Upholding the Australian Constitution Volume Twelve

Proceedings of the Twelfth Conference of The Samuel Griffith Society

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Foreword

John Stone

The twelfth Conference of The Samuel Griffith Society was held, finally, in Sydney in November, 2000, and this Volume of the Society's Proceeding's, *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.

I say "finally" because plans had originally been made for a Conference of the Society in February, 2000 focused around the single issue of Sovereignty, and taking advantage of the then expected presence in Australia of a delegation from the United States Congress, from which three eminent speakers at the Conference were to have been drawn. At the last moment, and much to the mortification of the Board of Management, the Congressional delegation's plans underwent such significant change that those speakers' Conference participation would no longer have been possible. Accordingly, the Conference had to be cancelled, to be restored only nine months later.

One brand was however saved from this burning. Professor Kenneth Minogue, who had arranged to come to Australia to speak at the originally intended Conference, was able to maintain his travel plans and, as a result, delivered two splendid Occasional Addresses in Melbourne and Sydney respectively. Those addresses, together with the Hon Peter Walsh's excellent address launching Volume 11 of these Proceedings, now appear as Appendices to this Volume. Professor Minogue's address on Australia's place in, and the world significance of, the so-called "Anglosphere", sheds a fascinating light on why, despite all the fashionable chatter about "national identity", "multiculturalism", and so on, Australia is the kind of successful constitutional democracy that it is today.

The most prominent topic of the twelfth Conference was, as indicated, Sovereignty, and it is clear that this is a topic to which the Society is likely to return. Certainly, nothing could be more subversive of the foundations of our present Constitution than the direct and indirect attacks upon Australia's sovereignty now launched almost daily by one set of international legal activists or another. Even the outpourings from the word-processor of Mr Justice Kirby are outdone by the torrent of treaty-making and other such activities which emerge daily from the doors of the United Nations and its subsidiary agencies.

Mention of the regrettable case of Mr Justice Kirby leads, of course, to the more general question of judicial activism and the whole issue of the separation of powers (and their obverse, responsibilities) between Parliament and the judiciary. The two papers in this volume relating to the topic of mandatory sentencing not only bear directly on that issue, but also indirectly (because of attempts by the U.N. on Human Rights Commission to put its interfering oar into Australia's domestic political water) on the issue of sovereignty. Whatever one's views may be on the topic of mandatory sentencing (and I freely confess that on this issue my own views are, most unusually, somewhat at odds with those of our President!), the two papers on that topic by the President of the NSW Bar Association, Ms Ruth McColl, SC, and the Chief Minister of the Northern Territory, the Hon Denis Burke, MLA are, each in their own way, models of exposition of the arguments.

When the Board of Management was arranging the twelfth Conference, the fact that Saturday, 11 November, 2000 would mark the 25th anniversary of the day on which the then Governor-General, the late Sir John Kerr, was forced to do his duty and dismiss the Whitlam Government, entirely escaped its attention. This oversight once rectified, however, it was obvious that the Dinner address that evening should be devoted to a retrospect on what the late Alan Reid's still gripping book called "the Whitlam venture". Mr Peter Ryan, whose courage has been

tested (and never found wanting) in both war and peace, rose valiantly to the occasion.

Since this was the first Conference of the Society to follow the 1999 constitutional referendum on the Republic issue (and the associated one on the proposed new constitutional Preamble), it seemed only appropriate to mark those events by two post-mortem papers from Sir David Smith and Mr Malcolm Mackerras, respectively (as well as a small, but none the less telling, note on media bias during the republic referendum campaign by the Secretary of the Society, Dr Nancy Stone). All those contributions make fascinating reading for anyone interested in either the conduct of that campaign, or its outcome.

As this Foreword is written – in Melbourne during the Centenary of Federation celebrations – it is appropriate to reflect upon the fact that, the bitching and moaning of the black arm-band brigade notwithstanding, Australians have much to be proud of (as well as some things to regret) in the history of their highly successful, now century-old, democracy. The papers by Professor Geoffrey Blainey (who tells us, by the way, of the exegesis of that "black arm-band" term) and Professor David Flint convey, each in their own way, a sense of quiet overall pride in that achievement. As such, they brought the twelfth Conference to a fitting close.

These papers (including, as noted earlier, the three Appendices) spread a rich and varied menu before the reader. They deserve to be widely read, and widely debated. It is to that objective that this Volume, like its eleven predecessors, is dedicated.

Dinner Address
The Erosion of National Sovereignty

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Jonathan Swift told the story of an island on which there was a spring whose water, when tasted, drove men mad. The water was so attractive that everyone drank it, except for one philosopher who was too wise to do so. In the end, however, the philosopher could not bear to be the only sane person left on the island and he too drank the water. Swift's point was that even the wisest person cannot free himself from the delusions of his time.

The truth illustrated by that fable seems to me to provide as good an explanation as any for the fact that so many nations have bound themselves to conduct their internal affairs according to rules expressed in terms of broad generality, particularly when the meaning and effect of these rules are to be determined by committees constituted by people of no particular qualifications, none of whom will necessarily be representative of the nation affected by the determination, and some of whom may be chosen from nations whose practices and culture are regarded as inferior or abhorrent.

The Covenants and Conventions which have this effect confer rights and impose duties which are entirely domestic in character. So far as Australia is concerned, they impose restrictions on the power of Australian governments to fulfil their functions within Australia.

Before the 1960s it was exceptional for a treaty to dictate to a State how it should govern the inhabitants of its territory, except in those cases where the requirements of the treaty were incidental to a matter which was essentially international in character. The justification suggested for making treaties which are concerned entirely with internal affairs is that the treaties concern human rights, and that the protection of human rights is a matter of international concern.

General De Gaulle once said that treaties are like girls and roses; they last while they last. That may have been true for the pragmatic French but Australia cannot shrug off its treaty obligations so easily. Even if a Convention is not incorporated into Australian law by statute, the Courts may give effect to it in two ways. They may conclude that the Convention is a statement of international law and that the common law should be developed consistently with it, or they may hold that individuals would have a legitimate expectation that administrative decision makers would act consistently with the Convention. It has not yet been explained how a person who has no knowledge of the existence of a treaty can have an expectation of that kind. More important, for present purposes, is the fact that there are agencies of the United Nations which monitor the performance of these treaty obligations and seek to enforce compliance with them.

Although most treaties of this kind were made after the second world war, there had earlier been a cloud on the otherwise clear horizon. A harbinger of change was the International Labor Organisation established in 1919 as a consequence of the Treaty of Versailles. That treaty stated that conditions of labour existed, "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". One may doubt whether world peace at that time was imperilled by the conditions of labour but however dubious the reason for its establishment, the ILO proved to be a sturdy creation. It survived the fall of the League of Nations and has produced hundreds of Conventions and recommendations which deal not only with conditions of labour but also with discrimination, the rights of indigenous people and the environment.

Revulsion at the barbarities committed during the second world war and the hope (that proved vain) of preventing similar atrocities in future led to the adoption of the Charter of United Nations, which had as one of its aims the promotion of the observance of human rights and

fundamental freedoms. In 1948 the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*. That was a statement of principle, rather than a binding treaty and would not have been regarded as infringing national sovereignty, at least in those days when it was not supposed that the Courts might give effect to documents of that kind as part of the national law.

The flood of treaties began to flow strongly in the 1960s. That was the time when the transformation of culture – some would say its disintegration – which the wars had set in train began to accelerate. One aspect of the change in society that then occurred was the tendency to insist on individual rights and to indulge individual wishes, without at the same time recognizing the co-relative obligations of individuals to society. The treaties that were made were in tune with this sentiment and some of them reflected the ideas that became regarded as politically correct. They covered a field including Civil and Political Rights, Economic, Social and Cultural Rights, Refugees, Torture, the Rights of the Child and The Elimination of All Forms of Discrimination against Women as well as the protection of the Environment. There is hardly an area of governmental activity which these treaties do not touch.

One feature of these Conventions was that they set up Committees to which the nations which are parties to the treaties are bound to report, and which themselves report to the United Nations and to the State concerned on the progress made in implementing the Convention. The members of these Committees are elected by the nations which are parties to the treaties; their qualification is that they must be of high moral standing and competence in the field covered by the treaty – in practice this allows a nation to nominate anyone who has not got a criminal record. The nations which win the right to make nominations to Committees need not themselves be notable exemplars of human rights. The Committee which decided against Tasmania in a case to which I shall refer a little later, included representatives from Senegal and Yugoslvia but none from Australia.

Under the first *Optional Protocol to the International Covenant on Civil and Political Rights*, which Australia ratified in 1991, any individuals who claim that their rights have been violated and who have exhausted all domestic remedies may submit their cases to the Committee. Similar rights are given to Australians under the *Convention on the Elimination of all forms of Racial Discrimination* and the *Convention Against Torture*. Australia has so far refused to ratify the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women,* which would give similar rights of access to a Committee under that Convention. This refusal has given rise to a clamour of criticism, but when one considers the nature of some of the decisions given by that Committee, which I shall mention later, the restraint of the Australian Government is indeed a wise one.

In addition to the remedies given to individual citizens by these Protocols, the Human Rights Commission of the United Nations, the ILO and UNESCO all have procedures under which they entertain complaints against governments. Not only the individual affected may apply; non-government organisations (NGOs) are recognised as having standing and status before these Committees and bodies. There are many dozens of NGOs. Some have worthy charitable objects, others simply aim to further their preferred ideologies. It is doubtful if anyone of these NGOs is responsible to the public in formulating the policies which it presses before these United Nations bodies. It is equally doubtful whether in principle these NGOs should be allowed to intermeddle in these matters, almost certainly against the interests of the States against which complaints have been laid.

Many of the provisions of the *International Covenant of Civil and Political Rights* seem on their face to be desirable and even to be statements of the obvious. However, the effect given to them by the zealous officers of the United Nations or by the NGOs is far from beneficial. Article 14 of that Convention says that a person charged with a crime is entitled to a fair and public hearing by a competent, independent and impartial tribunal. No one could disagree with that

proposition. However, surely that does not mean, as a United Nations investigator has held it to mean, that mandatory sentencing laws are in breach of this provision. I do not support mandatory sentencing, but a trial is no less fair and the tribunal no less impartial because the law provides a mandatory sentence.

Article 17 of the same Covenant provides that no one shall be subjected to arbitrary or unlawful interference with his privacy. A United Nations Committee held that sections of the Tasmanian Criminal Code which made criminal certain forms of sexual conduct between men, including those committed in private, were in breach of this provision and required that the law should be repealed. The Commonwealth Parliament complied, and legislated to over-rule the Tasmanian sections. If this decision is correct (and there was no way of appealing from it) it would mean that the United Nations Committee can form its own opinion as to the validity of any law which criminalised acts done in private; if it is an arbitrary breach of privacy to forbid sexual conduct between men, why could not the same be said of laws forbidding sexual conduct with girls under the age of 16 or laws forbidding the growing of marijuana plants or laws making it a crime to live on the proceeds of prostitution?

A Committee has criticised Australia for legislating, after the decision in *Wik*, in a way that affected in some circumstances the right of Aboriginals to negotiate before interests could be acquired over lands to which they claimed rights. Surely it cannot be said to be discriminatory to take away a privilege given by statute to one class of persons, when no similar right is available to the community generally.

A similar expansive view has been suggested regarding the *Convention against Torture*. It has been argued by a NGO that the reference to cruel, inhuman and degrading treatment in that Convention extends to cases of domestic violence. Other, even more bizarre views have been expressed by the Committee set up under the *Convention for the Elimination of all Forms of Discrimination Against Women*. That Committee has directed the Irish Government to eradicate the influence of Catholicism from its culture and its people; it has told Slovenia that it is inappropriate that children under three should be cared for by their families rather than in day-care establishments; it has criticised the Government of Belarus for reinstating a national Mothers' Day, and has said that the Koran should be interpreted in ways which the Committee considers permissible. We may mock at some of these rulings, which seem to be based on the rule of interpretation stated by Humpty Dumpty: "Words mean what I say they mean". But the rulings have the force of international law.

Not all of the Conventions even have an innocuous appearance. The *International Covenant on Economic, Social and Cultural Rights* is expressed in wide terms that practically invite a reference to arbitration. The *Convention on the Rights of the Child* appears designed to free children from all parental guidance and supervision. Mr Barry Maley gave us some examples at our Conference in 1998. Tomorrow's speakers may provide further instances.

One phrase that has been repeated in these treaties is particularly mischievous. The Charter of the United Nations stated that one of the purposes of that body was to develop friendly relations between nations based on respect for the principle of equal rights and self-determination of peoples. That reference to self-determination has been described as loaded with dynamite. It apparently was made in the light of the situation in Europe after the war. Whether that was so or not, the reference has been repeated in the *Conventions on Civil and Political Rights* and on *Economic, Social and Cultural Rights*, which cannot be restricted to European conditions.

In the very forefront of each of those Covenants there appears the following provision:

> "All 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".

One European delegate to the United Nations has said that these clauses are applicable only to conditions in Australia and the Americas, where invading powers have occupied the land of the

indigenous peoples. One wonders how any government in Australia or the Americas could have been so unwise as to accede to a treaty in these terms.

It has been argued on behalf of Australia that the provision does not normally entail the right of secession. The use of the word "normally" seems to have been cautiously incautious. It was further argued that the provision does not authorise action to impair the territorial integrity or the political unity of sovereign and independent States. Aboriginal activists have put forward a contrary argument, which is not without support in the words of the treaties. Their argument is for sovereignty, and the call that Australia should enter into a treaty with the Aboriginal people is a step in this direction. Some would limit the demand to one for internal self-government, but others more extreme would go further. There is under consideration at present a draft *Declaration on the Rights of Indigenous Peoples* which would of course re-assert the right to self-determination.

We may hope that there is only a remote possibility that effect will be given to the right of self-determination in a way that will detract from our sovereignty. The question remains whether the sovereignty of the nation is already being eroded by the Conventions that have already been ratified, and particularly by those that give our citizens, and other inhabitants, including illegal immigrants, a right of access to agencies of the United Nations. The Australian Attorney-General who held office at the time when the *Optional Protocol to the International Convention on Civil and Political Rights* was ratified claimed that no infringement of our sovereignty was involved. His argument was that the ability of the Committees of the United Nations to hear complaints from Australia derives from the power granted by Australia, and that these Committees have no power to enforce their decisions, which can be given effect only by Australian law. All this is technically true. However, it is equally true that individuals living in Australia have a right to apply to these international tribunals to seek redress against Australian laws and governmental actions. The decisions of these tribunals have so strong a moral force that governments face obloquy at home and abroad if they fail to give effect to them. Realistically these Conventions have diminished Australian sovereignty.

Some commentators say that the increasing interdependence of the nations of the world, and the need for Australia to relate to other nations, have made it necessary for us to transfer some of our sovereignty to the United Nations. It is true that we cannot live in isolation. It does not follow that we should allow remote Committees to decide what rights the inhabitants of Australia should have. The decisions they have so far made do not convince us that they have more wisdom than our own processes can provide.

Another argument is that although Australia has a better record than most in observing human rights, we set a good example to others by entering into these treaties. Like poor Admiral Byng in the 18th Century, we must suffer to encourage the others. The weakness in this argument is that people are not always willing to follow good examples. For instance, the developing countries do not appear to be inspired by the restraints imposed on developed countries by the *Kyoto Protocol* to reduce their production of greenhouse gases.

It has been frankly said, by supporters of the system, that the promotion and protection of human rights is a modern tool of revolution. That revolution has already been successful in Australia. We already have laws that have created new rights at the expense of rights that we took for granted. We should not allow a revolution that affects us to be under the control of others. There is no good reason to allow rules that govern the rights of individuals and shape the nature of society to be interpreted by foreign bodies which have plainly shown an intention to give effect to their own modish notions.

There are more Conventions which await either the completion of drafting or ratification. I have mentioned the draft *Declaration on the Rights of Indigenous Peoples*. A Convention setting up a court to try war criminals is being considered for ratification at present. One can understand the desire to bring to justice persons who commit atrocities, but the establishment of the proposed

international court will further surrender some of our sovereignty. It cannot be assumed that the alleged war criminals will always be the inhabitants of some foreign country.

It has been suggested that Baroness Thatcher should be indicted for the sinking of the *Belgrano*; who knows what military efforts of Australia might provoke a similar suggestion, and who can tell what action such a suggestion might provoke.

A nation is not sovereign unless it is independent from control from outside its own borders. In practice we have lost some of that independence. This erosion of our sovereignty was our own doing.

At the risk of hyperbole, we might apply Shakespeare's words to the present situation:

"This England never did, nor ever shall
Lie at the proud foot of a conqueror
But when it first did help to wound itself".

Whether future Parliaments will prevent the further erosion of our national sovereignty must be regarded as doubtful, having regard to the difficulty which even the wisest of men and women find in trying to free themselves from the prejudices of the times.

Introductory Remarks
John Stone

Ladies and Gentlemen, welcome to this, our twelfth Conference. As you all know, the Society had planned to hold a Conference here in Sydney in February this year devoted solely to the issue of Sovereignty – an issue which, I firmly believe, is taking on a more and more important significance in the minds of Australians. At almost the last moment, we were forced to cancel that Conference because we were given to understand that three of the major speakers, from the United States Congress, might not after all find it possible to attend. This was the first time in the Society's history that such a mishap had occurred, and to say that the Board was mortified would be an understatement.

Some time (and the Olympic Games!) now having elapsed, we have chosen to devote much of this Conference to that topic – Sovereignty – which was to have been the focus of that earlier, aborted gathering. And of course, last night, as was to be expected, our President, the Rt Hon Sir Harry Gibbs, launched our proceedings with his magisterial dinner address on *The Erosion of National Sovereignty*.

This morning we shall pursue that theme with four more papers – one which seeks to address the topic in its most general sense, and three others which focus upon more specific aspects of that generality. After lunch, we shall be privileged to hear two further papers which, although they are directed at the specific issue of Mandatory Sentencing, will also bear indirectly upon that same issue of Sovereignty. As I shall personally be chairing that post-luncheon session, perhaps it may be best if I say no more on that score.

The other issue which, since we last met, has commanded the attention of most members of this Society was, of course, the Referendum, on 6 November last year, on the republic issue (and the associated Referendum to insert a new Preamble into the Constitution). Later today Sir David Smith will open the batting on the republic matter with what I am sure will be some lusty despatches over the square leg boundary, and we shall continue tomorrow with a short paper on media bias during the referendum campaign, and a more extensive one by Malcolm Mackerras on what he has aptly called *The Inner Metropolitan Republic*.

On 1 January next Australians will celebrate the centenary of Federation of the six Australian Colonies, by Queen Victoria's proclamation of *The Constitution of Australia Act* on 1 January, 1901. In due course this Society will no doubt wish to mark that centenary by a Conference, next year, devoted to it. Meanwhile, however, this Conference tomorrow will conclude with what I know will be two splendid papers from two splendid people (notwithstanding that both are Professors, which these days is perhaps no longer a term to be conjured with). Geoffrey Blainey and David Flint will, each from his own perspective, look back upon this last near-century, and reflect upon the outstanding success of a Constitution upon which has been founded an outstandingly successful nation.

Before now turning to the first of our papers this morning, let me note that we had hoped to have this morning's session chaired by the Hon Andrew Thompson, MP, who among other distinctions happens to be the Chairman of the Joint Standing Committee on Treaties. Mr Thompson, however, has had to go to The Hague to attend the notorious gathering commencing there shortly as part of the follow-up to the laughable (if it were not so serious) *Tokyo Protocol* on so-called "greenhouse warming". I am particularly pleased that, at short notice, my old friend Senator Rod Kemp has agreed to chair the session in Mr Thompson's place. My pleasure in that regard is all the greater since, as some of you may remember, it was Senator Kemp who first spoke to the Society on the matter of United Nations interference in Australia's domestic affairs, back in 1994 in his still much-quoted paper.

I shall therefore now hand over to Senator Kemp.

Chapter One:
Setting the Sovereignty Scene: Use and Abuse of the Treaty Power

John Stone

Some of the ground to be covered in this paper has already been trodden, and more authoritatively, by our President, the Rt Hon Sir Harry Gibbs, in his splendid address to our opening Dinner last night, *The Erosion of National Sovereignty*. Nevertheless, in "setting the sovereignty scene" it is necessary to traverse some of it, albeit briefly, again.

The concepts of sovereignty, on the one hand, and the nation state, on the other, are two sides of the same coin. When the Thirty Years War (1618-48) ended in the Treaty of Westphalia, the Holy Roman Empire finally foundered. In its place there arose a bevy of European nation states, each proclaiming its full territorial sovereignty and its full independence from the "world governance" hitherto imposed (in varying degrees) from Rome.[1]

In recent times it has become fashionable in some circles to say that in this increasingly "globalised" world the nation state has had its day; and that, as a consequence, national sovereignty also is an increasingly out-dated concept. Shallow views of this kind typically emanate from such bodies as the World Economic Forum;[2] the United Nations; bodies of international lawyers; the Foreign Offices of (much of) the world; and other such obviously self-interested quarters.

Other than to dismiss it with the intellectual contempt which is all that it merits, I do not wish to spend time today on that view. Rather, I wish simply to examine the effects of treaty-making on national sovereignty – taking, as I do, both the continuing existence of the nation state, and the importance which its people invariably place upon preserving its sovereignty, as given.[3]

To that end, I shall examine four questions:

- Why do nation states enter into treaties, and how may such treaty-making be categorized?
- In particular, is entering into treaties in the national interest, or merely an expression of the moral vanity of those persons (foreign affairs officials, government Ministers) who do so, ostensibly on behalf of the people of their nation?
- What is the effect on a nation's sovereignty when it enters into a treaty?
- Does treaty-making have implications for the domestic democratic processes of the nation (e.g. via contributing to the so-called "democratic deficit"), and if so, what are the likely consequences?

The last of those questions will lead me to a topic long familiar to members of this Society – namely, the abuse of the external affairs power (s.51(xxix)) of our Constitution both by successive Australian governments and successive High Courts, and to the corrosive effects of those abuses both upon the federal nature of our Constitution and, over time, upon Australians' respect for the rule of law.

