsible government as it presently appears in the Constitution.

More specifically, and just as significantly, the Referendum Bill expressly preserves the operation of our existing constitutional conventions. Thus, clause 59 provides that the President will act upon the advice of the Federal Executive Council, the Prime Minister, and Ministers – that is, the clause specifically recites the relevant principles of responsible government – and goes on to provide that in relation to the reserve powers, the President will act in accordance with the conventions that previously bound the Governor-General. Far from representing some revolutionary massacre of the conventions of the Constitution, therefore, the relevant provisions of the Referendum Bill actually display an intensely conservative and meticulous determination to preserve them.

Yet another argument urged against the Convention model is that it will diminish the position of the States. Frankly, as one who has been condemned for many years as a veritable States' rights fetishist, it is difficult to see how. One thing that the model undoubtedly does do is to dispose comprehensively of the old chestnut that, as a part of Australia's conversion to a republican form of government, the States will be forced to abandon their own Monarchies. On the contrary, under the Referendum Bill, each State will be free to decide, in accordance with its own Constitution, whether or not it will retain its Monarchy, and no attempt is made under the Bill to impose republican structure onto any State Constitution. In this specific connection, regardless of one's views of the remainder of the Bill, credit should be given where credit is due: the Constitutional Convention acted firmly to protect States' rights.

Indeed, it usefully might be noted at this point that one incidental effect of the referendum model is to enhance the voice of the smaller States in the appointment of the Head of State, by requiring a two-thirds vote in a joint sitting of Parliament for the designation of the President, a forum in which the smaller States will be relatively strong through their equality of representation in the Senate. This is a markedly different position from that which applies at present, where the Governor-General is appointed by Prime Ministerial fiat. Moreover, it also is a vastly superior position from the point of view of the smaller States than that which would apply under any system of direct election, where the votes of the electors of Western Australia, South Australia and Tasmania would be completely swamped by those of electors residing in the vast population centres of the eastern seaboard.

The next argument against the Convention model for a republic undoubtedly is the most pernicious from the point of view of constitutional conservatism. This is the argument that, if Australia is to be a republic, it were better that its Constitution should embody direct,

rather than the parliamentary election of the Head of State. This is an argument which has been dealt with in detail elsewhere in this paper, and only a brief recapitulation will be offered here. It is the unequivocal truth that direct election is not an option open to a sincere admirer of our existing system of responsible parliamentary democracy, for the simple reason that it is – as has been demonstrated – totally inconsistent with the precepts of that institution.

However, even approaching direct election quite independently of any attachment to constitutional conservatism, it must be recognized that it remains a recipe for complete catastrophe. First, quite regardless of whether one slavishly supports the existing precepts of Australian constitutionalism, direct election would introduce into our constitutional system a fatal element of instability, by creating two contending poles of elected power, the President and the Prime Minister. Each would have a plausible democratic claim to govern, and government each inevitably would attempt.

Secondly, and coincidentally with this creation of a bi-cephalous constitutional monster, direct election would ensure that the President always would be a politician, and thus always would be pre-programmed to attempt just such disastrous political intervention. As already has been shown, this result would flow inexorably from the facts, first, that political parties would desire the office of President for the sake of the power and prestige it conferred; and second, that such parties are the only organisations of sufficient financial, electoral and organisational sophistication to be capable of effectively conducting a presidential election campaign.

The general conclusion in relation to direct election, therefore, must be that it would involve both the ultimate repudiation of our existing Constitution, as well as a free ranging constitutional disaster on its own terms. The only way in which such a conclusion might be avoided in relation to direct election would be to abandon all attempt at meshing such a system with parliamentary government, and to entirely scrap our Constitution in favour of an American-style executive Presidency. However, while one intellectually could maintain the internal logic of such a system, how could any constitutional "conservative" propose the elimination of our existing Constitution, with all its glories, let alone its replacement by a system that not only has produced the enormous and varied constitutional problems experienced in the United States, but which also undoubtedly is inferior in every relevant respect to our existing regime of parliamentary government?

A final argument, and one that has a certain plaintive quality, is that the whole process has been too quick, and that we should take more time over becoming a republic, if indeed we are to become one at all. Frankly, I would have more sympathy for most of the proponents of this argument if it were not so obviously disingenuous. Almost invariably, the true object of those who raise this argument is not in fact to secure further time for deliberation, but rather comprises a not particularly subtle attempt to derail the entire process. Such an argument often is accompanied by the claim that its articulator is not opposed to all republican models, just to that under consideration. The fact that equally profound objections cheerfully will be found to exist in each and every republican proposal as they are put forward is left conveniently unsaid.

It is, perhaps, natural enough for opponents of the referendum model to point towards the process of Federation as comprising a more leisurely and a more comprehensive approach towards major constitutional reform. They argue that Federation took at least ten years to accomplish, counting from the Melbourne Federation Conference in 1890, to constitutional

consummation in 1901, whereas the present republican referendum will take place within two years of the holding of the 1998 Constitutional Convention. Out of this comparison rises the pitiful wail of, "Why the rush?". There are a number of possible responses to this line of reasoning. One is to the effect that the process of "republicanisation" has been a good deal longer than sometimes is suggested. We have been arguing more or less constantly about whether Australia should be a republic now for around eight years, and stupendous amounts of ink, if not blood, have been spilt in this battle. In this sense, the Convention represented merely a formal culmination of republican debate, rather than its commencement.

A second and more basic response is that the comparison between the creation of the Australian Federation and the institution of an Australian republic simply is not valid. It genuinely is not possible to pretend that the conversion of our very much existent polity into a fundamentally similar republic will be an operation of remotely similar complexity to the creation of the Australian Commonwealth from constitutional scratch.

By way only of illustrative example, the sponsors of Federation had to deal with the basic issue of Federation itself; the adoption of responsible government; the powers of the Commonwealth; the correlative powers of the States; the design of the Senate, and its powers vis-a-vis the House of Representatives; the facilitation of free trade; the federal financial settlement; how the Constitution was to be amended; the constitutional protection of the smaller States; allocation of the powers of taxation; relations between the Houses of Parliament; and so on and so forth, almost *ad infinitum*. Compared to this almost ghastly list of problems which had to be surmounted by our Founding Fathers, those presented by the conversion of Australia into a republic modelled along its own existing constitutional lines pale into insignificance.

Thirdly, and finally, one cannot help but be struck by a certain sense of pathos as those who purport to be the heirs of those great constitutional conservatives, Griffith, Barton and Deakin, frenetically oppose the very modest proposal being put forward to referendum on the basis that too much is being attempted in too little time. That pathos arises from the fact that one cannot but conclude that many of these entirely sincere commentators undoubtedly would have voiced precisely the same tremulous objections to the adoption of the Constitution which they now so ardently believe they are defending, had they only been alive a century ago.

Thus, precisely the same arguments that now are being put forward to suggest that the Convention model was hastily conceived and is being hastily executed were heard from the mouths of anti-federalists in the 1890s: it is all too fast; the outcomes are unpredictable; it will destroy a system that works perfectly well; why not take another twenty years? Indeed, there are very strong similarities between many constitutional monarchists today, and the anti-federalists of the 1890s. Thus, the anti-federalists could not see that the time had come to translate colonial government into a new framework of self-governing quasi-nationhood, not as a rejection of the Australian Colonies' constitutional pasts, but merely as their natural development. So the constitutional monarchists cannot see that the time unavoidably has come to transfer the timeless jewel of our magnificent constitutional order, utterly intact, into a genuinely conservative republican setting.

Perhaps there is one further similarity between the doomsayers of the 1890s and their brethren of the 1990s. Each seem to have had a visceral loathing for the concept of constitutional compromise. Just as the anti-federalists derided our Constitution as the hotch-

potch product of back room deals and compromises, so the critics of the Convention model sneer at it as the bastard child of expedience and deal. Yet no-one with the slightest experience of constitutional history could fail to understand that every successful Constitution, from the American to our own, has been just such a product of a convergence and co-operation of minds. When Deakin said that "the watch word of the Convention was compromise", he could have been speaking –and just as approvingly – of the Convention of 1998 as that of 1898.

Conclusion

However unfashionable it may be to say it, for Australia to become a republic along the lines embodied in the referendum model will be, in terms of basic constitutional change, no great thing. Rather, while it will represent a significant change in the surrounding symbolism of our Constitution, such a step will embody only the smallest of changes in its institutions and machinery. In this sense, adoption of the referendum model will involve neither more nor less than translating our existing constitutional order faithfully into a republican idiom. This is a task of preservation, not innovation, that should be approached neither in elation nor fear, but with a calm dignity engendered from a confidence that we merely are taking the next small, logical and consistent step along a path already marked out by Burke, Deakin, Griffith and a host of others.

Above all, we must remember at every point that the object of a true constitutional conservative is to preserve the essence of our constitutional order, not to hold so tight to every one of its incidents that it is suffocated. Unless the Convention model is approved at the November referendum, the Australian Constitution will face the greatest and most dangerous challenge in its history. It will be presented with the prospect of the almost inevitable victory, at some time in the future, of a referendum proposing the popular election of an Australian Head of State, a victory that will represent the destruction of our constitutional order. If that grim battle eventuates, then all constitutional conservatives, myself included, will be fighting on the same side. But we will lose, going down in a saccharine sea of cheap jingoism and facile populism. In November, constitutional conservatives are presented with a priceless opportunity to ensure that Australia's republican future is directly derived from her conservative Constitutional heritage, a heritage that has endowed us with the finest Constitution in the world. Under no circumstances can we prove ourselves unworthy of that opportunity.

What a nice Referendum – Pity about the Debate

Sir David Smith, KCVO, AO

It has been said of British government that, at its heart "lies a mystery – the Constitution, the rules of the game under which power is fought for, then distributed or constrained once gained", and that "the system by which government operates baffles ministers themselves – let alone MPs, commentators and the general public".[1] Having served the Australian system of government for the whole of my working life, I believe these words apply equally to Australia.

As two Commonwealth Government inquiries have shown, Australians are abysmally ignorant of just how they are governed or what their Constitution says and means.[2] This lack of knowledge on the part of the electorate has enabled republicans to misrepresent our present Constitution and to deceive and mislead the Australian people about the changes they wish to make to it.

Earlier this year, in a speech to the National Press Club, Andrew Robb, convenor of Conservatives for an Australian Head of State, was sharply critical of the draft wording of the question to appear on the referendum ballot paper, saying its failure to refer to the replacement of the British monarch by an Australian citizen would have a negative impact and provoke a negative reaction from people.[3] He also objected to the inclusion of the word "Republic" on the ballot paper.[4] And only this week, in a submission to the Joint Select Committee on the Republic Referendum, Malcolm Turnbull said the terms "Republic" and "President" should be dropped from the referendum question because people do not understand what they mean.[5] Two days later, responding to the ridicule and condemnation which resulted, Turnbull changed his submission to the Parliamentary Committee and conceded that these terms might stay.[6] He proposed instead that the question refer to the President replacing the Queen as Head of State. This, however, only continues the republican attempts to fool and mislead the Australian people. The President would not take over the Queen's constitutional duties. The President would take over the Governor-General's constitutional duties and replace the Governor-General as Head of State. Robb and Turnbull do not want the ballot paper to tell the truth. The truth would have a negative impact on an ignorant people, and truth must not be allowed to stand in the way of the so-called inevitable republic.

Sadly, truth has become a casualty in the monarchy/republic debate, with republican mendacity aided and abetted by biased media who have their own commercial interests to serve. Paul Kelly, then editor-in-chief of *The Australian,* made this clear when he told a constitutional forum that the media would support constitutional change because "the media has a vested interest in change – change equates to news, and news is the lifeblood of the media".[7] In other words, the media support constitutional change, not because it will be good for Australia, but because it is good for their business.

In the absence of an informed electorate, republicans have invented false reasons for wanting to remove the monarchy from our Constitution. I dealt with these at some length in my paper at last year's conference,[8] but let me summarise them briefly. The monarchy has been held responsible for the high unemployment level, the recession, and the business excesses of the late 1980s. The monarchy has been blamed for the exodus from Australia of our top scientists. The monarchy has been blamed for stifling artistic talent, and our artists

have been promised that the republic will enable them to fully express themselves as artists. Trade officials have said that our present constitutional arrangements are harmful to the overseas promotion of our products and services.

Business leaders have promised us that the republic will present a windfall marketing opportunity for Australian exporters, 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. A former head of Australia's foreign service is a republican because he had difficulty in explaining our Constitution to a foreign dictator President of a republic. A former Chief Justice of the High Court became a republican at the age of eight because he disapproved of body-line bowling!

For seven years we were told that "the republic" would help us find our national identity, though most of us were blissfully unaware that we had lost it; that "the republic" would help us find our place in the world, though most of us thought we already had that too; that "the republic" would give us our national sovereignty and independence, despite the fact that the 1988 Constitutional Commission had reported that we already were a sovereign and independent nation, and had been for a very long time.[9]

And only last month, the High Court, in voiding Heather Hill's election as a Senator, provided further confirmation that Australia is a sovereign and independent nation, and that the Queen of Australia is not a foreign Queen and is a separate legal personality from the Queen of any of her other fifteen realms,[10] thus once again giving the lie to republican claims that we are not yet fully independent or that we are ruled by a foreign Queen.

The 1998 Constitutional Convention was held to enable the republicans to tell us just what sort of republic they had in mind, that would confer their promised wondrous blessings upon us, and finally they told us. Well, some of them did, but others are still talking about a different sort of republic. And still the misrepresentation continues to flow from republican mouths and pens. Let me give just a few examples.

Malcolm Turnbull still pretends that his republican model will replace the Sovereign with an Australian Head of State. It will do no such thing. The Turnbull republican model which will be before us at the referendum would replace an Australian Governor-General with an Australian President. One Australian would replace another Australian and go on doing exactly the same job. If the one would be our Head of State, then the other is now.[11]

Under the Turnbull model, the Monarch, whose only constitutional duty is to approve the Prime Minister's recommendation for Governor-General, would be replaced by federal politicians who would approve the Prime Minister's recommendation for President. The Queen would be replaced, not by the President, but by politicians. As for the committee process for producing names to be put to the Prime Minister, who would still be free to ignore the committee and choose his own candidate anyway, the Hon Peter Costello, himself a republican, did a superb job of ridiculing this absurdity at the Convention.[12]

The provision in the Turnbull model for the removal of a President has also scaled new heights of absurdity. The President would be removable instantly by the Prime Minister with a stroke of his pen. The need to submit the matter for the consideration of the House of Representatives after the event provides no protection at all. The Senate, which would have participated in the appointment process, would be totally ignored in the removal process. It would be easier for the Prime Minister to sack the President than it would be for him to sack his ministerial driver. Professor David Flint has said that the republican model would give the Prime Minister powers over the President which would be unique in the western

world.[13] Mr. Harry Evans, Clerk of the Senate, has said that it would make our President the most miserable Head of State on the globe.[14]

Probably the saddest case of gross misrepresentation in order to advance the republic has come from Sir Anthony Mason. This one-time interpreter of our Constitution claimed to have discovered a "robust" constitutional convention which he said has been hidden within our Constitution since 1901. According to this convention, the Governor-General ceases to function whenever the Queen is in Australia. As I described in some detail at last year's conference, Sir Anthony's claims are not true. His so-called "robust" constitutional convention does not exist. It is the product of a fertile imagination.[15]

Sir Anthony was selective in his use of the Constitution to reject any suggestion that the Governor-General is Australia's constitutional Head of State. In order to make his case, he completely ignored s.61-70 in Chapter II of the Constitution headed "The Executive Government", and relied solely on s.2 of the Constitution, which he then misquoted and misinterpreted.[16]

Sir Anthony's view that the Governor-General has no role other than as the Queen's representative flies in the face of the 1988 report of the Hawke Government's Constitutional Commission. Former Prime Minister Gough Whitlam was one of the Commission's members, and its Advisory Committee was chaired by former Governor-General, Sir Zelman Cowen. The Commission concluded that, "although 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".[17]

The constitutional reality is that s.2 relates to the Royal prerogatives of the Crown, while s.61-70 relate to constitutional powers and functions which are the Governor-General's, and his alone, as the head of the executive government. This apparent inability to differentiate between these two different sets of powers and functions, or to understand the meaning of s.2, or even to read the rest of the Constitution, has been diagnosed by a doctor friend of mine as constitutional constipation impacted on s.2.

This particular affliction seems to be prevalent among republicans, particularly republican lawyers. Even the Attorney-General, the Hon Daryl Williams, suffers from it, as confirmed by correspondence coming out of his office.[18] But then, this Attorney-General also believes "that the Republic Bill would not greatly change Australia's basic governmental arrangements".[19] What is worse, he and his advisers believe that his saying so publicly does not constitute an intervention by him in the current debate! With the greatest of respect to the Attorney, his remarks were a grossly improper intervention in the debate, and they were quickly seized upon and used by Malcolm Turnbull and Neville Wran. The Attorney's claim that he is acting impartially invites the question, "impartial against whom?" More to the point, his claim that the Republic Bill would not greatly affect our present system of government is at odds with the stringent criticisms which have been made by many distinguished republican constitutional lawyers, some of whom I shall mention shortly. In their view, the republican model to which the Bill would give effect is flawed and unworkable, a charge which certainly cannot be laid against our present constitutional arrangements.

One of the most revealing contributions to the debate has come from Michael Sexton, currently the Solicitor-General for New South Wales and one-time legal adviser to the Hon Kep Enderby. (You remember him: he was the Whitlam Government's Attorney-General in

those early days of November, 1975, who was far too busy to provide the Governor-General with a legal opinion which His Excellency had asked for urgently).

Sexton believes that the office of President of Australia should be dumbed down. In a recent article in *The Australian Financial Review* he claimed that our Governors-General have been men of eminence and intelligence and ability, and therefore far too highly qualified for what he described as essentially a ceremonial position.[20] Their extraordinarily high qualifications suggest to Sexton a wild case of overkill for a position which he believes calls for someone like the assistant secretary of the Glass Blowers' Union – someone who could be relied upon to take orders and keep out of the limelight. (As if to confirm my views about the role of the media in the current debate, *The Australian Financial Review* refused to publish an article which I submitted in reply to Sexton).[21]

At last we know who the Turnbull republicans really want as Australia's Head of State – a political puppet who will do as he is told, and face instant dismissal if he does not. That is why they resent the present system which gives us Governors-General of intelligence and ability and integrity. That is why they are proposing a method of appointment under which not one of the nine distinguished Australians who have held the office would have been appointed – some because the Opposition of the day would not have agreed, and all because they would not have accepted appointment under the conditions now proposed.[22]

And now, sad to say, we find that Professor Greg Craven has thrown his lot in with those who seek to misrepresent our Constitution and the changes they wish to make to it. At one time a supporter of the constitutional monarchy, he became a McGarvie republican at last year's Constitutional Convention in order to retain, as he put it, all the virtues of the present Constitution. He is now a firm supporter of the Turnbull republic which would destroy those very virtues. His various changes of position on the republic might best be described as constitutional *Karma Sutra*.

In preparing to follow Professor Craven this morning, I did not, of course, have the benefit of knowing what he would say to us today. I have therefore addressed the views which he expressed earlier this year in several published articles in seeking to justify his latest change of mind.[23]

On his own admission, Professor Craven was at one time a defender of the constitutional monarchy. He claims to have spent years trying to shore up the monarchy, presumably without success, because by 1998 he was a republican and a supporter at the Constitutional Convention of the McGarvie republican model,[24] seconding the proposal for its adoption after it had been moved by the Hon Richard McGarvie.[25]

The aim of the McGarvie model was to provide a mechanism for Australia to become a republic while preserving intact all of the principles and procedures and virtues of our present monarchical Constitution. In supporting the McGarvie model, Professor Craven was critical of both of the other contending models – parliamentary election and popular election – for he could see the problems inherent in both, and the damage that each would do to our system of government.[26] As for the McGarvie model itself, he saw it as providing safety and stability, and retaining what he called "the strengths of our present democracy".[27]

When the McGarvie model was rejected by the Convention, Professor Craven turned on the constitutional monarchist delegates for not supporting it. With our vote, the McGarvie model would have become the Convention's choice: with McGarvie defeated, the Turnbull parliamentary election model was the last one left standing. Professor Craven accused us of "recklessly endangering the safety of this Federation by refusing to adopt a responsible

course".[28] After the vote he confronted me in the corridor outside the old House of Representatives Chamber. In a state of high emotion he abused me soundly for what my constitutional monarchist colleagues and I had done in putting at risk the safety and stability of our system of government by allowing the Turnbull model to survive. The next day he abstained from the final vote on that model, which became the Convention's choice, describing it as a model which he could not support.[29]

One year later, all of Professor Craven's doubts about the practicality of the Turnbull model, and all of his objections to its features, have been miraculously resolved or swept aside, and he has become a supporter of the model, describing it as "the one sure defence of the Constitution". That which a year ago was a danger to the Federation and its Constitution is today their saviour and defender. So, let us see what caused this remarkable turn-around and how Professor Craven has sought to justify it and give it credibility.

His opening gambit in his March, 1999 apologia for yet another change of mind was that it is better to be right in the end than consistently wrong. Having described his earlier views as nonsense, Professor Craven provided no evidence that would suggest that his latest view is any better. But we do begin to see why he has been described as having "a formidable talent for manipulating argument to his advantage" and a "facility for taking a position whose initial premise may be faulty and doing a superb job with it".[30] Thus we find him saying now that, on the republic, he has been a changer and a compromiser, and that he is very proud of it.[31] This is the man who, less than two years ago, strongly (and in my view rightly) attacked High Court judges whom he accused of judicial progressivism and intellectual dishonesty.[32] Yet today he feels able to join in common cause with the Australian Republican Movement.

He told us that he firmly believes "that our existing federal parliamentary democracy embodies a profound and distinctive Australian constitutional genius", and that we must preserve "that genius, which has presided over an unequalled century of stable democracy". And he told us all of this in the name of throwing away that "profound and distinctive Australian constitutional genius" and becoming a republic, so that we can join all the other failed undemocratic republics around the world and enjoy our share of political instability.

I looked for Professor Craven's reasons why we should do such dreadful things to our "distinctive Australian constitutional genius" and our "unequalled ….. stable democracy." And what did I find? According to him, "a mere decade of republican debate has shown just how threadbare are the claims of the monarchy". I don't recall the monarchy making any claims. It just sits there quietly in our Constitution, making its silent contribution to our "distinctive Australian constitutional genius" and our "unequalled century of stable democracy". As for our decade of republican debate, does he mean the mindless chanting of "it's inevitable", or does he mean the more substantial debate that I mentioned earlier: the accusations that the monarchy is responsible for the business excesses and high unemployment of the 1980s, and for the scientific brain drain from Australia; that it stifles the creative talents of our artists; that it is harmful to the overseas promotion of our exports; and the claims that the republic will liberate the talents of our artists, will increase exports, will help us gain international recognition for our technology and our inventions, and will ensure an increased inflow of venture capital? Is this what he means by the relevation of threadbare claims? Is this what he means when he uses the word "debate"?

Then followed some propositions which illustrate perfectly Professor Craven's talent for manipulating argument despite his initial premise being faulty. "The Crown survives on

sufferance. ... A dead marriage between a faded monarchy and a jaded people is neither a suitable nor a secure basis for one of the world's greatest constitutional democracies". Does he not stop to think how we became one of the world's greatest constitutional democracies? It certainly wasn't achieved by adopting the system of government that exists in most of the world's trouble spots, or by having as President "the most miserable Head of State on the globe" – a creature of the Prime Minister of the day.

And what about these debating points? "Australian must become a republic, not in rejection of its glorious constitutional past but in re-affirmation. The timeless jewel of our Constitution must be placed in a new, non-monarchical setting". As I read those words I found myself asking, "Why?", but Professor Craven provided no answer. He is long on telling us what we must do, but short on giving us reasons why we must do it.

But wait – there's more. Professor Craven next asked the rhetorical question, "Can a McGarvie minimalist conscientiously take the short but decisive step to the model endorsed by the Convention?" In other words, having supported one model because it would have retained the essential principle of the Constitution, can he now support another model that would rip it out? You will not be surprised to hear that Professor Craven answered this question with a resounding "Yes". And he then claimed that this stems from his concern "with the long-term preservation of the Australian Constitution". He would preserve the Constitution by destroying one of its essential principles.

The Turnbull republican model which Professor Craven now supports will be defeated at the November referendum, and he knows it. Last year he himself described it as "a weak model, with a number of serious deficiencies".[33] Professor George Winterton described it as "flawed" and with "vital structural weakness". Professor Cheryl Saunders called it "significantly flawed", "incomplete" and "unworkable". Professor Moira Rayner described it as "a cobbled Constitution dressed up with a poetic meaningless preamble", and "a compromise" that would give "more power to Prime Minister, Cabinet and political parties". Professor Brian Galligan said it was "not properly a republican model at all". And these damning comments all came from republicans!

Professor Craven's great concern now is that, with the defeat of the Turnbull model, the way will be open for the direct election model to succeed at a subsequent referendum. That, he says, would be "deadly poison" to the Constitution. "By rendering the Constitution a two-headed monster, under which both Prime Minister and President would enjoy rival popular and moral mandates, direct election would usher in an era of constitutional conflict, instability and dismay". And then comes the final sophistry: "The one sure defence of the Constitution is the Convention model".[34]

No, Professor Craven, the one sure defence of the Constitution is the monarchy. Its role in holding everything together is so important that, while the republicans are agreed that they want to remove it, they cannot agree on what to put in its place. Each republican proposal for an alternative to the role of the Monarch in our Constitution has been rejected by other republicans as defective and dangerous.

At last we come to the nub of Professor Craven's successive changes of mind, and particularly his latest – not scholarly and intellectual processes, but sheer desperation. Originally a self-described wishy-washy supporter of the constitutional monarchy, he became a McGarvie republican, thinking it would be the winner at the Constitutional Convention. He thought that the constitutional monarchists would be as unprincipled as the republicans and that we would use our votes at the Convention to influence the choice of

republican model. But our platform was, and is, "No republic", so how could we vote for any of their models? How could we honestly campaign later against a model which we had helped to select?

Of course, the other republicans also thought that we would act in this unprincipled manner, so they rigged the method of voting for the various models in order to prevent us from doing so – to prevent our delegates from voting the way they thought we would want to vote. As it turned out, their attempts to rig the voting were as successful as their attempts at rewriting our Constitution. We still could have defeated their dishonest stratagems and voted to defeat the Turnbull model, had we been so minded. We still could have determined the final model, but we chose not to do so. Other Convention delegates, but not Professor Craven, were kind enough to say later that we had acted honourably.

With the defeat of the McGarvie model which he had seconded, Professor Craven abstained from voting for the Turnbull model because he found it objectionable. He is now a supporter of this objectionable model. He has now joined in common cause with republicans who are prepared to deceive the Australian people – who continue to misrepresent our present Constitution and to conceal the truth about their republican alternative. He now finds himself allied with those who want us to change our Constitution in order to become independent, when we already have full independence; who promise us an Australian Head of State when we already have one; who want the referendum question to be worded so as to conceal the truth about what we are to vote on; who invent a non-existent constitutional convention to bolster a dishonest case; and who seek constitutional change without any regard for the public good.[35]

I suspect that Professor Craven now realises that the model which his republican bed-fellows have chosen to foist on the electorate is unacceptable to the electorate. Not only does he fear the rejection of the Turnbull republic: he now also argues that this may lead to the even more objectionable direct election republican model. His latest strategy is to try and frighten constitutional monarchists into supporting the Turnbull republic on the grounds that a worse alternative awaits us all if we do not.

But life in the real world does not work that way, and we do not scare so easily. The answer to Professor Craven's personal dilemma lies elsewhere. When the Turnbull model is defeated on 6 November, and if the direct election republican model should subsequently rear its ugly head, Professor Craven's only option will be to help us defeat that model by once again becoming a constitutional monarchist. After all, as he himself has said, changing one's mind is such a virtue.

Endnotes:

1. Peter Hennessy, *The Hidden Wiring* (Victor Gollancz, London, 1995). The words quoted are from the inside front flap of the dust jacket.

2. See *Final Report of the Constitutional Commission* (Australian Government Publishing Service, Canberra, 1988), p. 43; and *Whereas the people... Report* of *the Civics Expert Group* (Australian Government Publishing Service, Canberra, 1994), pp. 18-19. The former found 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; the latter found that 82 per cent of Australians knew nothing about the content of the Constitution.

3. Richard McGregor, *ARM odd couple to rekindle campaign*, in *The Australian*, 30 March, 1999; and Gervase Greene, *PM's mate attacks preamble*, in *The Age*, 30

March, 1999.

4. Michelle Grattan, *Robb to become republic's 'Yes' man,* in *The Sydney Morning Herald,* 30 March, 1999.

5. *Turnbull's republic strategy: please don't mention the President*, in *The Australian,* 6 July, 1999; and *Don't mention the republic*, in *The Canberra Times,* 6 July, 1999.

6. *Hold it: republic's back in question,* in *The Australian,* 8 July, 1999.

7. Paul Kelly, *Constitutional Review – How, When and What?,* a speech to a Constitutional Centenary Foundation Council Forum, Melbourne, 12 November, 1993, p. 2.

8. *A Funny Thing Happened on the Way to the Referendum*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 10 (1998), pp. 1-47.

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

10. *Sue v. Hill* (1999) HCA 30 (23 June, 1999).

11. For a detailed discussion of the role of the Governor-General see the author's paper *The Role of the Governor-General,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp.167-187.

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

13. Professor David Flint, *Australia Already Has A Mature Constitutional System*, in *Australian Constitutional News,* Volume 1, Number 4, February, 1999, p.5.

14. Fiona Kennedy, *Republican model losing favour,* in *The Australian,* 12 June, 1998. See also Harry Evans, *A Non-republican Republic: the Convention's Compromise Model,* a paper given at The University of Queensland Law School symposium on an Australian Republic, 11 June, 1998. Mr. Evans describes the Head of State under the system of Cabinet government as a constitutional umpire, and questions a constitutional arrangement that would allow the players to appoint the umpire, and for the captain of the winning team to change the umpire in the middle of the game, particularly if he thought that he himself was about to be sent off. Mr. Evans concludes that the republican model that emerged from the Constitutional Convention would significantly weaken the position of the Head of State and undermine the present system of government.

15. For details of Sir Anthony Mason's evidence and of the facts in rebuttal, see *A Funny Thing Happened on the Way to the Referendum, loc.cit.,* at pp. 15-16 and 31-35.

16. ABC Television, 27 October, 1997; ABC Radio, 28 October, 1997.

17. *Final Report of the Constitutional Commission*, p. 313, para. 5.17.

18. Personal knowledge.

19. The Hon Daryl Williams, *Republic Referendum: The Process Leading to the Referendum,* an address to a Local Constitutional Conventions Forum, Canberra, 29 April, 1999, p. 3. But see note 13 above. See also Harry Evans, *Comments on Constitution Alteration (Establishment of Republic) 1999*, 10 June, 1999, in which Mr Evans sets out the many defects in the Bill and describes the drastic changes which it would make to our present system of government. In a submission dated 18 June, 1999 to the Joint Select Committee on the Republic Referendum, Mr Evans states that the provision in the Republic Bill for the removal of the President, and the absence of a fixed term, "are not to be found in any other Constitution in the world, the reason being that no other country has been so misguided as to adopt such obviously unbalanced arrangements. Both of these aspects of the 'model' would undermine the existing

system of Cabinet government which it was the stated aim of the 'model' not to change".

20. Michael Sexton, *The head of state could handle some dumbing down,* in *The Australian Financial Review,* 10 April, 1999.

21. My reply was subsequently published in *Australian National Review,* Volume 4, Number 1, May 1999, pp. 21-22.

22. The nine Australians who have held the office of Governor-General of Australia are: Sir Isaac Isaacs, Sir William McKell, Lord Casey, Sir Paul Hasluck, Sir John Kerr, Sir Zelman Cowen, Sir Ninian Stephen, Mr Bill Hayden and Sir William Deane.

23. Greg Craven, *No room for two at the top*, in *The Australian,* 5 February, 1999; *New setting for timeless jewel*, in *The Australian Financial Review,* 3 March, 1999; *A change of mind*, in *The Adelaide Review,* March, 1999.

24. The Hon Richard McGarvie, former Governor of Victoria and former Judge of the Supreme Court of Victoria, was an appointed delegate to the 1998 Constitutional Convention. The essential feature of the McGarvie republican model was that the role of the Monarch in the appointment and dismissal of the Governor-General under the present Constitution would be undertaken by a Constitutional Council in the appointment and dismissal of the President under a republican Constitution.

25. *Report of the Constitutional Convention,* Volume 4, p. 840.

26. *Ibid*., pp. 588-590.

27. *Ibid.*, Volume 3, pp. 240-241.

28. *Ibid.*, Volume 4, p. 893.

29. *Ibid*., p. 945.

30. Penelope Debell, *The Craven controversy*, in *The Age*, 15 May, 1995.

31. The references which follow to Professor Craven's views on the monarchy and the republic are taken from his two articles of March, 1999; see note 23 above.

32. Greg Craven, *The High Court of Australia: A Study in the Abuse of Power*, The 1997 Alfred Deakin Lecture, given at the University of Melbourne, 9 October, 1997, and reported by Richard Salmons, *Judges 'put dishonesty to good use'*, in *The Australian Financial Review*, 10 October, 1997. Professor Craven was reported as saying:

> "We have reached the point in constitutional cases where the reasoning in a decision essentially does not matter, so long as the conclusion is correct. What this means is that we now assume the willingness and the enthusiasm of the High Court for intellectual dishonesty in a constitutional context, and care only whether that dishonesty is put to good use".

33. The views quoted in this paragraph are taken from articles contributed by the authors and published in *The University of New South Wales Law Journal* Forum, Volume 4, Number 2, June, 1998.

34. See note 23 above.

35. See Gregory Melleuish, *Crown, People and Republic*, in *Quadrant,* July-August, 1999, pp. 11-13. Melleuish writes:

> "One of the problems that has bedevilled the whole 'republican debate' in Australia has been an imperfect understanding of the meaning of republicanism and the

> possible reasons for this country becoming a republic. If republic means the common good, then it is clear that one should only replace the Crown, and the Monarchy, by a President if the public good will thereby be enhanced. It is clear in the case of the ARM proposal that such will not be the case".

He describes the Crown as:

> "….. part of our political fabric; it is something solid, known, objective and representative of the 'common good' through its activity in both the political system and the law. It has an established reputation of speaking for the people as against particular interests. Because of its somewhat intangible qualities and its embeddedness in the institutional framework, it is not open to ideological manipulation".

Melleuish warns against adopting "a rhetorical device [that] does nothing to protect the common good or the rights of ordinary people; rather it becomes the tool of politicians and ideologues seeking their own ends", and he concludes that "the worst possible scenario would be the current republican model on offer that deprives us of the Crown without moving towards the people."

Preambulations

Michael Warby

A few months ago, John Stone rang me and gave me that most terrible of all possible speaking assignments. He charged me with the task of being funny and witty about the Constitution; a task not unlike being asked to discourse persuasively on the virtues of alcohol to a meeting of the Christian Women's temperance league. Of course, at least on such occasion one could start by observing firmly in alcohol's favour that it was only by imbibing several glasses of medicinal ale that the task one was currently undertaking could ever be attempted.

To make matters worse, John Stone felt it perfectly reasonable to require me to sound intelligent on the subject while conscious of being followed in my presentation by Sir Harry Gibbs.

The full enormity of the task that John Stone felt free to load on me should now be obvious to everyone: to be funny and witty about a document which reads, as Greg Craven once memorably said, like the deed of grant of powers it is *and* be followed by Australia's most eminent legal mind, talking on the very same subject.

At this point, one is left racking one's brain about what terrible error or injury I had done John Stone that he should feel free to visit this speaker's purgatory on me. It certainly seems a punishment fitting to be inflicted upon some errant individual by a gentleman who was once famously described as eschewing any resort whatever to the knife in the back since he had always found the axe in the forehead quite sufficient.

One remembers, at the time of the election of the Hawke Government, rumours went around that they were contemplating moving John Stone from his position of signing dollar notes to being Secretary of Defence. It was felt that, while Ministerial control of the armed forces might then be in doubt, civilian control at least would have been assured.

Now, as it happens, this is the second time I have been in a double bill with Sir Harry. The previous occasion was when Sir Harry was kind enough to launch a book I had written. On that occasion, I, fortunately, was the following speaker and, forgoing any attempt to match the preceding speaker, merely thanked him for his kind words and offered myself up for questions.

No such luck this time: I actually have to speak.

But then there is the great saving grace of this awful task. I actually only have to be amusing about the proposed new Preamble.

No real problem at all, then. Indeed, it is such a little problem that I defy anyone not of the lofty eminence of Sir Harry Gibbs to discourse for any length of time about the proposed Preamble without collapsing into some sort of laughter, drollery or uncontrollable merriment — intentionally or otherwise.

If ever there was a thing of smokes and mirrors signifying, as all really good jokes do, at once far too much and yet nothing at all, it would have to be the proposed Preamble.

Just consider the paradoxes. First, there is something so important that we have to go through all the expensive and time-consuming, and relatively rare, effort of a constitutional referendum campaign to consider it.

Yet this something is so insignificant that we are gravely assured that it will have no legal effect on anything at all.

Yet this thing without legal effect is nevertheless so important that the words of our unofficial poet laureate have to be amended for vital legal reasons.

Yet it is so unimportant that it need not bother with such elementary constraints as good English expression.

To discourse on such an object is to be landed, without effort at all, in the land of the surreal – as strange a place as one can imagine, outside the Party room of the Australian Democrats. Humour must inevitably follow, of some variety or other.

In fact, Natashas and Natashas of humour, which can but Lees one in huge Kernots of mirth before one can say "all change", like a carrot from its virtuous, noble raw untaxed nirvana to its nasty, shredded, fast-food, taxed purgatory. But I have to Stott there, or I will Despoja the joke.

Australians, one is glad to say, have lived up to their reputation as folk who like a joke – one has to have an advanced sense of humour to even pretend to give such personages as Philip Adams (Mr "I have a dream – and you're not in it") or Robert Manne (our very own distaff Disraeli – "Is that two, or possibly only One, nation I see before me?") status as workaday Sages. Indeed, both display a standard feature of so many Australian commentators: in the wonderful words of Jagdish Bhagwati about Chalmers Johnson, they refrain from permitting their contempt for their opponents' views to breed familiarity with what they actually say.

Australians have lived up to their reputation, and realise that Preambulation is a game anyone can play.

Gareth had already offered his own thoughts, of course, but someone who managed to show that too much reading of Biggles when young is dangerous even in the relatively un-aeronautical position of Federal Attorney-General can surely not be absent when nominations for Pomposity in a major national role are being handed out.

Jeff Kennett entered in, playing his long-running feature of anything-you-can-do-I-can-do-better and gave, one must say, a not discreditable performance.

The Democrats and the ALP got together and agreed on a version – basically a few minor amendments to Gareth's original offering. As we contemplate the joys of now-you're-in-now-you're-out' exempt, but-only-when-we-say-so, food – the Lees-Howard reprise of the well-known Kernot-Reith performance of the previous Parliament – we have to conclude that anything cobbled together with the Democrats has to have a bad look. And this one was agreed with the Greens as well, just for added (in)credibility.

What they came up with was:

Having come together in 1901, relying on God, as a Federation under the Crown;
And the Commonwealth of Australia being now a sovereign democracy, our people drawn from many nations;
We, the people of Australia
Proud of our diversity
Celebrating our unity
Loving our unique and ancient land
Recognising indigenous Australians as the original occupants and custodians of our land
Believing in freedom and equality, and
Embracing democracy and the rule of law
Commit ourselves to this our Constitution.

Funny, I thought we were already committed to the Constitution, having voted it in by two

rounds of referenda and considered no less than 42 amendment proposals since. But more of that later.

The Australian newspaper, following its self-appointed role as definer of national identity, and perhaps continuing the role which led the late Paddy O'Brien to call it "The Daily Keating", decided that this was a task beyond, or perhaps beneath, its own august sages and threw the matter open to public competition. Write your own Preamble, our judges to pick the winner: constitutional drafting as national game-show. But "Do You Want to Be A Preamble Drafter?" was only a low-grade version, with more effort and much less money or fame than the prime-time original.

And they duly flooded in; people's earnest, and not-so-earnest, attempts to express what they felt a constitutional Preamble should say.

What is a Preamble anyway? In an Act, it is an expression of what the ensuing document is about. In the words of the Macquarie Dictionary: "an introductory part of a statute....stating the reasons and intent of what follows".

Which, of course, the current document already has:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

> *Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:–*

Not great poetry of language, perhaps, but it has the great virtue of being true and, even better, not something even the most activist judge is likely to go into a legal frolic over.

Which is the great problem with adding a Preamble. It gives an added gloss on the document; it invites judges to interpret the words in its light.

At which point one contemplates how utterly surreal the whole thing is. Because this must be the only time anyone has seriously suggested that a Preamble should be added to a document a full century after it was written – a sort of retrospective attempt to tell us what the whole thing was about as if, somehow, we didn't already know.

Then again, when we have a High Court which can discover in the Constitution, albeit with some shuffling back most recently, an implicit Bill of Rights no-one had noticed for over 90 years, perhaps retrospective allocation of purpose is perfectly reasonable. Not surreal at all, merely cutting-edge legal theory finally getting its full run.

Or perhaps it is modern legal theory which is surreal, a dream of the mind connected only in the most tenuous terms to any sort of reality.

Perhaps. But what the Preamble seems to be really about in people's minds is defining what sort of nation Australia is, or ought to be, or likes to think it is, or would like to be, or something. An expression of national values, but one, mind you, which has no legal implications, but is terribly, terribly important anyway. Without actually mattering.

What did John Howard and Les Murray offer us?

With hope in God, the Commonwealth of Australia is constituted by equal sovereignty of all

its citizens.
The Australian nation is woven together of people of many ancestries and arrivals.
Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.
Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.
In every generation immigrants have brought great enrichment to our nation's life.
Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship.
Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.
In this spirit we, the Australian people, commit ourselves to this Constitution.
But how much of this is, in any sense, about a *Constituton*?
Do nations have purposes? Should nations have purposes? Does one drag out one's Oakeshott, and contemplate the difference between society as a civil association – a structure within which people pursue their own ends – and society as an enterprise association – something with a common purpose ?
Should nations have statements of national purpose?
If one is the United States, the answer is clearly "Yes". But the United States of America is the only nation-state in human history explicitly organised around a set of ideas: ideas that it took a great revolutionary war to forge, and then a murderous civil war to temper. The ideals are indeed grand, but the cost was high.
Unlike the United States, Australia is not an ideocratic state. We were not born in blood and revolution. There was no withdrawal or expulsion of defeated Tories to confirm the nature of the new order. On the contrary, Australia was born in perhaps the most civilised, and the most democratic, creation of a nation and constitutional order in human history.
A nation born in discussion, by popular vote, without shedding a drop of blood. A grand achievement, actually.
So is it appropriate for Australia to inspire to the grandeur of the US preamble?
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
Only if we express the ideals of our original constitutional creation. Which, surely, must give us pause. Not because those ideals are outdated – the crucial ones surely aren't. Indeed, our own revisiting of Constitutional Convening actually showed much less democratic confidence, and much less seriousness of purpose, than the original Conventions. It is surely entirely appropriate that the memoir of the ConCon was written, not by a soon-to-be Prime Minister in Deakin, but by Steve Vizard, someone well-known for being a comedian.
No, the reason to give us pause is, if the constitutional founders did not write a Preamble of grand vision back in the 1890s, why should we attempt to do so on their behalf a century later?
Perhaps we can only speak on our own behalf. But what are the current, new purposes? John Howard and Les Murray had a go, but reaction showed that there was no consensus on

that point, nor for the set put together by the ALP, Democrats and Greens.

We are left with the purposes of the founders, and their refusal to import a grand vision into our founding national document.

Or perhaps they did. Perhaps those workaday words expressed perfectly accurately the workaday nature of what they did. What was, in its understated way, as fine an achievement as the oft-cursed hand of the political animal has created.

Yes, well, perhaps the Preamble is no laughing matter at all; apart from the attempt to add one on 100 years later.

A Preamble: The Issues

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

If it was hoped that the Constitutional Convention of 1998 would produce acceptable recommendations for the reform of the Constitution, those hopes will have been dashed by the outcome of the Convention. The Australian Constitution has worked fairly well for nearly a century, and has indeed proved to be more effective and stable than most others, but it does require reform in certain respects, notably in the area of federal and State relations. The resolutions of the Convention did not touch upon any of the areas in which the Constitution is defective.

In substance, the Convention recommended two changes to the Constitution. First, it was recommended that a model for a republican form of government should be put to the people in a referendum. That model has many serious deficiencies; even committed supporters of a republic recognise that it is significantly flawed.[1] Secondly, it was resolved that the Constitution should include a Preamble which would refer to some matters that I am about to mention, but should not be used in interpreting the Constitution. It is this latter resolution with which I am now concerned.

Although there is no doubt that the first of these recommendations for a referendum will be given effect, it remains doubtful, at the time when I am writing this paper, whether the electors will be asked to approve of legislation for a new Preamble. An Exposure Draft of a Bill – *Constitution Alteration (Preamble) 1999* – has been presented, but controversy has raged concerning the contents of the Preamble which is set out in a schedule to the draft, and it is by no means certain that the Bill, if presented, will be passed.

In considering whether there should be a new Preamble, and if so what it should contain, one should not overlook the fact that the nature and functions of a preamble are well understood for legal purposes. The Privy Council has described a preamble as "an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow".[2] Quick and Garran, in their early and authoritative commentary on the Constitution, said:

"The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited before the enactments contained in an Act of Parliament are to be understood. A preamble may be used for other purposes: to limit the scope of certain expressions or to explain facts or introduce definitions".[3]

Modern statutes usually do not contain a preamble; when one is used, its purpose is to show the reasons for passing the Act, and to explain matters which may enable the enactments in the statute to be better understood.[4] The majority of delegates at the Constitutional Convention acted on the view that the preamble to a Constitution may have a more extensive operation, namely that it may set out the beliefs and values which are accepted by the people in adopting the Constitution. It was accordingly resolved that the Constitution should have a Preamble which should begin with the words, "We the people of Australia", and should refer to the following: Almighty God; the origins of the Constitution; the evolution of the Commonwealth into an independent democratic and sovereign nation under the Crown; the federal system, representative democracy and responsible government; the rule of law; the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders; Australia's cultural diversity; respect for the unique land and

environment; the agreement of Australians to reconstitute their system of government as a republic, and a reference to ongoing consideration of constitutional change. It was resolved that the Preamble should conclude with the statement that the people of Australia, "asserting our sovereignty, commit ourselves to this Constitution".

It was additionally resolved that the following further matters should be considered for inclusion in the Preamble: 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 wide view, that the preamble to a Constitution may have a symbolic effect, and should reflect what some delegates to the Convention apparently regarded as contemporary beliefs, values and aspirations, has been supported by reliance on the precedent said to be provided by the Constitution of the United States, and by other more modern Constitutions, including those of Ireland and South Africa.[5] Those preambles stated the purposes for which a new and independent nation was being created (as in the U.S. and Ireland) or an entirely new order of society was being brought into existence (as in South Africa). This, of course, is not the situation in Australia. We are, and have long been, an independent nation.

The proposed changes involved in the creation of a republic are said, by their proponents, to be minimal in effect. Indeed, it has been claimed by the present Attorney-General that the changes would not have significant consequences for the day to day workings of Parliament and Government,[6] and although one may doubt the correctness of this confident prediction, there is no reason to suppose that the changes would create a new order in society. The circumstances that may have made it appropriate to include a statement of beliefs and values in other Constitutions do not exist in Australia.

In any case, one may wonder why Australia should take as a model Constitutions which have not endured so long, or proved to be as successful, as ours. That last remark, of course, does not apply to the United States' Constitution, but that Constitution was considered closely by the framers of our Constitution in the 19th Century, and the Preamble which it contains was not followed by them as a precedent. In any case, the Preamble to the Constitution of the United States does not do more than state (eloquently) the purposes for which that Constitution was ordained and established. The Preamble suggested by the Convention would go much further than that.[7]

The Constitutional Convention recommended that the preamble to the *Commonwealth of Australia Constitution Act* should be kept. Apparently it was suggested in the course of discussion that the existing Preamble should be put in an attachment to the Constitution,[8] and also that the new Preamble should be built on the old.[9] Suggestions of this kind ignore the fact that the existing preamble forms part of an Act of the Parliament of the United Kingdom passed in 1900; it would be absurd to amend that preamble by an Australian law passed in 1999. I need not digress to discuss whether it would be possible to amend that statute by a referendum carried only in a majority of States, since what is now proposed is to insert a new Preamble in the Constitution itself, after the title.

The new Preamble was intended by the Convention to be an introduction to the Constitution when it was amended to convert Australia to a republic. The Government has since decided that the Australian people should have an opportunity to adopt a Preamble, irrespective of whether or not Australia becomes a republic.[10] If the referendum to make the changes necessary to bring about a republic fails, it would seem incongruous to enact a new Preamble to explain or introduce, retrospectively, a long established Constitution.

It was argued by supporters of the Australian Republican Movement that the proposed law to insert a Preamble should be considered separately from the other proposals for constitutional change. They appear to have thought that consideration of the Preamble might distract attention from, or weaken support for, the republican case. A Preamble cannot exist in isolation; if a new preamble is to be considered at all, it should be considered in relation to the provisions of the constitutional amendments which it is intended to introduce. It is difficult to find any justification for having a new Preamble if the referendum to convert Australia to a republic should fail. On the other hand, if that referendum should, unfortunately, succeed, there would be no point in inserting a Preamble of the kind now proposed by the Government, since it makes no mention of a republic.

The Constitution does not, in its present form, and would not if amended in accordance with the recommendations of the Convention, refer to a number of the matters which the Convention recommended that the Preamble should contain. In particular, there is nothing in the existing Constitution, and would be nothing in the amended Constitution, to refer to the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders or to the continuing rights of those people; or to Australia's cultural diversity; or to respect for the unique land and environment; or to the recognition of gender equality. Reference to these matters in a Preamble would not explain or introduce anything in the Constitution. They would be irrelevant to the provisions of the Constitution and out of place in it.

There are reasons, besides those of form and style, why a preamble should not include a statement of values or beliefs not reflected in the existing words of the Constitution. In the absence of a provision prohibiting the use of the Preamble in the interpretation of the Constitution, it would be permissible to refer to the Preamble to resolve an ambiguity or uncertainty in the enacting words of the Constitution; and in deciding whether those words are ambiguous or uncertain, the Preamble forms part of the context to which the Court must have regard.[11]

It should be obvious to anyone familiar with the course of constitutional development in Australia that the High Court might use a preamble of the kind suggested by the Convention as the basis for an interpretation leading to extensive constitutional change, unless effectively prohibited from doing so, and it appears that at one stage of the Convention some delegates hoped that the Preamble might in effect introduce a Bill of Rights into the Constitution by a back door.[12] Some delegates may still cling to those hopes. However, as I have already mentioned, the Convention resolved to exclude the use of the Preamble for the purposes of the interpretation of the Constitution. The Exposure Draft of the *Constitutional Alteration (Preamble) 1999* goes a little further; section 125(A), if inserted in the Constitution, would provide:

"The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth".

It is obvious that a provision of this kind would detract from any symbolic force that the Preamble might otherwise have had. Those hoping to find comfort in the Preamble would be entitled to regard it as no more than empty words – as the Romans would have scornfully said, *vox et praeterea nihil*. That is not to deny the practical value of the section; however, the protection which it is designed to afford may be to some extent illusory.

The Courts have held that a preamble may have wider effects than as an aid to

interpretation. A reference in a preamble to a matter will make evidence of that matter admissible.[13] Recitals in a preamble are *prima facie* evidence of the facts recited.[14] It would be arguable that these rules were not excluded by a provision that the Preamble has no legal force.

For example, it might be held that there is a presumption of fact that the recitals are *prima facie* correct, because, as was said more than 300 years ago, it cannot be thought that a statute made by the authority of the whole realm will recite a thing against the truth.[15] One can only conjecture, for example, what effect might be given in legal proceedings to the presumption that Aboriginal peoples were the original occupiers and custodians of Australia, since these words import that the Aboriginal peoples had possession of the land of Australia and the power to direct what should be done with it.[16]

Quite apart from these matters, however, a Preamble, even if devoid of legal force, could significantly affect ministers and other executive officers in the exercise of their discretionary powers. The decision in *Minister for Immigration and Ethnic Affairs v. Teoh*[17] seems to provide authority for holding that there would be a legitimate expectation that a decision maker would act in conformity with the statements in the Preamble, whenever they were relevant to the decision proposed to be made. If a minister or other officer proposed to make a decision inconsistent with that legitimate expectation, procedural fairness would require him or her to give the person affected notice and an adequate opportunity to present a case against the making of such a decision. A decision which was made without allowing procedural fairness to the person affected could be set aside. The fact that the Preamble had no legal force would not matter: to use some words from *Teoh's Case*,[18] the Preamble could not be dismissed as a "merely platitudinous or ineffectual act".

In addition, there can be no doubt that reliance could be placed on the words of the Preamble by interested groups seeking, for example, to establish Aboriginal rights, or to seek privileges for an ethnic group, or to prevent mining or development which it is claimed may damage the environment. The Preamble could form the basis of claims for compensation or of arguments for political change. And can no one doubt that those organs of the United Nations which our governments have unwisely allowed[19] to intrude into our affairs, in derogation of our national sovereignty, would be entitled to regard the preamble as stating values which Australia was obliged to respect and observe?

For all these reasons, if there is to be a Preamble, it should be narrowly and circumspectly drawn. It would seem appropriate enough, and not unsafe, to mention the origins of the Constitution; the evolution of the Commonwealth into an independent democratic and sovereign nation under the Crown; the federal system, representative democracy and responsible government; the rule of law and (if the referendum for a Republic is passed) the agreement of Australians to reconstitute the system of government as a Republic. It would, in my opinion, be inappropriate and unsafe to include a statement of beliefs, values and aspirations. Even something so apparently unobjectionable as an affirmation of the equality of all people before the law would have its dangers, since it might lead to confusing results similar to those caused by the provision in the American Bill of Rights which guarantees to Americans the equal protection of the laws.

Let it be assumed that all that I have said so far is rejected, and that it is decided that there should be a Preamble which sets out the beliefs, values or aspirations which the Australian people accept, or promote. It must then surely be agreed that only those things should be said which would meet with the general approval of the Australian community. Clearly, a

statement affirming the original occupancy and custodianship of Australia by Aboriginal peoples would not meet this test. Certainly it might be agreed that, so far as is known, the Aboriginal peoples were the original inhabitants of Australia, but most Australians would have only a vague and imprecise notion of the nature of the relation of the indigenous peoples to the land. Whether that relationship could be described as occupancy and custodianship is a question which would provoke controversy. To include a statement of that kind would cause acrimony rather than advance reconciliation.

The suggested reference to Almighty God raises delicate questions; the devout might press for its inclusion, but that would not be acceptable to all Australians, many of whom profess religions in which that expression would not be appropriate, and some of whom profess no religion at all. Delegates at the Convention justified the inclusion of the reference by attributing to the word "God" a wide and imprecise meaning. The reference to God was one of the few matters in the preamble to the *Commonwealth of Australia Constitution Act* that excited discussion in the Constitutional Conventions of the 19th Century, and the fact that the reference was to be made influenced the framers of the Constitution in inserting s.116, which protects religious freedom.[20]

Other matters suggested by the 1998 Convention which may lead to disagreement are the references to cultural diversity and to respect for the environment. Even if one presumes to think that all right minded citizens should agree on such matters, it by no means follows that the Preamble should mention them, if in fact they are sources of contention.

I would suggest that if beliefs, values or aspirations are to be mentioned in the Preamble, they should not only be generally acceptable today, but also should be likely to be generally acceptable during the whole life of the Constitution. The present Constitution has endured for nearly one hundred years, and during that time there have been vast changes in popular sentiment. To take, as examples, matters which the 1998 Convention suggested should be considered for inclusion in the Preamble, few Australians in 1901, when the Constitution was enacted, would have subscribed to a belief in gender equality or to the continuing rights of Aboriginal people. It would be unwise to incorporate in a Preamble ideas which may be in favour today, but out of favour tomorrow, thus attempting to force future generations to accept notions current at present.

The Preamble in the schedule to the Exposure Draft of the Bill[21] has been criticised for reasons of style. There is little advantage to be gained by debating questions of that kind. The substantive issue that is seized upon for political purposes is whether a Preamble should contain a reference to the original occupancy and custodianship of the Aboriginal people. I have already indicated why I consider that it would be unwise to include that expression. Indeed, it would seem futile to seek for any other word or compendious expression that would accurately describe, in a way generally acceptable, the relationship of the indigenous peoples to the land. In any case, there is no logical reason for mentioning in a Preamble that matter, which has no bearing whatever on constitutional development in Australia.

If a Bill for a Preamble is presented, and is placed before the electors at a referendum, the following questions would arise:

1. Is there a need for any Preamble if the referendum for a republic fails?
2. If the referendum for a republic succeeds, should a Preamble contain anything more than a brief account of the development from a constitutional monarchy to a republic?
3. If either of these questions is answered Yes, should a preamble incorporate any expression

of opinions or values, however firmly held by those who may claim to be an élite, unless it is certain that those opinions and values are generally accepted by Australian society as a whole, and are likely to continue to command general acceptance?

My own answer to all three questions would be "No".

Endnotes:

1. See *University of New South Wales Law Journal* Forum at p.7 (Professor Winterton) and p.11 (Professor Saunders).
2. *Olivier v. Buttigieg* [1967] 1 AC 115, 128.
3. Quick and Garran: *Annotated Constitution of the Australian Commonwealth* (1901) at p.284.
4. Craies, *Statute Law*, 7th ed. (1971), at pp.199-203; Pearce, *Statutory Interpretation in Australia*, 2nd ed. (1981) par.11; Bennion, *Statutory Interpretation*, 2nd ed. (1992) at p.499.
5. See *University of New South Wales Law Journal* Forum, at pp.25, 27 (note 1) and Constitutional Centenary Found-ation, *Quest for a Preamble,* in *Round Table* (No 2, 1998) at p.3.
6. See video address to Local Constitutional Conventions Forum, 29 April, 1999, by the Attorney-General (Hon Daryl Williams, AM, QC), paras.18-20.
7. The original draft of the preamble to the United States' Constitution read:

   > "We the people of the states of (13 named States) do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity".

   This was thought to be unsatisfactory since not all of the named States might ratify the Constitution. The delegates accordingly appointed a Committee on Style and Arrangement, which submitted a new preamble which was accepted without dissent. It reads:

   > "We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to Ourselves and our Posterity, do ordain and establish this Constitution for the United States of America".
8. See Constitutional Centenary Foundation, *What Kind of Republic?,* under heading "Issues to be Considered".
9. See *University of New South Wales Law Journal* Forum at p.25.
10. Explanatory Statement to Exposure Draft of *Constitutional Alteration (Preamble) 1999*, para.1.5.
11. *AG v. Prince Ernest Augustus of Hanover* (1957) AC 436, 461; *Wacondo v. the Commonwealth* (1981) 148 CLR 1, 23.
12. See *University of New South Wales Law Journal* Forum at p.19 (Professor Craven).
13. *Deputy Federal Commissioner of Taxation (NSW) v. WR Moran Pty Ltd* (1939) 61 CLR 735, 754, 767, 796.
14. *Dawson v. the Commonwealth* (1946) 73 CLR 157, 175; *Australian Communist Party v. the Commonwealth* (1951) 83 CLR 1, 224, 263-4; Craies, *op.cit.,* at p.199; Bennion, *op.cit.,* at p.500.
15. *Co. Litt.,* 19b.

16. See *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256.

17. (1995) 183 CLR 273.

18. *Ibid.*, at 291.

19. For example, by the Optional Protocol to the *International Covenant on Civil and Political Rights.*

20. *Official Record of the Debates of the Australasian Federal Convention* (1986 reprint), Volume III, pp. 1184-9; Volume IV, pp. 1732-1741, 1769-1779.

21. The Preamble in the Schedule to the Exposure Draft of the Bill is as follows:

> "With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.
>
> The Australian nation is woven together of people from many ancestries and arrivals. Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.
>
> Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.
>
> In every generation immigrants have brought great enrichment to our nation's life.
>
> Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship.
>
> Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.
>
> In this spirit we, the Australian people, commit ourselves to this Constitution."

A Bill of Rights: The Ultimate in Participation, or an Immature Stage in our Development?

Hon Gary Johns

> *"A bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government should refuse to rest on inference".* **(**Thomas Jefferson, December, 1787 – as the First Fleet was sailing along the east coast of Australia).
>
> Has Australia missed the boat on a Bill of Rights as the vehicle to achieve a just society? Yes and no. Yes, inasmuch as it seems a little late, that particular device has been rendered obsolete; and No, for precisely the same reasons. Australia has so many instruments, institutions and customs, which secure an array of rights, beyond the wildest dreams of Thomas Jefferson, that it hardly needs a Bill of Rights. More importantly, the argument that the ultimate mechanism in ensuring citizen participation in society is to arm every citizen with rights displays a naiveté about the needs of the political system.
>
> The "rights" strategy is part of a broader rights culture that has high expectations of individualised justice. It views the citizen as the holder of rights. It places great weight on one mechanism, the law, to achieve the objective. Further, it suggests some form of final settlement of the question of the well-being of citizens. In short, what looks like a remnant of an earlier constitutional project, the Bill of Rights debate, is in fact the vanguard of a broader citizenship strategy.
>
> As an advocate of rights recently acknowledged:
>
> "[t]he idea of a *rights-based* society represents an immature stage in the development of a free and just society … a society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing about individual duty – nothing about *virtue* … accordingly rights must be put in their proper place. I think it is to be done by choosing to regard them as a legal, not a moral construct".[1]
>
> But if rights are merely a legal construct, it is conceivable that such a society is asking too much of the law. The law should enforce old majorities, consensus decisions built over time. Its strength lies in the stability of its rule making, its authority is derived from making the law apply consistently. The more the law is used to seek justice, the more it will become a political tool to be consumed and wielded. The rights strategy may suit an electorate used to gaining its own way, and where the law acts to restrain excess, all is well. Where the law encourages excess all is not well. The discussion of an Australian Bill of Rights needs to be couched in a wider analysis of the rights culture and its use of the law. This is the purpose of this paper.

Australia's Bills of Rights: a game for more than one player

Australia has Bills of Rights in the form of the common law, the Constitution both expressly and implied, Commonwealth and State statutes, and international instruments to which Australia is a signatory. Principally these are:

1. A fundamental principle of the common law tradition, the right to due process: "there are no circumstances in which a man may be denied impartial justice".[2]

2. Expressly in the Constitution: s.80, the right to trial by jury; s.116, religious freedom; s.117, prevents discrimination on account of State residence; s.92, free trade between the

States; s.51 (xxxi), Commonwealth may only acquire property on "just terms".
3. Implied in the Constitution, freedom of political communication, procedural fairness in the exercise of judicial power.[3]
4. Commonwealth anti-discrimination statutes.[4]
5. Various international treaties which the Commonwealth accesses through s.51(xxix), the "external affairs" power.[5]

The criticism of this state of affairs is that an as yet unspecified though presumed ultimate list of rights is not guaranteed, meaning, is not beyond the reach of Parliament. The solution to these failures is to have a consolidated list of rights guaranteed by constitutional means. Whereas at present the courts have no express power to review primary legislation, a Bill of Rights would allow all legislation to be reviewed against a broad menu. The more democratic proponents[6] foresee an intermediate step of statutory rights, on the grounds that, under an entrenched set of rights, unelected judges would be given too much power, and for fear that a Bill of Rights ethos "quashes any sustained discussion of the common good".[7] A non-entrenched set of rights has the appeal of maintaining democratic primacy and the sovereignty of the Parliament within constitutional bounds.

The undemocratic architecture of the judiciary is only the first level of concern with the use of the rights approach. A responsible forum like the Parliament, which is unwilling or unable to constrain a non-responsible forum like the courts, which has become populist by inclination, say through implied rights, is a danger. An unconstrained judiciary invites new and more customers, it beckons the triumph of the little citizen against government and companies. A court, which constrains populism in favour of the public good, has a worthy rationale; a populist court has no such rationale.

Unfortunately, the non-entrenched strategy may come unstuck. For example, in New Zealand the *Bill of Rights Act 1990* was enacted so as not to override other inconsistent legislation and not allow the judiciary any invalidating power. It was to be an ordinary statute to strengthen parliamentary scrutiny of proposed legislation. The Court of Appeal in *Baigent's Case*[8] took a different view and created *ad hoc* a previously unheard of remedy of public civil liability. Adopting a Bill of Rights as an ordinary statute appears to make no difference as to who has the final say on rights.

The rights strategy is not confined to the legal profession. A Parliament similarly infused with rights talk is as likely as are the judges to make the errors of the rights strategy. For example, a legislature which refers to vague standards, such as fair, unconscionable, just and equitable simply allows, indeed forces the judiciary to impose their own values. The legislature can as easily play the rights game too, by writing legislation which sounds attractive but leaves the decisions in other less accountable hands. However, "if the legislature enacts rules with precise meanings, it means that it is forced to declare what will be the result of its policies in their application to particular classes of case".[9] In other words, the use of rules or principles, which give direction to the courts, keeps the policy decisions in the hands of the legislature and out of the courts.

Keeping policy in the more responsible forum is only half the issue. Whether Parliaments legislate standards or rules, the fact is that "Parliaments attempt to legislate for every conceivable detail".[10] This, as much as rights litigation, is a cause of an increase in litigation. For example, the Commonwealth passed 221 Acts in 1973, and 204 in 1991. While the 221 Acts passed in 1973 covered 1,624 pages of the statute book, the 1991 Acts took up 4,880. In 1998 there were 106 Acts passed and the number of pages was 4,150.[11] A

consequence of the growth of legislation is a growth in the amount of litigation. For example, in 1977, 322 cases were filed in the General Division of the Federal Court. By 1997-98 the number had risen to 2,665.[12] In 1977, 48 civil special leave applications were filed in the High Court. By 1997-98 this figure had risen to 245. Special leave applications in criminal cases rose from 66 in 1992 to 113 in 1997-98.[13]

Changing the forum does not foreclose the difficulties of the rights agenda. Whether the legislature or the legal profession holds the honours for an increase in litigation is also immaterial. Clearly the law-making climate that seeks to satisfy all comers is an environment in which rights flourish. A Bill of Rights may fan the flames, but the fire is already lit, and all law-makers, not just the judges, have to be watchful.

What is wrong with rights?

The essential critique of the Bill of Rights rests not so much on democratic control, but on the weaknesses of rights as an instrument to satisfy an electorate's needs. Rights rely on the law to determine contested concepts. Rights are treated as if they are not time and place specific, as if they are ahistorical. The attempt to give rights precedence in public life assumes universality and a moral certainty, which is not sustainable. Finally, though not least important, is the practical record of the device, which appears to be disappointing.

An ahistorical strategy

In the absence of other constitutional devices and conventions, political institutions and culture, an Australian Bill of Rights may have been useful. As things stand, it does not recognise the enormously rich and stable array of instruments, devices and cultures that have grown over two hundred years of European settlement and the historical legacy of the common law.

A rights approach does not answer the question, who are to be the recipients of rights: individuals, including or excluding foetuses, corporations, animals, or the environment? For example, the US Bill of Rights may have been state of the art at its inception, but it was fully two centuries before women could vote at Federal elections! Clearly, the meaning of a right is time and place specific. Furthermore, the right having been won is unlikely to be undone, unless it offends a considerable proportion of the community, at which time the courts will be arraigned against the democracy. There is a sense in which some things must never be undone; that is, locked away from future generations. The difficulty is that such sentiment offends the right of future generations to decide their own future, which includes making their own mistakes.

A Bill of Rights mechanism may be justified in the absence of the institutions and processes which are taken for granted in Australia. For example, the Hong Kong Bill of Rights exists where there is no fully representative democratic system in place, or likely to develop with the resumption of rule by the People's Republic of China. The Bill may act as a surrogate[14] for democracy in these circumstances, though it is doubtful it will carry much weight under a non-democratic entity. The rights strategy depends ultimately on mechanisms of consent, which are at the heart of democratic practice. Consent depends on a view current among a large majority at a given time and place. Accepting rules from other times and other places may not suit.

Asks too much of the law

Does a rights/litigation culture imply the failure of other institutions? Rights will not provide "relief from the heavy burden of political choice and institutional responsibility"[15] that our political democracy has been designed to facilitate. Rights and their use of the legal

forum does not of itself provide solutions to political or contested issues:

"The ideology of litigation … has something spurious to offer every political viewpoint. For radicals it offers an unending pantomime of class struggle and social upheaval, exposing the ultimate antagonisms between workers and bosses, consumers and producers, husbands and wives in a perfect orgy of consciousness-raising and grievance. For democrats it promises to impose the social norms of common-man juries and bring private concentration of private wealth and power to heel. For conservatives it claims to mold anti-social defendants into law-abiding citizens through the forms of a cherished tradition of legal order. For boosters of economic prosperity it vows to correct inefficiencies in markets and bring ultra-advanced business techniques to the legal profession itself. For libertarians it purports to defend individual rights against the coercive impositions of the outside world".[16]

Our politics has already become highly 'judicialised", either by an increasing number of decisions being taken in the courts or by the use of legal method in the political arena. Law is coming to dominate public life, as well as political life, so the question needs to be asked of the dangers that lie in placing a heavy reliance on this mechanism to resolve individual and societal problems. The delivery of rights by the law runs the risk of having the law displace all other institutions, which mould the way we live together. As Jenkins argues, "the legal apparatus is being asked to do too much with too little support: because other institutions such as the family, the church, and the school, are not functioning as once they did to develop character and define conduct".[17]

To the question, what is the role of law in the enterprise of justice, Jenkins cautions:

"The conviction that men should enjoy certain goods and attain certain ends does not mean that through its institutions society either owes them to or can bestow them upon its members. The knowledge that organised efforts are required to achieve certain values does not entail that this effort devolves upon or is within the reach of law".[18]

The requirement of law to decide substantive political and moral questions displaces more fundamental aspects of the law. Rights cannot make safe an unsafe conviction, cannot unprejudice prejudiced juries or necessarily promote ethical behaviour among the legal profession. These elements, which are the strength of the legal method, have been sidelined. The emphasis on outcomes rather than process is more likely to diminish ethical behaviour. A win is equated to justice.