As to my first question, it is useful to begin by asking why Australia enters into treaties at all. In asking that question, it is no part of my case to suggest that we should not do so; no sensible Australian would question the desirability of our entering into treaties where, on all the evidence, it is in our national interest to do so. Clearly, for example, a significant trading nation like Australia finds it advantageous, on balance, to belong to the World Trade Organisation (or its predecessor, the General Agreement on Tariffs and Trade, the GATT), notwithstanding the discomforts which WTO membership can also bring from time to time. But, to go to the opposite extreme, what national interest is served by – or, in more hum-drum language, how do Australians

benefit from – our becoming a party to the *U.N. Convention on the Rights of the Child*?[4]

In researching this paper I had occasion to consult the Treaties Secretariat of the Department of Foreign Affairs and Trade.[5] It is salutary to see how that body's *Information Kit*, which "has been put together in the interests of improving understanding of Australia's participation in the treaty process", answers its own question, "Why are Treaties necessary?" Space precludes more detailed examination, but suffice it to say that the Department's answer draws heavily upon the kind of "globalisation" arguments the shallowness of which was dismissed earlier, together with various sweeping generalizations (e.g. "the need for global rules on the protection and promotion of the world's cultural and natural heritage is now widely accepted") which, in most cases (like the one quoted) simply do not stand up to sceptical analysis.

The truth is that the most basic reason why, in the view of the Department of Foreign Affairs and Trade, treaties are necessary, is that the process of treaty-making provides numerous officials of that Department with a well-paid career, much of it spent in the gilded salons of Geneva, New York or wherever else international bureaucrats choose to ply their trade at the expense of their respective taxpayers. In that sense it is, if you like, nothing more than a particular example of so-called "public choice" theory.

Australia today is a party to something in the order of 2,000 treaties – about 300 of which were "inherited", so to speak, from our British origins up to the point where, by the Statute of Westminster (1931), Australia became a fully independent, and hence fully sovereign country. Different observers, surveying these treaties, would doubtless put forward different taxonomies for their classification. For the purposes of this paper, however, the treaties into which we have entered may be usefully separated into the following categories:[6]

- treaties which are of a "technical" nature, as against those of a "political" nature; or
- treaties which might be described as "necessary" in the national interest, or those which, while perhaps not strictly necessary, may still be regarded as, on balance, "useful", as contrasted with those which appear to serve no other purpose than to bolster the moral vanity, and flatter the egos, of those entering into them (together with, of course, their *claques* of supporters). For completeness, it should be added that it is this last category of "morally vain" treaties which also most comprehensively serves the purpose of those who wish to enter into treaties for the constitutionally subversive purpose of undermining the federal compact which lay at the heart of Australia's Constitution, in order that more power should be concentrated in Canberra.

Many of Australia's treaties are of the "technical" variety, for example:

- the earliest international treaty to which any part of Australia adhered, the International Telegraphic Convention of 1875, to which the Colony of South Australia became a party on 3 June, 1878 (followed in due course by each of the other five Australian Colonies, the last being Queensland in 1896). Via a series of transformations this treaty became the International Telecommunication Convention of 1932, which was ratified by Australia in March, 1934.
- our membership of the Universal Postal Union, which was signed by Britain for the Australian colonies in 1897 and subsequently ratified by Australia in 1904.
- our numerous post-World War II bilateral treaties governing taxation, by Australia and the respective bilateral partners, of income arising in one nation and flowing to the other. The earliest such double taxation treaty, with the United Kingdom (then the chief source of foreign capital for Australia) was entered into in 1946; that with the USA in 1953; that with Japan in 1970; and so on.
- the international agreements on standardisation of national accounts, involving consultations under the auspices of no less than five international organisations.[7]

Judgments will differ as to where this "technical" category of treaties ends and where the

"political" category begins. Moreover, within the latter category there are widely differing cases; for example:

- The Australia New Zealand Closer Economic Relations Trade Agreement, entered into between the two countries in January, 1983 signified a political decision by the respective governments to enter into a "closer economic relationship" than previously obtained between either of them and any other countries. The matters covered in this treaty were essentially of a highly political kind, relating principally to trading arrangements and the breaking down of protection of the two countries' industries against each other. It also laid the foundation for a much closer intertwining of their economies – and, in a broad sense, their polities.
- By contrast, the *UN Convention on the Elimination of all Forms of Discrimination against Women*, which was signed by Australia in 1980 (but not ratified until July, 1983) is a typical product of the UN "world governance" élites – allied in this case with the forces of "political correctness" in general and militant feminism in particular.
- In the same vein we have the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, signed by Australia in 1985 and subsequently ratified in 1989. Does anyone assert that Australians need to be widely protected against "torture" (however defined), or "cruel, inhuman or degrading treatment or punishment" (however, and potentially much more loosely, defined), by their governments, or their fellow Australians? And to the extent that they do, does anyone assert that the remedies already provided under Australian law are not wholly adequate? Given the undeniable answers to those two questions, why then does Australia need to resort to a windy international treaty on such matters?

It is of course questions of that kind which lead me to my alternative treaty taxonomy – the categorisation of treaties into those which are "necessary", "useful" or merely "morally vain". Clearly, many – even most – of those treaties classifiable as "technical" fall into the category of "necessary" treaties. Thus, even in 1878 it made good practical sense for the then Colony of South Australia (including, as it then did, what is now the Northern Territory, where the international telegraph from London first came ashore) to adhere to the International Telegraphic Convention. Today, it would be impossible to maintain our vast, and vastly complex, network of telecommunications with other countries in the absence of an international agreement governing the technical and financial relationships involved. It is no accident that our membership of the International Telecommunications Convention, and of its equally necessary postal counterpart, the Universal Postal Union, are among Australia's earliest treaty relationships. To a nation so affected by "the tyranny of distance", such treaties were more than usually necessary.

How, though, would one classify those other "technical" treaties to which I referred earlier, our double taxation treaties? Strictly speaking, they might not be described as "necessary" – and indeed, were clearly not regarded as such prior to 1946, when the first of them, with the United Kingdom, was drawn up. Even today, it is clearly not thought necessary to have such treaties with a great many other countries – and certainly not with all other members of the United Nations. As a broad generalisation, such treaties are not generally regarded as "necessary", in Australia's case, unless the counterparty has a significant economic interest (generally via capital investment, and the income produced by that investment) in Australia, or *vice versa*. Thus it was no accident that our second such treaty, that with the United States, was entered into with the nation which, after World War II, began to vie with Britain as the most important source of capital investment in Australia.

Consider however another "technical" treaty to which Australia is a party, the *Convention of the World Meteorological Organisation*, ratified by Australia in 1949. It is at least arguable that

in Australia's case our membership of this Convention is not strictly "necessary". Unlike most of its other members, we are a long way from anywhere – and in particular, from anywhere from which our weather derives – and it could be argued that, if our membership were terminated tomorrow, our Bureau of Meteorology would not be greatly incommoded. Nevertheless, it can equally be argued that our membership costs us rather little, that our participation in joint activities of the World Meteorological Organisation (WMO) involves no significant interference in our domestic affairs, and that membership of the WMO "club" gives us access to research and other scientific relationships which are of some value to our scientific community. On that basis, while this technical treaty might not be "necessary", it could probably be regarded as being at least "useful".

Within the category of "political" treaties, consider one such as the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea ... relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, signed for Australia in December, 1995 and subsequently ratified last December, but not yet in force. Australia's waters are, doubtless, home to so-called "straddling fish", and for all I know, to "highly migratory" ones also (although whales, of course, are not fish). On that basis, perhaps one might classify our membership of such a treaty as marginally "useful".

By contrast, the *Agreement governing the Activities of States on the Moon and other Celestial Bodies*, which was adopted by the UN General Assembly in 1979 (after having been developed – one might almost have guessed it! – by UNESCO) and acceded to by Australia in 1986, could be described, almost literally, as moonshine. For one thing, Australia is unlikely ever to undertake independently any activities on the moon (still less, on "other celestial bodies"!). For another thing, any major world power, such as the USA, the USSR (at the time of the Agreement's inauguration), or the European Community, which might undertake such activities at some future time, will then do just what it pleases, and no amount of finger-wagging or other forms of moral posturing by Australia or any other minor power will cause it to do otherwise. (It is worth noting that none of these major powers has acceded to this more than usually nonsensical document; Australia could even be said to be the most significant party to it, of the only 9 nations in that category!). Clearly, such a "political" treaty falls squarely into the "morally vain" category.

At least it may be said of that Agreement that, morally vain though it undoubtedly is so far as Australia is concerned, it probably would not do us much real harm if it were ever to become truly effective. That can certainly not be said of a plethora of other such treaties in the "morally vain" category to which Australia, for reasons best known to those responsible on *both* sides of politics, has chosen to become a party. Consider the following examples:

- The *International Covenant on Civil and Political Rights.*
- The *International Covenant on Economic, Social and Cultural Rights.*
- The *UN Convention on the Elimination of all Forms of Racial Discrimination.*
- The *UN Convention on the Prevention and Punishment of the Crime of Genocide.*

Such examples could be multiplied many times over. Yet, to take only these examples, Australians have long enjoyed all the civil and political rights in question. Australian Parliaments have long made their own judgments (and, unlike the United Nations, been accountable to their electors in the process) as to the economic, social and cultural "rights" appropriate to be bestowed upon the citizenry. Every Australian State has its own legislation governing questions of racial discrimination, providing for legally enforceable penalties against it. As to the crime of genocide, and notwithstanding the fevered imaginations of people like Sir Ronald Wilson and Mr Pat Dodson, that is not, thankfully, a crime about which Australians have ever needed to be concerned within their own country. Why then – moral posturing apart – has Australia seen fit to ratify a UN Convention which has nothing whatsoever to do with us?

The general answer sometimes given to questions of this kind is that, although there is no real need for Australia to be a party to any of these treaties from a domestic viewpoint, we should nevertheless sign up to them in the interests of being "a good world citizen". Alternatively, there is the *in terrorem* argument that, were we not to accede to treaties of this kind, Australia would become "an international pariah" in the eyes of "the international community". To take but one example, this latter argument was deployed *ad nauseam* by Commonwealth public servants and virtually every journalist writing on the topic in the lead-up to the negotiations on the *Tokyo Protocol* in respect of so-called "greenhouse warming". In that instance, the argument remains even more unconvincing now than it was then.

Space precludes any exhaustive examination of such generalized defences. Suffice to say that being "a good world citizen" (in the eyes of the Foreign Office élites) butters no more parsnips in today's world than it would have done when, nearly two centuries ago, there was first coined that famous dictum that a nation has no permanent allies, but merely permanent interests. As to "the international community", there is of course no such entity; and hence no need for concern about being regarded as "an international pariah" by that non-entity.

That comment about the non-existence of any such thing as "the international community" may evoke echoes of Mrs Thatcher's (as she then was) famous remark that "there is no such thing as society". Lest I be misunderstood – including, as in Mrs Thatcher's case, deliberately misrepresented – I am *not* saying that Australia need not care how it behaves internationally. In saying that there is no such thing as "the international community", I am saying rather that there are some billions of people in other countries to whom we should behave as we would wish them to behave towards us, but that there is no single entity which could possibly be sensibly described as "the international community".[8] I am also saying that, by and large, Australia's reputation in the world (including our classification or non-classification as "an international pariah") will stand or fall on the basis of how Australians comport themselves in the world both as individuals and as a nation; and that, by and large, we have earned a reputation for having comported ourselves, during the near century of our existence as a nation, rather well. Needless to say, that reputation has nothing to do with our having adhered to a bunch of morally vain pronouncements in the shape of treaties of this kind.

The second of the four questions enunciated at the outset of this paper was whether the entering into of treaties was undertaken in the national interest, or merely as an expression of the moral vanity of those principally involved in treaty-making. From what has already been said, the answer is, obviously, that it is sometimes the former and only too often the latter. Nevertheless, it may be worthwhile spending a little more time on the issue by posing the basic question: how do we decide when it is in the national interest for Australia to accede to a treaty?

The answer to that question, I suggest, is that it is in Australia's national interest to enter into a treaty (a) when doing so provides us with something that we need; and (b) when we cannot provide that "something" solely by our own actions. Even if those two necessary conditions are satisfied, that may not be sufficient reason to enter into the treaty if the obligations we undertake by doing so outweigh the value of the desired benefits.[9]

Against that yardstick, many – perhaps most – of the treaties earlier categorized as "technical" would probably pass this test. So would many of those earlier categorized as "political", such as the Australia New Zealand Closer Economic Relationship Trade Agreement. Many other treaties in that "political" category would not, however, pass that test, and clearly should never have been acceded to by the Australian governments of the day.

As for my alternative taxonomy, treaties earlier categorized as "necessary" would almost by definition pass the national interest test. So would many – perhaps most – of those treaties earlier categorized as "useful". Clearly, however, very few, and perhaps none, of those treaties earlier categorized as "morally vain" pass this national interest test. Indeed, it is fair to say that they differ only to the extent to which they *fail* that test.

It would be wearisome – and again, space in any case precludes doing so – to detail the manifold reasons why this "morally vain" category of treaties fails, time and again, to pass the national interest test. However, the posing of even a few simple questions may suggest the general line of argument. For example:

- As noted earlier, do Australians need the United Nations to instruct us not to torture each other (or anyone else, for that matter)?[10]
- Again, do we need the United Nations to instruct us not to discriminate against our fellow Australians but rather to treat them equally? There can be few more genuinely egalitarian countries than Australia in the world.
- Again, do we need the United Nations to instruct us in how to bring up our children? I defy anyone to advance a single instance of the beneficial effects upon Australians of our adherence to the *UN Convention on the Rights of the Child*.

The same point can be made in another way, again by way of example. In 1906 Australia acceded to the 1904 *International Agreement for the Suppression of the "White Slave Traffic"*. Clearly, we did not do this in order to guard against the ravages of that deplorable activity in Australia – where, even in 1906, there would have been laws against such activity (probably, and in my view rightly, harsher laws than exist today). We (or technically speaking, at that time, Britain on our behalf) acceded to that treaty partly in the doubtless genuine hope that it might contribute to wiping out the traffic in women concerned, but also because doing so flattered the moral vanity of the treaty-makers. Suffice to say that, nearly a century later, the "white slave traffic" – or these days, more often the "brown slave traffic" from countries such as Thailand or The Philippines – is still flourishing, Australia's membership of that treaty, not to mention our own immigration laws, notwithstanding.

It is time now to turn to the third question posed at the outset – namely, what is the effect on a nation's sovereignty when it enters into a treaty? In addressing that question, it is instructive to see what our Department of Foreign Affairs and Trade has to say on the matter in answering its own question, "Does ratification of international treaties result in a loss of sovereignty?"[11]

According to the Department, "ratification of international treaties does not involve a handing over of sovereignty to an international body". Why not? Because:

> ".. implicit in any Australian decision to ratify a treaty is a judgement that any limitations on the range of possible actions [that the treaty may impose on Australia's future capacity to act in particular ways] .. are outweighed by the benefits which flow from the existence of a widely endorsed international agreement".

Leave aside, for these purposes, the question of who makes that so-called "Australian decision", as well as the fact that by no means all treaties are describable as "widely endorsed international agreements" (e.g., the aforementioned *Agreement governing the Activities of States on the Moon and other Celestial Bodies,* which 20 years later has attracted only 9 member states). Boiled down to its essentials, the Department's statement amounts to saying that while (contrary to its initial statement quoted above) ratification of international treaties *does* "involve a handing over of sovereignty", nevertheless that sacrifice of sovereignty is justified by "a judgment" (again, by whom?) that that sacrifice is "outweighed by the benefits" of doing so. This of course is essentially similar to what I have earlier called "the national interest test".

There is however a vital difference between that test as I have formulated it, and the manner in which it is formulated by the Department. That difference is exemplified in the immediately following paragraph of the Department's exposition, namely:

"..ultimately, formal legal sovereignty is retained [when a country enters into a treaty], as the power to enter into such arrangements remains with Government".

This is precious close to saying that we retain our sovereignty because we retain the power to reclaim it after having surrendered it! A similar assertion is made in the conclusion of the

Department's answer, where it is said that, although "ratification of a treaty does require a State to perform its obligations in good faith", nevertheless "this is an exercise, not a relinquishing, of sovereignty". All one can say is that one could have fooled every Australian man and woman in the street on that score.

It is true that, as the Department goes on to say:

> "The Government also retains the right to remove itself from treaty obligations if it judges that on balance the treaty no longer serves Australia's national and international interests.[12] (Since 1996 Australia has tabled documents in Parliament foreshadowing its withdrawal from several multilateral treaties on the basis that these treaties no longer served Australia's interests.)"

Again, this goes to the question of sovereignty. In those (limited number of) cases where Australia has formally denounced treaties into which it had previously entered, it has restored that part of its sovereignty which it had previously yielded up – and as the Department notes, there have been several such examples in recent times.[13] It is therefore certainly important – indeed, absolutely essential – that every treaty into which any Australian government ever enters should contain within its terms due processes for its denunciation. Apart from any other consideration, it is simply not possible, within our system of parliamentary democracy, for any Parliament (or still more inconceivably, any Executive) to bind for all time the hands of all future Parliaments – not to mention the people whom those Parliaments purport to represent. But the mere fact that (I presume) all of our treaties do contain such terms for denouncing them does not mean that our entering into them has not involved any loss of sovereignty while we remain bound by them.

This brings us to the heart of the matter. On the one hand, we have what appears to be the official view – namely, that so long as any treaty into which Australia enters contains within its terms due processes for its possible future denunciation, then there can be no loss of sovereignty involved. Ratification of a treaty is, in those already quoted words of the Department of Foreign Affairs and Trade, "an exercise, not a relinquishing, of sovereignty".

The opposing view, on the other hand – the view to which I subscribe, and to which I suggest the overwhelming majority of Australians would subscribe – is that when Australia enters into a treaty, some sacrifice of sovereignty *is* involved (in varying degrees, depending upon the scope of the treaty) and that the only question is whether that sacrifice of sovereignty is justified in the national interest by the benefits which accession brings to Australians.[14]

Take, for example, the *UN Convention on Refugees*, which will be the subject of the Hon Peter Walsh's immediately following paper. If only for that reason, I shall not refer to that treaty in detail. Suffice to say however that, to the average Australian, the obligations under which Australia apparently labours as a result of our accession to that Convention are as amazing as they are, simply, democratically unacceptable. The pass to which we have been reduced – and which must make Australia's name a laughing stock wherever any group of people smugglers is gathered together – is nothing short of extraordinary, as I am sure Mr Walsh will be telling us. It simply does not make sense, under such circumstances, to assert that, those facts notwithstanding, our sovereignty has been in no way impaired merely because the Convention in question contains provisions for us to withdraw from it! That seems to me to verge on doubletalk.

Again, consider another topic on which, later today, we shall also be hearing from two other speakers, Ms Ruth McColl, SC and the Hon Denis Burke, MLA – namely, mandatory sentencing. Whatever the rights and wrongs of that issue may be, I confidently assert that there would not be one Australian in a thousand who would think it appropriate that the United Nations itself – let alone the miserable collection of international legal activists and other assorted misfits who make up the U.N. Committee on Human Rights – should intervene to lecture us on how we should approach the entirely domestic issues involved.

Considerations of that kind bring me to my fourth initially stated question, namely, does treaty-making have implications for the domestic democratic processes of the nation; and, if so,

what are the likely consequences?

Protestations to the contrary notwithstanding, it is clear that treaty-making does have implications for Australia's domestic democratic processes, and that those implications have been seriously malignant.

First, there is the fact that the process of treaty-making has resulted, when taken in conjunction with the enormously expanded interpretation which the High Court in the past twenty years or so has given to the "external affairs power",[15] in a huge expansion in the powers of the Commonwealth at the expense of those of the States. Of course, those who are in favour of greater centralization of power in Canberra (not least, a number of past and present High Court Justices) have doubtless welcomed this development. But anyone who believes in the old adage that "power corrupts" can only deplore it – as well as the fact that, by removing decision-making from the State peripheries and focusing it in Canberra, the Australian people have been relegated to one further remove from that process. Concerns of this kind were at the heart of the formation of this Society, and if only on that score perhaps need not be elaborated further.

There is however another way in which this "democratic deficit" between the decision-makers and the people has been widened via the treaty-making process. It derives from the fact that, increasingly, activists among the ranks of our judiciary, both State and federal, are disposed to seize upon the fact that Australia has ratified a treaty[16] in order to rule for (or against) certain outcomes. The most notorious example of this proclivity to date has been the High Court decision in the *Teoh Case* in 1995;[17] but there is a growing list of other examples.

It was the President of this Society, the Rt Hon Sir Harry Gibbs, who said that the High Court's widening of the interpretation of the "external affairs" power of the Constitution had now advanced so far that one could almost replace the two words "external affairs" in s.51(xxix) by the single word "anything".[18] The seriousness of that statement – and more fundamentally, the seriousness of the situation to which it referred – can hardly be overstated. As Dr (now Professor) Greg Craven has pointed out in several of his papers to this Society analysing the performance of the High Court of Australia,[19] there is probably no single aspect of judicial activism on that body's part which has done more to bring into disrepute the highest court in our land.[20]

The results are obvious. First, government from Canberra has now intruded into almost every facet of peoples' lives. Powers which, at the time of federation, were carefully withheld from the Commonwealth by the framers of our Constitution, are now exercised almost daily by Ministers in Canberra on the basis that, legally, to do so is necessary for the implementation of some treaty or other into which the Executive has entered and where, according to the High Court, that now means that the Commonwealth's writ must run.

It was a great American who said that you can fool all the people for some of the time, and some of the people for all of the time, but that you can't fool all the people all the time. Gradually, as the truth of what has been done to their Constitution, particularly in the past 20-25 years or so, by the centralists in Canberra has dawned upon the Australian people, there has emerged a mixture of feelings.

There has been anger at the way in which the federal compact has been almost conspiratorially eroded, and without reference (in those respects) to the people via the referendum mechanism of s.128.[21] There has been a growing sense of betrayal. Above all, and most dangerously of all in terms of the long-term health of the nation, there has been a growing loss of faith both in the system and in those who administer it (Commonwealth Ministers, their officials, and the federal judiciary – not excepting even the High Court of Australia). Is it any wonder that this growing sense of despair should give rise to such phenomena as the rise of Pauline Hanson? Or that the seeds of Hansonism should still be there, waiting to be tilled anew, even though that lady herself may have effectively disappeared from the political scene?

Those facts notwithstanding, nobody should be under any misapprehensions that the same constitutional termites which have brought us to this pass are continuing to gnaw at the

foundations of our nation. The project to which they have been devoting themselves for some time now is to attain, in effect, a "Bill of Rights" by the back door. Knowing, as they do, that the people will never countenance the bringing in of a constitutional amendment to that effect,[22] they have set about attaining one, in effect, via the treaty power. But that, like so many other aspects of this huge topic, is a matter for a paper in its own right.