Relies on a moral certainty

Giving prominence to rights is to assume that any right is so fundamental as to be incontestable. Clearly, the right to life is contested, the right to vote is limited, the right to free speech is limited, the right to welfare is an insurance contract and may not be a right limited by obligation. Rights as they seek to achieve justice suffer from the difficulty that "justice stands as an empty and formless receptacle that must receive its shape and substance from elsewhere".[19] Human rights are nothing more than social goods, and as such cannot escape some crucial questions.[20]

What particular group of rights is to be recognised: procedural or substantive, individual or collective? The rights of due process are generally treated differently from substantive rights. "There are no circumstances in which a man may be denied impartial justice … most substantive rights, on the other hand, are defeasible in the public interest".[21] Others argue that substantive or material rights should be recognised in order to allow the citizen to participate in society:

"This goal may require, either imposing on the State an obligation to guarantee, or

conferring on individuals a right to … a minimum level of income, … measures which ensure that people's health needs are met, … the provision of adequate housing, and … the availability of a broad range of cultural, recreational and leisure facilities".[22]

These objectives however rely heavily on a view of citizenship based on the dominant value of equality of opportunity as it applies to shared resources. This is a highly contested base!

How is the scope and nature of each right to be determined? The *Australian Capital Television Case*,[23] where the High Court of Australia implied a right of freedom of communication in the Australian Constitution, has its political science critics.[24] Its legal critics are just as severe:

"Judicially created 'human rights' protected and benefited large media corporations. The latter, not humans, were the aggrieved litigants. Commonwealth legislation … enacted to provide individual electors time to think and reflect free from media interference, was held unconstitutional … Large, powerful and wealthy corporations were given constitutional rights and protections. Smaller, poorer and weaker individuals, who had gained legislative protection, were rendered constitutionally vulnerable".[25]

No more so than Sir Stephen Sedley who, a keen advocate of "a rights instrument … to address … the imbalances and appropriations of power which threaten the values … of democracy",[26] was scathing in his criticism of the decision. He stated:

"Because democracy demands a free flow of ideas, the court holds that to accord a hearing to ideas in proportion to the wealth of those who hold them is not only a democratic course but the only democratic course: and in doing so it assumes a symmetry which simply does not exist between freedom of speech and freedom of information".[27]

How is a clash of competing rights to be adjudicated? The US Supreme Court in *Roe v. Wade* (1973) was forced to find an implied *right to privacy* and balance the right to life protected by the US 14th Amendment in an abortion case. Its decision was essentially a mathematical compromise. In the first trimester the state could not interfere in the decision to abort. In the second trimester the state could regulate the abortion procedure. In the third trimester the state could forbid abortions. This is an admirable piece of work in many respects but has no greater claim to moral certainty than "balance".

Great victories

Does the record of achievement of Bills of Rights justify the considerable risks inherent in their application? Sir John Laws, commenting on the incorporation of the *European Convention on Human Rights* into British law, noted its historical context and its aspiration, "namely the protection of people against lawless and violent abuses of power by an overwhelming State".[28] He rated the magnitude of the task as follows:

"While the Gestapo and the death-camps are the Convention's backdrop, its stage is now often a battleground against much lesser devils, such as corporal punishment in schools".

Another writer, similarly in support of a Bill of Rights also noted the limitations of its application:

"The abiding impression of the first seven years of Bill of Rights jurisprudence [in New Zealand] is the utter domination of criminal cases".[29]

The same was held to be true of Canada. A less sympathetic view of the Canadian Charter was that it had "extended well beyond influencing criminal law and procedure. Quite bluntly, the judges are far more powerful, active and influential in making social policy decisions than ever they were before 1982".[30] Further, the New Zealand *Bill of Rights Act* has so many grounds of discrimination, nearly fifty in all, that it caused one wit to remark,

"discrimination for the connoisseur".[31]

What has been won by a Bill of Rights that has not been won by other means? The aspirations of Aboriginal people in Australia have had to be satisfied to this point without a Bill of Rights, in fact with a minimum of judicial intervention, with of course the notable exception of the High Court decision in *Mabo*. The achievements of Aboriginal people in their "recovery"[32] phase, particularly post-*Mabo/Wik* is notable. Aboriginal people have enhanced political structures; Land Councils and ATSIC, a differentiated economic base; Native Title and the Indigenous Land Corporation, a recognised cultural base; heritage legislation, a legal base; common law rights, anti-discrimination statutes, and a welfare base; innovative and considerable funding, for example, CDEP. Scrutiny of the enormous number of instruments and programs in place indicates a job largely done. With the continued support of the wider community, the recovery is now in the hands of the indigenous community.

These considerable achievements however do not appear to count in the face of the next phase of demands, which centre on Reconciliation. The Council for Aboriginal Reconciliation draft Document for Reconciliation[33] includes a national strategy to promote the recognition of Aboriginal and Torres Strait Islander rights. It holds that these rights "will be based on the principles that all Australians should share equal rights and responsibilities as citizens". However, it continues:

"The strategy will recognise the unique status of Aboriginal and Torres Strait Islander peoples as the original custodians of Australia, their continuing cultures and heritage, and their rights under the common law".

These aspirations are multi-dimensional, and presumably need to be read in the context of the considerable achievements of differentiation noted above. There are of course two problems: the community has to accept the entire package, that is all of those matters which are also listed in the strategies to advance reconciliation, namely a national strategy for economic independence, and to address disadvantage. These are clearly political aspirations. The entire community will make judgments as to whether Aboriginal people are indeed "a people"; whether they can be equal and special, not just equal and different; and indeed how long any of the measures for achieving a desired status should remain. To press them into a legal context is asking too much of a rights instrument. These claims are contestable, time and place specific, resource intensive, in other words clearly not rights that non-political forums can address.

A rights culture

The rights culture has many sources. It arises from the explicit promotion of rights as a political tool, from its utility as a basis for laying claim to the common property of the welfare state, and the development of certain concepts of the common law. Rights may have three quite different goals: to promote the individual interest against authority or organisation with power,[34] the desire to have justice tailored to every eventuality, and as part of a broader political strategy – a political strategy which sees the "I am my brother's keeper" of the welfare state, changed to "everyone else is my keeper". The ideas of justice held in common are being displaced by the promise of a personal gain.

Citizenship

A source of theoretical justification for the rights strategy is the citizenship theory of the welfare state. The core of that theory is community membership:

"It is the *source of the claims* we have against each other. From our membership in our

community flow the welfare rights we can assert and the *duties we owe* to contribute to the support of our fellows".[35]

This means that it is appropriate to treat all claims on society as if they were compensation claims. "If some individuals benefit from a *social process* which pushes others below the benchmark, *compensation* is owed".[36] In effect, all citizens have rights to receive what they need to respect their status as full members of society, irrespective of the reasons why they lack resources and opportunities.

The basis of such a claim on society's resources is at considerable variance with other common models of the welfare state. Earlier models were the "Christian duty" of state-provided charity of the Poor Laws in England, and the "economy of altruism" of social insurance in Bismark's Germany. More latterly has been the "enabling state", the USA version of equal opportunity. More radical has been the "citizenship" of Marshall and Beveridge, with social security for everyone, and redistributive socialism, or the egalitarian "reduction of relative poverty" state.[37] Each of these models represented a dominant rationale, namely equality, whether egalitarian, meritocratic or liberal, need, altruism, or insurance.

The further development of the Marshall/Beveridge citizenship model, relying more explicitly on rights, argues that those with resources have a strict obligation to make them available to those in need. Need is defined as those resources which guarantee status as a full member of society. As the citizen does not have a choice to join society, consent is not sought. It follows that "I have some claim to be compensated for the fact that the society in which I live is not one in which I can be independent".[38] The further claim that "allowing a citizen to be cut off from the community is more serious than a marginal limitation on personal disposable income" helps to explain the high expectation of recompense that exists in some quarters.

While duties exist alongside rights, for example there is a duty to maintain one's health and to seek gainful employment, the potential outcome of the citizenship theory is that "society becomes solely the bearer of duties, with no right to impose conditions on or to make demands of its members. Individuals become solely the holders of rights, with no duty to conform or contribute".[39] The basis of democracy, consent, is firmly shown the door.

Expectation of total justice

The desire for rights is driven by the citizen's expectation of what Friedman[40] calls "total justice". It has three elements. Expectations of fair treatment, "everywhere and in every circumstances". Expectations of recompense, "that someone will pay for any or all calamities that happen to a person". And expectations of due process, that "no organisation or institution of any size should be able to impair somebody's vital interests without granting certain procedural rights". Fair treatment, recompense and procedural rights are at the root of the drive for human rights. The drive for total justice is the objective, and the rights strategy is its vehicle. An alternative strategy needs to address the origins of these elements of total justice.

The expectation of total justice is well primed by various "bad habits" derived from the common law. Decisions in torts and in contract, and in schemes such as victim of crime compensation, contribute to the desire for total and individualised justice. A recent study of trends in the Australian legal system spoke of "an emerging litigious mindset … and a tendency to regard the legal system as a 'first port of call' when championing rights and accountabilities".[41]

In the opinion of (now) Chief Justice Gleeson,[42] there is a trend in law, both judge-made and statutory, towards a preference for individualised, discretionary solutions as against the principled application of general laws. This is largely a function of societal expectation, which looks to the law to provide redress for an increasing number, and an expanding scope of grievances, in a manner tailored to the justice of the particular case.

In criminal law, originally anyone who caused death, intentionally or accidentally, was guilty of murder. In time the intention of the accused became the focus of concern; for example, were there grounds on which the accused were less culpable for their actions? The concepts of diminished responsibility and of provocation became lines of defence against murder. The central concept is one of temporary loss of self-control. It assumes a sudden loss of self-control. The problem now is that it can be very difficult to draw the line between a response to a prolonged course of conduct which is a loss of self-control, and a response that involves a deliberate and premeditated desire for revenge, or for putting an end to a source of pain.

In the law of evidence, as a general rule, facts in dispute at a trial are to be proved by the sworn testimony of witnesses capable of giving direct evidence of such facts, and whose evidence may be tested in cross-examination. Assertions of fact made out of court were generally inadmissible, unless they were sufficiently reliable or necessity dictated. More recently, the hearsay rule might be applied more flexibly, and individual trial judges might be confronted with the task of making a discretionary decision, on a case-by-case basis, as to the reception or rejection of hearsay evidence. Certainty will be sacrificed to considerations of merit.

In the law of contract, people can seek relief from an "unjust" (unconscionable, harsh or oppressive) contract, based on the circumstances at the time of the making of the contract. These circumstances may include poverty or need of any kind, sickness, age, gender, infirmity, drunkenness, illiteracy or lack of education, or lack of assistance or explanation. The consequence is that claims that contracts are unjust are becoming almost routine. The trouble with using unconscionability as a panacea for adjusting any contract is that litigants may need reminding that people should honour their contracts, even when this involves hardship. Gleeson concluded:

"We can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract".[43]

In the law of negligence, the concept of reasonableness is of key importance, and the duty owed by one person to another is greatly dependent on the facts of the case. In the area of occupiers liability, for example, definition of various categories of relationship between occupier and entrant on land, with different standards of care, has given way to a general standard. The standard is dependent for its application upon the facts and circumstances of the individual case which, therefore, in the event of dispute, require individual consideration. It was the opinion of Lord Denning that "we have extended the law of negligence to an altogether excessive degree".[44]

In the related area of personal injury, and more radically, Atiyah asks, why should a right to sue someone who wrongfully does you an injury exist?[45] He noted that right ideology assumes that everyone must be answerable at law for his or her own actions, which is compensatory justice. Left ideology assumes the injured victim should be assisted, that the perpetrator, usually large corporations or public bodies, be punished, which is distributive justice.

The current system is not a system of personal responsibility, because those who are responsible are hardly ever called to account or required to pay the damages. It is actually a system of insurance, but those who benefit do not pay the premiums. It is a system of distributive justice. The reason for the increase in personal injury litigation is the availability of liability insurance. It was thought fair that the costs of the risks of injury should not be borne solely by those at risk, but that others should be made to share or bear the burden. Yet, tort actions are becoming more common and payouts more spectacular.

Traditional corporate (and public sector) liability has it that actions of a guilty employee are attributed to the employer. Beyond motor vehicle accidents, the guilty party rarely pays an insurance premium. The employer or insurer, who is not to blame, pays the damages; the wrongdoer, who is to blame, does not pay. It is taken for granted that an employer is vicariously liable without any fault on his/her part for the negligence of employees. The whole idea rests on the principle of "long pockets"!

The Longford Royal Commission, reporting on the causes of the explosion at the Esso gas plant in Gippsland on September 25, 1998, concluded that neither the operators nor supervisors were to blame, because they were ignorant of the dangers present at the time. The company was blamed for failing to ensure its staff was informed. The company failed to identify all hazards and specify procedures for rectifying them.[46] Why does this result not surprise? Without wishing to doubt the Commissioner's findings, is it conceivable that an entity other than a company or government or other such organisation will ever not be held liable for whatever event befalls people associated with it?

The analogy with the citizenship theory of the welfare state is strong, to say the least. Atiyah was right to question the need for the pretence of causation; the presence of insurable risk, and the presumption that the individual is part of the larger organisation whether the society or a company, is sufficient to create a claim. And the action is not based on compensation but on redistribution. The same may be observed of the rights argument. The moral basis of rights is doubtful, but a cause of action is sought against the state, which by means of citizenship must make good any claim.

One further example illustrates the point. Victims of crime have successfully invoked this "victim" status, and have built on a public sympathy for crimes' victims and a public antipathy to criminals. This has enabled this particular class of claimant to sue for criminal damages (personal injury), and where insufficient funds are available to seek statutory compensation. In this example, the notions of compensation and redistribution become entirely mixed. It raises the question, to what extent do we socialise our misfortune? Should the state act as final insurer in essentially private actions, and if in some cases why not in others?

The theoretical rationale for crime compensation is not strong. Injuries, where they prevent someone from working are covered by Social Security. This does leave out the non-workforce, with respect to compensation, though Medicare covers medical costs. Which leaves the question: why should the state provide compensation, that is, over and above income replacement and medical expenses?

Does the state have a duty to protect its citizens? This certainly involves the maintenance of law and order, but compensating for injuries is a much greater step. Governments do not accept that they are liable for the actions of criminals. The risk of injury is so remote that the losses cannot be insured, although tax could be raised to cover the insurance premiums of all citizens. This does not answer the question why this source of injury alone should be

singled out. Is the system really a "top-up" for a certain class of victim? That is, those who have a common law action available but no "deep pockets" to pay compensation.

These are examples of a preference for the subjectivisation of issues and disdain for predictability and formalism. However, there are important constraints of principle upon the law's capacity to provide a form of justice that responds to the peculiarities of every individual case. Some of these constraints are bound up with the concept of justice itself.

It is expected of judges that they will apply neutral and general principles to the resolution of individual disputes. They have no mandate to act as *ad hoc* legislators who, by decree, determine an appropriate outcome on a case-by-case basis.

"No judge has, and no judge aspires to political legitimacy. It is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case".[47]

Justice Gleeson may not be correct that no judge has aspired to political legitimacy, but his point about driving the law beyond its capacity to deliver justice is well made. The common law may well be adding its bad habits to the already high expectation of justice, an expectation which feeds the rights strategy.

Conclusion

The Bill of Rights argument is a surrogate for a broader rights and citizenship debate. The entrenchment or otherwise of rights is not determinant; the nature of the rights themselves is the issue, not the architecture. Procedural rights are universal, but substantive rights, especially those with resource implications, are not; these require political consent. In both private actions, and in the welfare state, obligation and contribution will have to be re-introduced as an antidote to the rights strategy, this time around free of the divisions of race and gender, and hopefully in a way not to re-ignite class struggle. The idea that everyone else is my keeper will have to be challenged directly. Law-makers, both judicial and legislative, will have to invoke rules rather than values. There is no theory of just legislation, only the agreement to processes of evaluation and negotiation, consensus and rebuttal. An intellectual process to be sure, but not one for all seasons or places or all time.

Liberals and socialists, or more accurately meritocrats and redistributionists, seem to be swapping sides. The socialists are happy to advance the cause of individual (and group) justice if there is a reward to be had, and if the device is effective in the cause of redistribution. And the liberals are wary of the free rein of individuals to pursue through the courts their view of justice. They worry that claims for compensation are in fact claims in disguise for redistribution, and represent a free bite at the collective cherry.

The rights strategy is an immature stage in the development of democracy, and is a corruption of the objects of participation. Its method to achieve the just society will fail.

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Civil Rights and Other Impediments to Democracy

Hon Justice Roderick Meagher

We hear much nowadays about "civil rights". To magnify their importance, they are often designated "fundamental". What, if anything, are they in law?

They are not immediately recognisable, as having defined features. In this, they do not resemble ordinary proprietary rights, like rights to possess, to enjoy the benefit of an easement over another's property, a right of support. They seem to be of a different quality from, say, a parent's right to inflict condign chastisement on his child. They have nothing to do with rights arising out of contract or tort. They seem to be unlinked to obligations or responsibilities. They mean whatever each proponent wants them to mean.

They include things like: the right to life, the right to death, or more accurately the brief life of the right to death in Darwin, the right to strike, the right to work, the right to demonstrate, the right to own one's own body, the right to subsidised tertiary education, the right to bear arms. Various political philosophers and institutions, and right-thinking persons like Kirby J, make lists of them. No two lists coincide.

In Jacques Maritain's list, for example, we find: "The right of the church and other religious families to the free exercise of their spiritual activity".[1] Nobody else's list has that. As times change, new civil rights get born: in the United Kingdom some are asserting "the right to a tobacco-free job", the "right to sunshine", and the "right to a sex-break".[2] As new "rights" appear, old "rights" disappear from the lists. "The right to property" was on everyone's list until 1966, when it vanished from the *International Covenant on Economic, Social and Cultural Rights.* Nowdays it is not even on Kirby J's list, despite his Honour's extensive holdings of real estate. However, the "rights" which allegedly exist are often said to be "inviolable" or "inalienable" while they exist.

The concept has even infected dress. Thus, apparently I can assert that I have a civil right to wear the clothes I am now wearing. A decade or two ago it became briefly fashionable in London for women to wear earrings made of shrivelled human foetuses. Mrs Thatcher, who did not know overmuch about philosophical concepts, but did have a clear idea of what she approved of, passed laws to make the practice illegal. Thereupon, there was formed a committee of concerned persons, who were for the most part harpies, and included Miss Margaret Drabble, which accused Mrs Thatcher of infringing their civil rights.

Professor AJM Milne says: "Human rights are universal *moral* rights",[3] (emphasis his). Mr John Kleinig asks the question:

"Nevertheless, the fact that human-rights talk has been cut free from its moorings in natural law vocabulary leads us to pose the serious question whether it is now a ship adrift on the sea of political rhetoric, at the mercy of this or that 'ideological wind' ".[4]

It is not difficult to agree with writers such as these who see civil (or human) rights as moral ideals or as political slogans, but are they legally meaningful concepts?

In the face of the advancing flood of assertions of civil rights it behoves us to ask ourselves what it all means. What is a "right"? When does a normal right become "civil" or "fundamental"? Those who are most vociferous in their assertion of rights at least imply, if they do not express, that it is something with which no law-making body, not even Parliament itself, may tamper, hence "inviolable" and "inalienable". Thus, the unspeakable

Drabble sought to assert that Mrs Thatcher was legally unable to pass a law to curtail or extinguish the sale of foetus-earrings.

But the first, and most remarkable, fact about a right in our system of law is that it can never be an absolute; it can never be the entitlement, come what may, to do something; it must always yield to the principle of Parliamentary Sovereignty. In this respect, rights can never be regarded as inviolable or inalienable. Thus, in a very real sense, a "right" is no more than an entitlement to do something which neither Parliament nor the common law has forbidden. I can only wear what clothes I am wearing because Parliament has chosen not to pass a Sumptuary Act preventing me. And a "civil right" is only such an entitlement with a flattering adjective: whilst a "fundamental right" is such an entitlement with an even more flattering adjective.

A supposed "right" may, and very often will, have a strong political or moral basis, or both. Yet other supposed rights, like the right asserted in the American Constitution to "the pursuit of happiness", have no meaning at all.

I should like to examine a little more closely two of these alleged rights: the so-called "right to strike", and the "civil rights" allegedly involved in the abortion debate.

First, the right to strike. That such a right exists at all used to be constantly asserted. Today, less so. It is a particularly interesting example of "civil rights" because, it seems to me, it could not possibly exist; indeed, its very assertion is a contradiction of the law. When an employee takes employment with an employer, he undertakes a contract. The terms of that contract can be ascertained by the normal rules of contract, together with any industrial awards which might be applicable; but that it is a contract can hardly be gainsaid. A contract to do what? Surely, a contract to work. A strike is a refusal to work. A refusal to work cannot be other than the commission of a breach of that contract. That has been held to be the position by the House of Lords, but it hardly needs strong authority to reach this conclusion.[5] There is a maverick decision in New South Wales of Macken J to the contrary;[6] and there may be some very exceptional cases where the withholding of labour may not amount to a breach of contract, e.g., when the work is illegal, or possibly highly dangerous for the employee. But I do not know of any lawyer, however progressive, who would deny that a strike necessarily involves a breach of contract.

That, of course, is not the end of it. It will usually involve a tort as well: for example, an incitement to commit a breach of contract, or a conspiracy, or intimidation. How, then, can one in any meaningful legal sense, have a "civil right" to commit a legal wrong? It would be more accurate if those who supported the concept adopted the language of one of their brethren, Mr K D Ewing, who described it as "what would be regarded on the streets as a basic human right",[7] thus adopting the language of politics rather than law. (There would be some streets, needless to say, whose pedestrians might be disposed to take a less indulgent view). Nor, I think, need it be stressed that the same would be true of lock-outs, although I have never heard anyone, on the streets or off them, advocate a civil right of lock-out.

Now, for the "rights" involved in abortion issues. The opponents of abortion are often given to the proposition that all abortions are an infringement of the "right to life", a civil right of fundamental importance. Whilst it is not difficult to see the moral strength of such a view, it is not one which commands any legal strength.

In the first place, so long as the common law maintains its traditional view that human life commences at birth, a mere embryo , or a mere foetus, can have no legal "right to life", nor any other right. This consideration is supported by the fact that at common law an abortion

was not murder, although it may have been a common law misdemeanour.

Those in the opposite camp assert equally indefensible positions: insofar as one can understand what they are saying, they are asserting a civil right to control their own bodies. Abortion has been a criminal offence for many decades, and a woman can no more as of right have an abortion outside the common law exceptions to the crime, than she can as of right commit any other crime. If it is any consolation for her, no person, male or female, has complete control of his body: it used to be a criminal offence to commit suicide, the ultimate act of control over one's body, and traces of that law still survive.[8] Indeed, if *R v. Brown*[9] be correct, none of us has even the right to commit a serious act of self-mutilation; if public policy prevents one from consenting to another mutilating one, must not the same public policy prevent one from doing it to oneself?

One remarkable feature of those who insist on the civil right to own their own bodies is that they seem largely to consist of a herd of bearded lesbians, for whom presumably the problem of an abortion will never arise. Another remarkable feature of the pro-abortion lobby is that they clothe their arguments in language of impenetrable obscurity. Consider, for examples, the following:

"On its most viable reading, the Australian law, in requiring women to defend themselves against foetuses, is requiring women to justify their choices by reference to an individualising rights based model. As such, the legal rulings to date have merely been, at best, attempts to favourably accommodate women within this (male) theoretical practice. But this is already to be prejudiced! And at worst, we are handed a decision, such as Newman J's in *Superclinics*, which effectively relegates a woman's autonomy, to freely determine the course of her own life, to the dictatorial whim of the medical profession".

These musings come from the pen of a Mr Christopher M Tricker.[10] They underline the ease with which post-modernistic feminist legal thought slides into incomprehensibility – and split infinitives.

"Civil rights", on this analysis, can have little or no meaning in ordinary law. However, there is one context in which it may be capable of legal significance, and that is in constitutional law. The factor which prevents civil rights being inviolable is parliamentary sovereignty: if parliament can amend or abolish a so-called "civil right", it can hardly masquerade as inviolable. But if it be enshrined in a Constitution, so that it can only be altered within certain stringent conditions, there is some point in calling it an inviolable "civil right". The Constitution of the United States, adopting a Bill of Rights, contains many examples, the Australian Constitution very few. One example in Australia is afforded by s.92 of the Constitution, which affords freedom to all acts of interstate trade, commerce and intercourse. That can be altered, but only by such referenda as are needed to alter the Constitution.

There are two major disadvantages in such constitutionally entrenched civil rights. First, they are productive of seemingly endless litigation. The Constitution of India, where litigation is taken seriously, bristles with constitutionally entrenched rights, and in 1971 the average waiting time for a case involving "civil rights" to be heard was 20 years. It is now probably worse still. This is excessive, even by the standards currently obtaining in New South Wales.

Secondly, civil rights are exquisitely difficult to define with any precision. The Constitution of the United States has an entrenched Bill of Rights, and if one takes any of those rights as an example one will see what I mean.

In *Braunfield v. Brown,*[11] it was held that the First Amendment did not permit an Orthodox Jewish merchant, who recognized Saturday as his Sabbath, to disregard the Sunday closing laws. In *United States v. Lee,*[12] it was held that to require involuntary Amish participation in the social security system did not violate the First Amendment. In *Wisconsin v. Yoder,*[13] it was held that a law requiring compulsory school attendance for Amish – which was in contravention of Amish beliefs – violated the First Amendment. As a distinguished ex-Judge said, speaking extra-curricularly:

"Such judicial work not only strikes me as ignoble. It also bogs the Court down in endless permutations of factual situations each requiring separate adjudication by reference to the assumed meaning of a slogan devoid of real content. I once took the trouble to peruse the U.S. law reports in search of a sample of rulings on the First Amendment guarantee of the right of free speech. The line between behaviour which may be prohibited by law without offending the guaranteed right on the one hand and behaviour which is immune from interference because the First Amendment protects it has been solemnly drawn as follows. The right of free speech protects utterances of a coarse nature but not speech likely to provoke fisticuffs. It protects the man who limited his picketing, no matter how offensive, to the footpath, but not if he takes one step onto private property. The possession of obscene materials in the home is protected but not the carriage of the same materials in a closed bag on a public aircraft. It is legitimate to insert advertisements for abortion services in the press, but the display of political advertisements on public transport is not protected and can be validly prohibited. You may wear the U.S. flag on the seat of your pants with impunity, but burning it can be made an offence".[14]

In Australia, there are to be found in the Constitution very few express, or necessarily implied, civil rights in this sense. One is the right which I have already mentioned to freedom of trade, commerce and intercourse between the States guaranteed by s.92. After nearly 100 years of federalism, nobody yet knows what this means. This is not because opportunities have not existed for the High Court to tell us. Nor is it because they have not tried to.

That is as far as things go, if one extends one's labours to the text of the Constitution. What has now happened is that the High Court has begun reading into the Constitution civil rights which are certainly not overtly mentioned there, nor which are necessarily implied there on any ordinary rules of construction, but which are "implied" because the current judges of the High Court regard them as indispensable democratic rights. In *Nationwide News v. Wills,*[15] and *Australian Capital Television Pty Limited v. Commonwealth,*[16] the High Court, in various ways, has discovered that the Constitution guaranteed "a right to freedom of communication on matters relevant to political discussion". In *Leeth v. Commonwealth,*[17] there has emerged a new right to equality of legislative and executive treatment, although the judges could not agree what it meant in *Deitrich v. R,*[18] an implied right to a "fair trial" (meaning several adjournments until one can secure counsel of one's choice). And in *Theophanous v. Herald & Weekly Times*[19] and *Stephens v. Western Australian Newspapers,*[20] the High Court has invented a right to be free from the laws of defamation. In these two cases the majority disregarded what McHugh J said:

"It is not legitimate to construe the Constitution by reference to political principles or theories that find no support in the text of the Constitution. A constitutional doctrine is unacceptable unless it is based on some premise or premises that is or are contained in the Constitution itself".

What the High Court has done is enact a new s.92A.

These cases seem to me difficult to defend. First, they defy all the known rules (connected with *The Moorcock*[21])for detecting implications in a document. Any person who read the Constitution and asked himself the traditional question: "Does it guarantee a right to freedom of communication?", would have some difficulty in answering, "Of course". Secondly, every newly-discovered implied right is *pro tanto* a derogation from the sovereignty of Parliament, which is not only the recognized source of legal power but also expressly recognized as such in the Constitution itself. Thirdly, and as a converse of the above, the new doctrines are undemocratic.

In the *Australian Capital Television Case*[22] the Court seemed to recognize some implication of free speech to the regular transmission of information, so that to curtail political advertising prior to an election would be a breach of the implication, but the point of view that last-minute political advertisements trivialise political debate, distort the truth and misinform the electorate was barely considered. So we have an entrenched civil right to listen to rubbish. Whether such a point of view is valid is surely a question to be decided by an elected Parliament rather than by an unelected judiciary.

This point has been made by Sir Garfield Barwick, who said:

"It would be quite fair to say that those liberties which were spoken of earlier – freedom of speech, of association, of movement, etcetera – are far more secure under a Westminster system of parliamentary democracy than they are in the United States of America where they are in the hands of and subject to the vagaries of the judiciary. This until recently could also have been said of the position of those liberties in Australia. Our liberties could be protected by ourselves. But recent decisions of the High Court have implied a constitutional individual right of free speech and by doing so have reduced the sovereignty of the Parliament, withdrawn from the community its heretofore democratic control of its liberties and vested it in an unelected and unrepresentative judiciary. The Parliament cannot overturn such decisions even though in truth they may be unwarranted in law. It is exclusively a judicial function to construe the words of the Constitution. Like the entrenchment in the American Bill of Rights, this is an undemocratic step".[23]

One could go further, I think, than even Sir Garfield Barwick did. The basis asserted by the High Court for manufacturing novel civil rights is that they are necessary for the maintenance of a normal democratic society. That is what they assert. But do they really, the civil rights which I have listed, do they really help the average citizen? Do they help a democratic society? If you take the *Australian Capital Television Case,* for example, which said that there is a right of political discussion which can't be curtailed by the Parliament, who is going to be the beneficiary of that? It's not you or me. It is the press.

Likewise, if you look at the defamation cases, like the *Theophanous Case,*[24] which say that there is a freedom from the rules of defamation, who is going to be the beneficiary of that? Again, it is not you or me. It is the press. It is surely the position that the media moguls in Australia, as elsewhere, are sufficiently powerful not to need further protection by judges. They were said by Baldwin to be "the whores of society, who exercised power without responsibility". Why should the judges give them more power and less responsibility?

Although the Court has subsequently revisited *Theophanus* and *Stevens* in *Lange v. Australian Broadcasting Corporation*[25] and retreated from its hoisted petard of the constitutional defence, to put in its place the notion that qualified privilege extends to publication of matters to the world at large of or about public office and its officials, is,

would have thought, of cold comfort in a democracy. Further, to broaden the common law defence of qualified privilege, thereby extending a constitutional right to freedom of communication over defamation, can only afford greater protection to the press and her masters. Is this really a reasonable and appropriate exercise of judicial power?

Fourthly, it seems odd that the newly-discovered implied rights should have gone undetected for the almost 100 years during which the Constitution has existed without any observer having suspected their existence; suspiciously odd.

Fifthly, the new doctrine has an irrational basis. The framers of the Constitution had before them various formulations of the rights of man. They knew that a Bill of Rights was incorporated into the Constitution of the United States. They decided they did not want to follow that path. They opted for the alternative, government by an elected Parliament. By what means can one re-imply that which has been consciously rejected? As Mason CJ said in the *Australian Capital Television Case*:

"It is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted".[26]

Exactly. His younger colleagues have, however, achieved the impossible.

Sixthly, the new implications are unpredictable. How does one know what will be next conjured up out of the constitutional void? Will it be a civil right to social security payments? Or a right to the pursuit of happiness? And, in the peculiar reasoning involved, is one to disregard the values which the framers actually had while concentrating on those which modern "progressive" judges wished they had? Our founding fathers were monarchist to a man; theists as well; and they certainly thought the States of greater importance than the Commonwealth. Are these facts to be considered in formulating newly-emerging civil rights? If not, why not? And if so, how?

Finally, the process of discovering the new rights is idiosyncratic. It seems to go something like this: a judge says to himself that the right in question is essential to the ideal working of a representative democratic state, therefore the founding fathers must have been of a like mind, therefore (whether they wanted to or not) they injected it (all unseen) into the Constitution. Really!

We are thus moving to the position where we have more "civil rights" than countries which have an express Bill of Rights, and where the only legal content of a "civil right" depends on the imagination of the High Court.

"Civil rights" do not exist, except to the extent that they are manufactured out of thin air by the High Court, which acts like a sort of legal Doctor Coppelius, fashioning delicate and novel toys – and, one hopes, ephemeral toys at that.

Endnotes:

1. Maritain, J, *The Rights of Man: a Scheme* (1944), cited in Dowrick, FE (ed.), *Human Rights: Problems, Perspectives and Texts* (Durham, 1978), pp.148-9.
2. Kleinig, J, *Human Rights, Legal Rights and Social Change*, in Kamenka, E & Tay, AES (eds), *Human Rights* (Port Melbourne, 1978), p.40.
3. Milne, AJM, *The Idea of Human Rights: a Critical Inquiry*, in Dowrick, FE (ed.), *op. cit.*, p.24.

4. Kleinig, J, *op. cit*., p.38.
5. *Miles v. Wakefield MDC* [1987] 1 All ER 89 at p.97 *per* Templeman LJ.
6. *Re Federated Storemen and Packers Union of Australia, NSW Branch* (1987) 22 IR 198.
7. Ewing, KD, *The Right to Strike in Australia*, in *Australian Journal of Labour Law*, Volume 2 (1989), 18 at p.30.
8. See s.31C, *Crimes Act, 1900* (NSW).
9. [1993] 2 All ER 75, [1993] 2 WLR 556, [1994] AC 212.
10. (1995) 17 *Sydney Law Review*, 446 at 457.
11. (1961) 366 US 599.
12. (1982) 455 US 252.
13. (1972) 406 US 205.
14. Glass JA, and pseudonymously in Benjamin, S, *Discord Within the Bar and Sherman for the Plaintiff* (Sydney, 1981), pp.150-1.
15. (1992-3) 177 CLR 1.
16. (1992-3) 177 CLR 106.
17. (1992) 174 CLR 455.
18. (1992) 109 ALR 385.
19. (1994) 124 ALR 1.
20. (1994) 124 ALR 80.
21. (1889) 14 PD 64, [1886-90] All ER Rep 530.
22. (1992-3) 177 CLR 106.
23. Barwick, Sir Garfield, *Parliamentary Democracy in Australia*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), pp.13-14.
24. (1994) 124 ALR 1.
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26. (1992-3) 177 CLR 106 at 136.

Judicial Tidy-Up or Takeover? Centralism's Next Stage

Dr John Forbes

Judicial centralism in Australia is a phenomenon of the last twenty years. The courts are the last branch of government to be affected. Centralisation of other branches may be traced through the *Engineers' Case* of 1920 (the end of federalist presumptions), the Financial Agreement of the 1920s, the Uniform Tax Case of 1942, the explosion of the defence power during World War II, and the apotheosis of the external affairs power in the *Franklin Dam Case* of 1983. Since then, as Sir Harry Gibbs has remarked, the federalism we still enjoy exists not by legal guarantee, but by political expediency or inertia.

While legislative and executive centralism advanced, the Australian judiciary, for almost eighty years, was remarkably decentralised, as befits the branch of government that is properly concerned with the individual rather than Leviathan. The State courts, the oldest founded 175 years ago, administered Commonwealth and State law. The vast majority of actions ended in State appeal courts (if they went so far) and in criminal matters the High Court, in deference to local expertise, refrained from the incessant and often impractical tinkering which now makes trial judges' work more onerous, and their instructions to juries more bewildering.