The present Government, to its credit, has taken some small steps to render the exercise of the treaty power somewhat more transparent, and to involve the Parliament somewhat more extensively in the treaty-making (and particularly treaty ratification) processes. Yet nothing has really changed, and even such small crumbs of comfort as this particular Executive has given can, and I predict will, be taken away by a different Executive in future, unless something is done to prevent that happening.[23]

As that comment suggests, there is in truth only one conclusion to be drawn – namely, the need for a constitutional amendment to hobble the Commonwealth's use of the treaty power for purposes for which, clearly, it was never intended. Such an amendment was drafted some years ago by another speaker to this Society, Dr Colin Howard.[24] Not surprisingly, it has not found favour with even the so-called "conservative" side of Canberra politics – which, when the chips are really down, is just as power-hungry as those who sit opposite it. But, as the recent public utterances of the Chief Minister of the Northern Territory may suggest,[24] its time, I believe, is coming.

Endnotes:

1. It is for this reason that national sovereignty, as commonly understood, is often referred to in academic circles as "Westphalian sovereignty". According to some academic writers, Westphalian sovereignty is only one of several forms of sovereignty (e.g. "domestic sovereignty", "interdependence sovereignty", "international legal sovereignty"). Interesting though some of this dancing upon the points of academic needles may be, however, it is Westphalian sovereignty (the autonomy of the sovereign to act without external let or hindrance within the territory of its own nation) which accords with the understanding of the term by the man (or woman) in the street, and it is around that concept of sovereignty that this paper is constructed. On this and other aspects of sovereignty, as well as some nice historical material, see Stephen D. Krasner, *Sovereignty: Organised Hypocrisy*, Princeton University Press, Princeton, New Jersey (1999).

2. A latter-day successor to its 1970s predecessor, the Club of Rome, whose corporatist effusions on the intellectual fads of those days bore a striking resemblance to those pronounced from on high on Mount Davos today.

3. The enduring quality of the nation state, and the sovereignty which goes with it, has been demonstrated over and over again in recent years, including via the (re-) emergence of such ethnically based new nations as Croatia, Slovakia, Macedonia and so on.

4. For some arguments as to the costs of entering into the *UN Convention on the Rights of the Child*, see Barry Maley, *Importing Wooden Horses*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), 201.

5. Since this paper contains a good many criticisms, both explicit and implicit, of the attitudes of our Department of Foreign Affairs and Trade officials to the whole process of treaty-making, it is only fair to note at the outset that, when I approached the Treaties Secretariat

of that Department, the official concerned was extremely helpful – not merely in directing me to the appropriate internet website, but also providing me with hard copy versions of the two major Australian Treaty lists (Bilateral and Multilateral), as well as the Indexes thereto. Regrettably, it must be added that the accompanying departmental *Information Kit* is a highly tendentious document – to the point, in places, of being positively misleading.

6. As noted in the immediately preceding Endnote, treaties are also distinguishable into Bilateral ones (between Australia and one other nation) and Multilateral ones (involving several, or a multitude, of other nations). However, treaties in both cases are still separable into the categories used in this paper.

7. The International Monetary Fund (IMF), the World Bank, the Organisation for Economic Co-operation and Development (OECD), the Commission of the European Communities (Eurostat) and the United Nations. The System of National Accounts 1993 (SNA93) recently replaced the earlier version published in 1968 (SNA68). See *Implementation of Revised International Standards in the Australian National Accounts*, Australian Bureau of Statistics Information Paper (catalogue 5251.0), Canberra, 1997.

8. It is indeed ironic, in a post-Berlin Wall world, that the Foreign Offices of that world, and their own "club" in the United Nations, should so eagerly continue to embrace the collectivist mentality which the very term "the international community" so strikingly signifies.

9. Stating the conditions for determining the national interest in this general way does not, of course, resolve the question of how those conditions are to be weighed, *and by whom*, before the decision is taken to ratify a treaty. That raises the whole issue of executive authority as against the involvement not only of the Parliament in Canberra, but also of the governments, and as necessary the Parliaments, of the States. This is a large issue, meriting a paper in its own right, and cannot be pursued further here.

10. Typically, many of the UN member signatories to the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* are themselves nations where cruel, inhuman and degrading treatment and punishment are commonplace, and where even torture is also by no means uncommon. A few examples will suffice: Afghanistan, Albania, Cameroon, China, Democratic Republic of the Congo .. and the list goes on.

11. *Australia and International Treaty Making: Information Kit,* Department of Foreign Affairs and Trade, Canberra, November, 1999, pp.8-9.

12. Note the phrase "Australia's national *and international* interests". (Italics added). What are Australia's "international interests"? Are they not merely a particular facet of Australia's *national* interests? If so, why should they be stated separately? If not, what are they (other than, perhaps, the "world governance" interests of some of our Foreign Affairs officials)?

13. For example (and apart from the formal – but otherwise not materially significant – denunciation of treaties which had been subsequently superseded by new treaties embracing essentially the same, but updated, obligations), Australia has in recent years formally denounced, and withdrawn from, such treaties as:
    - *Constitution of The United Nations Industrial Development Organisation* (UNIDO). Ratified by Australia in July, 1982. Instrument of denunciation lodged December, 1987 with effect 31.12.1988. (Note that Australia subsequently acceded *again* to this

Organisation in January, 1992 and *again* denounced membership in December, 1996 with effect 31.12.97. Clearly, Foreign Affairs officials don't give up easily!)

- *Statutes of the World Tourism Organisation* (WTO). Instrument of adoption deposited by Australia in September, 1979. Instrument of withdrawal deposited July, 1989 with effect 26.7.1990.
- *Agreement establishing the Common Fund for Commodities*. Ratified by Australia in October, 1981. Letter of withdrawal deposited August, 1991 with effect 20.8.1992.

14. In saying this, I am aware that I am opposing the view recently stated by my friends in the Lavoisier Group in their submission of 28 August, 2000 to the Joint Standing Committee on Treaties Inquiry into the *Kyoto Protocol*. Thus, on page 4 of that submission it is stated that:

> "The statement [by a Commonwealth public servant on behalf of the Secretary of the Department of the Environment] that 'every agreement to which the Commonwealth Government commits Australia involves some ceding of sovereignty' makes sense only if the treaty contains no withdrawal or repudiation clauses, .."

With respect, I beg to differ. Indeed, it appears to me a counsel of despair to concede, in effect, that we need not be concerned about loss of sovereignty so long as every treaty into which Australia enters contains a denunciation clause. That is to gain the shadow (formal retention of sovereignty) while sacrificing the substance (practical loss of the nation's freedom of action, to a greater or less extent). On that basis, our Department of Foreign Affairs and Trade – and the governments, from *both* sides of politics, which sanction its actions – can go on ratifying treaty after treaty to their heart's content.

For the sake of completeness, it should also be noted that my difference from the Lavoisier Group position on this matter does *not* imply that I agree with the overall policy position being taken by the Commonwealth public servant whose statement is referred to above – and whose statement on the sovereignty issue, incidentally, appears to be 180 degrees at variance with the official view on that issue as enunciated by the Department of Foreign Affairs and Trade, quoted earlier.

15. Section 51(xxix) of the Constitution, which states:

"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ..

(xxix) External affairs."

16. Even where the treaty has not subsequently been enacted into domestic law by the Parliament.

17. *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995), 183 CLR 273. On the import of that decision, one can do no better than to quote the Department of Foreign Affairs and Trade's own *Information Kit* (p.14), as follows:

"In April 1995, the High Court of Australia handed down its decision in [the *Teoh Case*]. In that case the Court decided that ratification of a treaty gave rise to a 'legitimate expectation' that administrative decision makers would act consistently with the terms of the treaty even if those terms had not been legislated into domestic Australian law".

18. "It is hardly an exaggeration to say that it would not make any practical difference if the word 'anything' were substituted for 'external affairs' in that provision". Rt Hon Sir Harry Gibbs, Address launching Volume 1 of *Upholding the Australian Constitution*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993),

Appendix I, p.137.
See also:
"The scope of this power of the Commonwealth has thus become completely undefined". Rt Hon Sir Harry Gibbs, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), p.187.

19. "It is literalism [the High Court's approach to interpretation of the Constitution] which renders such provisions as the external affairs power .. so profoundly dangerous to Australia's federal character, by insisting that they be interpreted in the widest fashion possible, without regard being had to any federal considerations". Dr Greg Craven, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), p.75.

20. Unless it be the High Court's ventures into the so-called "implied rights" area – from which, however, it has since mercifully appeared to retreat as wiser judicial counsels have prevailed within its own ranks.

21. It is no accident that the centralists have chosen, for the most part, to evade the s.128 mechanism. On almost every occasion on which the people have been asked to give more power to Canberra (which is what the overwhelming majority of referendum questions have principally sought to do), they have steadily declined to do so – last year's referendum on the republic issue having been merely the most recent example.

22. Elements of a "Bill of Rights" were included in some of the questions put to the people in the Referendums of 1988. Those elements, like the other questions making up those Referendums, were overwhelmingly rejected.

23. One recent straw in the wind, indicative as it is of the perpetual tendency of the Executive to ignore even the Parliament (let alone the people) on treaty matters, is given by the joint announcement on 25 October, 2000 by the Attorney-General and the Minister for Foreign Affairs and Trade, that the Government intended ratifying (and introducing legislation to give domestic legal effect to that action) the *Statute of the International Criminal Court* – to which, with no prior public discussion, the present Government had previously appended its signature in Rome in December, 1998. At the time of the joint ministerial announcement, the matter had not even been considered by the Treaties Committee of the Parliament.

24. "What I would propose is adding, after the words 'external affairs' in s.51(xxix), the following:
'provided that no such law shall apply within the territory of a State unless
(a) the Parliament has power to make that law otherwise than under this sub-section; or
(b) the law is made at the request or with the consent of the State; or
(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia' ".
As proposed by Dr Colin Howard, QC in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), p.11.

25. According to a report in *The Age* of 31 October, 2000, Mr Denis Burke, MLA "proposed a bill that would ensure a treaty would need two-thirds support of both Houses of Parliament before Australia entered into it".

Chapter Two:
The *UN Convention on Refugees* and its Implications for Australia's Sovereignty

Hon Peter Walsh, AO

All UN Conventions and Treaties signed by Australian governments have the potential to erode both Australian sovereignty and democracy. Conventions are drafted by committees and replete with the usual defects of committee produced "consensus" documents: in particular, strong on motherhood statements and laudable objectives, imprecise in detail and meaning.

Statements and policy platforms from political parties have similar attributes for similar reasons. But in this case there are other, more sinister implications. I do not doubt many naïve people believe the UN and its committees are altruistic institutions like a Christian charity of old, not at all corrupted by power lust, greed, self-interest or self-aggrandisement. UN committees resemble, in structure, non-accountability and self-service, the International Olympic Committee.

Paddy McGuinness made these points in the October, 2000 issue of *Quadrant*:

> "Many participants in the work of the UN system have their own agendas, whether in matters of general human rights, or special rights like women's or indigenous people's rights, who also have little or any in the way of democratic credentials. There is a large number of international lawyers who work in these areas, both in the UN and in Australia and other countries, who see the agencies of the UN as a means of imposing their own standards on everybody else without any participation in decision-making by the people. Many countries, including Australia over the last half century, have signed new treaties and conventions of the UN in the expectation that they are simply making general promises of good behaviour. But these treaties have been used by zealous and inadequately supervised diplomats and lawyers as instruments for extending their own political power".

To these people, McGuinness says, "the faults of the UN system do not matter". What matters is that:

> "..they can be used for domestic political purposes against our own governments and laws when they disagree with them but know they cannot get popular support to change them. The international lawyers of Australia are determined that human rights become a cloak for building up their own undemocratic political power, through treaties and courts, to implement whatever good or bad agendas they might have. They have only contempt for democratic rights and ordinary people".

Assorted activists who have lost political debates/disputes within Australia see any UN Committee – no matter how fly blown it may be – as a court of appeal against policy decisions made by democratically elected Australian governments. Such appeals have not (yet?) been successful, but are always approvingly trumpeted by a media "commentariat" which hopes the government will be suitably chastened and intimidated. (So far that hasn't worked either.)

Recent examples include *Wik* amendments, mining uranium at Jabiluka and mandatory sentencing. On the last issue, Australia is to be "prosecuted" by "human rights" lawyer Cherie Booth (aka Blair), who is no more perturbed about the existence of mandatory sentences for housebreaking in Wales and England than is her husband Tony, PM. As usual, all the UN Committees which have criticised Australia include members from several countries which are authoritarian single party states, or military or clerical dictatorships.

The Australian government, justifiably angered by this hypocrisy, made known it would pay little attention, and specifically refused to sign the *Optional Protocol to the Convention for the*

Elimination of all forms of Discrimination Against Women. Our resident "human rights" activists were further outraged. *The Weekend Australian* reported, uncritically, that Meg Lees, Carmen Lawrence, Sex Discrimination Commissioner Susan Halliday and "Liberal Party matriarch" Dame Beryl Beaurepaire had condemned the government. Some went further, saying that by refusing to sign the *Protocol*, Australia will be responsible for women's rights abuses by *other* countries which have not signed.[1]

Countries which have signed include Thailand (in which desperately poor families are believed to sell their daughters to Bangkok brothels). In the Republic of Ireland, abortion is banned. What Meg Lees *et al* believe about women's rights in those two countries remains a matter for wide-eyed conjecture.

On August 7 last *The Australian* published, side-by-side, two letters. One was from Professor David Kinley and other signatories from the "Castan Centre for Human Rights Law", which slagged the government for pointing the finger at despotic regimes, because "Western liberal democracies such as Australia are well capable of breaching human rights." The other letter, from one Henry Wardlaw, defended double standards more honestly, saying, "UN Committees are surely acting sensibly if they direct their efforts to areas where they may have some influence (i.e., liberal democracies) rather than to those where nothing short of international sanctions or military force can be expected to bring about change".

For three decades or more, social engineers disguised as "human rights" advocates have campaigned for a *Bill of Rights*, the (intentional) effect of which would be to transfer power from Parliaments to unelected officials and judges. When Malcolm Fraser hopped on that bandwagon last August he was applauded by Federal Shadow Attorney-General Robert McClelland, who also lauded Canada's *Charter of Rights and Freedoms,* which, he told us, ensures that "before any legislation or administrative act is introduced it's vetted (by non-elected people) against their *Charter of Rights and Freedoms*". He continued: "If a government steps outside their bounds and infringes the rights of citizens ... citizens should have redress".[2] McClelland apparently has not noticed that we Australians already have methods of redress called elections.

To put in place the *Bill of Rights* wanted by McClelland and others requires a constitutional amendment and, therefore, a referendum. Such referenda have never secured majority support from the Australian people, who have more innate commonsense than their self-proclaimed guardians realise. United Nations Conventions and Treaties are seen as an alternative means of implementing the guardians' agenda without approval by either Parliament or people. To succeed fully, this subterfuge requires compliance by courts, ultimately in Australia the High Court. In one case (*Teoh*) to which I will refer later, the High Court has so complied.

The degree to which the High Court will endorse law based on UN Conventions not even *ratified* by Parliament, has yet to be tested. The *Mabo II* and *Wik* decisions, however, suggest that narcissistic High Court Justices will not necessarily be constrained by mere parliamentary injunction. A forthright declaration by key Ministers (PM, Attorney-General and Foreign Affairs) and endorsed by the House of Representatives, that any Convention signed by an Australian government, or law passed by the Parliament, can be amended or repealed at any time by Parliament, would surely have to be taken into account – even by a hypothetical future *Mabo* Six.

Several attempts by me in the early 90s to get such a statement were fudged. On 17 October, 1991 this question was put on notice:

> "What legislation or regulation is required by Commonwealth law to delist from World Heritage status areas which had been previously listed?"
>
> Attorney-General Duffy replied:
>
> "A Commonwealth Act or regulation could not operate to remove an area from the World Heritage List ... a removal can only take place if approved by a majority of two-thirds of the World Heritage Committee".

Later attempts to clarify this matter produced soft responses from Attorney-General

Lavarch and a claim from Foreign Minister Evans on 6 December, 1994 that "we retain the sovereign capacity to make and apply our own laws as we see fit".

Somewhat indirectly, an article[4] and letter[5] from Department of Foreign Affairs and Trade Secretary Michael Costello published in *The Australian Financial Review* made similar but stronger claims. Subsequent attempts to get the organ grinders (Lavarch and Evans) to back up the monkey's (Costello) claim were not successful. Neither Lavarch nor Evans, nor their successors, have ever stated unambiguously that any law passed by the Australian Parliament or treaty ratified by the Executive may be amended, repealed or repudiated by a future Parliament at any time.

This is not a mere semantic quibble. Greenpeace has already attempted to litigate planning decisions on the basis that they conflict with our "Kyoto obligations". There is reason to question whether Australian government officials dealing with treaties in general, and the *Kyoto Protocol* in particular, are at least as concerned about capturing their Minister, and receiving plaudits from their peers in a non-accountable international bureaucracy, as they are with Australia's national interest. The danger is compounded when non-elected Non-Government Organisations with their own, often subversive, political axes to grind, claim to have legitimate "standing" in Treaty and Convention deliberations. Such brazen attempts to usurp political power rarely fail to secure media endorsement.

When this was written, legislation was before the Senate to unilaterally impose a *de facto* carbon tax in Australia by requiring an extra two per cent of electricity to be produced from "renewable" sources, as part of our Kyoto commitment to cap our CO_2 emissions at 108 per cent of 1990 levels. That Australia, the most vulnerable country in the world, should be first to adopt economic lunacy based on dodgy science is almost beyond belief. But much worse is to come.

The *Kyoto Protocol* obliges Annex 1 (first world) countries to reduce CO_2 emissions by about five per cent from 1990 levels. The third world can do whatever it choses. To *stabilise* atmospheric CO_2 at present levels (360 parts per million), worldwide emissions would have to be reduced, according to the International Panel on Climate Change (IPCC) reports,[6] by 60 to 80 per cent of 1990 levels. According to the greenhouse "industry", we had already wrecked the global climate by 1990.[7] If zealot claims are taken seriously, *Kyoto* compliance would merely postpone the Apocalypse by a short period. It could, however, soften us up for the much stronger doses of authoritarian government the zealots crave.

The *UN Convention on Refugees* is qualitatively different from *Kyoto* and most other UN Conventions. Drawn up 50 years ago to deal with a refugee problem of a type which no longer exists, it is largely obsolete. But our present refugee problems are not derived from the Convention *per se*. They are a function of size – up to 20 million people seeking "asylum" worldwide – the criminal involvement of people smugglers, a noisy minority of Australians who relentlessly subvert public policy, avaricious lawyers and creative interpretation and expansion of Convention and statute by the judiciary – especially the Federal Court.

The Convention was drawn up principally to deal with the problems of post-war Europe – millions of people displaced from their homelands, unwilling to return because their countries of origin no longer existed or were controlled by authoritarian political regimes. Through most of the '50s and '60s the West perceived refugees to be people fleeing from Communist regimes. So much so that in the 1960s US authorities towed back to Haiti a boat loaded with people fleeing the barbarous but non-Communist ruling junta.

In the last 50 years Australia has resettled about 600,000 refugees. In the last decade the annual intake has been about 12,000, amongst the highest per capita "offshore" intakes in the world. In recent times the vast majority of the world's refugees have been "onshore"; i.e., they have crossed the border to neighbouring countries when fleeing from ethnic cleansing, climatic catastrophe, or civil and other wars. The Balkans excepted, most of these movements are from and to third world countries in Africa and Asia. Despite assistance from the United Nations High Commission for Refugees (UNHCR) and individual donor countries, neighbouring states bear a

disproportionate share of a burden they can ill afford.

The UNHCR has dealt with these people in three ways: repatriation where feasible, settlement in the (usually) neighbouring country of first asylum and, where neither appears possible, resettlement in a third country.

From the third group, Australia has drawn its "legal" offshore humanitarian migrant intake. Not surprisingly, first world countries are preferred by most of these people. Processes are orderly but acceptance rates vary. Acceptance rates in European Union countries in the 1990s have been 10–15 per cent of Afghani asylum seekers compared with 30 per cent in Australia. Australia has accepted this year about 90 per cent of Afghani asylum seekers compared with 30 per cent in the UK.

In the mid '70s "boat people" from Vietnam began to arrive in Australia. They have been coming ever since from several sources in highly variable and recently high numbers – more than 4,000 in the last financial year. "People smuggling" has become a global industry organised by criminals and said to yield up to US$1 billion a year. Orderly processing of asylum applications from these people, many of whom have thrown away all evidence of identity, is obviously difficult.

Most Australians resent this incursion. Illegal arrivals are placed in detention pending determination of their status. Some are granted visas for up to three years, which do not have any entitlement to family reunion or automatic access to social security payments. Unless the Minister uses his personal power – which he and his Labor predecessors have rarely done – those who fail the tests are deported. But due principally to a vain and meddlesome judiciary, the process can be extended for many years, during which a self-aggrandising minority, almost always supported by the media, tries to build up enough political pressure to overturn policy. These activists describe Australian detention centres as "concentration camps" of the Auschwitz and Dachau variety. For them, no lie is too monstrous, no misrepresentation too great.

Much of this should be dismissed as typical rent-a-crowd moral vanity. Those who take it seriously should be obliged to spell out their preferred policy. For them, the only policy logically consistent is an open door policy. In a liberal democracy people are entitled to such a belief. Pity though, they do not have the intellectual honesty to advocate it.

Refugee politics as practised in Australia has produced a pernicious *homo sapiens* mutant known as an "immigration lawyer", dedicated simultaneously to displaying their moral superiority while padding their wallets with public money by abusing legal processes. In the 1990s they have applied a new device for generating income while subverting the public interest – class actions. Recruit a thousand or so asylum seekers at $200 each for a class action. Some of them succeed in getting "bridging visas". This fact is then used to encourage and recruit other people to join class actions.

As far back as 1992 the Keating Government amended the *Migration Act*, inserting Part 8 in the hope and belief that it would prevent Federal Court judges from handing down inconsistent or capricious decisions, in effect *making* law whenever a judge felt inclined to do so. The Federal Court, or more accurately some of its rogue judges, continued to make decisions as if Section 8 had never been incorporated by Parliament.

Last month *The Australian* reported that the High Court sitting in Perth on October 25 would hear appeals by the Minister against decisions by the Federal Administrative Appeals Tribunal (AAT) and lower Courts which set aside his deportation order against an unsuccessful refugee claimant convicted of rape in Australia and sentenced to 6_ years gaol.[8] Earlier *The Australian* reported that the full Federal Court had quashed an AAT decision to overturn the Minister's deportation of a Fijian citizen with a long criminal record. AAT Deputy President Alan Blow, QC had set Mr Ruddock's order aside because "he (Shane Ali) may have been wrongly convicted", adding that he (Blow) did not know enough about the case to "make a finding" that "(Ali) was rightly convicted".[9]

In a recent speech Minister Ruddock dealt with these matters at some length, citing rebukes in 1996 from High Court Justices Brennan, Toohey, McHugh, Gummow and Kirby to the Federal Court for intruding, contrary to law, its version of merit when hearing appeals from Refugee Review Tribunal decisions.[10] In the 1999 *Eshutu Case*, Justices Gleeson and McHugh told the Federal Court:

> "It is not an acceptable approach to statutory interpretation to negate the clear intention of the legislation by reliance on Section 42 of the *Migration Act*".[11]
>
> In the penultimate paragraph of his aforementioned speech, Mr Ruddock observed:
>
> "There will always be some tension between the branches of government. Indeed some would argue that a degree of tension is an indicator of a healthy government. However I think the tension that presently exists is excessive. Some judges have strayed into the political arena, with reflections on the Parliament's wisdom in enacting particular provisions. I do not want to say any more than that".