Change began in the mid-1970s with the creation of the Family Court and the Federal Court of Australia. The former is an accident of history – a "permanent temporary" government structure thrown up when the Senate delayed the creation of the Federal Court. But not for long; Canberra's legal mandarins, keen to have their concerns before the Commonwealth's "own" judges, persuaded a new government to engage in "a little tidying-up operation". There are now one hundred federal judges, and their Stalin Baroque court houses occupy prime sites in several capital cities, accommodating not only "justices", but also a miscellany of federal tribunals and instruments of social engineering.

Let us consider how this concentration of judicial power came about in just two decades.

The Federal Court, unlike the Supreme Courts, is not inherently a court of general jurisdiction. But it is now directly fed by more than 100 items of federal legislation, and it has progressively picked the eyes out of the State courts' civil lists by means of a self-serving doctrine of "accrued jurisdiction". (The idea is that, so long as there is a plausible appeal to Commonwealth law, then all "related" claims can also be handled by the Federal Court.) This device enables that court to use one of its broad-brush powers to take over contract, tort and commercial law cases from the States – but not criminal cases, even when they are based on federal law. That exacting and unfashionable work is left to the States.

The Federal Court, if it so desired, could probably take over personal injury cases (a large slice of surviving State jurisdiction) by tacking them on to a claim that advertisements for the mangled motor cars breached the *Trade Practices Act*. Mile-wide clauses in that Act have absorbed even more State business since it was amended to cover "unconscionable conduct". Our laws are rapidly becoming vaguer and more dependent on the autocracy of judicial discretion. But discretion is a great work-maker, raising new hopes for a profession overcrowded by the output of ubiquitous law schools staffed by young non-tenured teachers, who dare not upset their salesmen-administrators by omitting to confer honours on half the graduating class and to pass any and every student "consumer". ("All shall run and all shall have prizes".)[1]

The Federal Court is no longer a triangle on a "trade practices" apex. When the Australian

Law Reform Commission sampled its cases last year, 22 per cent of them were immigration matters. (The plethora of immigration reports suggests that this is an under-estimate.) Other categories were trade practices (16.3 per cent – many with "accrued" common law matters attached), company law (12.2 per cent), administrative review apart from immigration (9.1 per cent) and intellectual property (8.4 per cent). No doubt the burgeoning native title department accounts for much of the remainder.

Immigration

The use and abuse of judicial review in relation to the *Migration Act* provides a feast of judicial politics in the Federal Court. It is difficult to escape the conclusion that some Federal Court judges fervently believe that they are the only true arbiters of illegal immigration and refugee status. A high standard of judicial arrogance was set by Justice Donald Graham Hill, a former death and stamp duties specialist, in *Moges Eshetu v. Minister for Immigration* (1997):

"So zealously does the Australian Parliament desire to implement its UN Treaty obligations to assist refugees, that it has enacted legislation specifically to ensure that it is acceptable for a decision on refugee status to be made by the Tribunal which not merely denies natural justice to an applicant but also is so unreasonable that no reasonable decision maker could ever make it".

At about the same time the Honourable Anthony Max North, a TV judge during the *Maritime Union v. Patricks* dispute, found actual bias in a refugee appeals tribunal. Most judges would have been content to find "apprehended bias", which meets an agenda of judicial intervention in a much less offensive way. With a slender sense of relevance, North proceeded to advertise his attendance at the political correctness sessions which began to be held for consenting judges in the Keating era:

"Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues".

In another case his Honour, with a fine sense of theatre, was about to order an international flight bearing deportees to make an immediate U-turn to Australia. He managed to resist the prospect of a headline when the Commonwealth promised to return them on the next flight.

Federal Court activism soared in the notorious *Teoh Case*, in which, unfortunately, the High Court was complicit. A convicted drug dealer faced deportation. The primary judge dismissed his application for review, but by the time of his appeal to a full Federal Court his lawyers had come across a United Nations manifesto on the Rights of the Child. Australia had no corresponding domestic law. Nevertheless it was held that Mr Teoh, who had never heard of the UN declaration until his lawyers belatedly discovered it, had a "legitimate expectation" that immigration officers would take it into account before deciding to deport him. The perceived basis of his "legitimate expectation" was just this: in some brief moments of leisure from his busy round of drug dealing Mr Teoh had fathered children in this country by the *de facto* wife of his deceased brother. Both sides of Parliament agreed that this judicial confection was "over the top".

It is amazing how a small group of judges can gaze into the Constitution, or a UN document – as witch doctors of old gazed into the entrails of a chicken – and find things there that are invisible to the rest of our tribe. We have the discovery of native title, implied rights and other divinations. Now the oracle has proclaimed – albeit not in unison – that England is a foreign power.

In immigration and other cases an expansion of Federal Court powers has been secured by ignoring the well-known limits of judicial review and effectively conducting appeals on the merits. Judicial review should be limited to the correction of legal errors, such as acting without authority or denying natural justice. It is not a licence to substitute a judge's opinion of the "right" result for the decision of the official authorised by law to make that decision. In this regard the High Court (even the Mason court) has taken Federal Court judges to task on several occasions, and it is safe to assume that quite a few similar cases have slipped through because of the cost and trouble of High Court appeals.

The Federal Court was overruled in the case of *Wu Shan* (1996), with a sharp reminder that judicial review is not a licence to second-guess the Minister. The High Court's strictures were not limited to the particular case. The Federal Court was bluntly told that it had developed a "false line of authority" by conducting *de facto* re-hearings thinly disguised as judicial review despite repeated directions not to do so. The Federal Court in *Wu Shan* included two gentlemen from Perth, Malcolm William Lee and Christopher John Seymour Metford Carr; each man has been creative in the native title area.

The multicultural interests of Justice Marcus Einfeld protruded when he and two other members of the court smiled on *Guo Wei Rong* (1997). While his colleague, Foster J, did not emerge unscathed, the High Court was especially critical of Einfeld's effort, which it described as "untenable", and improperly concerned with "purely factual" matters that were no business of the court. Even Justice Kirby could not forbear to say that "no course would be more likely to undermine the legitimacy ... of judicial review than a usurpation" of the functions of the other branches of government. Einfeld and Foster blotted their copybook again by granting Mr Guo a visa off their own bat, contrary to every principle of judicial review.

That is not the end of it. In December last year the High Court marked the Federal Court's homework in a case of *Thiyagarajah*, and the results were not impressive. The Federal Court had told the Refugee Tribunal to think again, simply because the alien's circumstances might have changed since its original decision to deport him. To the High Court this was a preposterous misuse of judicial review. Michael Kirby pointed out that, if the Federal Court had its way, the result would be "a circular process of endless litigation", while the appellants stayed in Australia, living and litigating at taxpayers' expense.

It is against this background that we should view the protests of the mild-mannered Minister for Immigration, Philip Ruddock. In November last year he said that some Federal Court judges were imposing their personal immigration policies on the country. "It's not too hard", he said, "to find one or two judges with a view of the world that is different from everyone else's". In December Mr Ruddock complained that some federal judges were on a "frolic" of their own to undermine immigration control, and were helping people wealthy enough to get here to frustrate the authorities in interminable court proceedings. Naturally, the Minister did not name the judges he had in mind, but *The Sydney Morning Herald* awarded guernseys to Justices Tony North and Raymond Finkelstein, who found that a large group of East Timorese asylum seekers were not Portuguese nationals. A ministerial award may have been intended for Hill, Einfeld, Carr and Lee as well.

On 15 July, 1999 the extremes of *Teoh* were matched by a 2-1 decision of the Federal Court in *Le Geng Jia v. Minister for Immigration*. Mr Jia, who gained entry to Australia on a student visa, was subsequently convicted of rape. The Minister ordered him to be deported as a person of bad character. Several stages of litigation followed at public expense.

Eventually two judges set the deportation order aside, on the ground that the Minister was guilty of bias in concluding that a person recently convicted of rape is not of good character. This is the merest pretence of using a technical ground of judicial review – "apprehended bias" – to second-guess the Minister. When the limited grounds of true judicial review are so distorted, there are few limits to judicial-political activities.

The Federal Court's own style of class action is nicely attuned to immigration by litigious exhaustion. Mr Ruddock instanced a case in which no fewer than 2,900 people were joined in an immigration action at $500 per head. He estimated that by 2001 taxpayers will be outlaying $20 million per annum for the privilege of supporting immigration lawyers and the pawns in their game.

The Federal Court as fount of Native Title

Aboriginal affairs have been a preoccupation of the Brennans since Brennan senior helped Woodward, QC to draft the *Aboriginal Land Rights (Northern Territory) Act*. Woodward was given that job after losing a speculative native title case in 1971. It was really a publicity stunt; as the law then stood the action had no chance of success, and significantly there was no appeal. Twenty-one years later *Mabo* arrived. Four years after that, in *Wik*, Brennan senior looked into the cupboard he had designed, shivered, and tried to close the door. But as he should have known, revolutions can be easy to start and very, very difficult to stop. The hope was that a place in history had been won by a relatively harmless transfer of vacant Crown lands, but now all Crown leaseholds were at risk. A new and wonderful legal industry was already established, heavily dependent on European ideas and resources, with highly-assimilated "leaders" as keen on a first-class flight to Canada, New York or Geneva as any other politician.

The *Native Title Act*, like the rest of us, has only the foggiest idea of what "native title" means, but it provides claimants (or their puppet-masters) with a superb tool for extracting "go away money". It gives a monopoly of *Native Title Act* actions to the Federal Court, despite the facts that: (a) virtually all the targeted land is State land; (b) land management is a State responsibility; and (c) land law is essentially a matter of State jurisdiction. A rich legal harvest is already evident, although many cases will end in "voluntary" settlements for reasons of financial or political expediency.

Subject to appeal (by which time findings of fact and credit are very hard to disturb), all it takes to establish rights over vast tracts of land, and perhaps natural resources of great value, is the opinion of one Federal Court judge that he accepts "oral history", orchestrated by anthropologists or a Land Council, as proof of native title.

We now have three substantive judgments relating to the mainland, as distinct from that Melanesian islet near New Guinea. (There have also been a number of expensive preliminary battles, including *Wik* itself, which established no native title but decided, by 4 votes to 3, that many Crown leases are not "real" leases after all.) The three substantive decisions are *Croker Island (Yarmirr v. Northern Territory)* (6 July, 1998), *Ward v. Western Australia* (24 November, 1998) and *Yorta Yorta v. Victoria and NSW* (18 December, 1998). The Aborigines won *Ward* and lost *Yorta*, while *Croker Island* is reminiscent of the Battle of Jutland in World War One; it took a long time and untold resources, and historians are still trying to decide the winner.

Croker Island

This case was heard by Howard William Olney J, sometime Perth magistrate, State parliamentarian, Supreme Court judge and (from 1988) a Federal Court judge and Northern

Territory land rights commissioner. He is a Deputy President of the National Native Title Tribunal.

The claimants, inhabitants of an island situated about 250 km north-east of Darwin, and sponsored by the Northern Land Council, claimed exclusive rights over some 2,000 sq kms of Australian waters and the seabed. "Sub-surface sacred dreaming tracks" were alleged. In a more secular vein an executive of the NLC confided to the press that the claimants wanted "a piece of the action" in the commercial fishing industry. The judge and his entourage camped on Croker Island to hear the Aboriginal witnesses; special arrangements for claimants abound in this type of litigation. After a long and costly inquiry, which produced no evidence of trading in the marine resources, let alone usage of minerals, the declaration of native title was limited to the protection of objects and places of "cultural significance" and a non-exclusive right to hunt and fish for non-commercial purposes. In cases of inconsistency the offshore rights are subject to State and federal laws.

There may be better times just around the corner. In March, 1997 there were 85 offshore claims pending in the Kimberley region, in South Australia, and in Queensland. By mid-1998 the number had risen to 120, including the simmering *Wik* claim.

***Ward v. Western Australia* (the Miriuwung-Gajerrong claim)**

Ward and other nominal plaintiffs asserted title to land and sea in the Kimberley region. The trial judge was Malcolm William Lee J. Four and a half years after the claim was filed he made sweeping orders in favour of the claimants over 7,900 sq kms, including Lake Argyle and the Ord River, parts of the Northern Territory's Keep River National Park, and Crown land near Kununurra. Parts of the land were listed by the State government as "exclusive possession" leases, immune from native title under last year's amendments to the *Native Title Act*.

Lee's orders gave the claimants exclusive rights to "make decisions about the use and enjoyment" of the area, to "use and enjoy [its] resources", to trade in them, and "to receive a proportion of resources taken by others", irrespective (it seems) of any efforts of their own. The orders coyly avoided any explicit reference to mining rights, but if the judgment survives appeal the word "resources" must surely include minerals. It will be interesting to read an articulate account of traditional prospecting and mining by Aborigines, onshore and offshore. Lee did not provide one.

Estimates of trial costs in *Ward*, directly or indirectly payable by the general public, range from three to ten million dollars. Obviously costs, delays and manpower diversions of this order must turn the minds of governments and even the largest companies to thoughts of "go away money" or "voluntary" settlements. How many native titles will be founded on proper judicial proof, and how many on fear of interminable proceedings with astronomical costs – win, lose or draw?

Apart from the question of title to minerals, the *Ward* judgment raises the crucial question whether a Canadian fashion – special treatment of "indigenous" evidence – will become part of the Federal Court's native title lore. In *Delgamuukw v. British Columbia* (1997) the Canadian Supreme Court summarily and superficially dismissed the painstaking work of two other courts, and with a little shudder of "concern", directed trial judges to treat evidence of native title "with a consciousness of the special nature of aboriginal claims", and to adopt a "unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples". This is easily decoded as a direction to suspend disbelief and to lower normal standards of proof for a special class of litigants, however

enormous their claims may be. Forget the academic metaphysics of native title law; the really vital issues are the manner and standard of proof.

In *Ward*, in an explicit reference to the Canadian wisdom, Lee stressed the "evidentiary difficulties" of native title claimants, and a need to give special treatment to their "oral histories". He proceeded to claim a right to supplement the evidence given in court with his own "historical knowledge and research". He did not consider what this meant for natural justice. Unfortunately, there is a precedent for such extraordinary behaviour in *Mabo*, although it defies fundamental principles of our judicial system. *Mabo* does not explicitly overrule the jurisprudence of due process, but it is hard to escape the conclusion that it does so implicitly.

In response to the Canadian fashion it should be said that the "evidentiary difficulties" of claimants are likely to be less severe than the difficulties of *defendants* trying to test the hearsay-upon-hearsay-upon-hearsay of claimants and their anthropological supporters. As it is, various special arrangements for taking claimants' evidence already have the Federal Court's blessing. They include special trips to remote areas (sometimes rewarded with ceremonial welcomes, as on Croker Island), "restricted" (secret) evidence, and bizarre procedures for "group evidence" and for excluding people of the "wrong" sex from hearings, in sedulous response to claims of "secret mens'/women's business". Surely these concessions are sufficiently "unique" and "sensitive" without a special low standard of proof?

On the contrary, some long-standing guidelines for assessing evidence should be emphasised: how easy is it to assert the claim, and how difficult is it to rebut? How significant is the self-interest of claimants and their witnesses, particularly if they are exposed to communal pressures (moral or physical) in isolated situations? What are the political or financial interests of professed experts who associate closely with the claimants, and whose essential subject-matter is Aboriginal affairs? How rigorous is their proclaimed science? And then there is the "Briginshaw test" – the larger and more unusual a claim, the higher the standard of proof should be.

Judges do not comment publicly on one another's judgments – unless they are Federal Court judges and the judgment involves native title. So soon as the *Ward* judgment appeared Robert French, first President of the Native Title Tribunal and a founder of the Aboriginal Legal Aid Service (WA), hailed Lee's decision as "further defining native title and clarifying where it could exist". A month later French declared that "rural groups" (but not their opponents, apparently) were "ferally intransigent" about native title, and that some State governments were more interested in acrimonious debate than in teaching the public about *Mabo*.

Ward is under appeal.

The *Yorta Yorta Case*

This was a claim for exclusive possession of about 2,000 sq kms of land straddling the Victoria-NSW border. The trial judge was Olney J, who heard the *Croker Island Case.*

It may not be widely known that, two weeks before the *Yorta* hearing began, Olney attended an anthropologists' symposium on native title at Sydney University. Another participant was Deborah Rose, who soon afterwards gave evidence in that case. Olney told the assembled anthropologists:

"The common law adversarial system of justice ... really throws back on those who are going to give the evidence, which really means the anthropologists, the experts, a very

heavy responsibility of convincing the particular court ... as to ... traditional customs. Some thought should be given to as to whether (sic) the Act needs some form of amendment *to facilitate the proof of traditional evidence*. ... My fear is that, left to the ordinary legal system, it will be very difficult indeed, except in the most obvious case such as *Mabo,* to get up a claim ... It may be that the anthropologists have got a job ahead of them in the political lobbying field". (Emphasis added)

The job of establishing the *Delgamuukw* doctrine in Australia, perchance? Anthropologist Gaynor MacDonald took the point: "The message here is (that) they need us white experts anyway, even before they put in their application". And then (in all innocence?): "Where do they get the money?". Ms Maher agreed that "the *creation* phase of the application is an absolutely vital one". But Dr Sutton, an experienced witness, warned: "[In contested cases] you are going to be asked, when was the first time you went out there with the Land Council?". (Anthropologists supporting native title claims, often full time employees of Aboriginal corporations, commonly live and work with claimants for long periods before a trial.)

Jim Fingleton tossed the ball back to the judge:

"Given the sensitivity of touching the Act at all for obvious reasons, do you think [that lowering the standard of proof] might be done by practice directions or something like that?"

Olney merely replied that the Chief Judge had asked him to draft practice rules for native title hearings.

Sutton suspected that judges would receive more scrutiny in native title cases than in Darwin's cosy Land Rights Commission. This cryptic statement of his seems to have been well understood by colleagues:

"We all saw how even the flexible Mr Justice Toohey was made to be inflexible in the case of the Alligator Rivers II, where the politics of it and the pressures were so great that this looseness of interpretation really went into the background".

But to Gillian Cowlishaw it was all perfectly simple:

"Of course it is Aborigines who know what native title is, and they alone".

The experts were then treated to insights into Northern Territory land rights hearings generally and Olney's contributions in particular. The following *obiter dicta* confirm earlier, well-informed advice to the writer that those hearings, which have resulted in transfers of about half the Territory to Aboriginal interests, were ponderous formalities:

"I think the tendency in the Northern Territory was for the Commissioner to be reasonably easily persuaded."

Then a touch of naiveté that leaves one wondering whether the speaker should be a sole arbiter of law and fact in ambitious native title cases:

" In my term as a Land Commissioner I never once required a witness to be sworn. My view was that they were there to tell the truth, and ... talking about such an important subject, you wouldn't expect them not to speak the truth. The moment you say to a witness ... if you don't speak the truth you might go to gaol – you are not going to get much co-operation from many Aboriginal witnesses I would think, because they'd rather not go to gaol and let you have the land back".

The Northern Territory Commission is the school in which several Federal Court judges, including John Toohey of the *Mabo* majority, were introduced to the mysteries of native title. Is there no possibility of distortion due to self-interest, group pressure or the influence

of non-Aboriginal oath-helpers or myth-makers? If not, why would the witnesses fear to take an oath? In *Yorta*, indeed, Olney found that two Aboriginal witnesses had lied, but far more important, the defendants in that case had the rare good fortune to come across strong documentary proof of extinguishment.

In a petition presented to the colonial Governor as long ago as 1881, ancestors of the Yortas admitted that their "old mode of life" had gone, and went on to demand a greater degree of assimilation to the European way of life. That was enough to dispose of the case, and surely the judge knew that in October, 1997 when, after 101 days and 195 witnesses, he tried to set aside the chalice of an unfashionable judgment by urging compromise. (Although, as it turned out, the merits were 100 per cent to nil. In "mediation" there is always something for everyone.)

When a decision could not be avoided, Olney grumbled about the great expense of the proceedings. It was indeed appalling, but Olney could have reduced it considerably by better case management – by taking the extinguishment issue first. The long-winded "traditional" and anthropological evidence would then have been unnecessary. Once extinguishment was proved, any prior native title would be of academic interest only. However, Arnold, Bloch, Liebler, the solicitors who employ Noel Pearson, should be content with the litigious saraband; it is reported that they have derived more than $3.5 million from the Yorta affair so far, and there is at least one appeal to look forward to.

Quite apart from the evidence of extinguishment, the claimants' case was not impressive:

"Notwithstanding the genuine efforts of members of the claimant group to revive [create?] the lost culture, native title rights and interests, once lost, are not capable of revival. ... Oven mounds, shell middens and scarred trees were described by a number of witnesses as sacred ... middens are nothing more than accumulations of the remains of shell fish frequently found on the banks of rivers ... many are protected by heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants ... nor that traditional law or custom required them to be preserved".

The *Delgamuukw* court would find this most "concerning", and local anthropologists were shocked. As for the claimants, after getting in some practice at a violent political demonstration while Olney was still deliberating, they branded his judgment "genocide". Friendly journalists opined that "native title claims in southern Australia have been dealt a massive blow".

The volume of the cries of genocide was probably amplified by this surprisingly robust comment of the judge:

" It is appropriate to observe that the special procedures that were previously ordained by s.82 [of the NTA] do not authorise the court to depart from two basic principles ... namely that the standard of proof is on the balance of probabilities and that the Court will have regard only to evidence which is relevant, probative and cogent. In particular, pure speculation, of which there has been much, must be disregarded. *Nor is there any warrant ... for the court to play the role of social engineer*, righting the wrongs of past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law". (Emphasis added)

However, all was not lost, because the Yorta Yorta were now prime contenders for "a slice of the federal government's $1.2 billion land acquisition fund".[2] They also had the consolation of knowing that taxpayers would meet the costs of a case that ran for four years, at a cost of several million dollars.

The native title business has some profitable subsidiaries. One of them provides developers with "cultural clearances". In January an ATSIC official admitted that anthropologists working in the bush with power or pipeline crews can earn up to $4,000 per week for their "culturally sensitive" absolutions. There is also money to be made by Aborigines for "sitting fees" at mediation sessions, or for identifying "areas of cultural significance". Last year it was reported that 70 Aborigines demanded $350-800 each to discuss "heritage issues" relating to a power line from Mt Isa to the Century zinc mine (for which enormous compensation had already been agreed). According to Century, some individuals received up to $100,000 for "consultancy services", and last year North Queensland Electricity Corporation spent nearly $1 million on "cultural clearances". Queensland's Labor government is planning changes to "heritage" legislation to curb what some of its officials describe as "a *de facto* compensation racket".[3]

Inevitably a less guilt-stricken and pliant Australia will one day decide that it must recover some of the native title domains decreed by the central judiciary, or ceded in "voluntary" settlements. What will then become of *Mabo* and all its elaborate superstructure?

Nicholson and the Magistrates

The Family Court was meant to be part of the Federal Court, but when Parliament did not deliver that benison in time another court was hastily assembled to celebrate Lionel Murphy's new rites of divorce. It has some very good judges who deserve better appointments, and case loads are certainly heavy, yet a separate Family Court provides high salaries, non-contributory pensions and chauffeured cars for more than a few mediocrities who would probably never have reached a State District Court, let alone a Supreme Court.

The Family Court gained an immediate monopoly of divorce, custody, property and maintenance litigation between married people. Later, by cession of State powers, it acquired custody jurisdiction over unmarried couples, and then the cross-vesting legislation gave it power to deal with property disputes between such people. The fact that most State judges were happy to be rid of these matters does not necessarily mean that the centralisation of the work (much of it formerly done by local magistrates) is on balance beneficial to the community.

The Commonwealth's judicial centralism began at the top. In the last 25 years it has created two bureaux described as superior courts[4] but no intermediate court or magistrates' court. Now, however, the federal Attorney-General plans a central magistracy and a *Federal Magistrates Bill* is before the Parliament. The new court, like its big sisters, will no doubt grow like Topsy. (In "Yes Minister" fashion there will have to be extra public servants to implement the economy measures.) Like State magistrates' courts, the new federal institution will be a convenient receptacle for any work that courts above find boring or beneath their dignity. The Federal Court will probably dump the bulk of its bankruptcy caseload on the magistrates. The beginnings will be modest, as with the Federal Court. Initially there will be sixteen federal magistrates, but the variety of their work, as outlined in the Bill, suggests there will soon be many more. It is proposed to give them subordinate jurisdiction in administrative law, bankruptcy, "human rights", trade practices and family law (including property matters up to $300,000).

This is not just an economy measure. Recent skirmishes between Attorney-General Williams and Justice Alistair Nicholson, head of the Family Court, suggest that in the short term the Commonwealth is less concerned to increase judicial centralism than to deconstruct Nicholson's empire. At last it has dawned on Canberra that a lot of Family

Court business used to be magistrates' work, and that it should be magistrates' work again – but now under Commonwealth control. This would not worry Nicholson if the new magistrates joined the army of judges, registrars, judicial registrars, counsellors and social workers under his control, but that is not what the Attorney intends. The magistrates will not be part of the Family Court.

To Nicholson this is anathema. He rejects out of hand any suggestion that his bureau is a "troubled institution", affected by "complaints of inefficiency and doubts about public confidence [and] overtaken by judicial formality and lacklustre administration", for which "the Nicholson recipe of more judges and more money is not viable".[5] He has publicly described his disagreements with Williams as "personal", and the latter's plan for a separate magistracy as a "recipe for trouble".[6] Williams, for his part, makes no secret of the fact that he does not want Nicholson to have "his own magistrates to boss about".

But to a degree Nicholson has pre-empted the Government. Several years ago, when the novelty of windfall judgeships began to wear off, and too much of the work became boring, it was progressively sloughed off to deputy registrars, registrars and more recently to semi-judges entitled "judicial registrars". Then a couple of months ago, after the Williams plan was announced, yet another grade of up-market registrars was invented, Nicholson explaining disingenuously that he "could not afford to wait" for the magistrates' court he hopes he will not see.

It is remarkable that the Family Court was able to create all these quasi-judicial positions by internal rules and delegations, without a need to amend the Act. The constitutional validity of such delegation was challenged in *Harris v. Caladine* (1991). On the authorities then available it seemed likely that the practice would be banned; the High Court usually draws a precious distinction between Commonwealth judicial power and "mere" executives. But not on this occasion; an unwillingness to touch the politically sensitive Family Court, or a reluctance to provoke further proliferation of its judges, may explain the difference.

State politicians have raised more objections to a federal magistracy than they ever made to the takeovers organised by and for the Federal Court. In January the NSW Attorney-General described the federal plan as an expensive waste of time, and the Law Society of NSW saw no good reason for adding an "extra layer" to the existing court system. However, these people said nothing while the Federal Court empire grew exponentially in the 1980s. The States, of course, have long-established networks of magistrates, and they were given some family law powers in 1975. In practice those powers have been whittled away by the Family Court and by lawyers who prefer a more prestigious venue, but the Commonwealth could easily reverse that trend without further centralisation.

Williams has also tried to shake one of the pillars of the Family Court edifice. Unlike other courts, the Family Court includes not only judges and administrative staff but also psychologists and social workers ("counsellors") who profess an ability to divine people's marital and parental qualities, in unfamiliar surroundings, and in a matter of hours. These functionaries also appear as witnesses in the court, and in custody cases their disfavour is usually the kiss of death. Daryl Williams believes – as do most lawyers who are not hostages to Family Court culture – that a court house is not the place to deliver marriage guidance, and that "in house" witnesses threaten the appearance if not the reality of justice.

There is a danger that weak, lazy or overworked judges will use experts to make their decisions for them, whereupon the witness effectively becomes the court. The risk is greater in the extraordinary situation where the experts as well as the judges are on the court staff.

Family Court litigants may call outside experts, but will they be seen as equals of the "house pets"? At least one Family Court judge, appointed with a minimum of court experience, and oblivious to the rules of natural justice, had a private chat with a "counsellor" during a trial, to the horror of the High Court. (A competent third year law student would have detected the error.) Another judge heard a case in which her current gentleman friend was professionally involved. According to Justice Peter Young, editor of the *Australian Law Journal*, there is a professional perception that if a Family Court judge does not accept the evidence of an in-house social worker, "there is a lowering of morale". Alas, that could result in a less pleasant work environment for the judge in question, if not a rebuke from three more correct colleagues sitting as a Full Court. The more clubbable and careerist followers of the Family Court have not given this question the attention that it deserves.

It was airily brushed aside until a senior judge of the court, Alwynne Richard Rowlands, entered the pages of the *NSW Law Society Journal.* "Given its umpiring role," he asked, "should the court employ and control these social science experts?" He doubted that "in house witnesses" are really consistent with the separation of powers. Worse still, Rowlands supported the idea of magistrates free from Family Court control and from the "formal, lengthy and costly ways of judges on superior courts".

Then a barrister of 25 years' experience, in a letter to *The Australian*, braved the penalties for political incorrectness:

"It is heartening to read the recommendation of one of the senior judges of the Family Court, that the primary function of the court be separated from its counselling services. He echoes my concern and that of many of my colleagues ... The non-confidential reporting function of the in-house counsellors has been a matter of concern to me in more than 20 years' legal practice. There is a very strong perception that the relationship between judge and counsellor is too close. Some in-house reporters are thought to be favourites of certain judges. One judge, now retired, committed the judicial indiscretion of consulting the in-house witness in the lunch hour and provoked a successful appeal".

Nicholson returned to the fray with the patronising statement that his brother Rowland's views were "neither new nor representative of even a significant minority of Family Court judges". But apparently there was *something* to worry about; in an elaborate public relations exercise, "consumer opinion" was sought. It was less flattering than the Chief Judge would have wished, but the tireless publicist was photographed in a suitably informal setting promising that in future his court would treat people "as individuals, not units to be processed in what some described as a sausage-machine like manner". Richard Ackland, Sydney's iconoclastic journalist-lawyer, remarked that:

"A softer, more caring Family Court is the idea that Nicholson is trying to get across ... [But there are] shocking relations between Nicholson and the federal government ... It would love a Family Court not headed by Alistair Nicholson".[7]

If one door closes perhaps another will open. Last month Linda Dessau, a recent Family Court appointment, claimed that it should have criminal jurisdiction over all juvenile offenders in Australia. And while her Chief Judge guarded his border marches against the Williams clan, Robert French, first President of the Native Title Tribunal, deplored the prospect of sharing its influence with the State organisations that may be set up under last year's amendments to the *Native Title Act*.

Judicial Tidy-Up or Takeover? Centralism's Next Stage (Continued)

Dr John Forbes

Class actions in the Federal Court

Centralisation has been assisted by procedural innovations. These have had the good effect of dragging the rules of some State courts into the modern era. But so far the States have prudently stopped short of adopting the open-ended class actions available in the Federal Court.

Until a few years ago class actions were seldom seen in Australian courts, because they could not be used in the area most attractive to the speculative lawyers who are now coalescing in "Plaintiff Lawyers Associations", namely actions for personal injuries and "consumer protection". But as disciples of America's Ralph Nader ascended into the firmament of legal fashion, the federal Law Reform Commission joined in. Eventually the Commission got its way, and the Federal Court's charter now offers Plaintiffs' Lawyers Associations a mouth-watering form of class action – the "opt out" system. You could call it the Slater and Gordon Amendment.

Some State courts have changed their rules to allow class actions for damages, but in the milder form of "opt-in" procedures, which make big class actions harder to organise. In South Australia the court's permission to begin is necessary, and it is not given until the class is precisely defined. In Victoria the written consent of every plaintiff must first be obtained.

"Opt out" rules are clearly better for entrepreneurial lawyers, and well calculated to siphon off State business to the Federal Court. One self-appointed (or lawyer-instigated) representative can sue on behalf of seven or more people who allegedly have claims arising out of similar or related circumstances. (Not necessarily the *same* circumstances – "similar" is wider, and "related" is wider still.) No permission or consent is needed to begin, and initially it is not necessary to specify the names or even the number of persons represented. Members of the class (if aware that they are in it) can sign papers to "opt out", but of course inertia is on the side of the promoters. It need not be shown that the action will resolve all the issues between the numerous plaintiffs and the defendant. If the lawyers are lucky there will be "second helpings" when the joint venture is completed. In the unlikely event of no win and no settlement, the plaintiffs could be liable for costs, but the court can reduce that disincentive by limiting in advance any costs that a successful defendant may recover. Ambulance-chasing lawyers are bad enough; litigation-seeking courts are worse.

The plea that class actions save court time and are a blessing for worthy little litigants is facile. Many of the claims would never be brought, or desired, without the class action device. Worthy little litigants who do wish to sue are quite well served by the less inflammatory "opt in" scheme, with less pressure from learned attorneys like Mr Nigel Pitt-Bull of Argy Bargy and Associates. As for alleged economies, many class actions become so complex and cumbersome that savings are problematic, to say the least. Still, whatever one thinks of the policy or ethics of class actions, they are certainly a great selling point for the Federal Court. It may need a little extra business while the cross-vesting confusion is sorted out.

"Melbourne Gas Disaster" was the first headline. "A Million Sue Esso for a Billion" was the next. Victoria's 1.2 million domestic consumers are part of the action unless they opt out. Messrs Slater & Gordon, Maurice Blackburn and Harry Nowicki & Co pegged out rich

deposits of legal ore for people who had never heard of those firms, and who may not all be grateful for their deep social concern. Esso complained that the solicitors were trying to corner the market in gaseous grievances; after all (it argued) the condign punishment of restrictive trade practices usually has high priority in the Federal Court. However, Merkel J is allowing Slaters and Blackburns to run in tandem. That is their reward for being off the mark within four days of the Longford explosion; poor Nowicki & Co left the blocks fully 24 hours later. So a huge unwieldy action has begun its stately progress, with excellent prospects of attracting much "go away money" (minus creative legal costs) in the coming by-and-by.

In February there was a volley of tummy rumbles after a school break-up dinner at a Brisbane hotel. Without the Federal Court's class action rules there would probably have been a slight rise in sales of Dexsal and possibly a few claims in the magistrates' court. But on receipt of papers from the Federal Court the hotel decided that "go away" money was the better part of valour. Even so, the organising lawyer complained to the waiting media that "a lot of judges still do not support the concept of class actions. There is no doubt they are beneficial to society".

The Federal Court's rules fertilise the already fecund field of applications for judicial review by immigrants with dubious legal tenure. Some of Mr Ruddock's complaints have already been noted. Last month he added that they "tout for cases in the ethnic press", particularly in "communities" with a high proportion of members hungry for valid visas.

In a recent issue of the *Australian Law Journal* Justice Peter Young observed that class actions enable lawyers to prosper by pursuing trivial grievances when most members of the class would never think of suing on their own. The position changed for the worse when the Federal Court's charter was "altered to accommodate [class actions], and to a degree to encourage them". The opt-out system has produced "a class of active solicitors and others who will promote class actions not just for the good of the consumers, but doubtless for the considerable fees involved".

Young sees an urgent need for supervision of class-action promoters and control of their fees. The popular line is that class actions are "with it" and provide the perfect answer to "rip-offs" by big business. But the very companies at which class action politics are aimed can turn the process to their own advantage:

"Under the 'opt out' system that applies in the Federal Court, they can cap their liability ... They settle, the plaintiffs' solicitors collect their fees and everyone is happy. However, great stress is placed on the person who has a claim because he or she needs to assess the position fairly quickly ... and decide whether to trust the promoters of the class action or mount their own proceedings".