Whether some Federal Court Judges will be chastened by either High Court rebuke or statute law remains to be seen. Perhaps we should expect no better from a court which has never had a functional reason for existence, and has been restructured for reasons of political expediency.

The Government has introduced a Bill amending the *Migration Act* to curtail the lawyer, judge and do-gooder driven abuses, which have bedevilled the system for a decade or more. One of its more important clauses tightens the legal rule of "standing". The present permissive system allows open-ended access to appeals, even to people who have no connection to the case. Most importantly, it seeks to prohibit the use and abuse of opportunistic lawyers' cash cow: class actions.

The Bill was passed by the House of Representatives. When this was written it was before the Senate with recommendations for amendment from a Senate Committee. Labor in power also legislated to clean up the system, but was thwarted by lawyers and the judiciary. In Opposition, Labor has opted for opportunism and joined the Democrats – who will never actually be accountable – in sabotaging policy directions Labor followed in office.

I fear Labor will do so again – that it will support typically stupid and sanctimonious Democrat amendments in the Senate. In this as in most areas Democrat policy is incoherently irresponsible. For example, Democrat policy a few years ago was zero net immigration, which would have limited the gross intake to 30,000. But Democrat Senators pursued amendments for an intake well above 30,000 in the humanitarian category alone.

As someone who has been a Labor Party member for 40 years, and a parliamentary representative for almost half that time, it disappoints me that today's Labor Caucus so often behaves like a lap dog of the Australian Democrats – a party which polled substantially fewer votes than One Nation.

Endnotes:

1. *The Weekend Australian*, September 30-October 1, 2000.

2. *The World Today* program (ABC), 25 August, 2000.

3. Letter to *The Australian Financial Review*, 11 August, 1994.

4. *The Australian Financial Review*, 29 November, 1994.

5. *Ibid*., 18 January, 1995.

6. IPCC WGI (1990 and 1992).

7. See S Fred Singer, *Hot Talk, Cold Science*, revised Second Edition, p.62.

8. *The Australian*, 23 October, 2000.

9. *The Australian*, 2 October, 2000.

10. Speech by the Minister for Immigration and Multicultural Affairs, 24 August, 2000.

11. It is a pity the High Court does not itself practise the restraint and respect for Parliament it recommends to "inferior" courts. In the *Teoh Case* the High Court overruled a Ministerial decision to deport Teoh because the Minister had not, when making his decision, adequately taken into account Australia's obligations pursuant to the *UN Convention on The Rights of the Child* – which Parliament had not even ratified. To my knowledge this is the only example of the High Court egregiously giving a UN Convention the value of statutory law. I fear it will not be the last.

Chapter Three:
The ILO and Sovereignty:New Dawn or New Dinosaur?

Hon Max Bradford, MP (NZ)[1]

The theme of my address is quite simple.

Slowly but surely, countries like New Zealand and Australia are being enveloped in a spreading net of international obligations that eat away at national sovereignty and independence.

However, the inability of international bodies, particularly the longer established bodies like the ILO, to change these obligations quickly enough to meet rapid globalisation and public expectations will reduce their relevance, and therefore hopefully any damage, to member nation states over time.

Inevitably, my comments will be drawn more from my experience as a New Zealander, rather than from those of an Australian. Nevertheless, a study of our respective histories does show a remarkable symmetry of experience between Australia and New Zealand in the years since our formation.

We think pretty much alike in foreign affairs, in defence (though I am ashamed to say that the NZ Labour/Alliance government is rapidly widening the gap between Australia and New Zealand in capability and strategic overview), and in human rights. Economic and trade policy, especially under the impetus of our Closer Economic Relationship, has converged significantly in the last 15 years.

We have diverged in some areas (such as New Zealand's Multi-Member Proportional electoral system, and dealing with indigenous issues), but in general our countries have had much more in common than in contrast.

Against this background, I imagine that the experiences I am about to share on the implications for Australia's and New Zealand's sovereignty of membership of the International Labor Organisation (ILO) will be easily understood. The question of what to do about them, and whether they have lessons for continued support of the ILO and its Conventions, is a matter I will return to later in this paper.

What is the ILO?

The ILO is an old international institution. Only the International Parliamentarians' Union is older.[2] Formally created in 1919, the ILO had its roots in the International Association for Labour Legislation founded in Basel in 1901.[3] The initial motivation was humanitarian, sparked by concern for the condition and exploitation of workers and their families.

The second motivation was political. The fear was that without an improvement in their conditions, the workers, whose numbers were increasing rapidly as a result of industrialisation,[4] would create industrial unrest, perhaps even revolution. Given the influence of Karl Marx's dogma and Lenin's aspirations for Russian Communism at the time, this was not unreasonable.

The third motivation was economic. Any industry or country adopting social reform would find itself at a disadvantage compared with its competitors, so the ILO was to embrace all countries to level the playing field of (increasing) international competition.

Unlike any other international body since, the ILO was set up as a tripartite body involving governments, employer organisations and unions. It remains unique, even though international bodies have increasingly been forced to involve non-governmental bodies in their policy formation processes.

An examination of the ILO's roots is interesting. The reasons for its formation were essentially defensive – to stop something worse (such as revolution) happening. Similar fears of

war, discord and financial chaos triggered the formation of the UN and other such major bodies as the World Bank and the IMF.

With the passage of time, the role of the ILO has changed. Fear of revolution no longer drives it. Greater altruism is a major driving force, to further the interests of its tripartite membership (especially unions and employers) and to defend and extend its Conventions and standards.

The original ILO economic objective still has great relevance. That is to ensure that countries with highly developed social systems are not put at a competitive disadvantage to those without such systems, and the humanitarian objective in lesser developed countries.

The European Union (EU) in particular has been putting pressure on Asian-Pacific countries, where social security systems are not as developed (and therefore do not enter into country cost structures). The EU, as a region with high social security costs, believes it is at a competitive disadvantage in world markets and the ILO can and should help resolve such a disadvantage.

Thus the EU and some other countries are using the ILO Convention process to pressure ILO developing members, particularly in Asia, into compliance with Conventions that would establish costly social systems in the hope that the perceived competitive disadvantage is removed.[5]

The ILO and National Sovereignty : a Case Study

In 1994, Senator Rod Kemp presented an excellent paper to the Society, entitled *International Tribunals and the Attack on Australian Democracy*.[6] In it, he outlined the way in which the Keating Government used the ILO to subvert the powers of States, in this case Victoria, to impose federal industrial relations powers by ratifying ILO Convention 158.

The government was then duty bound by international rules to pass legislation which, according to Senator Kemp, protected the power and privilege of Victorian trade unions, and imposed minimum standards on workplaces in spite of the State's legislation.

It is unusual, if not unique, for a national government to use the ILO against a democratically elected local or State government of its own country. What is more common is the use by one or other of the tripartite partners to berate the elected government of the day.

The underlying thesis is simple, on the basis that the closer to God you are, the greater the moral authority you have to impose your view of the world on those below you. As international organisations are perceived to be closer to God than member states, the greater is the moral authority they can wield, sometimes to the disadvantage of a member state.

The New Zealand case study I want to outline concerns ILO Conventions 87 and 98 and the way the ILO was used for domestic political purposes.[7]

Convention 87 concerns the freedom of association and the rights of unions to form collective organisations. Convention 98 confers on unions the rights to organise and bargain collectively. New Zealand has not ratified either of these Conventions. We have not been able to, as our labour laws over many years have not fitted the letter of the ILO Conventions and interpretations, nor have we pretended they do.

Seemingly this doesn't matter. In 1993, the NZ Council of Trade Unions (NZCTU) took the New Zealand government to the ILO Freedom of Association Committee (FAC), alleging *inter alia* that the *Employment Contracts Act (ECA)* violated Conventions 87 and 98 by first, not promoting collective bargaining over individual agreements or contract. Secondly, the NZCTU asserted that collective contracts were not "true" collective agreements as contemplated by the ILO. They also claimed that the processes of collective bargaining that emerged under the *ECA* were "contrary to the principle that both employers' and workers' organisations should bargain in good faith and make every effort to come to agreement".[8]

The Freedom of Association Committee is one of the ILO's audit committees, or more

correctly the ILO's Convention Police. It hears complaints from anyone who wants to make one, and determines whether a breach of ILO Conventions, standards, articles or decisions has occurred. While its processes allow the accused the right to make submissions, it is a "Star Chamber" in the sense that there are no open hearings, rights of cross examination or own right of reply as part of the FAC's report. Furthermore, this all takes place even if a government has not ratified the Convention it is accused of violating.

For example, Article 8 of Convention 98 makes it quite clear:

> "This Convention shall be binding only upon those Members of the ILO whose ratifications have been registered with the Director-General".

So why didn't the ILO simply reject the NZCTU complaint, given New Zealand hadn't ratified Convention 98?

Instead, the ILO processes simply took over, and the government of the day acquiesced to the so-called higher moral authority vested in the ILO. The domestic public opprobrium of refusing to see an ILO mission investigating a complaint about two Conventions New Zealand didn't formally endorse or recognise was obviously something the government didn't relish.

However, there was a principle involved, and in retrospect, New Zealand should not have given the NZCTU complaint credence by receiving the ILO mission. Our acquiescence gave credence to a complaint that had no credence because of the outdated nature of the ILO Conventions in question, their limited relevance to modern day industrial relations practices, and because the Conventions hadn't been ratified by us.

So in that case, the New Zealand government ceded a degree of sovereignty to an international organisation many see as increasingly an historical anachronism.[9]

The dysfunctional demand on nation states to adhere to ILO Conventions well past their use-by date is best illustrated by the following quote from the ILO report on the NZCTU complaint:

> "237……..The Committee further notes that the Government considers that the Act (the *ECA*) is an integral part of its wider economic policy strategy, which enabled it to achieve significant results….Whilst appreciating the importance of these factors for governments, employers and workers alike, the Committee stresses that it is not called in this case to examine whether and to what extent the Act has contributed to an improvement in the fiscal, financial and economic situation of the country".

Perhaps the Committee should have, as it might well have drawn a different conclusion than it did about the complaint. It might have also learned about the lack of contemporary relevance of two of the ILO's most controversial Conventions for countries like New Zealand.

The FAC concluded that rather than examine the relevance of a Convention to today's world, New Zealand was to be adjudged "guilty" of not having industrial relations legislation "fully consistent" with an ILO Convention written 50 years ago.

Being Dealt with by the ILO : Who Really is at Fault?

What are some conclusions from New Zealand's experience in this case, a case that is not out of line with the general approach taken by the ILO with many other complaints?

First, it is hard to escape a sense of "guilty until you prove yourself innocent" in the way the FAC conducts itself. The status accorded to complaints is to accept *prima facie* the claims made, then require the body against whom the complaint is made (usually governments) to disprove it.

Second, it doesn't matter whether a country has ratified ILO Conventions or not. A country can be adjudged guilty of violating a Convention — especially the so-called Fundamental Conventions[10] — even if it hasn't ratified.[11]

Third, as was the case for New Zealand in respect of the *Employment Contracts Act*, there was a clear domestic electoral mandate for the passage of the legislation. The principles of the

legislation were laid out well in advance of the election that saw National become the government in 1990. Those principles included the provisions the NZCTU later complained about to the ILO.

The question is which mandate (or sovereignty) should have preference? Should a democratic election result take preference over 50 year old ILO Conventions? If so, then the ILO shouldn't begin a process of calling a member country to account, and certainly not from a complainant politically opposed to its domestic legislation.

In this New Zealand case study, no complaint process should have commenced, as the two Conventions in question hadn't been ratified.

Fourth, no defence is allowed if an ILO Convention is clearly out of date. We would argue that Convention 98 is, on the basis that it is 50 years old, and industrial relations practices have moved on. There is no logic in requiring that collective bargaining be given preference over individual agreements, especially if legislative protection against undue influence is available to the individual.

There is no conceivable reason these days why unions alone should have monopoly bargaining powers, or that groups of employees can't bargain collectively of their own free will and register their own enforceable agreements. Yet ILO Conventions imply monopoly powers and prevent non-union organisations concluding collective agreements. Such provisions might have been relevant 50 years ago when employee bargaining power was weak in developed countries, but they aren't now.

They might be appropriate in some developing countries today, but the real question is whether a "one size fits all" approach to ILO Conventions can work in a rapidly diversifying world. Patently, they can't. If the ILO is to remain a credible international institution it needs to change its approach to modernising Conventions and "policing" mechanisms.

Fifth, even though the ILO has no punishment regime to speak of, the court of public opinion both at home and abroad can be very damaging. Often the news reports are based on complete ignorance of the facts or the relevance of out-of-date Conventions that no single country can realistically modify. What journalist can be bothered trying to understand the arcane ways of bodies like the ILO? It is enough for many citizens to hear a country is in breach of its international commitments for the damage to be done.

Sixth, in these days where we are supposed to act in "good faith", I find it bizarre that the tripartite partners in the ILO, including those at home and their international bodies, will use the ILO processes to pursue a domestic political agenda. Often the real objective is to publicly embarrass the government of the day back home, rather than seek a lofty and higher ideal. Australia and New Zealand have been afflicted with this perverse use of an international organisation's processes.[12]

It seems to me that the fault lies at the heart of the ILO's processes. Surely they weren't shaped originally to allow mischievous or malicious use of international commitments for domestic political purposes? The ILO now operates in a world entirely different from that when it was formed in 1919. Yet its Constitution, its Conventions and its *modus operandi* haven't changed appreciably.

There is a further penetrating, if not insidious, influence to take account of as well. That is what gets the headline, and sells the papers.

The increasing predilection of our Courts to look to international treaties and commitments in interpreting domestic law – especially common law – is fraught with potential dangers. This point was developed in Senator Kemp's paper in 1994 and in Dr Howard's in 1993. [13]

If one concludes that ILO Conventions, articles and decisions are to be used by domestic and international courts in second-guessing elected Parliamentary democracies, then we have to be confident ILO "law" is relevant and contemporary. So there is a significant premium on any elected government to be satisfied the international commitments it makes are relevant and contemporary. These observations lead me to conclude the ILO is far from being a relevant and

contemporary international institution.

Getting Consensus for Change

In a rapidly globalising world, the representational form of the ILO, the statutory framework of its Conventions, the operational nature of its policing machinery, and perhaps the very existence of the ILO, need fundamental re-assessment.

If that wasn't enough, the ILO, like other international bodies, has become an active agent for change in many nation states, including our own, in a manner not contemplated by the founding fathers. Decisions of various international and national Courts have spurred on the ILO, as have domestic and international pressure groups using the resources and mechanisms of the ILO, and the "audit" committee structures of the ILO.

More insidious though, is the distressing political pressure of not wanting to be seen as not conforming, even though your better judgment says otherwise. Elected politicians are but passing ships in a sea of permanent international civil servants and domestic ministries of this and that. The civil servants and ministries have a vested interest in seeing the continuation, if not the expansion, of international bodies such as the ILO and the UN, as well as the use of *ad hoc* bodies to deal with specific issues (eg. APEC, WTO, Climate Change).

Some might see this as a conspiracy to replace nation states with supra-national institutions that will take over where countries like Australia and New Zealand leave off. I don't subscribe to that view, although there will be individuals whose political dogma would like to see this happen.

A much more convincing explanation is the cock-up theory of management. It is simply too hard to revisit historical commitments, or weed the international organisation patch.

We don't make it easy on ourselves. Since 1980, Australia has signed up to 780 international treaties. New Zealand isn't much better. We signed 467. So two small countries signed 1,247 internationally binding commitments in 20 years. All will be more difficult to change or dispose of than to sign. 99.9 per cent will remain on the statute books in perpetuity to tie countries in as much red tape as that afflicting domestic business.

The chances of changing, modifying or getting rid of international bodies no longer serving the purpose for which they were formed is hideously difficult, if not impossible. The theory of large numbers should make it easier, but in fact it doesn't. In 1945 there were 51 member states in the UN. Now there are 189. In 2000, the ILO has 349 countries, territories, and areas participating in its conferences and processes – multiplied by three, as there are employer and union bodies involved as well.

Getting consensus for change in international bodies, let alone their voluntary liquidation, is virtually impossible given the vagaries of international politics. The sheer distress of trying to obtain agreement on what should change, beyond the banal declarations of, "Yes, we should do this, so let's form a committee and meet in Addis Abbaba next year to discuss it", is daunting for all but the foolhardy.

I am not attempting to say that all the treaties we have signed are irrelevant or wrong. Clearly many aren't. The ANZCER and ANZCDR are vital expressions of the living relationship between Australia and New Zealand, for example. Many of the fundamental universal declarations of the UN are values we should all subscribe to as citizens of a civilized world. Where there ought to be real concern, is the way in which countries are being tied into concepts and rules I daresay elected politicians of nation states have little appreciation of. Once agreed to, they are virtually impossible to change or re-negotiate.

In the period I was Minister of Labour, New Zealand launched a reform agenda for the ILO. It was modest, on the basis that by not scaring the chickens too much, a consensus for change might emerge. With the support of Australia, and a number of other Asian-Pacific government members, we proposed an agenda[14] to:

- Review all existing ILO conventions and standards against two key tests: their relevance and

effectiveness to the world today, recognising *"the ILO must adjust to the changing reality around it"*.

- Eliminate the bureaucratic proliferation of subject matter on Conventions (e.g., the processes of the FAC and other "audit committees" of the ILO) by adopting less prescriptive, more flexible standards and better achieve the core principles of the ILO.
- Establish evaluation procedures to test whether a Convention has achieved what it set out to do. In other words, measure and evaluate outcomes *"rather than simply assess and criticize compliance with labour standards, some of which are of questionable moment in a modern world"*.
- Improve the "teaching" functions of the ILO so it can educate organisations and countries (especially developing countries) on how to achieve the revised core principles of the ILO. This implies reducing the resources of the Convention Police, and increasing those of the training and extension services to member states.

Even this modest agenda was too much for many member governments, let alone the union and employer interests. ILO staff thought it too ambitious. Reform became too difficult, even though the new Director-General made noises during his election campaign about the need for reform. Consequently, nothing has happened. Nor will it.

In the meantime, the ILO will carry on gradually chipping away at the sovereignty of its members by creating more Conventions and standards. The ILO, together with the myriad of proliferating international bodies, will make it more, not less, difficult for elected Parliaments to address the problems of their nation state.

Cyberspace and New Threats to Sovereignty

The difficulties will multiply as international bodies use the enormous power of the Internet and the technological revolution it embraces. The harnessing by business of the Net and E-Commerce is rapidly eroding the power and relevance of national borders, national laws, and national taxation systems. Increasingly, all sorts of international bodies are directly reaching across to the citizens of nation states and mobilizing their votes in support of special interest issues. Greenpeace is a good, but now aging, example.

The outreach of politically inspired international groups is burgeoning and beginning to make life considerably more complex for national governments. Consider the impact of the collection of disparate groups against globalisation. They were capable of being organized only because of the Net, terrorizing national governments and the World Trade Organisation alike as they pursued a diverse, if not anarchistic, agenda.

Now the formal international bodies are using the Net in a similar manner too. For example, the ILO is using it to marshal support for its own causes. IPEC, the *International Programme on the Elimination of Child Labour*, a worthy cause, is being driven in a totally different way from earlier ILO programmes to ensure compliance with its conventions.

How much of a threat is this to national sovereignty or the ability of elected governments to pursue their democratic mandate? Indeed, did the framers of the original charter of the ILO contemplate direct contact with the citizens of member states in the manner made possible by the Net?

We cannot dismiss the difficulties this creates for democratically elected governments. The only direct accountability to voting citizens of democracies like Australia and New Zealand is through their elected national governments. Only governments can be called to account. The ILO can't. Nor can the UN, the IMF, the World Bank or the score of other international bodies now intruding on the space of elected governments.

To this add the cyberspace threat. The virtually zero cost of the Net as a delivery mechanism for "programmes" and campaigns like IPEC, means elected governments will be faced

with yet more single issue politics, driven by international organisations who have jumped over government's accountability responsibilities, into the voter base of member states.

Conclusions

I began by asserting that countries like New Zealand and Australia are being enveloped in a spreading net of international obligations that eat away at national sovereignty and independence. New Zealand's experience with the ILO proves this.

If you believe there is a role for international organisations (and I do, if they are constrained to establishing and promoting values the human race should aspire to, to allow us to live in peace and security) then those organisations have to be able to change with the times. The ILO has shown it can't, and probably will never be able to given its structure and *modus operandi*.[15]

Does that mean countries like Australia and New Zealand should forsake continued membership in order to protect our sovereignty? Whatever the decision, in my view it has to be a conscious one to stay and attempt further change *or* to leave and pursue the relevant ideals of the ILO in other ways.

One thing is certain. The tide of history, and the technological revolution we are just entering will sweep aside international bodies like the ILO if they do not fundamentally change.

Ironically, the Internet revolution rivals the Industrial Revolution that spawned the ILO. The question is whether the ILO, and other international bodies like it, can transmogrify enough to meet the challenges of a radically different world?

Perhaps the answer for the ILO *et al* lies in the fate of the dinosaurs.

Endnotes:

1. The views expressed in this paper are the author's alone and do not represent the views of the New Zealand National Party or the National Party Opposition.

2. The International Parliamentarians' Union was formed in 1889.

3. See www.ilo.org for more detail.

4. By this stage the Industrial Revolution had just about reached its zenith.

5. In the last few years in which I attended the ILO annual Conference, there have been significant by-plays by European nations, supported in some cases by the US, calling on greater compliance with ILO Conventions by major Asian states. There has been resistance by the European bloc to a major revision of ILO Conventions, and to allowing less developed countries to reflect the broad intent of Conventions in different ways, depending on the state of development of a country's economy. In my term as Minister for Labour, New Zealand argued that slavish adherence to the letter of Conventions is less important than establishing processes that encouraged countries to move toward implementing the outcome of a well-functioning labour market with desirable social outcomes. This would mean a comprehensive review of all ILO Conventions, and their expression in terms of outcomes rather than particular structures that might suit some countries given their stage of development or economic and cultural history, but not suit others.

6. Senator Rod Kemp, *International Tribunals and the Attack on Australian Democracy*, in

Upholding the Australian Constitution, Proceedings of The Samuel Griffith Society, Volume 4 (1994), p.119.

7. A similar case study involving Australia can be found in Case 1511, where the International Federation of Air Line Pilots' Associations accused the Australian government of violating Conventions 87 and 98. It basically involved an international union taking a domestic industrial dispute to the ILO. Even the FAC rejected this level of intrusion into a domestic dispute, but not without barbs in its judgment with respect to the rights for employers to take common law action against unions for breaking the law.

8. Para 686, Case 1698, Report 292 of ILO Freedom of Association Committee.

9. In an 83 page report, the FAC made a number of decisions which highlighted the differences between industrial practices that were incorporated into 50 year old Conventions, and the needs of a modern economy. See Part D of Report 292.

10. ILO Conventions 29 and 105 (forced labour), 87 and 98 (freedom of association and collective bargaining); 100 and 111 (discrimination); 138 and 182 (child labour).

11. This is sanctified in a little known passage of the ILO *Declaration on Fundamental Principles and Rights at Work* promulgated in 1998. The key passage is:

> "..all Members, *even if they have not ratified the Conventions in question*, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions."

This seems to conflict with the provisions of some Conventions (eg. Article 8 of 98), where there is express provision for exclusion from a binding commitment until ratification.

12. Besides the case study above, the NZ Employers' Federation took a complaint in 1987 against the Labour government. Australia has its examples, for example the case outlined by Senator Kemp in his speech to the Society in 1994, and the case referred to in endnote (7) above.

13. Dr Colin Howard, QC, *Australia's Diminishing Sovereignty*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), p.195.

14. See transcript of the address by Hon Max Bradford, Minister of Labour at ILO Conference 85th Session, 1997.

15. The history of international organisations transmogrifying from within is not encouraging. Change from without, by repeal and replacement, isn't much better, although the United Nations did replace the League of Nations after the First World War. Should this be the new dawn for the ILO?

Chapter Four:
The *Kyoto Protocol*: Fast Road to Global Governance

Ray Evans

It is necessary to begin with a brief discussion of sovereignty and the nation-state, and its political alternative, which is imperialism or, to use the current jargon, "global governance".

The contemporary nation-state, and its sovereignty, grew out of the collapse of the Holy Roman Empire. The Thirty Years War, 1618-1648, was the last desperate attempt by the competing Christian visions of Rome, Luther and Calvin to win a knock-out blow as they struggled for control of northern and central Europe. It is said that between 30 per cent and 40 per cent of the German-speaking peoples of Europe died during this conflict. Out of it came the *Treaty of Westphalia*, which recognised that the Holy Roman Empire was spent; which proclaimed the full territorial sovereignty of the former members of that Empire; and resolved the religious issues by recognising the right of private worship, liberty of conscience, and the right of emigration, everywhere in Europe except for the hereditary lands of the House of Hapsburg. The *Treaty of Westphalia* laid the basis for the global order we have today, and the UN Charter of 1945 is a contemporary version of it.

Some scholars regard sovereignty as a multi-faceted thing, and speak of:

- "domestic sovereignty", by which is meant the capacity of those who are politically responsible within a state (in former times, the sovereign), to actually exercise authority within the state's territory;
- "interdependence sovereignty", by which is meant the capacity of the sovereign to control movements of people and goods across state borders;
- "international legal sovereignty", referring to the mutual recognition of states or other entities; and
- "Westphalian sovereignty", by which is meant the autonomy of the sovereign, within the territory of the State.[1]

These distinctions can be useful when considering the special circumstances pertaining to a country like Taiwan, which is sovereign in every respect except that it is not recognised internationally as a sovereign state.

But in the debate over Kyoto, and whether Australia should ratify or not, these distinctions are irrelevant. The reality is that under the Australian Constitution, domestic sovereignty is shared between the State governments and the Commonwealth government, and that disputes between States and Commonwealth are adjudicated by the High Court; the Commonwealth government controls the movement of goods and people across Australia's borders; Australia is recognised internationally as a sovereign nation-state; and that, despite the fact that Australia has signed thousands of international treaties, we are autonomous in our capacity to repudiate them, if we deem it to be in our national interest to do so.

There is no treaty (including our defence agreements with the United States) to which Australia is currently a signatory which we cannot repudiate if we decide to do so.[2]

The issue of repudiation is central to sovereignty. Australia has entered into nearly 2000 international treaties since we became, unquestionably, a sovereign nation following the passage of the *Statute of Westminster* on 11 December, 1931. (We inherited some 300 treaties from the UK). Many of these treaties relate to practical matters in which, for example, telecommunications standards, or protocols for international shipping and air services, are decided. Other treaties are much more political. There are many UN Conventions, to which Australia has acceded, which

seek to establish a world-wide policy which is in accordance with the views of politically influential groups in North America or Western Europe. The *UN Convention on the Rights of the Child*, and the *UN Convention on Refugees*, are examples. Australia can withdraw from these Conventions at any time it chooses to do so.

The essence of sovereignty is that it is indivisible. A political community, or "polity", is either sovereign or it is subordinate to another political authority. Sovereignty cannot be shared, or pooled, any more than an individual can share his personality with another individual. Sovereignty can only be given up, or lost, in one lump. It is the whole loaf, or no loaf at all. Sovereignty is to the political community what legal personality is to the individual. Individuals can die, they can be murdered, they can lose their faculties and a guardian has to assume legal responsibility for them: all of these events have political counterparts in the life of a nation-state. Sovereignty means the capacity to choose between the various political options which are available at any time in the global scene and to act accordingly, for better or worse. The Old Testament, and the writings of men such as Herodotus and Shakespeare, are replete with accounts of such decisions, and the consequences which followed.

Sovereignty, therefore, cannot be eroded, fragment by fragment. What can be eroded, and gradually undermined, is our political will, as a nation, to uphold and defend our sovereignty and our independence. For example, every time the oxymoronic phrase "international community" is written without inverted commas, thus implying that there really is such a thing, our minds are a little bit more befuddled and our understanding of political reality diminished. Every time a Minister of the Crown solemnly intones the phrase "international obligations", as a legitimising principle for a policy which cannot stand up on its own legs, we have, likewise, moved a step from the world of reality into a world of make-believe.

This slow process of undermining our capacity to think about our national interests coherently, and thus the capacity to defend them vigorously when required, is a serious thing. There are in Australia people and interests who either through interest, or through intellectual incapacity, have become caught up in this attempt to capture the language of politics – leading eventually, if they are successful, to a situation where we will find it impossible to use the words we need to defend our sovereignty. At that point we will lose it. This is the battle-ground on which we are now engaged.

I have already referred to the *Statute of Westminster* of 1931 as the declaration to the world that Australia (among others) was a sovereign nation. We have become accustomed to living our lives and taking part in political life as citizens of a sovereign nation, the Commonwealth of Australia. During the 19th Century, Australians lived in various colonies, more or less self-governing, but they saw themselves as subjects of Queen Victoria and as citizens of the British Empire. The Imperial Parliament of Westminster was the source of political authority, and the Colonial Secretary was the Minister of State responsible to the Parliament for the administration of all the British colonies, not just the Australian colonies. The British Empire was of short duration compared with the empires of antiquity.

Many books have been written about empires, in particular the Roman Empire. One point to be made about empires is that they provide lots of career opportunities for those ambitious people who can make it into the imperial administration. It is noteworthy that within the Roman Empire many people from places other than Rome made it to the top. And I think it has to be said that a new global green imperialism, headquartered in Bonn or some other European city, will offer lots of career opportunities for an up-and-coming generation of green priests and green civil servants from Australia, as well as from other parts of the world.

Why should the *Kyoto Protocol*, of itself, presage a new imperialism? What distinguishes it from every other international treaty which Australia has ratified? The difference between *Kyoto* and every other international treaty is this. If *Kyoto* is brought into effect the economic dislocation which must follow its implementation will be unprecedented in modern times. It will be

equivalent to the famines of the early 19th Century in its disruptive power (except that the famines were followed by good seasons). There are some treaties which Australia has ratified which have caused economic loss to Australians and to people in other countries. The *Basel Convention* is the best known example. But the extent of the economic loss due to *Basel* is minuscule, at least in Australia, and understood by very few people. The *Kyoto Protocol* is a different thing, indeed, compared with *Basel*.

At this point of the argument the Greens say, "No, No, we are only talking a few percentage points of GDP here", and misquote econometric studies commissioned by the mining industry, for example, to bolster their soothing assurances. We need, therefore, to get behind the econometricians and their modelling exercises, to understand the significance of what the Europeans call "de-carbonisation" and others call "carbon-withdrawal".

The thing which makes life different for us, in contrast to the lives of our grand-parents, and more dramatically our great-great-grand-parents, is our use of energy. For example, we can call up huge trucks which can carry 300 tonnes of ore in their trays. We can fly from Sydney to San Francisco, non-stop, in 14 hours in aeroplanes which consume more than 140 tonnes of fuel on the journey. We cool our houses in summer and warm them in winter.[3] Our farmers can plant and harvest wheat on 10,000 acres, single-handedly, with the aid of massive tractors, the implements they can pull, and the energy-intensive fertiliser which enriches the soil, and the crop yields they obtain (tonnes per hectare) are unprecedented in the history of agriculture. All of this is completely dependent upon our use of fossil fuels.

It is true that in addition to coal, oil and gas, we have hydro-electricity and, globally speaking, some nuclear energy. We burn the bagasse from sugar cane in boilers in the sugar mills. But these are small fractions of the overall energy scene. In developing countries, animal dung is an important source of energy for heating and cooking. Developing countries quite rightly want to abandon that energy source.

To repeat, most of our energy is derived from burning coal, gas and oil. Some countries use nuclear fuels such as enriched uranium to provide electricity. In France they produce approximately 80 per cent of their electricity from nuclear power stations. Theoretically we could live without coal and oil by using nuclear power, and producing hydrogen for transportation fuels. Such a technology would, however, be very much more expensive than our present carbon-based technology and, of course, the Greens have categorically ruled out any recourse to nuclear power. This is no accident.

In response to these obvious predictions of energy shortages brought about by carbon withdrawal, the Greens claim that we can move smoothly and painlessly into a world of renewable energy. There are now two Bills before the Senate, fortunately held up by Democrat intransigence, the *Renewable Energy (Electricity) Bill* 2000 and the *Renewable Energy (Electricity) (Charge) Bill* 2000. These Bills, if enacted, and upheld by the High Court, will impose an extra cost of about $800 million per annum on electricity consumers, by requiring wholesalers of electricity to source a stipulated quantity of electricity from the high-priced but so-called renewable generators, at the expense of the coal-based generators who can provide electricity at a much lower cost. Our black and brown coal-based generators can produce for about $25 to $30 per MWhr. The most economical so-called renewable generators are based on burning wood chips, and their costs of production are about $90 per MWhr. The $800 million translates into a carbon tax of more than $200 per tonne of coal that is supplanted by wood chips.

Given our present technology it is an inescapable reality that to restrict the use of carbon, is to restrict our use of energy. The Greens have acknowledged, without embarrassment, that the *Kyoto* targets, if realised in full, will not measurably diminish the atmospheric CO_2 concentrations which are blamed for global warming. They accept that *Kyoto* therefore is but the first step along the long and difficult road to virtually complete de-carbonisation, which means the de-industrialisation of our society. Their ambitions are so audacious that it is difficult to accept the

reality of them.

Australia, because it is a major exporter of energy intensive products, and because its CO_2 emissions have already well exceeded the 108 per cent quota we accepted in December, 1997 at Kyoto, is the first nation to have to really face up to the price of *Kyoto*. Australia is also a democracy, and as the Inquiry conducted by the Joint Standing Committee on Treaties (JSCOT) into *Kyoto* proceeds, it is becoming increasingly clear that any political party which goes openly and frankly to the polls, on a *Kyoto* platform, will be soundly defeated. And, to repeat, *Kyoto* is but the first step towards a fully de-carbonised society.

The architects of *Kyoto* are determined to ensure, as best they can, that it will be impossible for those nations who commit to the *Kyoto* regime (the first step in a long journey) to ever change their minds. In order to ensure that the sovereign rights of withdrawal (which are written into the *UN Framework Convention on Climate Change (UNFCCC)* and the *Kyoto Protocol*), can in practice never be exercised, a new imperial order will have to be created, and meaningful and effective sanctions will have to be imposed on recalcitrants. Under this new global structure, decisions with the most profound and intimate effect on Australian economic and social life will be made by the Kyoto (*UNFCCC*) Secretariat based in Bonn[4] and Australia will only be able to escape from entrapment in this new imperialism through immense political upheaval, of the kind experienced by George Washington and his colleagues when they rebelled against the authority of the British Crown, and established the United States.

The prospect I have described of a new global imperial order, based on de-carbonisation, seems so bizarre and so far-fetched, as to invite ridicule. But the official documents describing a global carbon tax, international trading in carbon credits, enforcement, compliance and "facilitation" are readily to hand. The texts to be considered by the delegates to the sixth meeting of the Committee of the Parties (i.e., those countries party to the *UNFCCC*) (COP VI), soon to assemble at The Hague, are replete with these words, and it is a matter of considerable concern that the Minister representing Australia at COP VI, Senator Robert Hill, has been entrusted with a brief which allows him far too much latitude on these issues. None of these things, carbon taxes, international trading, enforcement and compliance, can happen, except in the context of a new global imperial order, in which nations such as Australia have given up their sovereignty, and have accepted an imperial rule legitimised by the totally weird belief that, in order to save the planet, we have to de-industrialise our economy and go back to the living standards of the early 19th Century.

To say these things is to invite accusations of derangement. To try to ward off such accusations I quote representative documents from authoritative sources which in my view provide compelling evidence for the claims I have made.

The first is from the recent issue of the journal *Foreign Affairs*. This journal is published by the Council on Foreign Relations, an organisation richly endowed by the Fords and Rockefellers, and membership of which is much sought after. The paper, entitled *The New Sovereigntists: American Exceptionalism and its False Prophets*, is by Peter J Spiro, Professor of Law at Hofstra University, and its appearance in this journal means that his views are regarded, at the very least, as worthy of respectful consideration by the American foreign affairs establishment. He is writing about the US:

> "Indeed, the Constitution will have to adapt to global requirements sooner or later. . . During the twentieth Century the United States was able to defy various international norms only because other countries were unwilling to bear the costs of sanctioning America for its sins; at the same time international organisations had little power to wield on their own. . . Washington will continue to maintain the fiction of an opt-out capability and the international community cannot yet force formal participation in international regimes. But economic globalisation will inevitably bring the United States in line.
>
> "Meanwhile the international community can advance the rule of international law by

working against key US actors – most notably corporations but also states – in trade and investment decisions. That way it can directly discipline US entities, circumventing and constraining anti-internationalist federal policy makers in the process. . . .

"When France undertook nuclear tests in 1995, NGOs launched a campaign against French wine that helped force President Jacques Chirac to back down from future testing. Something similar would happen if America announced an intention to test [nuclear weapons]. Boycotts might threaten certain powerful US industries (e.g., fast-food chains) with lost sales, which would in turn press the US Government to respect the tests ban. . . .

"For example, the chairman of the European Parliament's delegation for US relations warned George W Bush in 1998 that European companies – which hold $38 billions in investments in Texas – were under pressure from shareholders and public opinion to consider cutting back investments in states that apply the death penalty. It will take only so many lost auto plants, business conventions, and tourist dollars to make the death penalty look dramatically less attractive to state politicians.

"Above all the United States compromises its own interests by formally refusing to adopt widely accepted international regimes. Treaty committees and other international institutions usually extend participation rights only to member states. America thereby forfeits any right to help shape those regimes that it rejects. It has no voice in shaping international norms at a critical stage of their development, even as its ability to resist their imposition diminishes ...".

Professor Spiro has set out arguments that are very familiar in Australia where, compared to the US, our wealth and military power are very small indeed, and concerns about telling the "international community" to stop interfering in Australian affairs, are more keenly felt.

From New York, where the Council on Foreign Relations is head-quartered, we go to Melbourne, where the Business Council of Australia (BCA) is located, and my quote is from a letter sent to members of the BCA by its President, Campbell Anderson, dated September 12, 2000. He wrote, *inter alia*:

"Although there are still uncertainties in the science of climate change, the international community has embarked on a course of action to constrain greenhouse gas emissions. Notwithstanding that this has potentially significant economic and social implications for Australia and all other nations, the international communities are adopting this agenda and it is in this context that we as Business Council are operating".

When this sentence is deconstructed it is evident that we are dealing here, in the heartland of corporate Australia, with the triumph of faith over reason. Campbell Anderson acknowledges that "there are still uncertainties in the science of climate change", which one can reasonably interpret, given what follows, as a euphemism for saying that the science doesn't matter any more. Belief in global warming has become a matter of faith.

We therefore have to count the BCA amongst those organisations which are, at the least, relaxed and comfortable at the prospect of the new imperial order that I have outlined. That conclusion is further supported by a paper given on 25 May, 1995 by David Buckingham, currently Executive Director of the BCA, but who was then Executive Director of the Minerals Council. His paper was entitled *Australia in a Global Context: the United Nations and Law-making in the 21st Century*, and it focused on a number of international treaties which had seriously impacted on Australia's mining industry, in particular the *Basel Convention* and the *World Heritage Convention*. His concluding paragraph is noteworthy:

"In conclusion, I would suggest that in recent years we have witnessed an irreversible shift from our domestic, sovereign prerogative to a situation in which international treaty frameworks and commitments will, in ever increasing degree, govern the conditions under which we as a nation will operate. To the extent that this is the case, we as a nation need to make sure that we are not only geared to respond effectively to those processes, but that

the results and implications of those processes are generated and applied in ways all elements of society can accept and respect. Unless that is the case, the legitimacy of the instruments themselves will be in doubt and their application a matter of continuing controversy. The experience with both the *World Heritage Convention* and the *Basel Convention* should be ample proof of this. The more recent experience with the *Framework Convention on Climate Change* suggests we are learning".

My third document is a flier advertising a Symposium to be held on November 15-16 next at the New York University (NYU) School of Law in New York City. The Symposium is entitled:

"Combating International Eco-Crime in a Global Economy:
The Use of Technologies and Information Management to Monitor Compliance with International Agreements, Prosecute Environmental Crime, and Reform Environmental Law and Trade".

The Opening Statement is to be given by Michael Penders, First Chairman, G-8 Nations' Law Enforcement Project on Environmental Crime, and the sessions listed in the flier include:

- "International Environmental Law: Obstacles to Enforcement, Impacts on Free Trade and Development, and the Promise of New Technology";
- "The Utilisation of Remote Sensing and Other Technologies";
- "The Use of Technology by Non-Governmental Organisations"; and
- "Implications of the Use of New Technology for International Agreements, Trade, and Environmental Law".

The NYU Law School Symposium is a new development. To my knowledge, no one has publicly canvassed the extent of the police powers which will be necessary to ensure compliance with the *Kyoto Protocol* in the frank and open way which is set down in the agenda for this symposium. NASA imaging and NASA electronic environmental reporting, for example, are listed as topics for discussion.

The language in this conference flier is crystal clear when compared with the text of the Report of the Subsidiary Body for Implementation (SBI) of the *UNFCCC* (and the *Kyoto Protocol*) on its 12th Session (Bonn, 12 - 16 June, 2000). The text is heavily square-bracketed (i.e. text which is subject to dispute) and replete with competing euphemisms, but quoted here is text, with the square brackets ignored, taken from page 33 *et seq*:

"Section IV. Outcomes and consequences of non-compliance or potential non-compliance, taking into account the implications of Article 18:[5]

1. The compliance branch may, depending upon the case before it, decide upon one or more of the following consequences:
   (a) Provision of advice and assistance to individual Parties regarding implementation of the Protocol;
   (b) Facilitation of financial and technical assistance, including technology transfer and capacity building to non-Annex I Parties;
   (c) Making recommendations;
   (d) Publication of non-compliance or potential non-compliance;
   (e) Issuing of cautions;
   (f) Initiation of the enforcement procedure set out in annexe b".

(The penalties set out in the following text comprise "fines" under which the offending Party has its CO_2 "allowance" reduced by a formula related to the amount of emitted CO_2 over and above the *Kyoto* target.)

Under paragraph 4 of this Section we find:

"(d) Compliance Action Plan:
Option 1: The Party in question shall, within three months of the determination of the compliance body, determine and commit itself to a compliance action plan,

approved by the compliance body, which shall include, inter alia:

(i) An analysis of the reasons for the Party's non-compliance;

(ii) Policies and measures that the Party intends to implement in order to restore 1.x times the excess emissions and an analysis of their expected impact on the Party's greenhouse gas emissions;

(iii) A quantified assessment of the use of each of the mechanisms under Articles 6, 12, and if provided for by an amendment to the Protocol, Article 17 during the commitment period;

(iv) A declaration not to make transfers under Article 3, paragraph 11, for the duration of the implementation of the compliance action plan;

(v) Detailed information on the economic dimension of the implementation of any action under (ii) or (iii) above;

(vi) A timetable for implementing the measures within a time-frame not exceeding three years, including clear benchmarks for measuring annual progress in the implementation;

(vii) An assessment of the compatibility of the compliance action plan with the strategy developed by the Party to comply with its obligations during the commitment periods in which the compliance action plan is implemented.

Measures implemented under the compliance action plan shall not contribute to any Party's compliance with its quantified emission limitation or reduction commitments during the commitment period in which the compliance action plan is implemented".

The SBI meetings at Lyon did not get very far in terms of reducing the numbers of square brackets (i.e., disputed words) in the text, and the widely held view is that the meeting of the Parties to the *UNFCCC* (COP VI) to take place next week at The Hague will, likewise, make little progress with respect to any of these issues. If George W Bush, after the recount in Florida, does make it to the White House, his victory will upset the concentration of many of the American delegates to COP VI (all of them Clinton-Gore appointees). Contrariwise, if Vice-President Gore wins, then the pressure exerted by the US delegation on Australia to concede ground will be very great.

The main problem we now face in asserting Australia's sovereignty and upholding our political traditions of self-government is the fear, which some of our political leaders entertain, that the "international community" will invoke trade sanctions, or send us to some sort of international Coventry, if we defend our national interests. The questions and answers during the JSCOT's Inquiry into *Kyoto* have been illuminating in this regard.

On November 3 last, Professor Richard Lindzen, the Sloan Professor of Meteorology at the Massachusetts Institute of Technology, a distinguished scientist, and without doubt the most scientifically eminent greenhouse sceptic, appeared before JSCOT. Although most of his presentation was taken up with the state of the science debate, he was asked, as an American, about the alternative greenhouse consequences depending on the outcome of the presidential election, and the international ramifications, for Australia, if we should decide to withdraw from the *UNFCCC* and thus from the *Kyoto Protocol*.