In class actions, lubricated by a free-for-all in lawyers' advertising, the limits are being pushed by law firms with high financial incentives and low opportunity costs.

The cross-vesting imbroglio

In Brisbane last year I noted that cross-vesting legislation only became necessary when two new federal courts were created and rapidly expanded. I added that the constitutional validity of cross-vesting "is now in the balance after an equal division of opinion in the High Court this year". This was a reference to *Gould v. Brown*, in which the Brennan court divided 3-all.

Three weeks ago, in a collection of appeals that I shall simply call *Wakim*, the High Court, by a majority of 6 to 1, invalidated the cross-vesting arrangements – in so far as they confer

State jurisdiction on the Federal and Family Courts. While the Constitution has always allowed State courts to be given federal jurisdiction, it does not authorise traffic in the other direction. (The reason, I suspect, is that the authors of the Constitution neither expected nor intended federal tribunals to eclipse the Supreme Courts.)

Gaudron J went along with the *Wakim* majority after an elaborate complaint about submitting to "the will of men long since dead". The inexorable logic of her view does not seem to have occurred to her Honour. If the dead and their cultural legacy must be silenced forever, it follows that the only acceptable Constitution is one that is changeable at any time by a simple vote of Parliament (or a 4-3 division in the High Court). But if consistency still has any place in post-modern jurisprudence, what would Mary Gaudron and her fellow Bill of Rights enthusiasts say if *their* will could never be constitutionally "entrenched"?

Kirby J, alone in dissent, deplored the prospect of laws changing as High Court judges come and go. For what purpose, then, did the ailing Keating government, in the nick of Kirby's and its own time, place him on the High Court? The complaint ill befits the Kirby image. However, if it heralds a retreat from judicial activism, for that relief much thanks.

Will *Wakim* reverse the centralisation of Australian justice? Probably not; indeed, *Wakim* could even intensify it, if the politicians' first reactions to the decision are any guide. Media reports have raised spectres of arid demarcation disputes and actions between *de factos* split between State and federal courts. High-flying business lawyers who have developed a *rapport* with the Federal Court do not want to return to "old fashioned" State courts.

In such an atmosphere no politician is likely to say anything in favour of *Wakim*. Even around the parish pump, when it's a contest between votes and "State rights", the latter will come in second every time. No one mentions that, if the State courts still administered federal law generally, as they did for 80 years, no serious difficulties would arise. There would be an occasional question of whether to sue in one State or another, but there is nothing in *Wakim* to prevent cross-vesting *among the States*. It was the explosion of federal courts that created severe jurisdictional problems. Chief Justice after Chief Justice issued warnings,[8] but Canberra knew best. When it became just too obvious that this presumption was unsound, Canberra came up with cross-vesting as a perfect solution. Cross-vesting would solve everything and, incidentally, federal courts would be better off than ever. All that Canberra has to do now is to find a solution to the problem created by its solution to an earlier problem of its own making!

As a stop-gap measure the States will pass laws "deeming" past federal decisions affected by *Wakim* to be decisions of their own courts. It is a moot point whether this will be legally effective, but future arrangements are matters of even greater complexity.

Ironically, the centralists may emerge as the popular heroes and beneficiaries of the cross-vesting disaster. They can blame it on the diversity of the States, with not a word about the effects of their little "tidying up" exercise in 1975-76. They might carry a referendum to redistribute judicial powers to the centre. Despite the modest record of constitutional referenda, this one might succeed; the "Yes" case would be the easier to simplify and popularise, and it is doubtful whether a major party would see any profit in standing in the way.

Another possibility is to persuade the States to refer power to the Commonwealth under s.51 (xxxvii) of the Constitution. This would be cheaper and perhaps quicker than a referendum, but popular sentiment might be more difficult to engage. A third possibility (so far as company law cases are concerned) is legislation under s.51(xx) of the Constitution –

the corporations power, still a sleeping giant.

What else? Several years ago there was a proposal for some form of combined Supreme Court, staffed by judges nominated by all the States, but it came to nothing. I suspect that in the short term, at least, the Federal Court will use its "accrued jurisdiction" device more self-indulgently than ever. There is support for that tactic in *Wakim* itself. However, one wonders how federal judges can validly do for themselves the very thing that the Commonwealth Parliament cannot openly do, namely give those judges State jurisdiction.

There is no return to the Arcadian simplicity of the High Court and eight State and Territory Supreme Courts with full federal and State jurisdiction. One hundred federal judges are now very much with us, and no government department, tribunal or anti-discrimination bureau, once imposed upon the nation, is likely to disappear. "Diversity" and "choice" are such fashionable buzz-words these days, but they do not include democratic devolution or a greater measure of local autonomy. The real question is whether the State courts will retain what *Wakim* has returned to them, or whether adjudication by remote control will intensify.

A desirable re-arrangement might look something like this:

1. Confine the Federal and Family Courts to Commonwealth law (minus native title) – no "accrued jurisdiction", and no other devices for poaching State jurisdiction. All matters not based on a Commonwealth statute would be matters for the State courts. Bits and pieces of family law not yet covered by the Family Law Act could be the subject of a modest reference of State powers. Re-invest State magistrates with significant "family" jurisdiction, and let all governments consider a gradual wind-down of the central Family Court in favour of the WA model – a State Court, with State-appointed judges administering the Commonwealth Act.

2. Re-invest State courts with federal jurisdiction unless there is a strong and special case for confining select parts to the federal courts – the Family Law Act and Commonwealth industrial law readily come to mind.

3. Where both State and federal courts have jurisdiction, let the litigant choose. If the Federal Court really offers a better service, then so be it. But if points (1) and (2) were adopted, the size and hence the appetite of the Federal Court should be smaller. Jurisdiction-splitting would not be necessary, because in this scheme disputes involving federal as well as State claims would be clearly within the competence of the State courts.

If the State courts do manage to keep what *Wakim* has returned to them they will need more resources – another reason, unfortunately, for State politicians to favour the centralist cause. Perhaps some judges could be recruited from a scaled-down Federal Court, using an advanced ballet step known as the Reverse Arabesque. (Quite a few State judges with good Canberra connections have executed lateral arabesques to the Federal Court, whether for lighter case loads, better perquisites, an escape from criminal trials or a better chance of ascension to the High Court.)

However, the decentralising effect of *Wakim* can easily be exaggerated. It relates mainly to company law, and according to the ALRCs 1998 survey, company law cases comprise only about 12 per cent of Federal Court business, and by no means all of them will be removed. *Wakim* removes cases from the federal arena only when the cross-vesting legislation is the sole reason for their presence there. *Wakim* does not touch the "accrued jurisdiction" which has absorbed so many State matters. If lawyers can plausibly tack a State claim to a "pure" federal claim (usually a section of the all-pervasive *Trade Practices Act*), then a federal court can still handle both of them. The recent Federal Court award of $28.5 million against

one of the Gutnick companies was based on accrued jurisdiction, not on cross-vesting. As things stand, the large remainder of Federal and Family Court jurisdiction can be augmented by more grants of "pure" federal power, or by the imaginative use of "accrued" jurisdiction. Law, like other gaseous substances, is capable of almost infinite expansion.

A wrinkle in the Mutual Recognition Scheme

In 1992, under s.51(xxxvii) of the Constitution, the States gave the Commonwealth power to legislate "for the recognition within each State ... of regulatory standards adopted elsewhere in Australia regarding goods and occupations". The term "occupation" includes the professions of medicine, law, dentistry, and so on. Thus someone who is registered as a medical practitioner in Victoria is *ipso facto* entitled to registration in Queensland. In the late twentieth Century this is reasonable; it put an end to some indefensible "closed shops", such as the rule that only barristers resident in Queensland could appear in Queensland courts.

But the mutual recognition Acts include a little-known and less commendable provision that removes disciplinary matters from well-qualified State authorities to a federal sub-court, the Administrative Appeals Tribunal. It matters not that the State authority combines local knowledge with obvious legal and professional expertise. In New South Wales, for example, appeals by doctors normally go to the Medical Tribunal. It is chaired by a District Court judge assisted by medical assessors. In Queensland the Medical Assessment Tribunal is similarly composed, save that a Supreme Court judge presides. Lawyers subject to discipline normally have an appeal on the merits to their Supreme Court.

However, if a "mutually recognised" person is disciplined in his home State, and another State then applies similar restrictions (as it is entitled to do), the appeal against that decision suddenly becomes a federal case for the AAT, remote from the profession and the community concerned. This covert piece of centralisation is ripe for review.

Conclusions

The greater the centralisation of the judiciary, the more Australia will be ruled by a branch of government chosen obscurely and remotely, while opportunities to monitor unsuitable appointments are much reduced. A centralised judiciary is even more prone to undue remoteness than a central legislature. At least our legislative masters represent localities (areas considerably smaller than most States), and they are elected by the people who live there (at any rate when their seats are not so safe that they are really elected by their party pre-selection committee).

Federal and Family Court appointments descend from the Canberra blue, and people with better local knowledge could often make wiser choices. There are at least two federal judges who were whisked from Canberra backrooms to the bench with little no experience of practice, even at minor levels. Others have served apprenticeships on tribunals that are long on politics and short on law, and where (as a High Court judge has wittily observed) the main qualification is the possession of the "right" bias. An obscure appointment to a tribunal is now a stock method of beginning to make a *protégé* a judge when an immediate appointment as such would simply not be credible. But membership of a social engineering tribunal should be a disqualification from, not a qualification for judicial appointment.

One interesting federal appointment (via a federal tribunal and a token period of practice) favoured a junior academic from a new law school distinguished by armchair radicalism and dubious professional training. Similar (but less extreme) things can happen in the States, but the remoteness of federal patronage makes them easier to perpetrate, and harder

to discourage in future. Political patronage in the early years of a new and rapidly expanding court is crucial because, as time passes, and the institution is stacked with long-term incumbents, opportunities to appoint become fewer and less frequent. One tightly-controlled political party had a monopoly of federal judicial posts for thirteen years; three quarters of the present Federal Court judges were chosen in that time.

A judicial charter featuring such mile-wide concepts as 'monopolisation", "deceptive or misleading" conduct, "fair access to infrastructure", "native title", and second-guessing the government under the guise of judicial review politicises courts that are relatively new. Judicial and extra-judicial statements by federal judges frequently ignore the standards of judicial restraint that are observed by members of our traditional (State) courts. Last year, in *Two Decades of the Federal Court*, I offered a *pot-pourri* of unjudicial and injudicious statements by an array of federal judges. The list continues. Justice Jane Mathews moved quietly through two grades of a State judiciary to the Federal Court, and conducted a very expensive Hindmarsh Inquiry Mark II until the High Court decided that it was an unsuitable diversion for a federal judge. Late last year she joined Alistair Nicholson in strident criticism of the Government.

Mathews' *bête noire* is a proposed merger of several special-purpose tribunals with the Administrative Appeals Tribunal, of which she is a member – one little "tidying up operation" that did *not* appeal to Canberra's judiciary. Wearing her AAT helmet, Mathews described the relevant committee as an "unlikely lot of bedfellows if ever there was one". She added that "the process had been commandeered by the head of the Prime Minister's [department], a gentleman not particularly sympathetic to ... judicial review". (But judicial review does not occur in the AAT.) The Veterans Affairs Tribunal was exempt, and "the explanation for [that was] obvious; the veterans' affairs organisations constitute such a powerful lobby that they succeeded in persuading the government to maintain the status quo for their own". A trifle unnecessarily, the irate judge and tribunalist added: "I have been vociferous about this matter since the proposal emerged".[9]

Mathews' colleague Goldberg J, in an action against a Brisbane legal firm, saw fit to cast aspersions on past professional conduct of Justice Ian Callinan, a recent and, so it seems, politically incorrect appointment to the High Court. Subsequently, these modern Goldberg Variations, distinctly less pleasing than those of J S Bach, had to be disowned by a court of appeal as unnecessary, irrelevant, and unfair to a man who was not even a party to the proceedings in question.

Happily there are excellent judges who still favour judicial restraint. Recently Justice Bruce McPherson, chairman of a national judicial conference and a member of the Queensland Court of Appeal, opined that governments are increasingly abusing their power over judicial appointments for short term political purposes:

"It's getting worse. It's becoming apparent that people are being appointed because they are friends, possibly even political allies. ... If it becomes widespread you will end up with a bench that is not worth much and it will shake public confidence".

McPherson is not given to overstatement, and he is no publicity hound. When he says "it's becoming apparent", he is probably referring to a process well advanced.

When government creates large and novel courts the perception of an executive-minded judiciary arises. The Federal Court recently decided that, when company law requires "reasonable assistance" to an investigator, it is unreasonable to claim privilege against self-incrimination.[10] In 1989[11] and again in 1995 it found by tortuous reasoning that tax

inspectors can override that privilege. The legislation did not obviously say so, but despite an old rule that laws abrogating basic common law rights must do so plainly, a circular sent to MPs before they rubber-stamped the Act served to give the Executive a win. (The circular, let it be said, was more honest than the Act.) If politicians and public servants are not prepared to abrogate privilege openly, should judges complete the agenda?

Observations of an Associate to a Federal Court judge are interesting. He was on the judge's staff before they moved across from a State Supreme Court:

"The judge got an unpleasant surprise. The Federal Court atmosphere is very 'public service'. There's a hierarchy of registrars answerable to the Attorney-General's Department in Canberra. There's none of the independence of judges from administrators that you still have in the Supreme Court".

Do not take at face value any and every assertion that a centralised court system is more efficient. Efficiency and community service do not always coincide. But if efficiency is all that matters, it may be mentioned that we have had ridiculous indecision in the Federal Court on the narrow technical question of whether professional privilege under the Commonwealth *Evidence Act* applies to the pre-trial process of "discovery", or only at the final hearing. And on a broader canvas, is it efficient to have a nominal Chief Judge in Melbourne or Sydney, with forty-odd others scattered from Brisbane to Perth? Is it efficient to have appeals to three Federal Court judges chosen *ad hoc*, while several State courts have specialist Courts of Appeal?

With bated breath we await a new Preamble to the Constitution. The idea, it seems, is to have the constitutional book judged in future by its cover. In February Sir Ronald Wilson declared that:

"Any preamble must, in terms agreed to by indigenous leaders beforehand, not only acknowledge prior occupation but also subsequent dispossession, to be followed by an appropriate expression of regret and an assurance of acceptance".

Heaven knows, trade practices, immigration and native title are brews that are heady enough. There will be no holding the central judiciary if we have a Preamble saturated with "feelgood" phrases to carve the 1970s *zeitgeist* in stone.

Endnotes:

. For a valuable insight into the current tertiary education industry, see Lewis Carroll's *Alice in Wonderland* on the Caucus Race.

2. *The Australian,* 19-20 December, 1998, *'Tide of History' Sinks Land Claim*.
3. *Courier Mail,* 4 January, 1999: *Tighter Rules for Sitting Fees*.
4. But subject to review by prerogative writ, unlike any State Supreme Court.
5. *The Australian,* 1 April, 1999: *Family Court Up for Discussion.*
6. *Courier Mail,* 26 October, 1998: *Bitter Spat Threatens Family Court.*
7. *The Sydney Morning Herald,* 9 April, 1999.
8. See L Street, *The Consequences of a Dual System of State and Federal Courts* (1978), 52 *Australian Law Journal* 434; W B Campbell, *The Relationship between the Federal Court and the Supreme Courts of the States* (1979), 11 *University of Queensland Law Journal* 3.
9. *The Australian Financial Review,* 30 October, 1998.
10. *Australian Securities Commission v. Kutzner* (1997) 16 ACLC 182.
11. *Stergis v. Federal Commissioner of Taxation* (1989) 89 ATC 4442.

Republicanism and the Repudiation of post-1788 Australia

Dr Geoffrey Partington

Malcolm Turnbull has asserted on behalf of his fellow republicans:

> "We believe that there is so little that can be rationally be stated in favour of the retention of the British monarchy in Australia that the more the monarchist case is heard, the more republicans there will be".[1]
>
> Robert Hughes agreed with this judgment by his friend who, he claimed, has shown "how threadbare and even comic the monarchist opposition's case has turned out to be".[2]

Republican concern that arguments for constitutional monarchy should be widely heard would be highly praiseworthy, especially given the persecution some republicans claim to have suffered. Al Grassby has claimed, "Monarchist thuggery persists in Australia against those who dare to question Imperial decisions".[3]

Wayne Hudson and David Carter, the editors of the book in which Malcolm Turnbull urged wider public airing of the case for constitutional monarchy, advised their readers:

"While our editing of the book represents an argument for republicanism as a fruitful context for the reformulation of notions of citizenship, statehood and nationhood in Australia, we hope, through the diversity of the essays which follow, to give the contemporary republicanism debate a depth and complexity it has not often shown".[4]

In the event, however, their book, *The Republicanism Debate*, devoted only 24 out of 165 pages to arguments in favour of the retention of Australia's constitutional monarchy; but Hudson and Carter may subsequently have felt that 24 pages for the opposition were far too many, particularly since they included half a page each by Sir Harry Gibbs and Sir David Smith. I was reminded of Dai Jones, a Welsh bass with a passion for Handel. Dai went to heaven and was invited by St Peter to join the heavenly choir. Dai was surprised to find that there were ten thousand sopranos, ten thousand altos, ten thousand tenors and himself, the only bass. The first anthem of the day was the Hallelujah Chorus. After the final strains died away, St Peter congratulated the choir on a wonderful rendition. "Only one slight problem", the saint remarked, "A bit too much bass, Dai Jones". Wayne Hudson and David Carter should perhaps have contented themselves with half a page from either Sir David or Sir Harry, since each produces quite a deal of bass, not from both of them.

Republicans and Australian history

Malcolm Turnbull has proclaimed that:

"The lie that the Crown is an Australian institution is, of course, the 'big lie' of the whole monarchist cause, although it is often repeated".[5]

Turnbull has repeated variations of this charge on many occasions. It seems strange that a successful Australian lawyer should not bear in mind that since 1788 all property rights in Australia have derived from the Crown, all criminal prosecutions have been carried out in the name of the Crown, and until very recently all oaths of allegiance by office bearers both military and civil have been to the Crown as the symbol of a unified national authority. Indeed, it seems downright perverse to conceive of Australian history since 1788 without both the Crown and the pervasive influence of Great Britain.

James Cook wrote in his journal on 22 August, 1770:

"Notwithstand[ing] I had in the Name of His Majesty taken possession of several places

along this coast, I now once more hoisted English Coulers and in the Name of his Majesty King George the Third took possession of the whole Eastern Coast..."

When Captain Arthur Phillip took a party ashore at Sydney Cove on 26 January, 1788, he and his officers drank the health of the King and the Royal family and the success of the new colony. Many convicts showed strong loyalty to the Crown which had sentenced them. When, in 1800, there seemed to be a danger of French invasion, many emancipists volunteered to join a loyal association of militia to defend the colony. Patriotic occasions, especially the King's Birthday, and that of the Queen, aroused enthusiastic expressions of devotion to King and Country among many convicts, although free grog and a day off work may have been even more effective than patriotic zeal in producing this effect.[6] The first poems published in Australia were odes written by Michael Massey Robinson for recitation on the King's and Queen's birthdays. Republicanism was then unpopularly associated in Australian minds with the French Revolution, and by the more historically minded with Oliver Cromwell and standing armies.

Zeal for the Crown was, of course, found less among Australians of Irish Catholic descent than among Protestants from Great Britain and Ireland, but Thomas Keneally's stereotype of Australian history as one of continual cantankerous sectarian strife is crude and false. Keneally claimed that his grandfather believed Queen Victoria was syphilitic and "had to wear high collars to hide the sores on her neck", but any past follies and bigotries of the Keneally family were no more typical of Australians of Irish Catholic descent then than are those of republican Tom today.

There was great enthusiasm in 1868 when Prince Alfred, Duke of Edinburgh, visited Australia, one result being the naming of Prince Alfred College in Adelaide; and considerable distress when a Fenian tried to assassinate the Prince and succeeded in wounding him badly. This distress was shared by many Irish-Australians. A leading Sydney layman, J Edward Kelly claimed, "Irish nationality stinks in the nostrils of the 'respectable' community, even though they glory in being Catholic and loyal to their Queen".[7] During a fund raising visit for the Irish Parliamentary Party in 1895, Michael Davitt noted in many homes of Australian Catholics what to him was a strange combination of portraits: three heroes of Irish nationalism, Parnell, Dillon and O'Brien, together with Gladstone and Queen Victoria.

William Bede Dalley, the first Roman Catholic Premier of New South Wales, raised Volunteers for the Sudan Campaign of 1885. In later years he taunted Orangemen:

"Fancy, after all these years they have been calling us plotting papists and Fenian rebels, the first men ... to serve the Queen ... are being sent by a Paddy and a Holy Roman".[8]

When Edward William O'Sullivan first entered the Parliament of New South Wales, he wrote an article entitled "The Coming Republic", which advocated that Britain and the United States should form a federal republic. However, by the 1890s O'Sullivan decided that the existing British Constitution, although imperfect, was the instrument most "conducive to liberty, to the maintenance of the rights of the people and of freedom of speech".[9] O'Sullivan told the Irish-Australian readership of the *Freeman's Journal,* "There has never been a civilizer like the British Empire".[10] He told them to consider the British Empire as "theirs, because they have helped to build it, and to establish the high form of civilization which it confers".[11]

Cardinal Patrick Francis Moran, the first Irish-born Archbishop of Sydney and a leading figure in the federation movement during the 1890s, recognised that in Britain and Australia

basic freedom and equality had been achieved by the Catholic Church, whose position in many states with an overwhelmingly Catholic population was much worse. When he accepted the freedom of the city in Dublin in 1888, Moran declared:

"And whilst the Australians are thus one in heart and one in hand with their brothers of the dear mother country, [Ireland] we are not the less loyal to the empire of which we are proud to form part".[12]

Moran wrote that he regarded:

"…..our colonial Administration, linked as it is to the Crown of Great Britain, as the most perfect form of republican government. It has all the freedom which a republican government imparts, and it is free from the many unpleasant influences to which, as in the United States, an elected head of a republic is subject".

The radical Protestant Ulsterman George Higinbotham, who dominated Victorian politics during the third quarter of the nineteenth Century, was a persistent critic of existing constitutional arrangements, but he acknowledged that it was:

"…..the honest and ardent desire of ninety-nine men and women out of every hundred in this colony, that the connection which now exists – the formal connection, and even more the real and substantial connection – between Great Britain and her colonies should continue for an indefinite length of time to come".

Although he declined a knighthood, Higinbotham described Queen Victoria as "the best constitutional sovereign that has ever sat on the throne of England", and said he was "glad the colony bore her name". Higinbotham told a Melbourne meeting in 1887 that there was in Victoria an "almost unanimous" feeling of "great attachment and loving gratitude" towards the Queen. He picked out for especial praise the Queen's attachment to her constitutional obligations, "the high standard of purity and honour" she had always set, and the way her example had "benefited and advanced the position of women, and increased the respect for them among men".[13]

Henry Parkes, an artisan in his native Birmingham, had republican sympathies in the heady revolutionary atmosphere of 1848 but, like many former Chartists in Britain, he became increasingly attached to British constitutional traditions. Parkes told an audience on a return visit to England:

"If people liked to stay in England, all he had to say was God bless them in the dear old country. He was just as much an Englishman as any man present. The people in Australia were as thoroughly English as the people of the mother-country; they had forfeited nothing by going to a distance of 14,000 miles. Shakespeare and Milton belonged as much to them as to the people of England; they possessed by right of inheritance an equal share in the grand traditions, the old military renown, the splendour of scientific discovery, and the wealth of literature, which had made England the great civilising power of the world".[14]

In 1890 Parkes urged delegates to the Australasian Federation confederation in Melbourne:

"Make yourselves a united people, appear before the world as one, and the dream of 'going home' would die away. We should create an Australian home ... We should have 'home' within our own shores; 'home' ..."[15]

Yet, as Parkes called for "one nation, one destiny", he also planted an English oak as a symbol of ongoing attachment to Britain and "the crimson thread of kinship" which, he believed, would continue to link Australia's destiny to that of Britain, as well as uniting the Australian colonies.

It was shared Britishness as much as shared Australianness which enabled a federal

Australian Commonwealth incorporating the entire land mass of the continent, together with Tasmania, to be created peacefully. Until well into the twentieth Century more Western Australians and South Australians had visited Britain than had visited New South Wales, Queensland, Victoria or Tasmania. Similarly, more of the population of that second group of colonies had visited Britain than South Australia or Western Australia. Substantial percentages within each colony, especially Victoria and South Australia, were born in Great Britain and Ireland. Throughout the nineteenth Century and well into the twentieth, links with London were more important for each colonial and State capital city than those with cities within Australia. The near identity in patterns of political culture, religious beliefs, family structures, sports and pastimes in each colony or State was ensured as much by the continued links of each with Britain as by frequent intercourse between the colonies themselves.

A specifically "pro-British" party never developed in Australia, but this was because there was no need for such an organisation, since British immigrants quickly became unhyphenated Australians. "New-chum" separatism was strongly discouraged by London. Gladstone, for example, warned: "To attempt to create a Crown influence, to rally a British party, and to make attachment to Britain a watchword in political strife, would recoil", and the result would be that the national government "would be allied to something of distaste for the introduction or continuance of British institutions altogether".[16]

Our contemporary Australian republicans generally have difficulty with their nineteenth Century forerunners, small in number as they were, as well as with the large majority of Australians who supported the Crown and every other tie with Britain. On nearly every issue on which there was a clear division of opinion between nineteenth Century Australian republicans and the British Ministers of the Crown, republicans today, if they faced the matter openly, would be forced to concede that they themselves consider that London was in the right.

Take first Aboriginal policy. One historian highly favoured by republicans today is Henry Reynolds. Reynolds has oscillated between arguing that racism had prevented any acknowledgement of Aboriginal native title in Australian law before the *Mabo* judgments of 1992, and claiming that Aboriginal native title had always been recognised by the Crown, so that there was nothing revolutionary about the *Mabo* cases. Every bit of evidence advanced by Reynolds for the second proposition is derived from arguments made by British politicians such as Earl Grey and British jurists such as James Stephen, Pemberton, Burge, Follet and Lushington. These humanitarians did not propose land rights in the *Mabo* sense, but they urged the colonial governments to exercise the Crown's powers of discretion generously so as to ensure Aboriginal welfare. It was, no doubt, easier to advocate generosity at a distance of 14,000 miles than it was in the Outback, but it cannot be denied that advice offered from London was more favourable to Aborigines than were the policies adopted by colonial governments.

Take next the White Australia policy, which had no more fervent advocates than Australia's republicans, whereas the chief opposition to it came from London. On matters of race and colour British colonists, whether in Australia, New Zealand or South Africa, were, like those before them in the American colonies, much more exclusive than Westminster and Whitehall. Joseph Chamberlain, often denounced as an arch-imperialist, made it clear when he was Colonial Secretary that the Crown would disallow colonial legislation which explicitly used race or colour as a basis for exclusion or discrimination.

Joseph Furphy ('Tom Collins'), for many years a favourite figure with Australian republicans and the Left as a whole, was a typical committed "White-Australian". Close to death, he restated, "There is nothing else I am so thankful for as for the White Australia". Furphy was not a racist in the worst sense of that term. His basic political aim was a socialist republic of "mates": people who shared common values and would back each other up in times of trouble, but who were autonomous individuals. As Furphy saw it, Chinese immigrants to the goldfields had come in gangs subject to the control of a boss, had no experience of free institutions, and seemed unlikely to acquire it.

William Guthrie Spence boasted that the Australian Workers' Union which he founded "ignored all class or sex distinctions, and admitted all who had no other union they could conveniently join", but he added that it barred from membership, "Chinese, Japanese, Kanakas, or Afghans or coloured aliens other than Maoris, American negroes, and children of mixed parentage born in Australia".[17] The exclusions were clearly based on Spence's beliefs about cultural compatibility, not genetic inheritance.

Other republicans a century ago were racist in the worst sense. John Archibald's *Bulletin* asserted in 1890:

"The citizens of Sydney respectfully but firmly declines to be a brother by Act of Parliament to the Hindoo, or to become related to the Hottentot and the Egyptian merely out of regard for the murderous traditions of England, for under a system of Imperial Federation some 270,000,000 cheap Indians and innumerable myriads of still cheaper Chinese would have the run of this Continent".[18]

Henry Lawson warned against "the reeking crowds of Chinamen and their wretched European women", and endorsed the misquoted verse:

"Rule, Britannia! Britannia rule the waves!
No more Chinamen will enter New South Wales".

Such sentiments make it difficult for our contemporary republicans to identify closely with their predecessors. There is embarrassment, too, among many republicans in 1999 that a century ago Australian colonial governments were often much more aggressive in foreign policy that British governments. During the 1890s the New South Wales government drew up a list of territories it wanted Britain to annex, including New Guinea, the New Hebrides, the Bougainville Islands and the Marshall, Ellice and Gilbert Islands. The Queensland government threatened to go it alone against Wilhelmine Germany in New Guinea. The Victorian government proclaimed the "manifest destiny of Australia to be the controlling Power in the Southern Pacific" and asserted a need to annex Samoa.[19] Yet Victoria had recently found it difficult to raise enough armed force to subdue the Kelly gang, let alone the isles of the Pacific.

The rise of Japanese power led many Australians to criticise Britain, not for being bellicose, but as lacking the will to take a firm stand in the Pacific. Henry Lawson tried to revive a martial spirit among the British as well as Australians. The English figure he came to admire most was the stern Oliver Cromwell who, when ruling England, "thrashed her enemies at home/ And crushed her foes abroad". In "The King of our Republic", Lawson called for an Australian Cromwell:

"If you find him stern, unyielding, where his living task is set,
I have told you that a tyrant should uplift the nation yet;
He will place his country's welfare over all and everything,
Shall the King of our Republic, and the man that we call King".

Perhaps we shall have a "King of our Republic", but he may have been named, not after Oliver Cromwell, but Malcolm Canmore, the founder of a famous Scottish dynasty.

Australian history before 1914 is clearly an embarrassment for many republicans today. How much easier simply to dismiss it, with Sir William Deane and Justice Gaudron, as:

"…..the conflagration of oppression and conflict which was, over the century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people and leave a national legacy of unutterable shame".

However, some republicans still try to make political capital from the First World War. It began badly from their viewpoint, since when war came in Europe in 1914 Australia's Liberal Prime Minister Joseph Cook declared, "all our resources in Australia are ... for the preservation and the security of the Empire". Worse still, Cook was backed by Andrew Fisher, leader of the Australian Labor Party, who stated: "Australia will stand beside our own to help defend her to our last man and our last shilling". During the war there were, of course, legitimate Australian criticisms of the effectiveness of some British military commanders, both in the Dardanelles and on the Western Front, but these criticisms were little different from those made in Britain.

Overall, the sufferings of war brought the two countries even closer together than in the past. The friendship to Britain and loyalty to the Monarchy of most Australians who had personal experience of the fighting has frequently been attested to by Australian republicans, such as Robert Hughes, who castigated "the fiercely reactionary role" played by the Returned Services League.[20] With Peter Weir's monstrous *Gallipoli* in the van, however, recent republicans have tried to convert the Anzac experience from Australia's greatest time of solidarity with Britain to a source of suspicion and hatred.

A typical example is a recent attack by a regular columnist in the Adelaide Newscorp paper *The Sunday Mail*, Peter Goers, who repeated Weir's slurs on British troops at Gallipoli. My mother's eldest brother, Arthur Banks, a coal miner aged 18 in Atherton, just outside Manchester, was one of fifteen young men, who had been at school together and worked down the same pit, who volunteered as soon as war broke out. Eleven of them were killed on April 25, the first day of the landings at Gallipoli, as part of the 1st Battalion, Lancashire Fusiliers. Goers also contrasted the craven English with Simpson, the heroic water-carrier at whose grave Goers claimed he placed sunflowers, yet Simpson was a recent English immigrant, as were many of the first ANZAC volunteers in 1914-15. In the 46 years I lived in England I never heard or read a word which was disrespectful of the contribution to the allied war efforts made by Australians and New Zealanders. Far from it – the Anzacs were among the heroes of my childhood education. Until recent years Australian schools and media also respected the efforts of the English and the other peoples of the British Isles in two World Wars.

Goers managed to add a new dimension of republican hatred for Britain. He claimed that "Turks tell Australians and New Zealanders that 'the Anzacs were not our enemy. The English were our enemy' ".[21] Goers endorsed this alleged Turkish belief and claimed that in 1914 "the English used us to invade" Turkey. Yet without provocation Turkey entered the war on the German side on 29 October, 1914, when its fleet, commanded by the German Admiral Wilhelm Souchon, bombarded Odessa, Sevastopol, Theodosia and Novorossisk, and sank as many Russian ships as possible in the Black Sea, before actually declaring war. During the months the Gallipoli campaign was being waged, the Turkish government of Enver Pasha deported its entire Armenian population, some 1,750,000 in total, from

Anatolia to Syria and Palestine, then parts of the Turkish empire. About 600, 000 Armenians died in this process, many brutally massacred. This is almost exactly the same number of casualties suffered by armed forces at Gallipoli: between 250, 000 and 350, 000 on the Turkish side, and about 270, 000 on the allied side. Some republicans find strange allies when they embrace the enemies of their British enemy.

HV Evatt is rarely praised at our meetings, but we would surely agree with his argument in his 1935 work *The King and His Ministers* that:

"The Crown might do quite different jobs at the same time. It might be a means of unity among nations which had emerged from the old empire, and at the same time it might be a symbol of the independence of each one...there was only one monarch living in Britain, but the full monarchical authority might be invested in several governments at once".[22]

Republican Malcolm Booker admitted that "the idea of a republic barely surfaced between the two world wars". Booker noted that, as "the British Empire was gradually transformed into the British Commonwealth of Nations and the self-governing colonies into dominions", so "the argument that the link with the Crown endangered Australian interests became less credible. There was, on the contrary, a widespread feeling that 'the mother country' was in need of help and that it was the duty of Australians to give it".[23]

Republican and veteran Marxist Robin Gollan has offered an interesting explanation why Australian republicanism was weak during the late 1930s. In Gollan's account, "all the effort" of "the far Left, particularly the Communist Party and those influenced by its ideas", was "put into building an anti-fascist front to force conservative governments to pursue the policy of collective security".[24] Gollan did not remind his readers that those anti-fascists of the Australian Left opposed rearmament before 1939, and that between 1939 and Hitler's invasion of the USSR they denounced the war as an imperialist conflict of no concern to the Australian people.

On 3 September, 1939, Prime Minister Robert Menzies told the Australian people, "Great Britain has declared war and as a result Australia is also at war". As leader of the ALP before war began, John Curtin displayed little interest in resisting Hitler and the Nazi threat, declaring as late as August, 1938:

"He would be a bold man who would commit the Commonwealth and the lives of Australians as a pawn in a European conflict. For my part, I say that the safety of the Australian people impels us to recognise our inability to send Australians overseas to participate in a European war".

Curtin argued then that "the wars of Europe are a quagmire in which we should not allow our resources, our strength, our vitality to be sunk", but he subsequently rose to meet the challenge of the times. On 8 December, 1941 he responded to the entry of Japan into the Second World War with these words:

"We here, in this spacious land where, for more than 150 years, peace and security have prevailed, are now called upon to meet the external aggressor .... We Australians have imperishable traditions. We shall maintain them. We shall vindicate them".

As he urged renewed efforts to win the war, Curtin told the nation:

"Australians, you are the sons and daughters of Britishers. You came from England and Scotland and Ireland and Wales".