He was obviously troubled, on his return home, about the answer he had given to his interlocutor (Senator Barney Cooney), and he asked me to ensure that Senator Cooney received the following message, amplifying his off-the-cuff response. I'm sure that Senator Cooney would not object to my concluding this paper with Lindzen's statement, since he is second to no one in his concern for Australia's well-being and its continuing sovereignty and independence. Lindzen wrote thus:

"As an American, I hesitate to chide an Australian Senator for a lack of pride in Australia. Nevertheless, I was taken aback by your stated concern that an attempt by Australia to defend its own interests would form a target for criticism by other nations.

"Permit me to remind you that Australia is a great and successful nation that has rarely asked for help from other nations, and has generously and courageously come to the assistance of others in all modern times of difficulty, from the first and second World Wars to Korea and Vietnam. By comparison with Australia, most other nations must certainly be regarded as 'lesser' nations.

"Although I believe the abandonment of *Kyoto* to be in Australia's and the rest of the world's best interest, I am willing to accept sincere differences in opinion. However, the fact that Australia, having decided as to its best interests, is hesitant about putting them forth due to fear of criticism from these 'lesser' nations is much harder to accept. I feel confident in assuring you that Australia's moral stature in the world is not dependent on the approval of other nations, but on Australia's incontrovertible contributions to the world's welfare. In defending its legitimate interests, Australia will not even begin to expend any of its moral capital – capital not even available to most other nations".

Endnotes:

1. See Stephen D Krasner, *Sovereignty: Organised Hypocrisy,* 1999, Princeton University Press, Princeton, New Jersey.

2. It should be noted that an answer given by an Attorney-General concerning Australian sovereignty over World Heritage Areas indicates that Australian sovereignty has been ceded to officials abroad. Senator Peter Walsh, on 17 October, 1991 put the following question on notice:

   > "What legislation or regulation is required by Commonwealth law to delist from World Heritage status, areas which had previously been listed?"

   The answer stated, *inter alia*:

   > "A Commonwealth Act or regulation could not operate to remove an area from the World Heritage List . . A removal can only take place if approved by a majority of two-thirds of the UN World Heritage Committee".

   On 11 August, 1994, Attorney-General Lavarch, in a letter to *The Australian Financial Review*, supported journalist Christine Wallace, who had quoted Judge Robert Bork:

   > "Under our constitutional system no treaty or international agreement can bind the United States if it does not wish to be bound . . . Congress may at any time override such agreement by statute".

   Wallace claimed "Bork's statement is as true for us as it is for them", a position endorsed by Lavarch with the words, Wallace "hit the nail on the head".

   Michael Costello, then Secretary of the Department of Foreign Affairs and Trade, put a similar argument in an article published in *The Australian Financial Review* on 22 November, 1994, and in a letter to the same newspaper on 18 January, 1995. Gareth Evans, then Minister for Foreign Affairs, had claimed, with respect to the ratification of international treaties, on 6 December, 1994, that "we retain the sovereign capacity to make and apply our own laws as we see fit". But neither Ministers Lavarch nor Evans ever stated unambiguously that any law passed by the Australian Parliament, or treaty ratified by the Executive, may be amended, repealed or repudiated by a future Parliament at any time. Nor have their successors, Ministers Williams and Downer.

   This is not just semantic quibbling. The High Court has already shown its propensity to interpret our laws in accordance with international treaties when it deems appropriate (as in the *Teoh Case*). An unambiguous statement from Ministers Downer and Williams might

deter a political Court from doing so again, at least with respect to *Kyoto*. Greenpeace has already attempted to litigate planning decisions on the basis that they conflict with our "*Kyoto* obligations".

The confusion between the answer given to Walsh in October, 1991 and the Lavarch letter of 11 August, 1994 is presumably explained by the extreme reluctance of Department of Foreign Affairs and Trade and Attorney-General's Department officials to ever advise ministers that treaties can, through the withdrawal processes set out in each treaty, be repudiated. The time has come to advertise this fact and at the same time remove the spectre of trade sanctions from public discourse.

3. During the 1960s, as a young engineer with the State Electricity Commission of Victoria, I recall that the maximum demand for the year was a winter event, determined by frosts and other cold weather events. Wagers were made on the size of the maximum demand and when it would occur. Today, the maximum demand is a summer event, well above the winter peak, driven by the demand for air-conditioning. Tropical and sub-tropical Australia is now regarded as habitable only because of air-conditioning.

4. It is noteworthy that the German government has extended substantial subsidies to the *UNFCCC* Secretariat in order to ensure that this rapidly expanding bureaucracy is housed in the parliamentary and public service buildings of the former West German government. Given the strong commitment of successive German governments to the international carbon-withdrawal project, this generosity has obvious political consequences.

5. Article 18 of the *Protocol* cites Article 14 of the *UNFCCC* with respect to dispute settlement procedures and states that the same procedures shall apply to the *Protocol*.

Chapter Five:
The Argument against Mandatory Sentencing

Ruth McColl, SC

"My object all sublime
I shall achieve in time,
To let the punishment fit the crime ...
The punishment fit the crime;"[1]

What is a Mandatory Sentence?

Before embarking upon a detailed consideration of this topic it is essential that the subject matter be defined. "Mandatory sentences" are those sentences which a judicial officer is required to impose no matter what the circumstances of the offence. In other words, the judicial officer has no discretion to impose a higher or lower sentence depending upon the nature of the crime.

Mandatory sentences by definition fall foul of the fundamental principle of law that a sentencing court should not impose a punishment which does not fit the crime.

The thesis of this paper is that the imposition of mandatory sentences is inconsistent with proper sentencing principles.

The Criminal Justice System

In 1988 the Australian Law Reform Commission identified two main criteria by which the community will judge the justice of the criminal justice system. They were:

> "First, the criminal justice system must involve imposing on offenders punishments of sufficient severity that it is possible rationally to say that a breach of the law, when detected, is attended by significant consequences. Secondly, the system must be consistent in the apprehension, identification and punishment of offenders. The need for consistency pervades all elements of the system. One of the most damaging criticisms that can be made of any aspect of the criminal justice system is that it is inconsistent. This is so whether the inconsistency is in sentencing, or differential police or prosecution practices".[2]

Given those are the goals of the criminal justice system, it is essential to understand how those objectives are sought to be achieved in the area of sentencing before the nature of mandatory sentencing can be considered.

The Purpose of Sentencing

In 1996 the New South Wales Law Reform Commission identified the objectives and aims of punishment as being "retribution, deterrence, rehabilitation, incapacitation and denunciation".[3] These goals are said to operate as "guide posts to the appropriate sentence".[4] That being said, it is acknowledged that "sometimes [the guide posts] .. point in different directions".[5]

It cannot be doubted that the law of sentencing is contentious.[6] The balancing of even the primary objectives of punishment is, of a necessity, a complex exercise. To that might be added the secondary but multiple factors which may be regarded as mitigating in the penalty. Thus, in *Pavlic v. The Queen*[7] Justice Slicer referred to studies in Australia and England which had shown that judges had identified over 200 factors which might mitigate a sentence. He concluded that "it is impossible to allocate to each relevant factor a mathematical value, and from that, extrapolate a sum which determines the appropriate penalty".[8] It is no surprise then that the Full Court of the Victorian Supreme Court has held that:

> "Ultimately every sentence imposed represents the sentencing judge's instinctive synthesis

of all the various aspects involved in the punitive process".[9]

Further, while the primary objectives of sentencing are reasonably well settled, they have been given different emphasis from time to time. In determining what emphasis should be given to any one of the factors, it is important to bear in mind that:

> "... one of the main purposes of punishment, .. is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages that has been the main purpose of punishment and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offence. *On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment".*[10] (emphasis added)
>
> To like effect are some observations of Brennan J (as he then was). His Honour said:
>
> "The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose. In *R. v. Cuthbert* (1967) 86 WN (Pt. 1) (NSW) 272 at 274, Herron CJ in a judgment in which Sugerman and Walsh JJA agreed, said:
>
> > 'The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime. The sentence should be such as, having regard to all proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others: per Jordan CJ, *R. v. Geddes* (1936) 36 SR (NSW) 554. Courts have not infrequently attempted further analysis of the several aspects of punishment (*Reg v. Goodrich* (1952) 70 WN (NSW) 42), where retribution, deterrence and reformation are said to be its threefold purposes. In reality they are but the means employed by the Court for the attainment of the single purpose of the protection of society'.
>
> Retribution, deterrence and reformation are related, however, to the specific conduct in respect of which the offender is sentenced. Deterrence (whether of the offender or others) from committing other kinds of crime, reformation in respect of other failures, or retribution for other kinds of social misconduct are not purposes to which the judicial discretion in sentencing is directed. But a sentence which is imposed with the object of deterring the offender from committing offences *of the same kind* again, and with the object of rehabilitating him by reducing or eliminating the factors which contributed *to the conduct for which he is sentenced*, serves the appropriate purpose provided that the sentence is apt to secure those objects ... though punishment is not the end which sentencing seeks to achieve, it is usually the only means which the Court has at its disposal

> ... though the punishment of imprisonment must be imposed to protect society in appropriate cases, severity in sentencing is tempered by society's respect for the liberty and physical integrity of the offender and the weight given to these values frequently and inevitably limits the achievement of the ends of sentencing. The *lex talionis* may be an efficient law for protecting society from criminal recidivists, but it has no place in the administration of contemporary criminal justice. Sometimes, where the protection of society from a dangerous offender cannot be reasonably secured without imposing a lengthy or indefinite sentence of imprisonment, the interests of the offender have to be overridden (although only where stringent criteria are met: *Reg v. Hodgson* (1967) 52 Cr. App. R. 113). In other cases, the interests of the offender are more evenly balanced against the protection of society, and the offender is sentenced to a shorter period of imprisonment, or no imprisonment at all. The sentence is moulded by reference to its appropriateness to deter, to rehabilitate and to provide retribution relevant to the conduct in respect of which the sentence is imposed, and its severity is limited to what is reasonably necessary to secure the protection of society balanced against the offender's liberty and physical integrity. Though guidance is thus given in the exercise of the sentencing power, the sentence depends largely upon the pragmatic evaluation by the court of the weight to be given to the various factors...".[11]

Principle of Proportionality

The fundamental sentencing principle reflected in the last part of the passage above from *Channon's Case* reflects the well established sentencing principle long observed in our society that a sentence "should be proportionate to the gravity of the offence"[12] *or, to use the Mikado's words, "the punishment [should] fit the crime".*

In *Veen [No. 2]*, it was held that:

> "The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen [No. 1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the defender".

Some idea of the durability of the principle of proportionality in sentencing can be seen from the following outline:

> "The notion of proportionate punishment, which seems so deeply rooted in common law jurisprudence, has had a chequered history. It is an old idea which has been expressed in both lay and legal literature in a variety of ways. The *lex talionis* of the book of Exodus required a high degree of equivalence between the offence and the sanction: 'eye for eye, tooth for tooth, hand for hand, foot for foot'. Cicero saw proportionality as only setting outer limits: 'take care that the punishment does not exceed the guilt'. In 1215, three chapters of the Magna Carta were devoted to ensuring that *'amercements'* were not excessive. The 1689 *Bill of Rights* prohibition on excessive fines and cruel and unusual punishments conveys the same notion. In Italy, in 1764, the father of the classical school of criminology, the Marchese de Beccaria, published a much translated and influential *Essay on Crimes and Punishments* in which he argued for the Courts to be bound by a graduated and legislatively defined scale of crimes and punishments".[13]

Since *Veen [No. 2]*, the High Court has reaffirmed the principle of proportionality as common to sentencing practices throughout Australia in *Chester v. The Queen,*[14] *Baumer v. The Queen,*[15] *Hoare v. The Queen,*[16] and *Bugmy v. The Queen*.[17] These cases arose respectively from prosecutions in New South Wales, Western Australia, the Northern Territory, South Australia and Victoria.

In *Baumer's Case* the High Court said (in words redolent of Gilbert and Sullivan):

> "In applying a section like s. 154 [of the *Criminal Code (N.T.)*], the sole criterion relevant

to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence".

Mandatory sentencing can never satisfy this fundamental requirement.

A Brief History of Sentencing

The principle of proportionality was enshrined in our law very early in the piece. It was given legislative recognition at times when the people exerted their will over oppressive government. Thus, in 1215, clause 20 of the Magna Carta provided that:

> "A free-man shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced gravity of the offence …Earls and barons shall be amerced ... only according to the degree of the misdeed...".

When, in 1688, the English people permitted constitutional monarchy to continue, they did so subject to the monarchs agreeing to observe the *Bill of Rights* 1689. The *Bill of Rights* provided:

> "Excessive baile ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted".

The preamble to the *Bill of Rights* recited that King James II had engaged in various iniquities, which included requiring excessive bail of persons committed in criminal cases in order to elude the benefit of the laws made for the liberty of the subjects, the imposition of excessive fines, and the inflicting of illegal and cruel punishment. It was in that context that the *Bill of Rights* prohibited such matters occurring in the future.

Despite the Magna Carta and the *Bill of Rights*, mandatory penalties were available for a wide range of offences in the 18th and early 19th Centuries. It was only during the 19th Century that such penalties gave way to a more enlightened system of justice in which the judiciary was given discretion as to the penalties which could be imposed.[18]

At the outset of the 19th Century capital punishment was the mandatory penalty for a wide range of offences. By 1810 Blackstone estimated that there were 160 capital statutes in force. He wrote:

> "Yet, although in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by Act of Parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death".[19]

The capital punishment laws applied irrespective of gender and with little regard to age. Children over the age of seven could be sentenced to death, and indeed were. Not all those sentences were carried out but some were. Radzinowicz records that in 1814 a boy of 14 was hanged at Newport for stealing.[20] The uniform nature of the sentences which had to be imposed, irrespective of the nature of offence, drew early criticism. A useful illustration of the indiscriminate nature of the mandatory penalties can be seen in considering the crime of arson. By the mid-18th Century arson was, with limited exceptions, punished by death without benefit of clergy.[21] This drew criticism from Eden who, after referring to a section of the *Waltham Black Act* which imposed a sentence of death for setting fire to any house, barn or out-house, to any hovel, cock, mow or stack of corn, straw, hay or wood, mused:[22]

> "I have given a literal transcript of this clause as a strong instance of the vague, unfeeling, undistinguished carelessness with which penal laws are imposed, even in the most polished times ... every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small

heap of dried grass".[23]

Starting from 1800, however, Sir Samuel Romilly, an enlightened jurist, introduced into the House of Commons bills to abolish the death penalty for the multitude of crimes which carried that punishment.[24] In trying to introduce his reforms, Romilly drew the House of Commons' attention to the objects of punishment, which he suggested should primarily be deterrence and prevention as well as reform.[25]

There was resistance to Romilly's novel ideas. On five occasions he succeeded in getting through the Commons a Bill to remove the death penalty for the offence of stealing from a shop goods to the value of 5 shillings, but the House of Lords rejected the Bill.[26]

It should not be thought that the reforms that were effected in relation to punishment in the 19th Century were received uncritically. Professor Sir William Holdsworth records:

> "It was said by Ellenborough that the removal of the death penalty for privately stealing from the person had increased a number of these offences 'to a serious and alarming degree'; and it was in vain pointed out that the mitigation of the penalty had led to a greater willingness to prosecute and therefore to a larger number of convictions".[27]

Gradually, however, Beccaria's teachings on the necessity for proportionality in sentencing became increasingly influential. Between 1826 and 1832 *Peel's Act* abolished the death penalty for a large number of felonies with, in many cases, seven years transportation being its substitute.[28] At the same time, Peel created the modern English police force. Its development had a tendency to shift the focus of criminal law from draconian punishment to effective administration.

As the 19th Century progressed, utilitarian views and humanitarian principles gained increasing acceptance and assisted in liberalising the criminal law. By 1861 the death penalty remained only in cases of treason, murder and piracy with violence.[29]

In 1846 judges were given increased power to vary the punishment imposed in certain cases. At about the same time, the principle that the age and antecedents of offenders should affect punishment was also recognised.[30]

Despite these measures and the reduction of the number of offences for which capital punishment was the penalty, in the mid-19th Century the criminal law was still the subject of much criticism for the absence of its systematic rules of sentencing. There was no consistency as between the imposition of alternatives to maximum penalties. There was no attempt to draw analogies between corresponding crimes to allocate punishment commensurate to similar offences. Further, there was no attempt to make the punishment proportionate to the offence. Thus the same penalty was imposed, for example, upon three men who broke into a building and stole property to the amount of £1,000 as for a youth who stole an apple from a stall.[31]

It was in these circumstances that the famous words of the Mikado were penned, to mock the fact that, due to the vast disparity in the laws of sentencing indeed, more often than not, the punishment did not fit the crime!

It should be noted that in the late 19th Century, the NSW Parliament made a brief attempt to create a sentencing structure with five steps, and with both minimum and maximum sentences. This led to such injustice that *The Sydney Morning Herald* of 27 September, 1883 wrote:

> "We have the fact before us that in a case where a light penalty would have satisfied the claim of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion".[32]

Within a year the scheme was abandoned.

Contemporary Approaches to "Cruel and Unusual Punishment"

In *Boyd v. R.,*[33] the New South Wales Court of Criminal Appeal considered the effect of the *Bill of Rights* prohibition on "cruel and unusual punishment" and the issue of proportionality.

Although those clauses are frequently cited in support of that notion, it is clear from the consideration given to that provision by the Supreme Court of the United States in *Harmelin v. Michigan*[34] in relation to the Eighth Amendment that the "cruel and unusual punishment" to which the provision was directed was not one which was disproportionate to the offence but, rather, punishments which represented a "departure..from the laws and usages of the kingdom".[35]

By way of contrast, however, in Canada the Supreme Court has held that a statute, which required a minimum term of imprisonment for seven years for anyone guilty of a certain type of drug offence, was unconstitutional because it infringed the prohibition in the *Canadian Charter of Rights and Freedoms* of "cruel and unusual treatment or punishment". In *Smith*[36] the Supreme Court held:

> "A punishment would be cruel and unusual and violate s. 12 of the Charter if it has any one or more of the following characteristics:
>
> (i) the punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
>
> (ii) the punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
>
> (iii) the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards".

The Reaction to Mandatory Sentences

The fact that there are many guide posts to inform a judicial officer exercising a power of sentencing underlines the proposition that there are a number of ways in which the punishment may be made to fit the crime. Having said that, it will be immediately apparent that a sentence which a judicial officer is required to impose, there being no discretion to enable that judicial officer to mould the sentence to the circumstances of the crime or the offender, is unusual. Barwick CJ described the nature of such a penalty in the following terms:

> "Ordinarily the Court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the Court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases *and it is a traditional function of a Court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime*".[37] (emphasis added)
>
> Along similar lines, in *Cobiac v. Liddy*, Windeyer J said:
>
> "The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. The more strict a rule is made, the more serious become the consequences of breaking it, the less likely it may be that Parliament would intend to close all avenues of exception. Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon a conviction, that it would abolish it, not directly but by a side wind. This is not because mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice".[38]

In 1977, Professor Norval Morris described mandatory minimum sentences in the following way:

> "This is the most extreme form of legislative limitation of judicial discretion – a fixed term or a fixed minimum term for a defined crime. A popular example is the minimum of a 5-year sentence for anyone carrying a gun at the time of the commission of a felony. Legislation of this kind is unprincipled and morally insensible; it cannot encompass the

factual and moral distinctions between crimes essential to a just and rational sentencing policy. It is based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press in the United States.[39] Nevertheless, recently it has become politically fashionable to demand the imposition of such stringent limits upon sentencing discretion, and in many jurisdictions statutory provisions for mandatory sentencing have already been adopted. In practice, such provisions have always met with non-enforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of plea bargaining inevitably ensures the reduction of charges for offences carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable. In fact, the attempt to eliminate sentencing discretion results in its being transferred from the judge to the prosecutor, who exercises such discretion in the process of charge and plea negotiations. In an overcrowded Court system, it is as though discretion were like matter, the quantity of which Helmholtz described as 'eternal and unalterable'; it cannot be destroyed, it can only be displaced".[40]

In an attempt to illustrate the consequences of mandatory minimum sentences, Professor Morris gave the following illustration:

"In Detroit during the 1950s State statutes prohibited probation for burglary in the night-time and imposed a significant, mandatory minimum sentence for armed robbery. In practice...burglaries committed after dark resulted in pleas to day-time burglary and...robberies committed with a gun ended up as pleas of guilty to unarmed robbery. So common was the practice that the Michigan Parole Board would often start the interview with 'I see you were convicted of unarmed robbery in Detroit. What calibre of gun did you use?' Without even a smile, the inmate would respond, 'a .38 calibre revolver' ".[41]

This brief outline of the principles of sentencing law highlights the inherent injustice of mandatory sentences. Such sentencing provisions fly in the face of permitting the courts to apply the varied and complex objectives of sentencing principles.

Despite this, mandatory sentences have been legislated in a number of Australian States in relation to a variety of offences ranging from murder to fines for traffic infringements. At the lower end of the equation (fines for traffic infringements), the relatively minor nature of the penalty tends to lead to acceptance. It is at the higher end of the range of penalty (life imprisonment for murder) or the imposition of sentences which allow of no application of judicial discretion that criticism abounds.[42]

In November, 1996 amendments to the Western Australian *Criminal Code(WA)* commenced operation. They have become known colloquially as the "three strikes and you're in" provisions. Section 401(4)(a) required a sentence of at least 12 months imprisonment to be imposed on an adult convicted of home burglary if the offender had been previously convicted of at least two counts of the same offence. Conviction included a finding or admission of guilt, whether or not a conviction had been recorded. The legislation prohibited the suspension of a term of imprisonment. It did not permit the sentencing officer to take into account the circumstances in which the third offence had been committed, the time which had elapsed since the prior convictions or, for example, to give the offender any benefit for a plea of guilty.

The Northern Territory legislation was introduced at about the time the Western Australian legislation commenced operation. The Northern Territory amended its *Sentencing Act 1995(NT)* effective from March, 1997 to apply mandatory sentences of imprisonment to a wide range of property offences. These included theft, receiving stolen goods, criminal damage. For a first offence the mandatory sentence was 14 days imprisonment, for a second offence, not less than 90 days, and not less than 12 months for a third offence.

These provisions have recently been ameliorated by the introduction of an exceptional circumstances provision for single offences of a trivial character where restitution had been made, the offender was of good character and there were mitigating circumstances.

Proponents of mandatory sentencing have advanced a number of justifications for its introduction. At the time the Northern Territory introduced the amendments to its *Sentencing Act* which led to the first version of its mandatory sentencing in relation to property offences, the Attorney-General, Mr Burke said:

> "The Government believes that the proposal for compulsory imprisonment will: send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted".[43]

Other arguments advanced to support mandatory sentencing, in the Northern Territory at least, include that "its purpose was punishment rather than deterrence, the legislation being developed to ensure that offenders paid for their crimes".[44] This has unfortunate tones of pre-19th Century punition. Moreover, as the Senate Committee inquiring into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999 observed, the introduction of mandatory sentencing in both Western Australia and the Northern Territory was "a direct response by government to community concern about home burglary (Western Australia) and a number of property crimes (Northern Territory)".[45] The Senate Committee concluded that the objective of the Western Australian legislation appeared to be deterrence, while that of the Northern Territory was a mixture of deterrence and retribution.[46]

In fact, it has been pointed out that the rationale for their introduction has shifted as it has been demonstrated that they have not achieved any of their "claimed justifications of deterrence, selective incapacitation and reduction in crime rate..". Now the justification is said to be " 'community concern'; 'don't forget the victims' and 'no money for alternatives' ".[47]

Law and order policies are said to be a response to community concern about inadequacies in the enforcement of the criminal justice system. But is such concern justified? In a speech on *Sentencing Guideline Judgments*,[48] Chief Justice Spigelman of the NSW Supreme Court noted:

> "Research throughout the western world has indicated that there is a widely held belief that sentences actually imposed are not commensurate with the seriousness of the crimes for which they are imposed. However there are now numerous studies which show that the public opinions expressed in polls, through the media and talk-back radio and various other expressions of public opinion, are often ill informed. The belief that there exists a significant disparity of a systematic character between actual sentencing practice and what the public sees as appropriate sentences is wrong. More detailed and sophisticated methods of gauging popular opinion suggest that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentence actually imposed or, at least, to express the opinion that they are lenient to a significantly lesser extent than answers to general, undirected questions would suggest. This is true of research in the United States, the United Kingdom and in Canada. These studies have been replicated in Australia with generally similar results".

Of course, the principal reason why mandatory sentencing has become such a notorious topic, particularly in the year 2000, is because of the Senate Inquiry into Mandatory Sentencing Legislation which was triggered, in turn, by the tabling in the Senate of a private Bill, the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999. The Bill was intended to have the effect of prohibiting mandatory sentences in respect of offences committed by juveniles. At about the same time as the Senate inquiry was proceeding, a 15 year old Aboriginal boy committed suicide in the Northern Territory while serving a 28 day mandatory sentence for stealing stationery worth about $150.

His death provoked an Australia-wide furore. What was particularly sad about the debate which followed was that politicians and the media had overlooked the substantial criticisms made over the period since the mandatory sentencing legislation was introduced in both Western Australia and the Northern Territory.

The amendments to the *Sentencing Act* 1995 (NT) which led to the mandatory sentencing provisions were passed in March, 1997. Soon after, in *Trenerry v. Bradley*,[49] the Full Court of the Supreme Court of the Northern Territory held that they operated, according to their true construction, to require the Court to impose a mandatory term of imprisonment in the prescribed circumstances. It was clearly an unpalatable conclusion, with at least two members of the Court (Angel and Mildren JJ) describing the mandatory provisions as leading to unjust sentences.

In the same year, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission published their report: *Seen and Heard: Priority for Children in the Legal Process*.[50] The Report concluded:

- That the mandatory sentencing provisions breached the *United Nations Convention on the Rights of the Child* (*CROC*). Article 40 of *CROC* requires the principle of proportionality to be applied, so that the facts and circumstances of the offence and offender are taken into account in sentencing. Article 37 requires that "in the case of children detention should be the last resort and for the shortest appropriate period".[51]
- That the mandatory sentencing provisions then in force in the Northern Territory and Western Australia had a disproportionate effect on the Aboriginal community.[52]
- The "violations of international and common law norms" in the mandatory sentencing laws were so serious that it recommended federal legislation to override the laws unless they were repealed by Northern Territory and Western Australia.[53]

  The Federal Government has never formally responded to this recommendation.

In August, 1997 the Northern Territory Bar Association passed a resolution opposing mandatory sentencing. It wrote to both the Northern Territory Attorney-General and the Commonwealth Attorney-General advising them of its concerns about the injustices which would flow from mandatory sentencing. In November, 1997 the Australian Women Lawyers' Association expressed concern over the likely effect of the mandatory sentencing provisions on the imprisonment rates of women. In March, 1999 the Law Council wrote to the Chief Minister and Attorney-General of the Northern Territory, Mr Burke, informing him of the Council's opposition to the legislation as "far too harsh, arbitrary and ineffective".

Since 1997, imprisonment rates in the Northern Territory, particularly of indigenous children and women, have soared. In the year following the introduction of mandatory sentencing, imprisonment rates of juveniles increased by 53 per cent. The imprisonment rate of indigenous women has increased by 232 per cent. While the precise cause of these dramatic increases appears to be the subject of debate, the coincidence of the introduction of mandatory sentencing legislation and the higher rates of imprisonment suggests a strong correlation.[54]

Mandatory sentencing is said to be unjust for several reasons including:

(i) Its inflexibility (and consequent inability to take account of the circumstances of the offence and the offender), which will inevitably lead to harsh, unfair and discriminatory outcomes;
(ii) its potential or actual violation of international human rights law;
(iii) the shift of discretion from the judiciary to the police, which is less visible and less accountable (lack of review);
(iv) the prospect of fewer guilty pleas and the resulting additional cost and delay. [55]

Evidence from both the United States and Western Australia is said to indicate that "mandatory sentencing does not produce the effects of deterrence, selective incapacitation and crime reduction which are its stated justifications and does produce a range of damaging side

effects in terms of distortion of the judicial process, widely disproportionate sentencing, additional financial and social costs and deepening social exclusion of individuals and particular communities".[56]

The United States experience is particularly useful because mandatory sentencing provisions have been enacted there since the 1950s. In the United States the 1990 US Sentencing Commissions report *Minimum Mandatory Penalties in the Federal Criminal Justice System* was described as demonstrating:

> "...that mandatory minimum sentencing laws unwarrantedly shift discretion from judges to prosecutors, result in higher trial rates and lengthened case processing times, arbitrarily failed to acknowledge salient differences between cases and often punish minor offenders much more harshly than anyone believes is warranted. Interviews with judges, lawyers and probation officers at twelve sites showed that heavy majorities of judges, defence counsel and probation officers disliked mandatory penalties; prosecutors are about evenly divided. Finally, and perhaps not surprisingly given the other findings, the report shows that judges and lawyers not uncommonly circumvent mandatories".[57]

Research in Australia indicates that the shift from judicial to prosecutorial discretion is already occurring.[58] While this may deflect the harsh application of the mandatory sentencing provisions, it has the undesirable connotation of closed door and unaccountable justice which is inimical to the criminal justice system.

The cheap attraction of mandatory sentences was well described by the NSW Director of Public Prosecutions, Nicholas Cowdery, QC when he wrote:

> "If one says 'mandatory life imprisonment' quickly and often, without thinking about it too deeply, it sounds tough and that is what politicians like to do. It is easier and cheaper than taking time and committing resources to the development of policies that can address the causes of crime and reduce its incidence. The 'tough' approach appeals to people who are driven by retribution; and they vote".[59]

The tragedy of mandatory sentencing provisions can be seen from a few examples of their application. Margaret Wynbyne was sentenced to 14 days for stealing a can of beer. This sentence cost Australian taxpayers $2,400. Kevin Cook was jailed for a year on a third strike offence for stealing a towel to use as a blanket. Many more examples of clearly disproportionate sentences can be given.[60]

Judges oppose mandatory sentences because of the prospect that such provisions lead to the prospect of injustice. As the Chief Justice of NSW has said: "No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice".[61]

Endnotes:

1. *The Mikako*.

2. The Australian Law Reform Commission, *Sentencing*, Report No. 44, par. 26.

3. New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), par. 3.2.

4. *Veen v. The Queen [No. 2]*, (1988) 164 CLR 465 at 476.

5. *Ibid*, at 476 – 477.

6. *Hoare v. The Queen* (1989), 167 CLR 348 at 354.

7. (1995) 5 Tas. R. 186.

8. *Ibid*, at 202.

9. *R. v. Williscroft* [1975] Vic R. 292 at 300.

10. *R.v. Raddich* [1954] NZLR 86 at 87, cited with approval in *R. v. Rushby* [1977] 1 NSW LR 594 at 597 – 598.

11. *Channon v. The Queen* (1978) 33 FLR 433 at 437.

12. *Veen v. The Queen [No. 2]*, *supra*.

13. R.G. Fox, *The Meaning of Proportionality in Sentencing*, 19 Melbourne University Law Review, 489 at 490.

14. (1988) 165 CLR 611.

15. (1988) 166 CLR 51, 58.

16. (1989) 167 CLR 348.

17. (1990) 169 CLR 525.

18. Morgan, N., *Capturing Crimes or Capturing Votes? The Aims and Effects of Mandatories*, Volume 22 (1) (1999) UNSW Law Journal, 267.

19. Blackstone 4 *Commentaries* 18, quoted in Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Volume 1, Stevens & Sons (1948) at 3.

20. Radzinowicz, *op.cit.* at 11–14.

21. *Ibid*., at 654.

22. *Ibid*., at 654.

23. *Ibid*., at 10.

24. WJV Windeyer, CBE, MA, LLB, *Lectures on Legal History*, The Law Book Company of Australasia Pty Limited (1949) at 307.

25. *Ibid*.

26. *Ibid*.

27. *The Movement for Reforms in the Law*, 56 Law Quarterly Review at 214.

28. Windeyer, *supra*, at 307-308.

29. *Ibid*., at 308.

30. *Ibid*.

31. Sir William Holdsworth, *A History of English Law*, Volume XV, Methuen & Co. Limited (1965) at 165.

32. Cited by the Honourable JJ Spigelman, AC, Chief Justice of New South Wales, *Sentencing Guidelines Judgments*, Address to the National Conference of District and County Court Judges, 24 June, 1999.

33. (1995) 81 A. Crim. R. 260.

34. 501 US 597 (1991).

35. *Boyd v. R.*, *supra* at 268.

36. (1987) 34 CCC (3d) 97.

37. *Polling v. Corfield* (1970) 123 CLR 52 at 58.

38. (1969) 119 CLR 257 at 269.

39. For this might be substituted elements of the press in Australia.

40. *Sentencing and Parole*, a paper presented on 7 July, 1977 at the 19th Australian Legal Convention by Professor Norvall Morris, Dean, Law School, University of Chicago, 51 ALJ 523 at 529.

41. *Ibid.*, at 529.

42. See, in relation to murder, Nicholas Cowdery, QC, *Mandatory Life Sentences in New South Wales*, Volume 22(1) (1999) UNSW Law Journal, 290.

43. Northern Territory Parliamentary Record, Seventh Assembly First Session No. 27, 17 October, 1996 cited in Zdenkowski, G., *Mandatory Imprisonment of Property Offenders in the Northern Territory*, Volume 22(1) (1999) UNSW Law Journal at 303.

44. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights(Mandatory Sentencing of Juvenile Offenders) Bill 1999* at par. 2.21.

45. *Ibid*.

46. *Ibid*, at pars. 2.22, 2.25.

47. Professor David Brown, *Mandatory Sentencing, a Criminological Perspective*, paper delivered to the UNSW Symposium 2000: *Mandatory Sentencing – Rights and Wrongs*, p.11.

48. *Supra*.

49. (1997) 15 NTR 1.

50. Australian Law Reform Commission Report 84.

51. *Ibid*., par.19.63.

52. *Ibid*., par.19.60.

53. *Ibid.*, par.19.64; Recommendation 242.

54. Senate Inquiry at pp. 26-36.

55. Zdenkowski, G., *op.cit.*, at 312.

56. Brown, *supra*.

57. *Ibid*, pp. 5-6.

58. *Ibid*., at p.9.

59. Cowdery, *supra*, at 291.

60. Brown, *supra*, at p.9.

61. Spigelman CJ, *supra*.

Chapter Six:
Mandatory Sentencing: A Catalyst for Debate

Hon Denis Burke, MLA

I appreciate the opportunity to address such a gathering of those learned in the law, particularly on a subject which has sparked such intense debate.

There is nothing wrong with debate, of course. What is unfortunate is that this debate is mostly based not on the legal and parliamentary principles behind minimum mandatory sentencing, but on a series of the most blatant falsehoods about the operation of this legislation.

For instance, I quote from *The Sydney Morning Herald's* coverage on 30 October at a University of New South Wales Symposium 2000 on *Mandatory Sentencing – Rights and Wrongs*. The story reads:

> "Police found it easy to arrest an Aboriginal woman who walked into a flat through an open door and took a tin of meat and two tomatoes from a table, according to Alice Springs black leader Mr William Tilmouth. 'She was on the pavement in front of the flat feeding the meat and tomatoes to her three children', he said. 'Under mandatory sentencing laws, she went to jail and her children had to be cared for by another family' ".

Now, you will all agree that sounds like pretty rough justice – the sort of thing to justify the language used in the March issue of *Bar Brief*, the newsletter of the New South Wales Bar Association. It described mandatory sentencing as "this modern version of the 18th Century transportation laws".

But what are the real facts in this case, according to court records? They show that on the evening of 7 February this year, a woman smashed windows to gain entry to a flat occupied by a frail 85 year old pensioner. He was unable to prevent the home invasion or the stealing of his food. Police, alerted by neighbours, apprehended the 25 year old woman eating the food nearby. There was no mention of children being involved. *Their first appearance* on the court transcript is when defence counsel made submissions on sentencing.

The magistrate was not impressed for she then gave the offender 28 days imprisonment – *double* the 14 day sentence for a first striker under the mandatory minimum sentencing legislation. And the offender had priors for criminal damage and stealing before the new legislation came in. No appeal against the 28 day sentence has been lodged, so whilst the misquoting of the facts of the case at the Sydney conference is grist for the misinformation mill, the legal aid lawyers are not about to chance their arm by going back to court.

That is why I am grateful to be invited here today by the Conference convenor, Mr John Stone. It is an opportunity to set the record straight. I do not intend doing a case by case rebuttal of the misreported cases – I do not have time; but I am concerned when even the judiciary and senior legal professionals are seriously debating the fallacies, not the facts.

The fallacies about mandatory sentencing have now graduated from the daily media to law journals, and I refer again to the *President's Column* in the March edition of the New South Wales *Bar Brief*. The author is the previous speaker, Bar Association President Ruth McColl, SC.

President McColl reported that the coverage of mandatory sentencing was sparked in part by, and I quote:

> ".... the suicide of a 15 year old Aboriginal boy serving a 28 day mandatory sentence for stealing stationery worth about $150".

For obvious reasons, I am not going to pull that statement apart bit by bit, especially as it involves the nation-wide tragedy of youth suicide.

But that 21-word statement contains numerous factual errors and major omissions, including the reasons the lad was under detention. In fact, I can guarantee that in every case of mandatory sentencing highlighted by the media, the basic facts are so wrong you would have difficulty reconciling the media reports with the court transcripts.

In the same article, Law Society President McColl reports that:

> "Since 1997 imprisonment rates in the Northern Territory, particularly of indigenous children and women, have soared. In the year following the introduction of mandatory sentencing imprisonment rates of juveniles increased by 53 per cent. The imprisonment rate of indigenous women has increased by 232 per cent".

These figures are also incorrect. The facts are that during 1997-98 a total of 197 Aboriginal women were sentenced to detention in the Northern Territory. In 1999-2000, the number was 124. That represents a *reduction* of 37 per cent.

Numbers of juveniles in detention have generally declined over the past decade. Throughout this year, with the debate at its height, juvenile detention numbers have been at their lowest on record. As of last Wednesday, there were 10 juveniles in detention Territory-wide, only one of whom is serving a mandatory sentence. This compares with levels of between 30 and 40 during the late 1980s.

One of the eight objectives of The Samuel Griffith Society is to "restore the authority of Parliament as against that of the Executive". So I think it is important to track back on the political and democratic processes which accompanied the gestation of minimum mandatory sentencing legislation in the Northern Territory.

And since it is commonly condemned as racist law, I will outline the attitude of many Aboriginal communities to these laws. Like everybody else, Aboriginal Territorians have voted on these laws twice, and I have spent hours and days discussing them with Aboriginal community leaders.

The first point is that this legislation was developed in the Country Liberal Party (CLP) party room – not the Cabinet room. In other words, it came from constituents, through their elected Members – it was not imposed on the Party wing or the Parliament by the Executive. And at that stage it enjoyed the support of the Labor Opposition as well.

In 1994, the governing CLP put to Territorians the following policy for the general election that year:

> "Introduce compulsory imprisonment of 28 days for repeat offenders (including juveniles) for crimes such as unlawful entry, unlawfully on the premises, stolen motor vehicle, interfere with motor vehicle, shoplifting and criminal damage".

As a central plank of CLP election policy, it was heavily advertised in the media, including radio and television. The same ads ran on Imparja radio and television, which goes into every Aboriginal community in the Northern Territory, as were run in the urban media of Darwin and Alice Springs. So there was no secrecy about the intentions of the CLP government.

In the 1994 election, voters returned 17 CLP Members to the Territorian Parliament of 25, including, for the first time since self-government, the big bush seat of Victoria River, with its majority of Aboriginal voters.

In the Darwin seat of Millner, with our largest concentration of urban residents of Aboriginal descent, voters also opted for a CLP government Member for the first time since 1977.

As Attorney-General in 1996 I saw the first cut of mandatory sentencing legislation through the Legislative Assembly after exhaustive community consultation and parliamentary debate. This came into effect on 8 March, 1997. During those parliamentary debates, I made a number of points, such as:

> "I believe the government's duty can be simply put: the safety and protection of the community is paramount. The first principle of law and order is that Territorians have the

right to be protected from those who would do them harm. The second principle is that, if a person chooses to abuse that first principle, that person will pay the price".

The next point is as relevant to the race debate as it is to the points raised about the age of offenders:

"I have to stress again that the government's proposals for compulsory imprisonment apply to those who persist in flouting the law. It is not aimed only at adults and it is not aimed only at juveniles. It is aimed at the guilty, whether they be 15 or 50".

Please keep in mind that these laws have been changed a couple of times since 1996 – in the case of juveniles, quite radically.

But I am trying to import some of the flavour of the parliamentary debate, and the community, or if you like, the democratic pressure which drove it. One of the more illustrative quotes from Hansard is this, during debate on amendments in 1999:

"Mandatory minimum sentencing is all about providing a base line below which the courts cannot go because it is unacceptable to the community. Because of the endless variety of fact situations that may come before the courts, it is desirable, within the limits set by the baseline of mandatory minimum sentencing, to give some discretion back to the courts to determine the appropriate sentence.

"The parliament sets maximum penalties, so why is it unable to set minimum penalties? The community demands its government intervene and set the framework on many issues. If the community believes that the punishment meted out by the courts is not sufficient or appropriate, then governments have no option but to act upon the will of the people".

As I said, the proposal was put to the electorate in 1994, and they had another opportunity to express their will at the general election in August, 1997. By this time, spokesmen for the Aboriginal industry – not the Aborigines themselves – and legal aid lawyers had convinced the Labor Opposition to turn against mandatory sentencing, so the political differences were clear cut and heavily advertised.

The result of that ultimate exercise in democracy? Another seat to the governing CLP, and a majority Aboriginal seat at that. The voters of McDonnell, which runs from the fringes of Alice Springs, out to both the West Australian and Queensland borders and down to South Australia, voted out Labor after 23 years and turned to the CLP. And the new member for McDonnell was a CIB detective, well known in the various Aboriginal communities through his police work.

I hope that outline provides you with the political context in which mandatory sentencing for a number of offences against the person and property has been enacted by the Northern Territory Parliament.

I will now expand briefly on the attitude of Aboriginal communities, and also mention in passing the role of the United Nations. Commentators keep quoting the UN to me to prove that the Northern Territory is somehow an international embarrassment to Australia.

Many commentators assume Aboriginal people are targeted by law and order measures, and therefore automatically oppose laws like mandatory sentencing. Those commentators do Aborigines a great disservice. They also forget that the activities of Aboriginal criminals mostly leave Aboriginal families as victims of crime.

In fact, I am dismayed at the utterances of some civil liberty advocates, many of whom were in full cry at the mandatory sentencing symposium at the University of New South Wales a fortnight ago. These people seem to assume Aborigines don't mind their possessions being stolen. Somehow, they are different from the rest of us. I say to those civil libertarians, Aborigines have property rights, they want those rights defended. As has been put to me at meeting after meeting, Aborigines are not just over-represented in Territory jails – although nowhere near as over-represented as they are in other Australian jails – they are also massively over-represented in the long list of victims of crime.

Where Aboriginals do have difficulty with the law is in trying to understand the long-winded

and circuitous nature of our court system. In Aboriginal society, you do not lie about your guilt if you have done the wrong thing, so the role of defence counsel is very confusing to traditional Aboriginal people. In those societies, if you have done the wrong thing, you don't lie about it – you cop it, and get the punishment over as soon as possible so the healing can begin. Many Aborigines have told me of their dismay when a known community devil was transformed into a courtroom angel by the silver tongue of a Legal Aid lawyer.

And many Aboriginal communities have become active partners with NT police in the raft of pre-court diversionary programs resulting from my talks with the Prime Minister and Attorney-General on mandatory sentencing legislation.

Under this scheme, juveniles who would previously have been charged with minor offences have, since the end of August, been diverted away from the criminal justice system. That diversion is into programs designed to prevent juveniles from further offending. The diversions include oral and written cautions, victim offender or family conferencing and community-based programs.

I will touch briefly on the United Nations. I admire much of the work the United Nations does, and in fact I wore the blue beret on peacekeeping duties in the Middle East some years ago. I am not so enthusiastic about some of the criticisms from UN Committees about our legal system, our environmental policies and so on. And it appears I am not alone. In Radio National's Law Report of April 18 this year, Professor Arie Freiberg of the Department of Criminology at Melbourne University did an international comparison of legal regimes.

He found that, compared with the United Kingdom and United States mandatory sentencing regimes, the Territory and Western Australia look positively wimpy. Professor Freiberg goes on to say that if UN organisations are indignant about mandatory sentencing, they should apply their indignation equitably!

And I have just the place for the UN to start. They actually run prisons in one place in the world, and that is East Timor. A Darwin-based lawyer, Mr Martin Hardie, fell foul of the legal system in East Timor and spent some time in the UN administered prison at Becora, outside Dili. When he got out, he was reported in *The Australian* newspaper of August 24 this year as saying:

> "There's a heap of kids and others who have been sitting in jail for up to six months without their cases being investigated or being tried.
>
> "Sixteen kids were arrested after a fight on the beach at Baukau five months ago. No investigation has taken place.
>
> "The Court has just detained them for the period without a hearing. They're just sitting there waiting for a trial to happen. They don't understand. These kids are in the same cells as militia members".