Curtin was well aware in 1941 that British conscripts were fighting on fronts much closer to Australia than to Britain, whereas Australian conscripts were confined to home duties, later extended to include New Guinea, and only volunteers went overseas. Curtin appreciated

that Churchill made desperate efforts to save Singapore, including sending to their destruction the battleships *Prince of Wales* and the *Repulse*, both sunk in December, 1941, with six hundred drowned. This understanding had disappeared from the minds of many Australian republicans by the 1990s. In his first major assault on Britain and its links with Australia, Paul Keating accused his Liberal opponents of:

"…..cultural cringe to a country which decided not to defend the Malay peninsula, not to worry about Singapore, not to give us our troops back to keep ourselves free from Japanese domination. That was the country you wedded yourselves to".

During the Second World War, Australia's greatest historian of his generation, WK Hancock, described the monarchy as "a living and popular institution" in Australia. He admonished some American commentators as follows:

"I understand very well that the American people found their freedom by repudiating the British monarchy. I respect their republican symbolism. Won't they understand that the British people, and the Canadian people, and the Australian people, and many other peoples, have found or are finding their freedom by adapting the flexible institution of the British monarchy to their own special needs and purposes? Won't they respect our monarchical symbolism?".[25]

Sir Keith Hancock had no need to address such an admonition to Australians in 1943.

Malcolm Turnbull conceded in 1993 that:

"Fifty years ago the patriotic ideas of Australia were not distinct from those of Great Britain. Public and political meetings in those days would have seen the platform festooned with Union Jacks".[26]

According to Turnbull, "all political parties, including Labor" were "effusively pro-British in the 1950s".[27] Indeed, Herbert Evatt claimed in the 1953 debate on the *Royal Style and Titles Act*:

"The word British means as much to us as it does to the people of the United Kingdom itself and of New Zealand and Canada. To all of us it means the British tradition of Government under which every member of this Parliament pledges his faith and allegiance to the monarch".[28]

In Robert Hughes' words:

"The cause of republicanism was so feeble in 1954, so tied to old socialist dreams of the late nineteenth Century, that it seemed to middle-class Australians merely an obsolete rhetorical idea, fatally contaminated by its left-wing origins".[29]

Hughes admitted with regret that for people like him, born in or around 1938, "the sacramental mana of royalty was still in place and wholly intact", and "...it seemed entirely natural and inevitable that we should have a Head of State, with power to dissolve our governments and repeal our laws, who was not a citizen of our country and lived 14,000 miles away". Such sentiments were, in Hughes' view, even stronger after the Second World War.[30]

Peter Spearitt wrote in 1993 of Australians then over the age of forty:

"Australians of this vintage saw the Monarch almost every day of their lives. The Monarch's portrait was to be found in court houses and police stations, town, shire and scout and guide halls, all State schools and even some Catholic schools. Banks, building societies, stock and station agents proudly hung Her Majesty's portrait in their offices. Almost all offices displayed a royal presence ... Charities, hobbyists, sporting organisations and professional bodies sought the ultimate seal of approval by adding 'Royal' to their

names".[31]

Spearitt recalled:

"I spent most of my school holidays with my maternal grandmother, a stalwart of the Country Women's Association and a committee royalist. Illustrated books on royalty figured prominently in her library. My grandmother often talked of the Coronation and the 1954 Royal Tour as if they were the most important events of this Century. In the semi-tropical climate of the ancestral home in Queensland all this royal paraphernalia impressed itself on my psyche".[32]

For several generations the tyranny of distance limited visits of the Royal family to Australia, but there was great enthusiasm when the Duke and Duchess of York and Cornwall (later George V and Queen Mary) were present for the opening of the first Commonwealth Parliament in 1901, and when Parliament first met in Canberra in 1927. The 1954 Royal Tour outdistanced anything before it. Jane Connors, Executive Producer of Radio National's Social History Unit, estimates that "approximately seven million Australians, out of a population of nine million, managed to get themselves in front of the Queen and the Duke of Edinburgh at some point during their eight-week tour".[33] The Queen presided over the Cook Bicentenary in 1970, the opening of the Sydney Opera House in 1973, and the New Parliament House in 1988.

In 1999 two Australian States, Victoria and Queensland, are still named after our Queen's great-great grandmother. I live in a city which still bears the name of another English Queen, and its main street is still named after her husband, William IV. My suburb is Malvern, and my street and all its neighbours (Cheltenham, Winchester, Eton, Rugby, Harrow, Marlborough, Oxford and Cambridge) are still named after famous English schools and universities. The colours of Sturt Football Club are still the Double Blue, light and dark, of Oxford and Cambridge. My Australian university shares with an Australian island, river and mountain range the name of Matthew Flinders, the Lincolnshire sailor who gave Australia its name.

These tangible links with Britain annoy many republicans. Geoffrey Dutton lampooned Sir Alick Downer, father of our Foreign Minister, because he "built a fake Georgian mansion, bulldozed all the Australian trees, and planted a little England of oaks, ash, elms and so on".[34] If only Downer had built a genuine humpy instead of a fake Georgian mansion!

Malcolm Turnbull seethed when recalling 1988, because:

"That Bicentennial year was a year of shame. Every major event was presided over by a member of the British royal family .... [the eyes of the world] saw Prince Charles and Diana in centre stage on Australia Day".[35]

Turnbull ought to understand that hating the past is one thing, but pretending that it never existed is quite another.

Donald Horne has wondered, "How can we understand the older generations in Australia without taking the Empire and the belief in 'Britishness' into account?". Horne admitted that "the similarities between Britain and Australia seem obvious to people who have matured in a different kind of society".[36] Horne recalled, too, how he had been brought up to respect "hard work, perseverance, team spirit, temperance, plenty of fresh air and cricket", which in those days "were believed to be the middle class virtues that won the empire and kept it great".[37] That upbringing failed to have much influence on Horne, but it did have a beneficial effect on the lives of thousands of other Australians, many of whom he openly despises. Horne wrote that "some of the older people seemed to be too stupid even

to have withdrawal symptoms" in face of the "collapse of Empire".[38] Bob Hawke had, of course, a pithy expression for inadequate elderly Australians. In a process Freudians term projection or transference, Horne claimed that:

"The old Empire loyalist habit of despising one's ordinary countrymen has increased and it has spread far beyond the ranks of the old loyalists".[39]

Disparaging attitudes towards older Australians, especially those of British origins, are found in many political circles. In May this year Federal Health Minister Michael Wooldridge lost his temper after receiving what was no doubt a provocative and unprovoked letter. Dr Wooldridge tried to ring its author to express his annoyance, but on finding himself speaking to the man's wife, he abused her instead. Once he was again cool, calm and collected, Dr Wooldridge decided to apologise. He said:

"Look, it wasn't my best of performances. Of course, when you saw him on telly, he's a puffed up little Pom with a permed hair-do. And again I'm sorry for doing that to his wife".

Can one doubt that Dr Wooldridge would have lost his ministerial office had he spoken of "a puffed up little Chink with lank hair" or "a puffed up little Abo"?

1975 was the critical year for some republicans, but here Morton's Fork came fully into play. Recalling the events of 1975, Robert Hughes maintained that:

"The fact, suddenly made concrete, that any elected Prime Minister could be dismissed at the royal pleasure brought all Australians up with a jerk, regardless of their political loyalties".[40]

For other republicans, however, it was not the Queen's alleged intervention into the 1975 crisis that proved their moment of conversion, but her failure to intervene. Al Grassby claimed that "Queen Elizabeth in effect abdicated her responsibilities" in a letter dated 14 November, 1975 from Buckingham Palace which stated *inter alia:*

"The written Constitution and accepted constitutional conventions preclude the Queen from intervening personally in those functions once the Governor-General has been appointed or from interfering with His Excellency's tenure of office except upon advice from the Australian Prime Minister. The present political problems are watched by the Queen with the greatest concern but they can only be and doubtless will be resolved by the exercise in Australia of the proper political process".

That proper political process was, of course, to call a General Election, which is precisely what happened, and which enabled the decisive majority of Australian voters to endorse the dismissal of the Whitlam Government.

Al Grassby has not been alone in expressing shock at the failure of the Queen to sort out Australia's constitutional deadlock according to her personal views. On 26 May, 1999 *The Australian* shared with its readers the thoughts of Greg Barnes, described as "a long time Liberal staffer" and "a senior adviser to John Howard". Mr Barnes had come across a letter from the Personal Secretary to the Queen written in reply to a complaint about the conduct of Sir John Kerr. The Australian complainant was told that in all such matters the Queen would "take the advice of her Australian Ministers". This convinced Mr Barnes that the monarchy was "irrelevant" to Australia. Apparently it did not occur to him that the Governor-General also acts on the advice of the Australian Ministers and that, at least under the "minimalist" republican proposals, so would any future President.

Australia's ethnic composition and the Monarchy

Republicans often claim that our constitutional monarchy is alien and irrelevant to ethnic groups which have entered Australia in large numbers since the end of the Second World War. Paul Keating argued that:

"The people of modern Australia are drawn from virtually every country in the world. It is no reflection on the loyalty of a great many of them to say that the British monarchy is a remote and inadequate symbol of their affections for Australia".[41]

Malcolm Turnbull claimed that:

"The dual identity – the sense of being British as well as Australian – is very hard for young Australians to understand in the 1990s".[42]

On the other hand, many republicans deny that it is difficult for, say, young Greek-Australians to have a dual identity, apart, that is, from difficulties created by our having a monarchy.

Federal Race Discrimination Commissioner, Irene Moss, conceded in 1994 that:

"Less than 50 years ago, Australia was very secure in its national identity, and had been so for some time. The population was homogenous, mainly Australian-born of Anglo-Saxon or Celtic stock. At the time of the Second World War only two per cent of Australia was of non-English speaking background".[43]

Although this was hotly denied at the time, and continues to be denied in respect of prospective immigration, Moss's clear implication was that large scale non-British immigration had rendered Australia's national identity insecure. Malcolm Booker was explicit on this point, and claimed:

"We have become a multi-racial society ... We need symbols that look not to the past but the future".[44]

Always excepting, of course, symbols relating to the past of Aborigines and to their ongoing custodianship of Australia.

Al Grassby believes:

"It is the experience of Aboriginal Australians which lends a timeless dimension to the Australian Republic. Using the accepted definition of a republic – that supreme power rests in the people and not in an hereditary monarchy – it can be demonstrated that the Aboriginal peoples achieved a high sophistication in the administration of their affairs which constitutes a challenge to allow us to do as well ... Black Australia was a republic which resolved disputes and tended the land for the common weal through a sophisticated system of consultation and ritual shows of strength".

Indeed, "Black Australia" was even more admirable than that, since it consisted of several hundred such sophisticated republics and, according to Al Grassby:

"The boundaries of the Australian nations were more important than any other national frontiers on earth because the division of land had been made by divine law".

It may be outmoded superstition to believe that the Lord God gave Canaan to Abraham as a promised land, but it is up-to-the-minute republican insight to believe that Dreamtime Spirits fixed the boundaries of Aboriginal clans for all time. The British ended this exemplary political system, but only after "the British Army saw more action in Australia than in any other English colony with the exception of southern Africa".[45] Historians in Washington, New Delhi and Islamabad should hasten to sit at Al Grassby's feet.

Malcolm Booker made the incredible claim:

"The Union Jack is a symbol of imperial rule and oppression, especially among people in our own Asia-Pacific region. The present flag gives this symbol pride of place, and it cannot

be expected to win the devotion of all those people and their descendants who have come to this country to find freedom from domination and exploitation".[46]

Tens of thousands of people have defied their own governments, pirates and sharks in and out of the water, to get away from their "own Asia-Pacific region" and to reach lands where the Union Jack is part of the national flag.

Republican feminists

Feminist republicans wonder how to attract more women to the cause. Helen Irving has alleged that for constitutional monarchists:

"Part of the problem is that Queen Elizabeth remains in the mould of her great-great-grandmother. She is the prototypical bourgeois matron, respectable and virtuous, mother of a large(ish) family, church going, herself a little stout and 'cross-looking' these days, silent on almost everything that seems now to matter, including the marital disasters of her own offspring".[47]

If we have a female President of Australia in the near future, one or two candidates come to mind who cannot be accused of being overly respectable and virtuous, and one or two others who are not very stout, although inclined to look cross at times. Malcolm Turnbull suggested that under his new republic a drover's wife such as Susan Bradley, who then ran a cattle station near Kunmurra, could readily become President.[48] So far, however, no woman has yet become President of the ARM. Turnbull claimed that "the Monarchy is the ultimate sexist institution",[49] although in 107 of the 162 years between 1837 and 1999 Australia has had a female Monarch, and in 107 out of 211 years since 1788. This proportion somewhat exceeds that of any republic, even including those in "our region" such as People's China.

When Malcolm Turnbull began to plan a final break with Britain, that country had a female head of government as well as Head of State. However, Chilla Bulbeck suggests that:

"The long prime ministership of the 'iron maiden', Margaret Thatcher, reminded the world that the best imperial show Britain can manage is to wrest back the Falklands from Argentina".[50]

A Newscorp republican columnist, Bruce Wilson of the Adelaide *Advertiser*, abused the Prince of Wales for the following words he addressed to Argentinians when on a recent state visit:

"My hope is that the people of modern democratic Argentina, with their passionate attachment to their national traditions, will in the future be able to live amicably alongside the people of another modern – if rather smaller – democracy, lying a few hundred miles off your coast".

Wilson commented that "poor bloody Charles" had unnecessarily affronted Argentinian national feelings on behalf of a "bunch of rather backward outlanders living in what can only be called a British colony".[51]

In fact, the Falkland Islanders have had every opportunity to exercise self-determination and, like the presumably similarly backward people of Gibraltar, overwhelmingly want to stay with Britain. Just imagine the outcry if a Newscorp journalist described Aborigines as rather backward, so that their expressions of intent might be ignored, or suggested that the people of East Timor were rather backward, so that they had better stay under Indonesian rule!

Cheryl Kernot wrote:

"As a long time advocate of Australia becoming a republic,

> it is a source of regret to me that this important debate has largely failed to capture the imagination of the women of Australia".

She added that, since "the Australian Constitution was written by economically privileged, white Christian men" and "written nearly a century ago", then "it becomes fairly obvious that the document's relevance to Australian women in the 1990s is questionable".[52]

A huge amount of history would have to classified as irrelevant to Australian women in the 1990s on the basis of Cheryl Kernot's criteria. Not much literature would remain either.

At least Cheryl Kernot ought to feel some satisfaction that Australia's educational system has been reconstructed to ensure that neither young females nor males now know much history and literature relating to dead white Christian males, nor indeed to non-white, non-Christian females. A group of university students thought it a hoax when I gave them the words of the now discarded third and fourth verses of *Advance Australia Fair* by Peter Dodds McCormick, an emigrant from Port Glasgow:

"When Gallant Cook from Albion sailed
To trace wide oceans o'er,
True British courage bore him on
Till he landed on our shore.
Then here he raised old England's flag,
The standard of the brave.
With all her faults we love her still.
Britannia rules the waves.

"Britannia then shall surely know
Beyond wide ocean's roll,
Her sons in fair Australia's land
Still keep a British soul".

Tim Fischer has recently suggested that "Waltzing Matilda" should be our national anthem, but with different words. I doubt, however, whether Mr Fischer will wish to restore earlier words to that tune the English brought out to New South Wales. The chorus began in the eighteenth Century with, "Who'll come a soldiering for Marlborough with me?", and had probably been sung to similar words long before the time of the Great Duke and the War of the Spanish Succession.

Australian feminists face problems when they try to assess the value of writings by women during the century following 1788. They want to celebrate women's writings, and complain about past 'marginalisation", but they find that nearly all the women novelists during those generations, such as 'Tasma' (Jessie Couvreur), Rosa Praed, Ada Cambridge, Mary Fortune and Catherine Martin, revered the close ties between Australia and Britain. A frequent *motif* in novels by and for Australian women was growing romantic attachment, despite misunderstandings and accidents, between two potential lovers, one native born and the other straight from Britain. Even women writers most favoured by radical feminists in Australia today, such as Catherine Helen Spence, usually fail to come up to republican scratch. Spence was a doughty pioneer of women's rights, but she came to see great virtues in the British constitutional tradition. She wrote after visits to the United States and Britain in 1894:

"Socially I liked the atmosphere of America better than that of England, but politically

England was infinitely more advanced. Steadily and surely a safer democracy seems to be evolving in the old country than in the Transatlantic Republic".[53]

On matters of law, especially affecting women, as on those relating to Aborigines, our contemporary republican feminists are often disconcerted to find that the gubernatorial representatives of the Crown were generally in the right if and when they disagreed with radical opinion in the Australian colonies.

Take, for example, the horrific pack rape case in 1886, when a 16 year-old domestic servant, Mary Jane Hicks, was repeatedly raped by four larrikins who also mutilated her and left her to die, although she managed to survive. *The Bulletin's* editor, the leading republican John Archibald, and one of its most prominent contributors, the republican Henry Lawson, conducted a persistent defence of the convicted rapists. The conviction of the Mount Rennie larrikins was likened by *The Bulletin* to British oppression during "the darkest pages of Irish history". When Lord Carrington, who as Governor of New South Wales confirmed the death sentence passed by judge and jury on the Mount Rennie rapists, unveiled a statue to Queen Victoria in Sydney, he claimed that the citizens of that State:

"…..recognise that under a constitutional monarchy we have been able to obtain the greatest amount of freedom which a country has ever enjoyed, with the certainty that the weakest of us will be protected, and that justice will be meted out to all alike".

This was intended, as and understood as, a reference to the trial of Mary Jane Hicks's rapists and mutilators. *The Bulletin* accused Carrington of "dragging from the grave the skeletons of the poor wretched ignorant boys whom he sent to the gallows in deference to the laws of a convict colony that has not even yet emerged from beneath the shadow of the gaol wall".[54]

However, some parts of the past remain relevant to women today in the eyes of Australian republican feminists. Elizabeth Gertsakis, Curator and Collections Manager of the National Philatelic Archives of Australia, has shared with us the thought that:

"Marxist political idealism pervaded and perforated modernist thinking throughout the twentieth Century in unparalleled degrees of influence. If Marxist theology caught the imagination, it did so because of its essential humanism".[55]

Marx, of course, was not a Christian, and was dark enough to be nicknamed "the Moor" by his few intimate friends, so he has some chance of retaining relevance. Elizabeth Gertsakis also commended Charlotte Corday who, in killing Marat, "was doing precisely what the Republic expected of her". The philatelic curator did not go on to nominate any Australian politician as a proper target for assassination, perhaps because those closest in sympathies to Marat are to be found among the republicans, not among their foes.

Dr Geoffrey Partington

The relevance of the past

Many of our leading republicans are determined that not only must the constitutional monarchy be destroyed but much else together with it. Cheryl Saunders has denounced "the outmoded symbolism of a 26th January Australia Day". She added that:

"It is hard to discard the myths: that Parliament is sovereign; that it securely safeguards rights; that it decides whether to incorporate or not to incorporate international obligations; that the hostile cut and thrust between Government and official Opposition is the only way to settle public policy".[56]

Professor Saunders holds a Personal Chair in the Faculty of Law in the University of Melbourne, is Director of the Centre for Comparative Constitutional Studies, and conducted the inquiry into Women's Business in Hindmarsh Island appointed by Mr Tickner when he was Commonwealth Minister for Aboriginal Affairs. One suspects that, if she had her way, there would soon be an end to hostility to government policies by an official Opposition, providing, of course, that her friends formed the Government.

Malcolm Turnbull asserted that, "Far from being the birth certificate of a nation, our Constitution is rather the cook book for a colony".[57] Alison Broinowski, in 1994 the Regional Director of the Department of Foreign Affairs and Trade and Chair of the Melbourne Writers' Festival, argued that:

"Republicanism implies much more than replacing a monarch with a president: it implies extirpating from our society all the symbolic expressions of hereditary class values".[58]

Except, of course, when related to Aboriginal heredity, or fathers and grandfathers in the ALP or the trade union movement.

Sandra Phillips states:

"I am not proud of mainstream Australia. I hold little respect for its political and legal institutions. I hold only derision for its flag".[59]

Phillips, who was "raised in her mother's country of the Wakka Wakka", and who "uses her skills in social research, organising, teaching and writing in many settings", was advancing what is termed in the technical literature of the trade the "process of reconciliation".

Paul Keating was in one sense right when he claimed that:

"The fact is that, if the plans for our nationhood were being drawn up now, by this generation of Australians and not those of a century ago, it is beyond question that we would make our Head of State an Australian".[60]

So was Malcolm Turnbull when he maintained that:

"Her Majesty is Queen of Australia simply because, at the time our Constitution was enacted, Australia was a colony of Great Britain".[61]

Who can doubt that, if the colonies which formed the Commonwealth of Australia had not been British, the Queen of England would not be Head of State in Australia today. Nor would English be the national language, nor would games such as cricket, rugby or bowls be played, etcetera, etcetera. But "the fact is", to use Paul Keating's expression, that Australia has had the history it has had. There is no justification for ignoring or rejecting that history, especially since it is not one of shame, but one of the most successful stories of

national advancement ever known.

Paul Keating was absolutely right when he noted in 1995 that Australians "are not as we once were, in a parent-child relationship". He added that:

"Nothing in the creation of an Australian republic will alter the facts of our heritage and our affections .... We are friends with separate destinies to carve out in the world".[62]

Yet he surely must recognise that, when children achieve full independence of their parents, as all sensible parents hope and pray will happen at some time or the other, those children are still the offspring of their parents, and filial obligations and decencies remain which are of a different order from those of even the closest friendship. To acknowledge and value these is not to become "a political or cultural appendage to another country's past", as Keating claimed.

I doubt whether any organisation has done more than The Samuel Griffith Society to demonstrate the value to Australia of its constitutional monarchy, and to show that this has become legally and effectively an Australian and not a British monarchy. Nevertheless, I very much doubt whether these arguments will suffice to ensure the continuance of the system we have inherited. Men and women are affected by sentiments deeper than those of utility and interest. Australia is, as Keating and Turnbull maintain, a constitutional monarchy because Britain was a constitutional monarchy and because modern Australia is an offspring of Britain. Yet most of the organisations which defend constitutional monarchy in Australia seem terrified of republican scorn if they dwell upon its British origins. The case for the continuation of an Australian constitutional monarchy has been detached by many constitutional monarchists from Australia's British past, and all the emphasis is often placed upon the practical utility of our current constitutional conventions.

Our own frequent failure to assert the ongoing value to Australia of its British origins and connections, and of the personal embodiment in our Queen of our constitutional inheritance, may itself have contributed to the belief expressed earlier in this conference by Greg Craven that constitutional monarchy is now dead within the hearts of the Australian people. I believe that Greg is mistaken, but if parent and child have irretrievably ended family ties, and if Britain is merely a foreign country as Thailand or Mexico are foreign countries , I fear that all efforts to preserve for Australia one of the best systems of government in the world may be in vain. I hope that such fears will prove unfounded.

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Getting Serious about Sovereignty1

Ray Evans

Tomorrow the World Heritage Committee meets in Paris to decide whether it will put the Kakadu National Park on its "In Danger" list. Until very recently this Committee has ignored Australian legal processes, the policy of the Australian Government, and the evidence put forward by the Australian Government during the last eight months. The substantial and expensive lobbying efforts which the Government has recently undertaken may or may not procure a favourable outcome. If not, that will put Australia in a position where, according to the Committee, it is in breach of its obligations under the World Heritage Convention.

At a presentation given to a mining industry meeting held in London on 20 October, 1998, a week or so before the inspection of Jabiluka by the World Heritage team, the speaker was Dr Mechtild Rossler from the World Heritage Centre. This lady was quite candid in her attitude and language, and she listed Kakadu and the forthcoming visit to Jabiluka as the leading example of her organisation's effectiveness in protecting National Parks. Unfortunately I do not have a transcript of her remarks, but judging from her demeanour, and her words, I would have to say that as far as the World Heritage Centre was concerned, it was already clear that the Australian Government, prior to the visit by the World Heritage Centre team, had been found guilty, and that all that remained to be decided was the manner in which the judgment was to be delivered.

On 23 June last a letter addressed to US President Bill Clinton and signed by 34 US congressmen, all Democrats, was made public. The drift of the letter is clear from the first and final paragraphs:

"Dear President Clinton,

"We are writing to you on behalf of the two 1999 Goldman Environmental Prize winners, Jacqui Katona and Yvonne Margarula of Australia. These extraordinary Aboriginal women have been leading a popular national campaign to prevent construction of the Jabiluka uranium mine on the land of the Mirrar people. Yvonne Margarula is the leader of the Mirrar people and bears the responsibility of ensuring the protection of their lands and culture in accordance with 60,000 years of her forefathers…..

"Mr President, we thank you for all of your fine efforts to preserve and protect America's natural heritage. We ask you to extend the same courtesy and assistance to the Australian environmental, human rights, and indigenous rights advocates who now need your help. We and the American public are counting on your firm leadership in the ongoing effort to protect this premier example of the world's natural and cultural resources from irrevocable harm".

The driving force behind the congressional letter was Cynthia McKinney, an African-American congresswoman from Atlanta, Georgia. The answer to the obvious question, why would a black congresswoman from Atlanta be interested in events in the Northern Territory, is revealed when it is discovered that one of her staffers is an Australian, whom I understand is an environmental activist from Adelaide. Globalisation is more than trade liberalisation and rapid movements of capital. The signatories urged the President to ensure that the US delegates to the World Heritage Committee vote against Australia at the meeting in Paris which begins tomorrow, and thus contribute to declaring the Kakadu Park to be "In Danger" as a result of the development of the Jabiluka mine.

My understanding is that there is no need for President Clinton to issue any instructions to the US delegation. The head of the delegation is Karen Kovacs, a former World Wide Fund for Nature staffer, and although she has kept her intentions close to her chest, it would be remarkable if she reversed the position she has taken at previous meetings, at least as far back as October last year.

Australia is the only signatory to UNESCO's *Convention for the Protection of the World Cultural and Natural Heritage* (1972) which has passed domestic legislation to give effect to that Convention. The statute in question is the *World Heritage Listed Properties Conservation Act 1983*, and the point of the legislation was to give the Commonwealth constitutional authority, through the external affairs power, to supersede the States on questions of land management.

Having trumped the States on who exercises power on land management issues, the Commonwealth now finds itself in the position where it in turn risks being trumped by a Committee of green apparatchiks from around the world who have no interest in, knowledge of, or responsibility to Australia and its people.

The degree of intellectual confusion which the Government has displayed in this affair almost beggars belief. The World Heritage Committee has only once before taken upon itself supranational powers when, in 1982, it voted to place the Old City of Jerusalem on its list of endangered sites. Israel, which claimed legal authority over the site and was certainly in effective control of it at the time, was not a party to the *World Heritage Convention*, had not asked to have it listed as "in danger", had not been consulted about its views, and had not even received an on-site inspection by World Heritage officials. When the vote was taken it was 14 - 1, with 5 abstentions. The US was the sole dissentient.

The Old City of Jerusalem is still on the "in danger" list and the Israeli Government has found it prudent not to ratify the *World Heritage Convention*.[2]

The proper response of the Australian Government to this second attempt by the World Heritage Committee to exercise supranational authority was to state that the Committee, under the terms of the Convention, has no such authority; and to give notice, without equivocation, that if the Committee seeks to claim and exercise such authority Australia will immediately revoke its ratification of the *World Heritage Convention*, and withdraw from UNESCO.

Senator Hill is reported in the press[3] to have "told the bureau that the World Heritage Committee could not list a property against the objections of a member State". Such protestations sit oddly with the enormous effort and expense which the Government has recently been putting into obtaining a favourable vote. It would have been much cheaper just to send a letter to the Chairman of the World Heritage Committee and the Director-General of UNESCO explaining the consequences of WHC presumption. Such an action would have earned the Government a great deal of prestige at home and abroad.

The Jabiluka episode portrays a Government which has allowed itself to be made a fool of, again. I'm reminded of Arthur Calwell's line on this: "He who fools me once – shame on him. He who fools me twice – shame on me". I fear that it is not merely twice or thrice, or even four times. The Government, and I am speaking of Australian governments over more than a decade, has been made a fool of many times. This has happened because of repeated attempts to use international tribunals as weapons in domestic politics, and also because there is a body of opinion in Australia which believes that the "international community" (an oxymoron if ever there were one) has a greater claim to our political loyalty than our

own country.

A recurring theme which emerges from looking at the history of government indifference to Australian sovereignty, particularly with respect to environmental treaties or multilateral environmental agreements (MEAs), as they are called, has been the willingness of Australian governments over the years to make international commitments which are open-ended, undefined or, at the very least, whose consequences are not understood.

When Australia plucked defeat from the jaws of victory at the Kyoto Conference of Parties to the *United Nations Framework Convention on Climate Change* (UNFCCC) of December, 1997, by agreeing to a 108 per cent target of 1990 greenhouse gas emission levels for the year 2010 (a target increase which, it is now understood, will be well exceeded by Western Australia alone), the Government presumably thought that either Australia would be able to live with such a commitment, or that the Kyoto Protocol would never in fact come into effect. Thus, having signed the Kyoto Protocol in May, 1998, Cabinet, in its muddle-headed way, announced just before the 1998 election that it would not ratify the Kyoto Protocol unless and until the US ratified.

Nevertheless, officials from the Australian Greenhouse Office and Environment Australia speak as if ratification of Kyoto is a foregone conclusion, and that regardless of the huge economic dislocation which a regime of carbon withdrawal will bring in its train, Australia has no choice but to accept the Kyoto targets.

Worse still, the Howard Government's recent *Environment Protection and Biodiversity Conservation Act* gives statutory authority to the Kyoto targets, in a way which raises grave concerns as to the willingness of the Howard Government to sacrifice the economic well-being of the next generation of Australians, merely to get a tax Bill through the Senate for temporary political gain.

The Basel *Convention on the Transboundary Movement of Hazardous Wastes and their Disposal* is an important example of a treaty which the Australian Government ratified, and which the Howard Government legislated into domestic law in September, 1996, in which essential details were completely unknown when the legislation was passed. Lists of materials which were to be subject to trade bans were specified in domestic law by reference to their place in the Basel Convention, but the items in the cited list were still to be determined by committees established by the Basel Secretariat. Australia thus legislated in September, 1996 to ban exports of unknown materials, the identity of which was still to be determined by a committee the membership of which was totally unknown to the Parliament, which would meet in Geneva or elsewhere in Europe, and decide what materials were going onto the list, and would thus be subject to an Australian statutory export ban.

It has to be said that this is a gross dereliction of constitutional duty. One of the most important activities of a sovereign state is engaging in political activity with other sovereign states. The analogy which assists in understanding this activity is that of a citizen who engages in commercial activity with other citizens and accepts contractual obligations in pursuit of his commercial interests. The difference between the sovereign state and the private citizen is that the sovereign state is acting on behalf of all the citizens. The private citizen has only his own interest to consider. Very few citizens would commit themselves to contracts in which their obligations were open-ended, undefined, or subject to the whims of outside parties. But this is precisely what the Australian Government did when it gave domestic legislative authority to the *Basel Convention*.

The ratification of the *Basel Convention*, the Paris meeting tomorrow of the World Heritage

Committee, and even more the Kyoto Protocol, are important mile-stones in a step-by-step process which will take Australia, unless we bestir ourselves, to a point where we will indeed find ourselves no longer a sovereign nation.

In order to understand the nature of this seditious process we need to understand what sovereignty means and how it came about. We have to understand, in clear and simple terms, why it is important. And we will have to steel ourselves to say some rather unpleasant things about those people – bureaucrats, politicians, opinion leaders – who at best count Australia's sovereignty very cheap, and at worst seek, actively, to subvert that sovereignty.

The nation-state, and the sovereignty that is the essential characteristic of the nation-state, was born in 1295, the year that Edward I called together a House of Commons to legitimise the raising of taxes, primarily from the cash-rich merchants and traders of the medieval towns. Edward needed extra revenue to finance his dynastic wars in France. These wars were usually triggered by the failure of provincial dukes and counts to provide male heirs. Economists tell us that the money spent on rent-seeking trends upwards towards the value of the rents that are perceived to be available. The Hundred Years War[4] between France and England for control of Flanders and other provinces on the southern side of the English Channel economically devastated the two countries,[5] and cost both sides to the prolonged struggle probably a thousand-fold or more times the rents that could conceivably have flowed to the successful war-lord.

In order to finance the war against his French rival for control of Champagne, and then Flanders, Edward I had to convene a Parliament to raise taxes, particularly from the merchant classes; and as the war dragged on and on, and King succeeded King, Parliament became institutionalised as the instrument of legitimate taxation. That connection persists to this day, and was most recently highlighted, in the Australian context, in the 1975 constitutional crisis.

In this prolonged struggle between the English and French monarchs, the Pope was a key player, and the papal courts were of great importance. In order to ensure that these processes would operate to French advantage, the French King, Philip the Fair, kidnapped Pope Boniface VIII, and forced him to march from town to town until he died of a heart attack. He then persuaded the cardinals to choose a French bishop as the new Pope and relocated the papacy in Avignon. The English response, in due course, was to pass an Act in 1351 under Edward III, known as the *Statute of Provisors*; and then in 1393, under Richard II, to pass a similar Act, the *Statute of Praemunire*.

The offence of *praemunire* is so called from the words of the writ preparatory to prosecution of the offence: *praemunire facias* A.B. (cause A.B. to be forewarned) that he appear before us to answer the contempt wherewith he stands charged. Blackstone defined the essence of the offence as "introducing a foreign power into the land and creating *imperium in imperio*, by paying that obedience to alien process which constitutionally belonged to the King alone".[6] The punishment of the offence of *praemunire* was that the offender was put out of the Crown's protection, and his lands and goods were forfeited to the Crown.[7]

The intent of the *Statute of Praemunire* (and its predecessor the *Statute of Provisors*) was to ensure that English litigants, be they political or ecclesiastical activists, could not go outside England in order to seek a more favourable outcome than they would obtain from the courts at home. The ground for this policy was the very reasonable suspicion that the papal courts,

then under the control of the French, would in reality behave as "kangaroo courts".[8]

The *Statute of Praemunire* became an important part of our history when it was used by Henry VIII to destroy Cardinal Wolsey. Wolsey's two great mistakes were, first, to tax with unprecedented zeal in order to finance his activist foreign policy and, second, to fail to deliver the papal dispensation which would allow Henry to have his marriage with Catherine of Aragon annulled, leaving him free to marry Ann Boleyn. His taxation policies made him a deeply hated man, and when the King turned against him he had no friends, anywhere. The fact that Henry had been completely involved in everything that Wolsey had done in seeking the approval of the papal courts for the annulment was irrelevant. Wolsey pleaded guilty to the charge, and then tried to save his life, and some small remnant of the immense wealth he had acquired as Chancellor and Cardinal. He died just in time to avoid being tried for treason and thus certain execution.

Praemunire then is central to the history of sovereignty and to our understanding of sovereignty, and it is certainly relevant to the debate over the role of the World Heritage Committee and its intrusion into the domestic affairs of Australians with respect to the Kakadu National Park and the Jabiluka mine.

In order to help clarify our ideas about sovereignty, I want to relate some episodes from our history which illuminate the concept. These examples (not a comprehensive list), and which are not related to each other except that the Commonwealth Government has been a player in all of them, help us more to reach an understanding than spending time in legal argument.

1. As part of the agreement reached between Colonial Secretary Joseph Chamberlain and the Australian delegation in London in August, 1900 (the debates were very tense), appeals from Australian courts to the Privy Council were allowed in common law cases, and in constitutional cases involving private citizens. But the High Court was supreme in constitutional cases involving disputes between the Commonwealth and States, so-called *inter se* matters, although the Constitution still allows for the High Court to issue a certificate which allows the parties in an *inter se* dispute to go to the Privy Council.

Getting Serious about Sovereignty (Continued)1

Ray Evans

The right of appeal to the Privy Council was first interdicted by the Gorton Government in 1968 with respect to federal matters, then restricted further in 1974 by the Whitlam Government, and finally finished off by the *Australia Acts* of 1986. (Whilst I agree with the argument that constitutional matters should be resolved within Australia, I see no reason why common law matters should not go to the Privy Council. The availability of an authoritative and indifferent court in commercial disputes, for example, can lead to greatly reduced transaction costs in business life, and thus provide a significant economic benefit to every citizen.)

2. In 1908, the Great White Fleet of the US Navy visited Australian ports. The invitation to do so was issued by the UK Government. The Colonial Office was extremely hostile because of the way Prime Minister Alfred Deakin had used his contacts with US officials to secure the visit.

3. Soon after war broke out in August, 1914, Australian policy with respect to exports of wool was governed by British directives. Under the provision of the *War Precautions (Supplementary) Regulation No 23* of 23 September, 1916, the entire Australian wool clip was to be acquired on behalf of the British Government for the remainder of the war at a price of 15.5 pence per pound, 55 per cent more than the pre-war price. The British Government had initially proposed prohibiting exports of wool from Australia and New Zealand to all destinations other than the UK and allied countries. The Australian Prime Minister, W M Hughes, however, protested strongly that this would occasion hardship to producers given the shipping problems, so he urged that the UK acquire the whole clip. The onus was then on the British government to provide shipping. That arrangement continued until 30 June, 1920. From September, 1916, any approval for sales to Japan had to be obtained from London. Not surprisingly, as allies of the British, the Japanese (who had been important buyers of Australian wool prior to 1914) insisted the embargoes were discriminatory.[9]

4. In 1931 the UK Parliament passed the *Statute of Westminster*, which gave legislative form to decisions agreed to at Imperial Conferences held in 1926 and 1930. In particular, the self-governing Dominions were to be regarded as “autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations”. The Royal assent was granted on 11 December, 1931 and that date is, in constitutional terms, the birthday of Australia as a sovereign nation.

5. In 1992, the US environmentalist movement worked hard to get a Bill through the US Congress which, if it had passed, would have implemented a phase-out programme for lead, leading to its eventual prohibition throughout the US. This Bill failed to get through the House, although only by a relatively small margin. After missing out in Washington, DC, the activities of the lead-banners then moved to the OECD. When nations join the OECD they commit to accepting an OECD Council Act as binding on their domestic law. However, an OECD Council Act requires unanimity to get through.

By 1995 every OECD member except Australia, Mexico, Turkey and Canada had agreed to support the lead ban. Canada was perceived to be a bit wobbly. Mexico and Turkey had

been given some hard treatment for their opposition to the proposed ban. Nevertheless, Australia had let it be known that, even without any other support, it would veto the lead ban all on its own. I understand that the Canadian Prime Minister was lobbied energetically by the US Vice-President but, in the end, to no avail. Australia did not end up having to cast a veto on its own, but if it had come to that, I am confident that our Government would have done so. The Department of Foreign Affairs and Trade (DFAT) officials who were responsible for the carriage of Australia's position deserve high commendation. It often goes against the grain to maintain a position, month after month, which however well supported by argument and logic, in the end simply says "No".

6. At a Cabinet meeting held in Bendigo, some months before the October, 1998 election, and coincidentally the same day that Pauline Hansen was in town, a decision was taken, against the advice of DFAT, that the Government would no longer accept the words "self-determination" in the UN *Draft Declaration of the Rights of Indigenous Peoples*. This policy change caused outrage amongst indigenous group leaders at the time, and when the Australian delegation to the *Draft Declaration* meeting held in Geneva in December, 1998 affirmed the new Australian policy, further outrage was exhibited by the Aboriginal representatives in Geneva.

The key issue in the language of the *Draft Declaration* is the underlying theme that indigenous peoples are, in some way, entitled to the prerogatives associated with sovereignty. The words "self-determination", "peoples" (rather than people), and collective rights more generally, either explicitly or implicitly suggest that the Indigenous Peoples Non-Government Organisations are demanding a status for indigenous peoples which is akin to the status of sovereign nations. The position of these bodies can be summarised as follows: Given the existence in international law of the right of all peoples to self-determination, and the fact that indigenous peoples are peoples, indigenous peoples have, *ipso facto*, the right of self-determination as stated in Article 3 of the *Draft Declaration of the Rights of Indigenous Peoples*.[10]

What is extremely important in this particular debate is that the Labor Party, taking note of the new position declared by the Government in Bendigo, did not then contest with the Government on this issue. The ALP leadership could see that if it were to become an election issue, they would pay a heavy price for being on the wrong side of that debate.

7. Last November the Appellate Body of the World Trade Organisation (WTO) handed down its decision in the shrimp-turtle case. In doing so it created a crisis situation for the WTO membership because, for the first time in the history of the GATT-WTO, the sovereignty of the member-states of the WTO has been placed at risk.

In order to understand why we are facing a crisis, it is necessary to give a brief history of the GATT-WTO and of the turtle-shrimp case. The General Agreement on Tariffs and Trade (GATT) was founded in 1947 as part of the post-war construction of a new international order. The idea was to create a rule of law in international trade which would provide predictability and confidence. The GATT was based on three principles. The first is that of non-discrimination between the parties to the GATT; i.e., a tariff applied to one member of the GATT had to apply to all members. This is called the Most Favoured Nation or MFN principle and it was set down in Article I of the Agreement.

The second is the equal treatment principle. Once an import had been let into the country (having paid whatever duties were required), it could not be discriminated against in favour of domestic goods. This was set down in Article III.

The third is the tariffication principle. It was accepted at the outset that the parties to the GATT would not agree to open borders. Protectionism was too powerful a political force for that. But it was agreed that barriers to imports would only be imposed as a tariff, and not as a quota or as some other non-tariff barrier (Articles II and XI).

The thinking behind the tariffication principle is that of transparency. Once people realise that trade barriers are no different from taxes, then domestic pressures will build up for reduction of tariffs. And that is indeed what has happened since the GATT was established in 1947.

Having agreed to these basic principles, the parties to the GATT then decided that exceptions were needed so that these basic principles would not cause political havoc. These exceptions were listed in Article XX, the exceptions clause, and they legitimised, for example, quarantine regulations.

The GATT-WTO has become perhaps the most important international institution that we have, and its success is measured by the extraordinary growth in international trade that has taken place since it was established in 1947. Dr Alan Greenspan, the Chairman of the US Federal Reserve System, referred to this in a speech in Dallas a few months ago:

"One of the most impressive and persistent trends of the last half century is the expansion of international trade. Adjusted for price change, trade across national borders has increased fourteenfold – far faster than the fivefold increase in world GDP.

"The evidence is overwhelmingly persuasive that the massive increase in world competition – a consequence of broadening trade flows – has fostered markedly higher standards of living for almost all countries who have participated in cross-border trade. I include most especially the United States".

Arguably the most important thing about the GATT-WTO is that it has, at the centre of its legal and philosophical structure, a strong commitment to preserving the sovereignty of the WTO membership. This might not matter to strong and powerful countries like the United States, but it matters greatly to small and much less powerful countries like Australia. Since 1947 almost all of the detailed work of the GATT, and of the various trade rounds, has been focused on reducing trade barriers, to our very great benefit.

A key element in protecting the sovereignty of the member states of the GATT was that Article XX did *not* legitimise trade sanctions or trade discrimination based on how an article was made, or to use the technical jargon, on production and processing methods (PPMs). That is to say, it was contrary to the GATT Articles to discriminate against an import because it had been made with cheap labour, or because it had been made from battery-grown hens, or, and here we go straight to the shrimp-turtle case, because the shrimp had been caught with nets that did not have the turtle extruder devices (TEDs) that were mandatory in US waters.

The fundamental reason why trade sanctions, because of PPMs, were illegal under the GATT is that, without such an agreement, the sovereignty of the GATT or WTO member states is fatally impaired.

Sovereignty is all about self-government; it is about the capacity to make political decisions affecting the life of the nation without recourse to foreign powers or foreign tribunals. It is about constitutional closure or self-containment. Labour market regulation, for example, is central to the exercise of sovereignty. Whether we give legal privileges or not to trade unions is something for us, and us alone, to decide – at least as long as we remain a sovereign nation. The International Labour Organisation (ILO) requires that trade unions

are legally privileged, and that is why the ACTU keeps running off to the ILO to complain about Peter Reith.

Environmental regulation is, likewise, a matter for sovereign decision making. How we catch our shrimps, cut down our trees, or mine uranium, is something for us and us alone to decide, provided we retain our sovereignty.

This central element of the GATT structure has meant, at least up until the Appellate Body's decision in shrimp-turtle, that GATT disputes panels were vigilant in defending the sovereignty of the member states in matters of labour market regulation, environmental regulation, and so on. But this critical element of the GATT rules and structure has been under attack from environmental Non-Governmental Organisations (NGOs), in Europe and the US, for more than a decade. They want the power to use trade sanctions to enforce their environmental policies around the globe, and in the case of Thailand, the US Government, because of green NGO pressure, banned imports of Thai shrimp because the nets used by the Thai fishermen did not have these Turtle Extruder Devices.

The Thai Government took the case to a WTO Dispute Panel and won, and the argument used by the Dispute Panel in finding against the US was the traditional GATT doctrine that PPMs did not give grounds under Article XX for trade sanctions.

The US Government then appealed to the Appellate Body and, once again, the Appellate Body found against the US; but, and this is where the alarm bells are ringing, the Appellate Body found against the US not because PPMs were used as the basis of the trade sanction, but because the US had not used the correct procedures to apply the trade ban.

This is a very bald summary of the case, and GATT experts will criticise it as "simplistic". But it is the essence of it, and its implications are profound.

If it becomes accepted that powerful interest groups in the US or Europe can impose trade sanctions on imports because they do not like the methods used to produce the product, then our sovereignty becomes effectively subordinate to the pleasure of these interest groups.

The comparison with the World Heritage Committee is important. Whether or not the Committee finds against us in Paris tomorrow – but of course particularly if it does – the Government will have a great deal of egg on its face, and those of us who care about our sovereignty should lose no opportunity to point out just how foolish Australia has been, for nearly two decades, in going down this road. But Government Ministers have an extraordinary capacity to pretend that the egg on their collective face is just an illusion, and life will go on pretty much the same.

But if the lamb exports we hope to get into the US were subject to a trade ban because powerful interests in the US objected to the way in which our sheep were crutched and their tails docked, then it is a very different story. Or if our gold exports were subject to trade bans because of the use of cyanide in the extraction processes, we would once again have a fiscal crisis to manage.

The most important aspect of the opening of the door to the use of PPMs as a legitimate cause of trade sanctions is that the environmentalists have always seen trade sanctions as the method through which they will impose a carbon withdrawal regime, around the world. The first step in that programme of carbon withdrawal is, of course, the Kyoto Protocol. Up till now the rules and traditions of the GATT-WTO have stood in the way of such ambitions.

Let me conclude with some observations. I have given some examples in which the Australian government of the day upheld our sovereignty, and some examples in which that

sovereignty was suborned. I have briefly outlined the critical situation facing the WTO and its members as a result of shrimp-turtle. I think it is becoming obvious that the Australian people find the use of international tribunals as a weapon in domestic politics completely objectionable. The use of the external affairs power to take from the States the powers given to them under the constitutional settlement is not only egregiously offensive, it is also very dangerous politics. A government that proposed a contemporary version of the *Statute of Praemunire* would get considerable support from the people.

The reason why such support would be forthcoming goes to the heart of sovereignty and its virtues. SEK Hulme, QC once told the story of Owen Dixon and the question he addressed to some young lawyers he was entertaining at lunch. Sir Owen asked them, "Who is the most important person in the courtroom?". The young barristers proposed the judge, the counsel for the plaintiff, counsel for the defendant, and so on. Dixon shook his head. "The most important person in the court", he said, "is the person who is going to lose. He or she must be completely satisfied that having lost the case, with perhaps great personal loss as a consequence, he has, nevertheless, received 'justice according to law' ".

The same argument applies to sovereignty. Politics is a never-ending process of debate and argument. Decisions affecting life and property are made as a consequence. Young men (and nowadays women) are sent off to risk their lives in war. Taxes are levied, with horrendous economic consequences for millions of people. All of us, very often, are at the wrong end of political decisions. But we accept the decision because we are part of the process, and the process is something we have inherited, along with family heirlooms and Shakespeare's plays.

Governments are always testing our acceptance levels. Their great weapon is that our attachment to our homes, our families, and our country, is very great. But unless they pull back from the process of suborning our sovereignty, and pushing our political processes and decision making into foreign capitals such as Paris, Geneva or Nairobi, then before long it will be found that we will not accept decisions arrived at in those far away places, by people who are unknown to us, and who are not accountable in any way to us.

Such an outcome would signal the beginning of the end of our enviable history of domestic peace and political stability.

Endnotes:

1. The author has been greatly helped in his understanding of this issue by an essay by Noel Malcolm, entitled *Sense on Sovereignty*, published in 1991 by the Centre for Policy Studies, London. Malcolm's discussion is in the context of the United Kingdom's position vis-à-vis the European Union, but his arguments and analysis apply to Australia's position vis-à-vis the "international community".
2. Testimony given by Professor Jeremy Rabkin to the US House Committee on Resources and Energy, on HR 883, the *American Land Sovereignty Act*, 18 March, 1999.
3. *The Australian Financial Review*, 8 July, 1999.
4. It actually lasted, off and on, for more than 130 years.
5. See Shakespeare's description of a France devastated by war in *Henry V,* Act V, Scene II, the Duke of Burgundy's speech before Henry V and Charles VI.
6. *4 Blackstone Commentaries*, 103.
7. *The King's Great Matter.*
8. This term, obviously unknown to fourteenth Century lawyers, originated in the USA.

9. Sandra Tweedie, *Trading Partners: Australia and Asia 1790 - 1993* (University of New South Wales Press, 1998).

10. Article 3: “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

Thoughts on the 1949 Reform of the Senate

Malcolm Mackerras

Towards the end of this year we will commemorate a fiftieth anniversary which has so far largely escaped notice. To be precise, on Friday, 10 December, 1999 we will commemorate the fiftieth anniversary of the general election held on Saturday, 10 December, 1949. That was the election which began the Menzies years. It was, just as importantly, the first election with a new Senate electoral system.

The system in question is commonly called "proportional representation". Until quite recently even a pedant like me used to call it that. However, further thought I have given to this subject causes me to revise my language. I should have been describing the system in two sentences, not one. The two sentences are: (1) When the most recent Senate election was double dissolution, the system might be described as one of PR (proportional representation). (2) However, when the most recent election was half-Senate, the system should be described as semi-proportional.

It was the result in 1998 which finally brought me to that description. There are now nine Senators for the Australian Democrats party. By contrast, there is only a single Senator for Pauline Hanson's One Nation party. (That sentence assumes there will be such a Senator. At the time of writing Mrs Heather Hill has been thrown out by the High Court, and we are all assuming that the second One Nation candidate, Len Harris, will take her seat). If you were to tell a South African, an Israeli or a Dutchman (people accustomed to PR) that the Australian Senate is elected by a system of PR, he would assume that the 1998 election had given nine votes to the Democrats for every one given to One Nation. When you told him that One Nation had polled 1,007,436 Senate votes (9 per cent), while the Democrats had polled only 947,938 (8.5 per cent), he would quickly tell you that the system is not one of PR. It is, at best, semi-proportional.

Armed with the realisation above, I have gone through all the post-1949 statistics which produce this opinion. I now understand that my description in the second paragraph above should always have been the correct description. Over the entire period we should have been calling the system semi-proportional except when a double dissolution takes place. Only then could we rely on a proportional result.

The 1949 reform was the result of a piece of ordinary legislation which passed through the Commonwealth Parliament in 1948. At the time, debate was dominated by the short-term consequences of the new system. Looking back over 50 years, however, we can now give a verdict on the behaviour of the Senate. It is given in Table 1. Note that there have now been more parliaments under "PR" than there were under previous non-proportional Senate systems from 1901 to the election of the 18th Parliament in 1946.

Table 1: Control of Federal Parliaments, 1949–98[1]

Date of Election[a]	Number of Parliament	Prime Minister at Opening	Date of Dissolution
Hostile Senate[b]			
December 1949	19th	Menzies (Liberal)	March 1951
December 1972	28th	Whitlam (Labor)	April 1974
May 1974	29th	Whitlam (Labor)	November 1975

October 1980	32nd	Fraser (Liberal)	February 1983
December 1984	34th	Hawke (Labor)	June 1987
Government Senate Majority			
April 1951	20th	Menzies (Liberal)	April 1954
May 1954	21st	Menzies (Liberal)	November 1955
November 1958	23rd	Menzies (Liberal)	November 1961
December 1975	30th	Fraser (Liberal)	November 1977
December 1977	31st	Fraser (Liberal)	September 1980
Government de Facto Senate Control			
December 1955	22nd	Menzies (Liberal)	October 1958
December 1961	24th	Menzies (Liberal)	November 1963
November 1963	25th	Menzies (Liberal)	October 1966
November 1966	26th	Holt (Liberal)	September 1969
October 1969	27th	Gorton (Liberal)	November 1972
March 1983	33rd	Hawke (Labor)	October 1984
July 1987	35th	Hawke (Labor)	February 1990
March 1990	36th	Hawke (Labor)	February 1993
March 1993	37th	Keating (Labor)	January 1996
March 1996	38th	Howard (Liberal)	August 1998

(a) The date of the election is that for the House of Representatives, which was also usually a Senate election date. The government of the day at all times enjoyed a House of Representatives majority and, therefore, total control of the Lower House.

(b) A "hostile Senate" is defined as one which was dissolved. Thus the date of dissolution column records the date of the double dissolution. In respect of the rows for "Government Senate Majority" and "Government de Facto Senate Control" the dissolution date is for the House of Representatives only. It is important to note that there were only five double dissolutions but there were 15 dissolutions for only the Lower House.

An opinion is now conventional that it is a dreadful thing that only five of the 20 Parliaments in Table 1 saw the government of the day with a Senate majority. I dissent from this "dreadful thing" view. To justify my dissent I give two further tables.

Table 2 sets out the percentages at those elections when a "big party" received a primary vote in excess of 49 per cent. I regard a 49 per cent support as high enough to be called a "majority" of the vote.

Table 2: Senate First Preference "Majority" Percentages

Party	1949	1951	1953	1975
Coalition	50.4	49.7	44.4	51.7
Labor	44.9	45.9	50.6	40.9

It will be noticed that two of the four entries above failed to give a majority of Senators to the party with the majority of votes. Labor continued to have a majority in the Senate in the Menzies 19th Parliament. By contrast, Menzies had a Senate majority throughout the whole of the 20th and 21st Parliaments – even though Labor won 50.6 per cent of the vote at the

May, 1953 separate election for half the Senate. In all three cases the reason has to do with the rotation of senators.

By contrast, the Coalition's 49.7 per cent in 1951 and 51.7 per cent in 1975 did produce a Senate majority in the 20th, 21st, 30th and 31st Parliaments. The reason has to do with the proportionality of the result when the most recent election was double dissolution, and the semi-proportionality of the result when the most recent election was half-Senate.

The continuing refusal of the Australian people to vote for the Government of the day in the Senate election has produced this consequence. The normal situation is that the government has *de facto* control of the Senate without enjoying an actual majority. While we may disagree with the decision of the Senate to reject this or that piece of government legislation, it is difficult to object on democratic grounds. In defence of my view, I set out in Table 3 the percentage of the vote secured by the Government (which in 1983 and 1996 entered the election as the Opposition party) at the Senate election relevant to the main life of that Parliament. Note that in 1964, 1967 and 1970 the election in question was a separate election for half the Senate.

Table 3: Selected Government Senate Percentages (Parliaments where Government had *de facto* Senate Control)

Election Date	Party	Percentage
December 1955	Coalition	48.7
December 1961	Coalition	42.1
December 1964	Coalition	45.7
November 1967	Coalition	42.8
November 1970	Coalition	38.2
March 1983	Labor	45.5
July 1987	Labor	42.8
March 1990	Labor	38.4
March 1993	Labor	43.5
March 1996	Coalition	44.0

While a government may, perhaps, reasonably object to Senate rejection of legislation by a genuinely hostile Senate (of which there have been only five cases in 20 Parliaments after 1949) it is difficult to see how any government could reasonably object to Senate rejection of legislation during any of the Parliaments covered by Table 3. It is worthwhile noting that three of those Parliaments met the technical conditions of s.57 of the Constitution – as is set out in Table 4. It is also worth noting that none of Menzies, Hawke or Howard could justify to himself the pulling of the "trigger" he had established for himself in the 22nd, 33rd and 38th Parliaments. That is why the subsequent election was of the conventional type, that is to say, for the House of Representatives and half the Senate.

The assertions above about the semi-proportionality of half-Senate elections appear to be based on disproportionality caused by the rotation of Senators. It is true that this was the point which was noticed in the early days of the system. As we shall see, the 1949 Senate election was not *of itself* disproportional. Rather, the combination of Senators elected in 1946 and 1949 produced the dreadful result that a government which had achieved over 50

per cent for both houses in 1949 was badly outnumbered by the official Opposition party in the Senate. A double dissolution thus became inevitable in 1951.

These points about proportionality may seem rather pedantic but they are worth making in the light of comments made below. They raise two questions. First, when does an election result cease to be proportional and become semi-proportional? Second, when does an election result cease to be semi-proportional and become non-proportional?

The answer lies in a device of modern psephology known as

Table 4: Parliaments Which Have Met Conditions of Section 57

Number of Parliament	Date of Election	Prime Minister	Term of Office	Date Conditions of s.57 First Met	s.57 Bills	Date of Dissolution	Next Election	Length of Parliament
5th	31 May 1913	Cook (Liberal)	First	28 May, 1914	1	30 July, 1914 (double)	5 September 1914	1 year 21 days
19th	10 December 1949	Menzies (Liberal)	First	14 March, 1951	1	19 March, 1951 (double)	28 April 1951	1 year 25 days
22nd	10 December 1955	Menzies (Liberal)	Fourth	27 March, 1958	14	14 October, 1958 (single)	22 November 1958	2 years 8 months
28th	2 December 1972	Whitlam (Labor)	First	29 August, 1973	6	11 April, 1974 (double)	18 May 1974	1 year 1 month 15 days
29th	18 May 1974	Whitlam (Labor)	Second	11 December, 1974	21	11 November, 1975 (double)	13 December 1975	1 year 4 months 2 days
32nd	18 October 1980	Fraser (Liberal)	Third	10 March, 1982	13	4 February, 1983 (double)	5 March 1983	2 years 2 months 10 days
33rd	5 March 1983	Hawke (Labor	First	14 June, 1984	2	26 October, 1984	1 December 1984	1 year 6 months 5 days

		)				(single)		
34th	1 December 1984	Hawke (Labor)	Second	2 April, 1987	1	5 June, 1987 (double)	11 July 1987	2 years 3 months 16 days
38th	2 March 1996	Howard (Liberal)	First	25 March 1998	4	31 August, 1998 (single)	3 October 1998	2 years 4 months

the Gallagher least squares index of disproportionality. Named after the Irish political scientist Michael Gallagher, it measures in a single statistic deviations from proportionality.

In respect of recent events studied by me the highest index was that for the November, 1993 New Zealand general election.

Table 5: Gallagher Least Squares Indexes for Australia

Election	House of Representatives	Senate
1949	7.50	3.42
1951	5.36	3.03 (full)
1953	–	3.29
1954	2.88	–
1955	6.84	6.52
1958	11.05	6.18
1961	7.12	9.75
1963	9.00	–
1964	–	2.06
1966	10.83	–
1967	–	3.80
1969	6.95	–
1970	–	3.16
1972	6.90	–
1974	5.96	3.72 (full)
1975	14.05	3.08 (full)
1977	15.02	7.30
1980	8.46	1.51
1983	10.41	3.37 (full)
1984	7.82	5.35
1987	10.41	2.60 (full)
1990	12.49	4.39
1993	8.06	3.33
1996	11.24	4.54

1998	11.85	7.48

The index was 17.69. That composite statistic was calculated from a National Party over-representation of 15.46 (50.51 per cent of seats for 35.05 per cent of votes), a Labour Party over-representation of 10.77, an Alliance under-representation of 16.19, a New Zealand First under-representation of 6.38, etcetera.

Thoughts on the 1949 Reform of the Senate (Continued)

Malcolm Mackerras

South Africa has the most proportional system in the world today. At the June, 1999 general election the Gallagher least squares index of disproportionality was only 0.16. For example, the African National Congress won 266 of the 400 seats in the National Assembly, which is 66.50 per cent of the seats. It had 66.36 per cent of the votes. The New National Party won 28 seats, exactly seven per cent of the 400 seats. It won 6.87 per cent of the votes; and so on.

Table 5 gives the equivalent Australian figures. Double dissolution elections are shown with the word (full) by their side indicating an election for the whole Senate. It should be noted that only in 1961 did the Senate election result turn out to be less proportional than that for the House of Representatives. It was a half-Senate election. My judgment is that an index of less than four constitutes a proportional result, while an index of more than ten constitutes a non-proportional result. Anything in between is semi-proportional. Thus I say that only when the whole Senate is elected can the system be said to be one of PR. Notice that the index was 3.03 in 1951, 3.72 in 1974, 3.08 in 1975, 3.37 in 1983 and 2.60 in 1987.

The title of this paper is *Thoughts on the 1949 Reform of the Senate.* It is to be noted that the reform was implemented by a Labor government and that the Liberal Party was initially critical of significant aspects of the new system. However, from 1951 onwards the Menzies Government became quite comfortable with the new arrangements. Indeed, why would it not be comfortable? From 1951 onwards Menzies had a majority in both Chambers.

Reference to "the 1949 reform" may, perhaps, give the impression that I am unaware of two subsequent changes. Not so. I am very much aware of them. It is just that I do not regard either the changes of 1975 or those of 1984 as being of any significance. Having never argued for the reversal of the 1949 reform, I have also never argued for the reversal of the changes of either 1975 or 1984, both of which were also implemented by Labor governments, and opposed by the Liberal Party.

The 1975 change simply added two Senators from each of the Australian Capital Territory and the Northern Territory to the existing ten Senators from each State. That had the effect of increasing the total size of the Senate from 60 to 64. Territory Senators are peculiar in that they do not rotate. Consequently they always have three year terms because their election is always tied to that of the House of Representatives. It could be argued that the addition of these "lower class" Senators dilutes the federal nature of the Senate. The Senators from the States serve terms of six years and do rotate. They are the "upper class" Senators.

I can see the argument that Territory Senators should be removed. Their presence undermines the idea of the Senate as a States' house. However, it seems to me that the Senate has evolved into a multi-party House – and that is where its value lies. Since the 1975 change did not alter that, I oppose its reversal. In any event I am an elector of the ACT and do not want to lose my Senate vote! Finally, since the High Court has now twice upheld the constitutional validity of Territory Senators, I cannot see any reason why a paper for a conference titled *Upholding the Australian Constitution* should recommend the abandonment of Senators who have sat quite constitutionally for nearly a quarter of a

century.

Where the Whitlam Government had implemented the 1975 change, it was the Hawke Government which changed the rules from the 1984 general election onwards. Henceforth there would be 12 Senators from each State, increasing the total to 76. Future half-Senate elections would be for six Senators, where previously they had been for five. The Liberal Party opposed that change also. One of the arguments it used was that elections should always be for an odd number (say, five or seven), never for an even number (say, six).

There is some logic in the argument. In an odd-numbered election, a party's vote of 50.1 per cent would give it three out of five or four out of seven. A majority of votes would give a majority of seats. By contrast, if six are elected, one party with 56 per cent of the vote may win three seats while another party with 44 per cent of the vote may also win three. Thus a clear majority of the votes only translates into half the seats.

While acknowledging the logic in the argument, I disagree with it. These are questions of the workability of institutions, not of logic. There is no reason why the Australian Senate should not work with six Senators being elected each time from each State. Indeed, I argue that the Australian Senate has worked just as well since 1984 as it did in the period 1949-84. Consequently I oppose the proposal to reverse the change of 1984. That is why I always revert to my pedantic point. If it be agreed that the Senate system is, in practice, semi-proportional there is no reason to keep quoting a theoretical PR point about the need for odd numbers. I always suspect that those who say this are either defective in their understanding of these things or have a political axe to grind.

Which brings me to the Liberal Party. The Menzies Government won a Senate majority in its second term, as a consequence of the Coalition receiving 49.7 per cent of the Senate vote in 1951. The Fraser Government had a Senate majority in both its first and second terms, when the Coalition had won 51.7 per cent and 45.6 per cent, respectively, of the Senate votes in 1975 and 1977. Consequently, the Liberal Party quickly got over its railing against the changes of 1949 and 1975. By contrast, the Howard Government has not had a Senate majority in either of its terms. Thus the Liberal Party is still railing against the changes of 1984. It has no basis to do so, as can be clearly seen from Tables 6 and 7.

Table 6: Post-War Cases of the "John Howard Prime Minister"

Prime Minister	**1st Win**	**Senate % at 1st Win**	**2nd Win**	**Senate % at 2nd Win**	**Decline**
Robert Menzies (Liberal)	December 1949	50.4	April 1951	49.7	0.7
Gough Whitlam (Labor)	December 1972	(a)	May 1974	47.3	—
Malcolm Fraser (Liberal)	December 1975	51.7	December 1977	45.6	6.1
Robert Hawke (Labor)	March 1983	45.5	December 1984	42.2	3.3
John Howard (Liberal)	March 1996	44.0	October 1998	37.7	6.3

(a) The December 1972 election was for the House of Representatives only.

A “John Howard Prime Minister” is one who had been Leader of the Opposition but led his party out of Opposition to victory at a general election. The Senate record of the five post-War cases is set out in Table 6. One notices the decline in their Senate percentages at their second win. Most of all, however, I am impressed by the magnitude of the Howard decline and the low overall vote, a miserable 37.7 per cent in 1998.

Table 7: Non-Labor[(a)] Senate Percentages[2]

Election	Vote (per cent)	Election	Vote (per cent)
1910	45.6	1949	50.4
1913	49.4	1951	49.7
1914	47.8	1953	44.4
1917	55.3	1955	48.7
1919	55.2	1958	45.2
1922	52.0	1961	42.1
1925	54.9	1964	45.7
1928	50.5	1967	42.8
1931 (highest)	55.4	1970	38.2
1934	53.2	1974	43.9
1937	44.8	1975 (highest)	51.7
1940	50.4	1977	45.6
1943 (lowest)	38.2	1980	43.5
1946	43.3	1983	39.9
		1984	39.5
		1987	42.0
		1990	41.9
		1993	43.0
		1996	44.0
		1998 (lowest)	37.7
Average 1910–46	**49.7**	**Average 1949–98**	**44.0**

(a) The term Non-Labor means Liberal from 1910 to 1914, Nationalist in 1917, Nationalist-CP from 1919 to 1928, UAP-CP from 1931 to 1943, Liberal-CP from 1946 to 1980 and Liberal-National since 1983.

Table 7 illustrates my thinking best of all. Howard’s Senate vote was poorish in 1996, when it was exactly the long-term Coalition average of 44 per cent. His 1998 Senate percentage was the lowest ever for Non-Labor. The lowest in 34 elections! How dare the Liberal Party complain about the system! In any event, the Coalition presently has 46.1 per cent of the Senate seats when its most recent vote was 37.7 per cent. Under a so-called PR system the Coalition is over-represented by 8.4 per cent.

John Howard himself has repeatedly stated that he is not considering radical changes to the Senate electoral system. However, that has not deterred other Liberals (equally

repeatedly) from railing against the present method of electing Senators. Since these people keep proposing so-called "reforms" I should like to consider whether these reforms are constitutional or not. If for no other reason, that duty is imposed upon me by the title of this conference which, let me remind you, is called *Upholding the Australian Constitution.*

Clearly, a reform which merely takes the Senate back to the pre-1949 period, or to the period 1949-75, or to the period 1975-84, would be perfectly constitutional. There is, in fact, a case for taking it back to the period 1975-84. During that period there were 64 Senators, while the numbers in the House of Representatives ranged from 127 to 124. Thus the argument would be the desirabilty of getting rid of 12 Senators and about 20 or so Members of the House of Representatives. Under the nexus provision of s.24 of the Constitution, the numbers in the lower House "shall be, as nearly as practicable, twice the number of the Senators".

Given that New South Wales has reduced the size of its Legislative Assembly from electing 109 members in March, 1988 to electing 93 in March, 1999; and given that Tasmania has reduced the size of its House of Assembly from the 35 elected in February, 1996 to the 25 elected in August, 1998, there may well be a case for cutting 20 or so Members out of the House of Representatives. That could easily be done by reducing the size of the Senate from 76 to 64. Plainly that would be a constitutional thing to do.

The trouble is, it would neither make the Senate more workable, nor would it increase the likelihood that a government has a Senate majority. Subsequent to 1949 no Labor government has had a Senate majority. Menzies and Fraser did, Howard did not. Why? The first two Menzies Senate percentages were respectable, 50.4 and 49.7. Fraser's first two were also respectable, 51.7 and 45.6. To understand Howard's failure one need do no more than inspect his miserable percentages as set out in Tables 6 and 7.

Having ascertained that the reform consistent with the Constitution (reversion to the numbers of 1975-84) would not solve the Liberal Party's problem, what about the other proposed reforms? Essentially both are radical and unconstitutional, as I shall explain. Consequently the Liberal Party's problem is easily explained. It has nothing to do with nefarious changes introduced by the Chifley, Whitlam and Hawke Labor governments. The difference between Menzies and Fraser on the one hand, and Howard on the other, is Howard's abject failure to persuade significant numbers of Australians to vote for his government at Senate elections. Where Menzies and Fraser succeeded, Howard has failed.

It must be very galling to supporters of the Howard Government to know that its Senate vote of 37.7 per cent has inflated into "only" 46.1 per cent of the Senators. How, then, do you get a *decent* size of inflation? Answer: Liberal Party luminaries concoct radical schemes of "Senate reform", and assure gullible journalists that either scheme could be implemented by a simple act of the federal Parliament. When a difficult fellow like Malcolm Mackerras argues that the schemes are unconstitutional, you get your journalist friends to ignore him or put him down.

The first "reform" is being promoted by Senator Helen Coonan of New South Wales. It proposes that a threshold (or hurdle) be inserted at Senate elections. She is suggesting that the threshold be five per cent. Any party which gets less than five per cent would be cut out by the threshold. It could not get a Senator elected in any State in which the

party's vote is less than five per cent.

To people with a smattering of knowledge (but no real understanding) about electoral systems the proposal sounds quite reasonable. It is actually outrageous, and unconstitutional. The plausibility of it comes from saying that successful countries with PR, such as Germany and New Zealand, have five per cent thresholds – so should Australia. We are invited by the argument to think like this: "New Zealand is very like Australia, let us copy New Zealand. Germany is a very successful federation, let us copy Germany".

There is a simple reason why I do not accept the argument. I know something about electoral systems. Those advancing the argument obviously do not. Anyone who knows anything about electoral systems would know that Australia may be compared with Ireland and Malta, but not with Germany or New Zealand.

PR systems come in two types. There is the single transferable vote (STV) of Australia, Ireland and Malta. Then there are party list systems of PR which apply in a host of countries, including Germany and New Zealand. STV is a system of direct election. Under party list systems, by contrast, the voters merely distribute numbers of party machine appointments. Party list systems permit the concept of a threshold. A party getting below the threshold sees its entire vote thrown into the rubbish bin. STV does not permit a threshold. A candidate with a poor vote will be excluded at the appropriate stage of the count. His or her votes will then be transferred by preferential marking to other candidates still in the count. STV is a preferential system.

Would it be possible to change our Senate PR to a party list system? No, it would not. The first sentence of s.7 of the Constitution provides:

"The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate".

Since STV is the only system of PR under which Senators are "directly chosen by the people", it is the only form permitted by the Constitution.

Since Senator Coonan's proposal for "Senate reform" is so clearly out of the question, what are we to say for the scheme being promoted by former Liberal Party federal director, Andrew Robb? I would say it deserves twice as much consideration as Coonan's but should still be firmly rejected.

One of the merits of the Robb scheme is that it has, at least, been put into legislative form. The distinguished former Senator, Malcolm Colston, decided to make his last contribution to the Senate very recently. He tabled a 50-page Bill with the title *Electoral Amendment (Senate Elections) Bill 1999*. To quote from the longer title, the Bill is "to provide for the division of States into Wards for the purpose of choosing Senators, and for related purposes".

The purpose of the Colston-Robb proposal is to turn the Senate into a federal version of the Victorian Legislative Council. That body presently has only Labor, Liberal and National members. Only they can get elected in a single-person preferential election. Every present Senator currently being an Independent, or currently belonging to the Democrats, Greens or One Nation, would be doomed to defeat when their present terms expire.

No doubt Andrew Robb is pleased that a very senior former Senator (the Father of the Senate, no less) should have given his prestige in support of what used to be regarded as Andrew Robb's hobby horse. That is why I call it "the Colston-Robb Bill". Unlike the

Coonan scheme, a case can be mounted that the Bill is constitutional.

Essentially, the argument rests on the presence of the words "until the Parliament otherwise provides" in s.7 as quoted above. Whereas direct election is a permanent requirement, so the argument runs, the expression "voting . . . as one electorate" operates only "until the Parliament otherwise provides". My reason for rejecting the argument is that I have studied the circumstances which led to the inclusion of those words which allegedly make the Colston-Robb Bill constitutional.

The Founding Fathers knew that they were making the Australian Senate to be a copy of the American Senate. At the time, the American Senate was partly elected by the people and partly chosen by State legislatures (according to the laws of the State in question). However, because there were only two American Senators per State but there would be six per State in Australia, our Founding Fathers were uncertain as to how it might work. As a statement of modesty they inserted those saving words for fear that the system may fail. They thought the Parliament should be given some flexibility.

If, during the first 20 years of Federation, the concept of Senators being elected from States voting as one electorate had proved demonstrably to be a failure, I have no doubt it would have been possible to enact the Colston-Robb Bill in, say, 1920. As far as I am concerned, the words "until the Parliament otherwise provides" expired in 1920, or thereabouts.

Would the High Court agree with that view? I think it would. It would decide that the Constitution effectively reads: "The Senate shall be composed of Senators for each State, directly chosen by the people of the State, voting as one electorate". They would decide that such a reading is essential to the role of the Senate as the States' House.

Anyone wanting to understand the likely reaction of the High Court would do well to study the judgments in the February, 1996 McGinty case which dealt with electoral boundaries in Western Australia. There is a train of thought which comes through all the judgments. It is that an electoral system of very long standing can acquire a legitimacy which makes constitutional a scheme which might otherwise be unconstitutional.

In the case of the Senate we can state as an historical fact that there are two fundamental characteristics of the system which have remained unchanged since 1901. They are "directly chosen by the people", and States "voting as one electorate". Any attempt to change either of those would have a character quite different from the several changes since 1901 which are well known (such as plurality changing to preferences, majoritarian characteristics changing to PR, the introduction of ticket preferences, etcetera).

Consequently my view is that the High Court would not permit either the Coonan or Robb schemes. However, I admit this against myself. Among the several legal experts I have consulted, opinion is divided 50-50 on whether the Colston-Robb Bill is constitutional or not. By contrast, opinion is unanimous that the Coonan scheme is unconstitutional.

It is my expectation that the Senate of the 39th Parliament (that is, the present Parliament) will be dissolved. My guess is that we shall have a double dissolution election in about April, 2001. The present would, in my way of classification, then be a "hostile Senate". It is not an expectation which worries me. Nor does the prospect justify "Senate reform" of any kind.

From time to time the majorities in our two Chambers get out of harmony. In Table 8 I set out my assessment in that regard. It shows just 11 years out of 100 in which those majorities were out of harmony. Not a great number of years of discord. However, how does it happen? Some say it is because people vote differently between the two Chambers. I do not

deny the fact of widespread vote-splitting. What I deny is that vote-splitting explains the discord.

Table 8: Years House of Representatives and Senate Majorities Not In Harmony

Number of Parliament	Years	Prime Minister	Length of Discord
5th	1913–14	Cook (Liberal)	One year
12th	1930–31	Scullin (Labor)	Two years
19th	1950–51	Menzies (Liberal)	One year
28th/29th	1973–75	Whitlam (Labor)	Three years
32nd	1982	Fraser (Liberal)	One year
34th/35th	1987	Hawke (Labor)	One year
39th?	1999-2001?	Howard (Liberal)	Two years?

In my opinion the explanation for the discord of Table 8 has, since 1949, always been found in the different electoral systems operating for the two Chambers. For example, in the present Senate we have a left-of-centre majority which reflects the votes in a broad sense. In the House of Representatives, by contrast, we have a comfortable Coalition majority when the Labor Party received 51 per cent of the two-party preferred vote while the Coalition received only 49 per cent.

I have deliberately put question marks in the bottom row of Table 8. The reason for those question marks is that we do not yet know whether the present will turn out to be a hostile Senate. If the present Parliament does turn out to be one of discord between the two Chambers it will be due entirely to the two different electoral systems. It will raise this response from supporters of the Senate:

"If Australia must continue to suffer from such a rotten electoral system for the House of Representatives, it must surely expect some discord between the Lower House with a rotten system and an Upper House with a good system".

Mind you, that is not what I would say. I think it is a good thing to have those two different electoral systems. If occasionally their operation produces discord, then so be it. That is the consequence of having a system of checks and balances.

Endnotes:

1. Source: Ian McAllister, Malcolm Mackerras and Carolyn Brown Boldiston, *Australian Political Facts*, 2nd edition, Macmillan, 1997, pp.8, 78 and 80. Updated for the 38th Parliament by Malcolm Mackerras.
2. Source: Ian McAllister, Malcolm Mackerras and Carolyn Brown Boldiston, *op.cit.*, pp.100–106.

Federalism and Sir Owen Dixon

Dr Philip Ayres

Sir Owen Dixon is noted for his advocacy of a pure legalism in interpreting the Australian Constitution, and any consideration of his attitude to federalism has to start with that fact. On taking the oath of office as Chief Justice of the High Court of Australia in 1952, he said that:

"Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".[1]

Note that Dixon was a *legalist*, not a *literalist*, when it came to interpreting the Constitution. This was because he believed that the Common Law was the ultimate constitutional foundation, and that to the interpretation of the Constitution one properly applied the principles of the Common Law. It was Sir Isaac Isaacs who advocated literalism – finding the meaning of the Constitution purely in its *words* – but Dixon read the Constitution also through its federalist *implications.*

It is almost doctrine today that every judge is political in his judgments, however much a legalist he may believe himself to be. This concept of the political is as vague as the sociological or psychological connotations one chooses to give it. It is insisted upon at great length, but never really proved, in Brian Galligan's interesting book, *Politics of the High Court*.[2] The truth is that it would be hard to find a less politically influenced judge than Dixon, though politicisers like Galligan would call him "establishment", adding "QED". A classicist in spirit, a pessimist by inclination, sceptical, agnostic in religious matters, he had a profoundly logical mind, and his pronouncements on Australian federalism, to which he gave more serious thought than any of his contemporaries on the bench, are as disinterested as one could want.

It is probably true to say that Dixon did not believe federalism to be the ideal system. He once joked that in England they had the Constitution flexible and the judges rigid, in the United States they had the Constitution rigid and the judges flexible, and that in Australia we had the Constitution rigid and the judges rigid too. This suggests that he saw the British system as the best of the three, or at least better than the Australian system. However, he would have believed that if you *had* a federal system, then it should be made to work as it was meant to work.[3]

Dixon often spoke on federalism, in the United States and Canada as well as in Australia, exploring the connections between the American model and ours, measuring the influence of John Marshall and other American judges on constitutional interpretation in Australia.[4] In these speeches he traced the history of Australian federal-State relations in a very objective fashion.

What he objectively saw, of course, was a gradual expansion of the federal sphere and diminution in the power of the States. But he does not barrack for one side against the other, as his one-time pupil Sir Robert Menzies barracks for centralism in his 1967 University of Virginia lectures, collectively and triumphally titled *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*—a collection dedicated to Dixon.[5] The *Engineers' Case* (1920), which threw

out the old doctrine of implied mutual immunities of Commonwealth and State instrumentalities, along with the previous understanding of the reserve powers of the States, was Menzies' first victory for centralism but not his last.[6] By contrast, Dixon did much to wind back *Engineers'* principles (particularly on implied immunity of instrumentalities), reading them down, as will be seen, in judgment after judgment through the 1930s, '40s and '50s, and taking the Court with him; not because he was a States'-righter, but because he was concerned to read the Constitution logically as a federalist document with necessary implications for the protection of the States against discriminatory federal legislation that threatened to infringe their powers.

There is no evidence that anyone viewed Dixon as a centralist during his thirty-five years on the High Court bench, from 1929 to 1964. The Court of the *Engineers' Case* soon changed complexion. Sir Isaac Isaacs, the arch centralist, left it within two years of Dixon's appointment. The other radical nationalist and centralist on the Court, Henry Bournes Higgins, had died in 1929. Sir Frank Gavan Duffy, who had dissented in *Engineers'*, was still there and would soon be elevated to Chief Justice. H V Evatt, appointed in 1930, was a noted States'-righter. The High Court by 1931 was a very different body from what it had been in 1920.

Because it was a federal body the Court was seen by many as *ipso facto* a threat to the States. In mid-1935 there was talk in Melbourne of Dixon being appointed Chief Justice of Victoria, but in September Eugene Gorman, a prominent Melbourne silk, told him that Victorian Premier Albert Dunstan's anti-federal bias was the reason for Dixon not in fact being offered the position.[7] This does not mean that Dunstan saw Dixon as a centralist—that Dixon was a federal judge at all would have been enough to put Dunstan off him. Dixon greatly admired NSW Chief Justice Sir Frederick Jordan, a States'-righter, though not his later stridency in that cause, which Dixon referred to as Jordan's "queer views about federalism"—queer because unbalanced.[8]

Dixon was Australian Minister to Washington from 1942 to 1944, during Roosevelt's third Presidency, and most (though not all) of his American contacts and friendships there were with Roosevelt Democrats, who were undoubtedly centralists. His best friend in Washington was Justice Felix Frankfurter, no States'-righter. Dixon could joke at the expense of American States'-righters. For example, there was the time he visited a court in California, probably in August, 1939. As he tells it:

"The Judge was hearing a suit of an ordinary character and a point was before him to which we are not accustomed. There was a requirement of notice before action. The notice had been given to the wrong authority. The Judge said that it was very hard to take such an objection, a very hard case indeed; he would not like to give effect to the objection that notice before action had been given to the wrong body. Counsel said, 'I have authority. There is a decision of the Supreme Court that you must', and he read the decision. The Judge said, 'What Supreme Court is that, is that Roosevelt's Supreme Court?'. 'No', said the Counsel, 'that is the Supreme Court of California'. 'Oh', said the Judge, 'then I will have to take notice of that' ".

But Dixon could also jest at the expense of the *Engineers' Case*. He detested the style of that judgment, which was written by Isaacs in his usual manner, full of superfluous rhetorical flourishes, and he despised much of its reasoning, including the way it minimised the influence of the American model on the Australian Constitution and trumpeted to the skies the British elements of unity of the Crown and responsible government. In Dixon's

paper on *Marshall and the Australian Constitution*, delivered at Harvard in 1955, he openly ridiculed, in typically dry wit, much of the logic of *Engineers'*, its irrelevancies, and its lack of appropriate sequencing:

"The reasons the Court gave combined many elements, not all of them satisfactory. But first and foremost it was insisted that you could find nothing compatible with State immunity in the principle which the High Court had adopted from *McCulloch v. Maryland* and formulated [in a previous judgment throwing out Tasmanian stamp duty on federal officers' salaries] . . . Then came passages in the judgment containing protests against resort to implications; against the desertion of the golden rules of construction enshrined in English law; and against an endeavour, as the judgment described it, to find one's way through the Australian Constitution by the borrowed light of the decisions and at times the *dicta* that American institutions and circumstances had drawn from the distinguished tribunals of the United States. We are next exhorted by the judges to bear in mind two cardinal features of our political system, namely the unity of the Crown and the principle of responsible government, and these are said radically to distinguish it from the American Constitution. And so of course they do; but in no relevant respect. For they do not touch the federal structure of the Constitution or its consequences. The warning against the use of light borrowed from the United States does not deter the judges giving it from resorting once more to Marshall as an authority for the interpretation upon which they rely in deciding that the States are subject to the federal legislative power concerning industrial disputes. . . ."

And so it goes on, with Dixonian irony, for another page.

As Sir Robert Garran pointed out in 1923: Dixon's reading down of *Engineers'* was examined 34 years ago by Leslie Zines in an article I will not attempt to replicate.[9] A survey of the pertinent sections of the relevant judgments will suffice. One does not want to overstate the degree of revisionism involved, and Dixon certainly did nothing towards reinstating the old doctrine of the reserve powers of the States. He took *Engineers'* to be a valid check not only to that doctrine, but to the excesses (as he saw them) of the "implied immunities" of Commonwealth and State instrumentalities, both doctrines enshrined in earlier judgments of the High Court, particularly in the *Railway Servants' Case* (1906).[10] Isaacs, in his *Engineers'* judgment, had heralded a new age of constitutional interpretation in which only the words of the Constitution itself, not their alleged implications, would be examined by the Court. Although the States received *Engineers'* as a revolutionary blow to their sovereign rights and powers, it was evident to some constitutional lawyers that one could not read a federal Constitution for long without considering its implications.

"No rule of construction can ignore the truth that what is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication is necessary".[11]

In late 1930, his second year on the Court, in *Australian Railways Union v. Victorian Railways Commissioners*, Dixon wrote that, as he read it, the central principle in *Engineers'* was that:

"…..unless, and save in so far as, the contrary appears from some other provision of the Constitution, or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies *if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their*

agencies".[12]

He added that:

"During the argument of this case it appeared that the judgment of the majority of the Court in the *Engineers' Case* ought not to be understood as laying it down that over a State the power of the Parliament is as full and ample as over the subject and allows the same choice of remedies, measures and expedients to secure fulfilment of the legislative will".[13]

These exceptions and reservations which Dixon understood to be contained or inferred in the *Engineers'* decision were further elaborated by him in *West v. Commissioner of Taxation (NSW)* in 1937, and he boldly affirmed the validity of implications:

"Since the *Engineers' Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' Case* meant to propound such a doctrine. It is inconsistent with many of the reasons afterwards advanced by Isaacs J. himself for his dissent in *Pirrie v. McFarlane*. Indeed, he there refers to 'the natural and fundamental principle that where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other'. He adds: 'Such attempted destruction or weakening is prima facie outside the respective grants of power'. There is little justification for seeking to find in the *Engineers' Case* authority for more than was decided".[14]

Dixon then repeated the two reservations he had mentioned in the 1930 case: no Commonwealth legislation should affect "the exercise of a prerogative of the Crown in right of the States", and federal Parliament would not seem to be authorized "to enact legislation discriminating against the States or their agencies".[15]

Then, in *Essendon Corporation v. Criterion Theatres Ltd* (1947), in a judgment heavy with American citations, he added a third reservation: that the States could not tax the Commonwealth in respect of the exercise of its powers and functions.[16] But this immunity Dixon regarded as mutual, as we see in his judgment in the *State Banking Case* (1947), where we get his most extended consideration of the implications of federalism. Section 114 of the Constitution provides that a State:

"…..shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State".

In the *Essendon Corporation Case*, as Zines points out, Dixon gives this clause its maximalist reading:

"It could be argued that as the Constitution makes express the immunity of property of a government from tax by another government no other tax immunity is contemplated by the Constitution: *expressio unius est exclusio alterius*. This approach was rejected by Dixon J. He maintained, in effect, that s.114 extended rather than narrowed the tax immunity that the Constitution would have otherwise granted. The 'implied' immunity is immunity from being taxed in respect of any function. The immunity granted by s.114 is based merely on ownership and does not depend on the nature or purpose of the use or on who is using it".[17]

At issue in the *State Banking Case* was the Commonwealth's attempt, by way of s.48 of the

Banking Act (1945), to prevent the State Governments and their agencies from using any but Government trading banks – in effect, the Commonwealth Bank. In his judgment rejecting the legislation as discriminatory against the States, Dixon takes the opportunity to set out clearly his own views on federalism. (I prefer not to call them a theory, though Zines does – Dixon was not really a theorist).

Dixon wrote that:

"The federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions . . . The objection to the use of federal power to single out the States and place upon them special burdens does not spring from the nature of taxation. . . . The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities. . . . The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country".

Dixon went on to point out that:

"The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation".

And he stressed that:

"The considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States [that is, the old reserve powers doctrine] but from their position as separate governments in the system exercising independent functions".

This, he made clear, was implicit in "the very frame of the Constitution".[18]

So the implications of a federal Constitution involve the "continued existence" of the States "as independent entities". The federalist system of government is guaranteed not by doctrines of reserve powers, but by "the very frame of the Constitution", that is, the federal nature of the compact. One may think this is stating the obvious, but Dixon was stating it during Chifley's period of government, and he was the only one clearly stating it when it needed to be said. By finding what he saw as significant exceptions to the overthrow of the implied immunities doctrine, he had in fact given that doctrine some new life, though he continued to refer to it as something that had been overturned *qua* doctrine.

Dixon of course gave full weight to s.109 – that, "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid", though even that he saw as subject to the implications resting in the federal frame of the compact. The Commonwealth was clearly advantaged by a Constitution which gave it a range of express powers. Partly for this reason, and because he believed that the States had almost no legislative power over the Commonwealth, in the *Second Uniform Tax Case* (1957), and in *Commonwealth v. Cigamatic Pty Ltd* (1962), Dixon as Chief Justice, along with his Court, ruled that the Commonwealth had priority over States in respect to payment of debts in company bankrupcy proceedings[19] – something he had argued in dissent as early as 1947 in *Uther v. Federal Commissioner of Taxation*.[20]

In 1943 Dixon addressed the annual banquet of the Law Club at the University of Toronto

on "Aspects of Australian Federalism". In his conclusion he reiterated his point that "the story as I have narrated it shows a continual decline in the authority of the States and a growth in the predominance of the federal power", but he added that "like all developments it is irregular and its end is not yet. The only lessons to be gained from it perhaps are that all is flux and that you never can tell".[21] How true that is. Who could predict that in 1978, for instance, the Fraser Government under its New Federalism would endeavour to wind back the Commonwealth's powers in favour of the States, not only by transferring significant government programmes from the Commonwealth to the States, as they did, but by offering to return the income-taxing power – and that the States would decline the offer?[22] Fiscal power of a kind basic to sovereign existence – no longer wanted. The fear of freedom.

One can guess what Dixon would have thought of the recent tide of judicial activism. He would have despised it as an overt politicizing of the law. His own reading of federalist *implications* into the Constitution might seem, on a superficial view, to foreshadow the finding of other implications in the Constitution, including the "implied rights" established by the High Court in decisions of the early 1990s such as *Nationwide News Pty Ltd v. Wills* and *Australian Capital Television Pty Ltd v. Commonwealth*,[23] both to do with implied freedom of communication. It is highly unlikely, though, that Dixon would have agreed with the judgments in those cases. The Constitution is manifestly federalist, and thus full of federalist implications; it is not manifestly full of implied rights.

Dixon was deeply sceptical; perhaps even, secretly, of his own stated view that if one applied a pure legalism to the Constitution and its federal implications one could always come up with the "correct" reading, even of s.92 – where, incidentally, he gave the words "absolutely free" in regard to trade, commerce and intercourse between the States their maximalist reading, applying them as he did to affirming the *individual's* right to trade across borders unrestricted by government regulation, limiting the powers of both Commonwealth *and* State governments in this important area.

His general scepticism was so great that in 1937, in an address to the University of Melbourne's Law Students' Society, he even doubted the most fundamental of legal assumptions, that of causation. He was depressed with his work on the High Court at the time, strongly advising others against becoming a judge. In this most interesting speech he made passing glosses on Descartes and Malebranche (referring to Descartes' "distinction of mind from body"), Leibnitz, Hume (referring to Hume's "radical scepticism, discontinuity"), Kant, Mill (citing the view of "phenomena as causes, volition merely an antecedent"), F. H. Bradley (mentioning Bradley's notion that "Separate 'causes' may have sufficient 'truth' to be practically reliable, but cause and effect are irrational appearance, not reality"), and Quantum Theory. Lawyers, Dixon told his impressionable young audience, are sublimely ignorant of the epistemological abysses they skirt. Each and every kind of causation – and he listed "Immediate", "Direct", "Proximate" – "all are illusionary in point of logic", he insisted, calling them " 'broken links', or worse".[24]

Dixon would not allow the Law Students' Society to publish the address, perhaps because he thought it might seem controversial coming from a High Court judge. But the Dixon who could write like that on the subject of causation may also have been somewhat sceptical of his own view that a pure legalism would always and necessarily guide you to the right judgment on constitutional matters. He sympathised with Pontius Pilate, Prefect of Judaea, who asked the most philosophical of questions, "What *is* truth?". Dixon ended one of his speeches by reference to that question.[25] It is true, as Francis Bacon says, that Pilate "would

not stay for an answer", but Dixon CJ would not have presumed to offer him one.

Dixon knew, however, that in interpreting the Australian Constitution, legalism was a lot safer than its alternatives, and we can see that today as we survey some of the results of recent constitutional interpretation in this country. In that context, the recent cross-vesting decision might be welcomed as a shift back towards the Dixonian position.

Endnotes:

1. Sir Owen Dixon, *Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952*, in *Jesting Pilate and Other Papers and Addresses*, ed. Woinarski J, Melbourne (1965), p.247.
2. Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, Brisbane (1987).
3. I am grateful to Sir John Young, a former Associate of Sir Owen Dixon's, for the point about Dixon's probable preference for a non-federal constitutional model, and for his careful reading of this paper.
4. See, *inter alia*, *The Law and the Constitution* (1935), *Two Constitutions Compared* (1942), *Aspects of Australian Federalism* (1943), and *Marshall and the Australian Constitution* (1955), in *Jesting Pilate, op.cit.*, pp.38, 100, 113 and 166.
5. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*, London (1967).
6. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
7. Dixon, Diary, Friday, 20 September, 1935.
8. Dixon, speech on retirement from the High Court, 13 April, 1964. Typescript copy, p. 7.
9. Leslie Zines, *Sir Owen Dixon's Theory of Federalism* (1965), *Federal Law Review* 220.
10. *Federated Amalgamated Government Railway & Tramway Service Association v. NSW Railway Traffic Employees' Association* (1906) 4 CLR 488.
11. Sir Robert Garran, address delivered at the University of London (1924), 40 *Law Quarterly Review*, 202 at 216.
12. *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 CLR 319 at 390. Italics added.
13. *Ibid.*, at 391.
14. *West v. Commissioner of Taxation (NSW)* (1936–1937) 56 CLR 657 at 681–682.
15. *Ibid.*, at 682.
16. *Essendon Corporation v. Criterion Theatres Ltd* (1947) 74 CLR 1 at 22.
17. Zines, *op.cit.*, p.227.
18. *Melbourne Corporation v. the Commonwealth* (1947) 74 CLR 31 at 81–83.
19. *Second Uniform Tax Case* (1957) 99 CLR 575 at 611–612; *Commonwealth of Australia v. Cigamatic Pty Ltd* (1962) 108 CLR 372 at 376–379.
20. *Uther v. Federal Commissioner of Taxation* (1947) 74 CLR 509.
21. Dixon, *Aspects of Australian Federalism*, delivered 18 March, 1943, in *Jesting Pilate, op.cit.*, p.122.
22. *Income Tax (Arrangements with the States) Act 1978.*
23. *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.
24. Dixon, *Causation and the Law*, address to the Law Students' Society of the University

of Melbourne, 22 March, 1937. It survives only in the form of Dixon's manuscript notes, and a précis written by a student member of the audience, John Kinnear. My quotations are an amalgam of the manuscript notes and the précis notes, which Dixon solicited from Kinnear.

25. *Jesting Pilate*, George Aldington Syme Oration to the Royal Australasian College of Surgeons, 20 August, 1957, printed in *Jesting Pilate, op.cit.*, p.10.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

It has become the custom to grant me the privilege, or perhaps I should say to impose on me the obligation, to make a few observations of my own on some of the matters that have been discussed at this our 11th Conference. I cannot in these brief remarks attempt to do justice to all that the speakers have said.

The Conference had four themes, the first of which concerned the forthcoming referendum. Surely no-one can doubt the correctness of Professor Flint's conclusion that the change proposed will be a substantial one, and not merely symbolic. I hope that it will also be agreed that the change need not and should not be made.

The argument for change advanced by Professor Craven rests on the assertion that the institution of the Monarchy is dead and valueless, and that the model proposed for the referendum will preserve the essence of the present Constitution and is, in any case, a good one. It is regrettably true, as Dr Partington pointed out, that there has been a tendency in Australia to discount or deny the value of our British inheritance. One hopes that it will be possible to inform the public, not only that the proposed model is flawed, but that the Monarchy serves a significant function in setting a standard of integrity and freedom from political bias which the Queen's representatives must follow and in providing a symbol of national unity which a President could not match.

As Sir David Smith has suggested, the unequalled century of stable democracy in Australia has been enjoyed under a constitutional monarchy. Sir David also pointed out that the republican claim that Australia should have an Australian Head of State in place of a foreign Queen misses the point that a President would take the place of the Governor-General, not that of the Queen.

Professor Craven, perhaps realising that the proposed model, described even by some of its supporters as significantly flawed, will not find general acceptance, argued that the present model put forward by the Convention should be accepted for fear that its rejection might result in a Constitution for Australia which he would regard as calamitous. This argument involves the assumptions (neither of which may be proved correct) that, if the present model is rejected, a less attractive model would be put to a referendum and passed, and the further argument that, if the present model is approved, no other model would thereafter be put forward at a future referendum. Professor Craven is to be respected for his earnest and eloquent argument, but the argument itself is a council of despair; it is analogous to be suggesting that one should rush into certain danger to avoid perils which may never come to pass.

As to the proposed Preamble to the Constitution, neither Mr Warby nor I could find much good to say about it.

Another topic, that of sovereignty, provides a contrast to the republican argument that we should get rid of a so-called foreign Queen. As Mr Ray Evans has shown, our governments have allowed organs of the United Nations which are alien to Australia, and have no traditional relationship with us, to intrude into our affairs and thus to suborn our sovereignty. This is a grave issue which our governments should be induced to remedy.

The idea of a Bill of Rights is plausibly attractive. However, as Mr Gary Johns has said, a

Bill of Rights is undemocratic and would allow judges to usurp the place of the legislature. Jeremy Bentham described the idea of natural rights as "nonsense on stilts" and Mr Justice Meagher has proved the truth of Bentham's description with more wit than Bentham showed.

Finally, there was discussion on federalism in its various aspects. Dr Forbes described the unsatisfactory position into which the federal courts have drifted; not the least of the disadvantages of the present system is that unqualified persons may, for political reasons, be appointed to the federal bench by way of prior appointment to a federal tribunal, since such appointments are not as closely scrutinised as those to the State Supreme Courts. Professor Mackerras has argued that the proposals to amend the election of Senators, with the hope of removing the independents, are neither necessary nor desirable – nor, he would add, constitutional. I am not convinced that it would be unconstitutional to divide States into wards for the purpose of senatorial elections, but I am a firm believer in checks and balances. Unfortunately, most people, and I suspect many politicians, do not know what checks and balances are.

Finally, Professor Ayres spoke on that greatest of Chief Justices, Sir Owen Dixon, and his views on federalism, including his opinion that the judgment in the *Engineers' Case* was badly written and defective in much of its reasoning. It was that case which proved to be a prime cause of the decline of federalism in Australia.

The Conference has been a stimulating and, again, a successful one. I thank all the speakers, and also all those who have attended, for their contribution to these proceedings.

Appendix I

Contributors

1. Addresses

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (BScEcon, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociale, Paris (DSU, 1979). After admission as a Solicitor of the NSW Supreme Court in 1962, he practised as a solicitor (196272) before moving into University teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. In 1987 he became Chairman of the Australian Press Council, and in 1992 Chairman of the Executive Council of the World Association of Press Councils. Since October, 1997 he has been Chairman of the new Australian Broadcasting Authority. He is the author of numerous publications and in 1991 was honoured as World Outstanding Legal Scholar by the World Jurists Association. In 1995 he was made a Member of the Order of Australia.

Dr Geoffrey PARTINGTON was born in Lancashire and was educated at Queen Elizabeth Grammar School, Middleton and the Universities of Bristol (BA, 1951; MEd, 1972), London (BSc, 1971) and, after his emigration to Australia in 1976, Adelaide (Ph D, 1988). He was a teacher, headmaster and Inspector of Schools in England and has since taught in the school of Education of Flinders University, South Australia. During that time nearly 200 of his essays and articles have been published, many in scholarly journals as disparate as anthropology and moral education. His books include *Women Teachers in the Twentieth Century*, *The Idea of an Historical Education*, *What do our Children Know?*, and most recently, *The Australian Nation: Its British and Irish Roots.*

2. Conference Contributors

Philip AYRES was educated at Adelaide Boys High School and at the University of Adelaide (BA, 1965; PhD, 1972) and is currently Associate Professor of English Literature at Monash University. In addition to numerous books and scholarly articles on English literary history, he has published first-hand accounts of Khomeini's Iran and of the mujahedeen side of the war in Afghanistan. In 1989 he was elected a Fellow of the Royal Historical Society (London), and in 1993 was Visiting Professor at Vassar College in New York State. He is the author of *Malcolm Fraser: A Biography* (1987) and is currently working on a biography of Sir Owen Dixon.

Professor Greg CRAVEN was educated at St Kevin's College, Toorak and the University of Melbourne (BA, 1980; LLB, 1981; LLM, 1984). He taught at Monash University (1982 1984) and was Director of Research for the Legal and Constitutional Committee of the Victorian Parliament (19851987). After serving for three years (199295) as Crown Counsel to the present Attorney-General for Victoria, he returned to his previous post of Associate Professor and Reader in Law at the University of Melbourne, before being appointed (1996) as Professor of Law at Notre Dame University, Fremantle. He specialises in constitutional law, and has written and edited a number of books in that area, including *Secession: The Ultimate States' Right* (1986) and *Australian Federation: Towards the Second Century* (ed.)

(1991).

Ray EVANS was educated at Melbourne High School and the University of Melbourne (B Eng Sc, 1960; M Eng Sc, 1975). He worked as an engineer with the State Electricity Commission of Victoria (196168) and then lectured in Engineering, first at the Gordon Institute of Technology and then at Deakin University (197682), becoming Deputy Dean of its School of Engineering. In 1982 he joined Western Mining Corporation (now WMC), and has since worked as executive assistant to its Chief Executive Officer, Mr Hugh Morgan. In 1971 he was a founding sponsor of the Australian Council for Educational Standards, and foundation editor (197375) of its journal. He was one of the founders of The H R Nicholls Society in 1985 and has been its President since 1989.

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.

The Rt Hon Sir Harry GIBBS, GCMG, AC, KBE was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland (BA Hons, 1937; LLB, 1939; LLM, 1946) and was admitted to the Queensland Bar in 1939. After serving in the AMF (193942), and the AIF (194245), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (196267), a Judge of the Federal Court of Bankruptcy (196770), a Justice of the High Court of Australia (197081) and Chief Justice of the High Court (198187). In 1987 he became Chairman of the Review into Commonwealth Criminal Law; since 1990, he has been Chairman of the Australian Tax Research Foundation. In 1992 he became, and remains, the founding President of The Samuel Griffith Society.

Hon Gary JOHNS was educated at Flemington High School and Monash University (B Econ, 1972; MA, 1976). After a few years tutoring in academia he was appointed in 1978 as a research officer and organiser for the ALP National Secretariat in Canberra. In 1987 he became the Federal Member for Petrie, in Queensland, and then, successively, Parliamentary Secretary to the Minister for Health, Housing, and Community Services (199293), Parliamentary Secretary to the Treasurer (1993), Assistant Minister for Industrial Relations and Minister assisting the Prime Minister for Public Service Matters (199396), and finally, Special Minister for State and Vice-President of the Executive Council (1994 96). Since being defeated in the 1996 federal election he has embarked on a PhD while lecturing in the Department of Government at the University of Queensland; he is also a Senior Fellow with the Institute of Public Affairs, Melbourne.

Associate Professor Malcolm MACKERRAS was educated at St Aloysius College, Milson's Point and Sydney Grammar School. While employed by BHP (195760) he studied at night for his B Ec (1962) at the University of Sydney. After periods as research officer for the federal secretariat of the Liberal Party (196067), ministerial assistant (1967) and economist with the Chamber of Manufactures (196870), he moved into academia, initially at the Australian National University (197073), then at the Royal Military College, Duntroon (197486). Since 1987 he has taught in the school of politics at the Australian Defence Force Academy. He is the author of numerous books and articles both in professional journals and the daily press.

The Hon Justice Roderick MEAGHER was educated at St Ignatius College (Riverview), Sydney and St John's College, Sydney University (BA, LLB). He was admitted to the New South Wales Bar in 1960, at the same time lecturing in the Faculty of Law at Sydney University. He was subsequently appointed Queen's Counsel and served as President of the New South Wales Bar Association (197981) before being appointed, in 1989, a Judge of the Supreme Court of New South Wales and Judge of the Court of Appeal, in which post he currently serves. He is the author, and editor, of a number of major legal works.

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 is now a visiting Fellow in the Faculty of Law, the Australian National University. In February, 1998 he attended the Constitutional Convention in Canberra as an appointed delegate and he is currently a member of the No Case Committee for the 1999 Referendum.

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 (196770). 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 199697 he served as a member of the Defence Efficiency Review into the efficiency and effectiveness of the Australian Defence Force. He now writes for *The Adelaide Review* and is a member of the Victorian Committee for the No Republic Campaign.

Michael WARBY was educated at Manly Boys High School, the University of Sydney (BA Hons, 1981; Dip Ed, 1982) and the Australian National University (Dip Ec, 1989). After a period in the Commonwealth Public Service (1982-95), including five years in the Parliamentary Research Service (1990-95), he became Public Affairs Manager for the Tasman Institute in Melbourne (1995-98). Since early 1998 he has been Editor of the Institute of Public Affairs publication *IPA Review* and Director of the IPA's Media Monitoring Unit. He has published widely on a range of issues.