Lawyer Hardie went on to explain that he was the first to appeal the detention order, and he told *The Australian*:

> "I only did it because I've got contacts and I know what I'm doing".

I make no other comment apart from the observation that the United Nations' flag flies over Becora prison.

I now turn to the overall role of the judiciary, particularly when duly elected Parliaments pass laws with which some members of the legal fraternity have difficulty. And mandatory sentencing can be seen as such a law. It has certainly provided a catalyst for broad community debate on the role of judicial officers in our society.

There have been a number of legal and political challenges to the laws. It is not surprising that the legal attacks have been unsuccessful, given the High Court's specific recognition that Parliament may provide mandatory sentences. That proposition was established in the case of *Sillery v. The Queen* in 1981. The political challenges are another matter, but I believe have been equally unsuccessful.

My own view is that mandatory sentencing laws repair an eroded public confidence in the administration of the criminal law, in much the same way that the 1998 decision of the Court of

Criminal Appeal in New South Wales established a judicial minimum tariff of imprisonment for culpable driving offences.

A common criticism of the Northern Territory laws is that they abrogate the usual judicial discretions for sentencing and in some way damage the administration of justice. Such superficial comment overlooks the history and practise of sentencing.

Each of the Parliaments within Australia has exercised its undoubted legislative powers to express society's requirements for appropriate penalties to be provided by the criminal law. Each of the Commonwealth and the States maintains its own mandatory sentencing laws for some crimes, ranging from murder or drug offences (which may carry mandatory life imprisonment), to culpable driving, drunk driving and driving unlicensed.

The notion of mandatory terms of imprisonment is not new. Nor is it anathema in other jurisdictions throughout the world. In the United States – considered to be a democratic, civil libertarian country – it is accepted that it conforms with the *Bill of Rights* for federal laws to impose mandatory imprisonment that has largely nullified the judiciary's sentencing discretion. This has been achieved by the introduction of guidelines for sentencing judges. The guidelines are mandatory – not optional.

After the judge has worked through each level of the guidelines he or she arrives at a penalty points score. The score precipitates a prison term, which is fixed and ranges from 6 months to life.

Let me turn now to the publicly expressed opinions of some senior and prominent holders of judicial office.

There has been comment on the statement by Justice Wood of the NSW Supreme Court in a November, 1999 address at the Uniting Church in Ashfield, Sydney. After discussing some contemporary issues such as drug injection rooms His Honour said, from the pulpit:

> "There are those who say that Judges have no business expressing such ideas – that they should quietly apply the law and policy set by others without question or protest. I do not believe that Judges can successfully complete their spiritual journey by silence.
>
> "It is my hope that there will be Judges in the next century who are prepared to dare, to listen to their consciences and their faith, and to take a stand against the unjust laws and policies of the secular state. At least let them not allow injustice to be committed in their names".

I would be disturbed if Justice Wood sought to enjoin the judges and the magistracy of the Northern Territory to defy their duties of office and to act in breach of their obligations, which are to apply dispassionately the laws of the Territory in their courts. I take it however that no more was intended than to say that in some circumstances a Judge might choose to resign rather than to apply a law that is inconsistent, as Justice Wood puts it, with "their consciences and their faith". As to this I have no objection.

Such a position has the recent authority of the Chief Justice of Australia in his speech to the Australian Bar Association Conference in New York on 2 July, 2000:

> "... if a judge is unable in good conscience to implement the law, he or she may resign. There may be no other course properly available. Judges whose authority comes from the will of the people, and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule. No judge has a choice between implementing the law and disobeying it".

Mr Justice Gleeson may have been inspired to make his comments by such outbursts as that of Mr Justice Einfeld of the Federal Court, who on 15 February, 2000 published an article in *The Sydney Morning Herald* criticising the Northern Territory and Western Australian mandatory sentencing laws as an insult to "the standards of justice and morality that Australians believe in".

Justices Fitzgerald, Stein, Beazley and Wood of the New South Wales Court of Appeal wrote a letter to *The Sydney Morning Herald* which attacked the mandatory sentencing laws in the

Northern Territory as racist and cowardly. Their Honors asserted:

> "[t]he inability of the national political process to achieve reconciliation with indigenous Australians and to terminate mandatory sentencing provides a disturbing insight into the practical operation of the simplistic notion that democracy is merely the majority will".

Having engaged the fourth estate as its vehicle for this denunciation of the laws of a body politic outside their jurisdiction, and from their publicly funded chambers, three of the Judges then made themselves available for interviews. On the resignation issue, Justice Wood told ABC Radio:

> "You have a duty to apply the laws if you're a judge. Your only choice really is to resign if you feel you can't do the job. But the real problem with that is if judges start resigning who have strong principles they may well be replaced by judges who have no principles, and are prepared to bow to the will of the State".

Justice Fitzgerald was reported as saying that members of the judiciary had to be very careful not to buy into political debate, but opined that mandatory sentencing was "beyond being a political question". To this day I am not sure what he meant by that.

This extraordinary outburst by judges caught public and political attention. The Commonwealth Attorney-General issued a news release:

> "I respect the right of the judiciary to raise community awareness about legal issues by explaining the role of the courts and the process of judicial decision making. However, I also believe that judges should refrain from commenting on politically contentious issues, which are properly the domain of the democratic political process.
>
> "[t]he doctrine of the separation of powers means that not only should the judiciary be free of interference from the executive, but that the judiciary should not interfere in matters that are the clear responsibilities of democratically elected Parliaments".
>
> The Prime Minister also warned judges to keep out of the political debate, saying that:
>
> "... it was one thing for a judge to talk about the law, it is another thing for the judge to wander into making political comment"; and
>
> "if politicians want to be judges they should stay in the law, and if judges want to go into politics then they should go into politics".

I entirely agree with these rebukes by senior Commonwealth Ministers directed to senior members of a State judiciary. It is interesting to note that there was no such published rebuke, at the political or judicial level, in New South Wales, the resident jurisdiction of these publicly vocal judges.

Let me add that these overt lapses in conventional judicial behaviour are not limited to mandatory sentencing. In September this year the media reported a public speech by Justice Wilcox in support for Aboriginal land rights as a way of healing "the running sore of racial antagonism in our country". He was reported as saying that the restoration of Aboriginal rights to traditional land was "an essential first step" to resolving the problems that afflict indigenous people, and as calling on the States and Territories to support native title regional agreements.

On the Federal Court bench, Justice Wilcox has jurisdiction over native title applications and anti-discrimination cases falling within the Court's jurisdiction. In my view, his comments, as reported, should not have been made publicly by any judge of the Federal Court. They are likely to be perceived by the public as an expression of partiality and bias, and may form a ground for his disqualification from hearing matters within the mainstream of the Court's jurisdiction.

An articulate and authoritative proponent of judicial reticence in Australia is Justice Thomas of the Supreme Court of Queensland. In *Judicial Ethics in Australia,* he wrote that "with few exceptions, the taking of a public stand by a judge on any controversial topic lowers his or her effectiveness as a judge". Further, he said:

> "It is now quite clear that the making of statements by judicial officers on controversial political subjects is improper, unless the issue directly concerns the law, the legal system or the administration of justice. The reference to 'the law' must be limited to matters of a

legal kind in which policy matters do not intrude".

I fully agree. Most judges justify maintaining judicial silence off the bench as being required to ensure judicial independence, to maintain impartiality and to sustain public confidence, both in appearance and in reality.

Chief Justice Gleeson considered it a wise observation that "enthusiasm for a cause is usually incompatible with impartiality, and is always incompatible with the appearance of impartiality". The Chief Justice has emphasised the need to avoid any appearance of pre-judgment. To my mind the Chief Justice speaks with a high authority compounded by commonsense. His statements reflect the required standards of the community.

One qualification accepted by those who support the view that judges should not make extra-curial comments on governmental policy is that judges should be able to reply to unfair and misleading criticism. I agree, and hasten to add that it should be carefully exercised and not be a response to each "pin-prick". A Chief Justice, as the Chairman of his or her Board, may be obliged by circumstances to express a public position to preserve the professional reputation of his or her Court.

However, this judicial capacity to defend the integrity of a court does not extend a licence to the entire bench to indulge in the multi-media equivalent of the soapbox on Hyde Park corner.

In Canada, following a public and controversial outburst by a Supreme Court Judge from British Columbia about a constitutional accord between the Canadian Prime Minister and nine provincial Premiers, the Judicial Council in Canada resolved that:

> "The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts.
>
> "[j]udges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem".

and:

> "If a judge feels compelled by his conscience to enter the political arena, he has, of course, the option of removing himself from office. By doing so, he is no longer in a position to abuse that office by using it as a political platform".

I urge the Australian judiciary collectively to take steps down the same considered path taken by Canada. At the request of the Council of Chief Justices, the Australian Institute of Judicial Administration is researching and writing guidelines for judicial ethics. I await those published guidelines, and will be interested in the collective opinion of the profession on whether the AIJA has taken full advantage of this golden opportunity to set the ground rules for judicial ethics.

At the lowest level of criticism, it is plain that a publicly expressed opinion on almost any social and political issue may compromise a judge's capacity to appear impartial in judicial office. Any such statement may give rise to a justified apprehension of bias sufficient to satisfy the test for objective disqualification. The publicly expressed enthusiasm for a cause by a judge may be incompatible with the impartiality demanded of the office and the absolute requirement for the retention of appearances of impartiality.

Such technical considerations suffice to demand judicial reticence. However, the rule has broader justification. Our society requires – in fact, demands – confidence in the judiciary as the entrenched and dispassionate referee of disputes between its citizens.

What I have said this afternoon may be viewed as controversial in some of the more radical quarters of the legal profession. Should this paper generate wider and more public discussion that will, indeed, point to the fact that mandatory sentencing has played a number of useful roles within the community, including acting as a catalyst for debate.

Chapter Seven:
The Referendum: A Post-Mortem

Sir David Smith, KCVO, AO

> *"We have a lust to destroy in Australia. It is not that Australians are cynical – they are just unaware of what they are doing. They really think they are engaged on work of national progress and are unconscious of being on work of national destruction. What we need to spread throughout this land is the idea that before you knock something down you take a second look at it. We need to decide whether you knock it down or whether it is valuable enough to keep".*[1]

Earlier this year *The Canberra Times* published the following extract from the transcript of a court case in South Africa:

Question: "Doctor, before you performed the autopsy did you check for pulse?"
Answer: "No".
Q: "Did you check for blood pressure?"
A: "No".
Q: "So, is it possible that the patient was alive when you began the autopsy?"
A: "No".
Q: "How can you be so sure, Doctor?"
A: "Because his brain was sitting in a jar on my desk".
Q: "But could the patient have been alive nevertheless?"
A: "It is possible that he could have been alive and practicing law somewhere".

Many republicans are still trying to breathe life into some version or other of a republic, but the Keating/Turnbull republic – the subject of last November's referendum – is as dead as the patient in that court case. I was proud to be one of the many who helped kill it off, and I am delighted to have been invited to conduct this post-mortem.

In fact, the Keating/Turnbull republic died several deaths. The first occurred when two late-night deals were struck in Old Parliament House, Canberra in the concluding days of the 1998 Constitutional Convention, in an attempt to gather in the support of the many republicans who refused to support the original Keating/Turnbull model.

That model had called for the President to be appointed, and dismissed, by a two-thirds majority of a joint sitting of both Houses of the Commonwealth Parliament. When the former Governor of Victoria, Mr Richard McGarvie, pointed out that this virtually placed control over removal of a President in the hands of the Opposition, the model was amended to put removal in the hands of the Prime Minister alone, subject only to later ratification by the House of Representatives – the Senate, though involved in the appointment process, was to be ignored in the removal process.

This deal was designed to attract the support of the so-called conservative republicans, and they fell for it hook, line and sinker. But the voters turned away when they read the fine print, the more so when they found that, in the event that the House of Representatives should fail to support the Prime Minister's action, the dismissed President would not be reinstated. The Prime Minister would have absolute control over the President, no matter what Parliament said. This neutering of the constitutional umpire clearly was not acceptable to the electorate.

The second deal provided for the establishment of a nomination process that would have enabled members of the public to make nominations to a Presidential Nominations Committee. That Committee, in turn, would submit a short list of suitable candidates to the Prime Minister.

This seemingly very democratic process was designed to appeal to the direct-elect republicans, but was perceived to be a fraud and a sham when, once again, the electorate read the fine print and found that the Prime Minister would be able to ignore the Committee's recommendations and choose his own candidate anyway.

Not content with inflicting fatal wounds on their republican model even before the Constitutional Convention was ended, the republicans allowed it to suffer further deaths during the ensuing referendum campaign. A slow and lingering death was inflicted by their republican friends in the media, who treated the Australian people as idiots, and who prostituted their professional roles as observers and commentators by becoming partisans and advocates.

The final fatal wound resulted from that unholy alliance towards the end of the referendum campaign between Gough Whitlam and Malcolm Fraser. The electorate quickly realised that any constitutional arrangement on which these two could agree had to be bad for the rest of us. I shall have more to say about the media and the two former Prime Ministers.

The death of the Keating/Turnbull republic was formally announced early on the night of 6 November, 1999, even before the close of polling in Western Australia, in separate speeches by Mrs Kerry Jones and Mr Malcolm Turnbull, the leaders of Australians for Constitutional Monarchy and the Australian Republican Movement respectively, and who had also chaired the official "No" and "Yes" campaign committees for the referendum.

In claiming victory, Kerry Jones said that she did not feel elated, just a great sense of relief that the Australian people had finally had the chance to have their say on this issue, and deeply humbled by the confidence that the Australian people had shown in our country and its Constitution. And before she thanked all those who had made victory possible, she said this:

> "I would like to offer our commiserations to Malcolm Turnbull and the 'Yes' campaign team. The 'Yes' campaign is full of good Australians who want the best for their country too. This vote means that the country did not find favour with their vision for Australia. It is my wish, and the wish of all those involved in the 'No' campaign, that Australians who voted 'Yes' will join together with us so that we can celebrate the Centenary of Federation as a united nation. All of us want the best for our country. All of us are proud Australians".

Malcolm Turnbull in defeat was less gracious. After thanking "Yes" supporters and giving a serve to republicans who had voted "No", he turned on the Prime Minister, claiming that "fighting for the republic in John Howard's Australia has been gruelling and heartbreaking". This was the Prime Minister who gave the republicans a national Constitutional Convention so that they might sort out the raft of republican models that they had been arguing about for years; who promised in advance, sight unseen, to put their chosen model to the Australian people; who was thanked and congratulated by Turnbull in the concluding stages of the 1998 Constitutional Convention when he announced that their model would be put to the people; who asked the Parliament to pass a referendum Bill to which he personally was opposed; who gave his parliamentary colleagues, including his Ministers, a conscience vote while the Opposition refused to do the same; who publicly funded the republican campaign to the tune of $7.5 million, (and it will be interesting to see whether a future Prime Minister, from either side of politics, will give the monarchists an equally even break next time round); and who finally held a referendum to enable the Australian people to have their say. To describe fighting for a republic in such favourable circumstances as gruelling and heartbreaking was just plain dishonest.

Turnbull concluded his televised diatribe on referendum night with this gem:

> "My friends, there is only one person who could have made the vital difference, who could have made November 6 a landmark in our history, and that, of course, is the Prime Minister. Whatever else he achieves., history will remember him for only one thing. He was the Prime Minister who broke a nation's heart".

Apparently the 55 per cent of the national electorate who voted "No"; the 72 per cent of all federal electorates that voted "No"; the 40 out of the 40 polling booths in Mr Whitlam's

former electorate of Werriwa that voted "No"; and the six out of six States (and the Northern Territory) that voted "No", are not included in Turnbull's definition of the Australian nation. Right to the bitter end and beyond, Turnbull's rhetoric of division and hostility stands in sharp contrast to Kerry Jones's plea for national unity. Even the ABC's Kerry O'Brien apparently found Turnbull's concluding paragraph beyond the pale, for he edited it out when he replayed the speech on national television on referendum night, just a few minutes after it had been delivered.

If there were any hearts that might claim to have been broken, it was the hearts of constitutional monarchists when we discovered just how many stumbling blocks "the system" was able to put in our path during the referendum campaign.

The first was money. Not for us the backing of wealthy republicans able and willing to use their personal fortunes to try and change the Constitution. Not for us the millions of private dollars that would be used to try and persuade Australians that the republic was "inevitable". On the final day of the February, 1998 Constitutional Convention, a republican delegate told a group of constitutional monarchist delegates that he had $1 million of his own money to put into the referendum campaign. His message was clear and unambiguous – we would lose because we would never be able to match the republican war chest.

Our next major problem was with certain aspects of the publicly funded education campaign. With the exception of the two 1967 referendum questions relating to Aboriginals, a constitutional referendum is normally supported by the Government of the day and opposed by the parliamentary Opposition. The political parties and their supporters do the campaigning, the advertising and the letterboxing, and parliamentarians write the "Yes" and "No" cases that are required to be distributed to all voters.

In 1999 the situation was different, and called for different measures. The "Yes" case was to have the campaign support of the Labor Party, the minor parties, the trade union movement, and a major part of the Liberal Party. To further complicate the matter, the referendum Bill was a Government Bill, and Government members were bound to support it in Parliament, even if they intended to campaign against it later. It was therefore arranged that a token number of Senators and Members would vote against it so that they would then have the right to draft the "No" case to be distributed by the Australian Electoral Commission to all electors.

In order to ensure that the electorate could be as fully informed as possible, the Government decided that there should be publicly-funded "Yes" and "No" campaigns, using television, radio, newspaper and other material, to present the competing arguments during the final and intensive stage of the referendum campaign. Two committees, chaired by Kerry Jones and Malcolm Turnbull respectively, were appointed from among Constitutional Convention delegates, to prepare and disseminate this material. Each committee was to have $7.5 million dollars to spend in accordance with guidelines laid down by the Government. I was appointed a member of the official "No" Case Committee.

In addition, an Expert Panel, chaired by former Governor-General Sir Ninian Stephen, and with a budget of $4.5 million, was appointed to prepare and distribute neutral educational material some months before the referendum campaign. This material was to explain the proposed republican model, the existing constitutional arrangements, and the referendum process: it was not to present arguments for or against change.

As these committees were spending public funds in accordance with government guidelines, they were accountable to the Ministerial Council on Government Communications, and their activities were subject to the supervision and control of a Referendum Taskforce of officials set up within the Department of the Prime Minister and Cabinet. Each committee had attached to it a seconded official – a senior officer from the Referendum Taskforce who worked with the committee and its consultants on a day-to-day basis and helped them to ensure that whatever they did was in accordance with the government's guidelines.

In view of what I am about to say, may I make it clear that none of what follows refers to

the officer who was seconded to the "No" Committee. That officer performed her duties efficiently, competently and with integrity. She quickly earned the respect and, importantly, the trust of all members of the "No" Committee. We relied on her advice and experience and she never let us down, all the while being mindful of her responsibility to ensure that the rules were complied with.

Both the "No" Committee and the "Yes" Committee were required to submit their advertising material and their strategies for its use to the Ministerial Council on Government Communications for approval. We knew that most of the parliamentarians on this committee were republicans, and that gave us some concerns about the confidentiality of our campaign intentions, as did the membership of the Taskforce of officials, about whom we knew nothing. We soon experienced the first example of just what we were up against when, within hours of one of our supposedly confidential decisions, Kerry Jones received a telephone call from a member of the parliamentary Press Gallery asking her about that decision.

One of the "No" Committee's first tasks was to approve the appointments of those who would guide our campaign – a Campaign Director, a market research company, a creative advertising agency, and a Campaign Coordinator – and to decide on the location of the campaign administrative headquarters. With each of these appointments we obviously made the right decision, for we had the services of some of the best professionals in their respective fields.

On 10 June, 1999 the Attorney-General introduced the *Constitution Alteration (Establishment of Republic) Bill* and the *Presidential Nominations Committee Bill* in the Parliament.[2] Their introduction had been anticipated by the Parliament which, some two weeks earlier, had resolved to appoint a Joint Select Committee on the Republic Referendum to inquire into and report on the provisions of the Bills.[3] That Committee presented its report on 9 August, 1999.[4] In the Foreword to the Report, the Committee chairman noted:

> "Generally, the [two Bills] faithfully reflect the findings of the 1998 Constitutional Convention. The Committee accepts the evidence that the provisions in the Bills are workable. When raised, criticisms of the Bills usually went to matters of fine tuning, and even with no amendments, most critics felt the Bills should proceed".

Nonetheless, the Committee proceeded to make no less than 14 amendments in a report of 168 pages.[5]

The Committee's first, and most significant, recommendation, and the only one that I shall deal with in this paper, related to the long title of the *Constitution Alteration (Establishment of Republic) Bill*. A referendum question sets out the long title of the proposed law to alter the Constitution, and then asks whether the voter approves of the proposed law, so the language used in the long title is very significant. The original long title proposed by the Government was:

> "A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament".

In other words, it told voters that the Bill would give us a republic and a President, and described the President's method of election – i.e., by the Parliament.

Some witnesses before the Joint Committee, including republicans such as former Prime Minister Malcolm Fraser, considered this long title to be satisfactory. However, the chairman of the Australian Republican Movement, Malcolm Turnbull, and the convenor of Conservatives for an Australian Head of State, Andrew Robb, amongst others, objected to the inclusion of the words "republic" and "President" on the grounds that they were confusing and misleading! Robb also urged the removal of reference to the method of election of the President by the Parliament because he felt it might provoke a negative reaction from voters!

Although the Joint Committee was able to resist the representations to remove the words "republic" and President", it accepted the view of former Labor Attorney-General, Michael Lavarch, that the long title should make it clear that the President would replace the Queen and

the Governor-General. It also accepted Robb's objections to the method of election of the President being included, and it therefore recommended that the long title should be:

> "A Bill for 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 an Australian President".

The Government accepted the Committee's recommendation to include reference to the Queen and the Governor-General being replaced by a President, but insisted on retaining its original reference to the President's method of appointment. Accordingly, the Attorney-General, Daryl Williams, moved that the long title of the Bill be amended to read:[6]

> "A Bill for 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".

As the Queen's only constitutional duty, which is to appoint the Governor-General, would pass to the Parliament and not to the President, and as the President would inherit only the Governor-General's powers and not the Queen's, the President would replace the Governor-General but would not replace the Queen. Thus, the Lavarch proposal and the Joint Committee's recommendation misrepresented the effect of the Bill. One can only assume that the Government accepted the recommendation in a spirit of compromise.

On the other hand, the Government's insistence on retaining the reference to the method of appointment of the President by the Parliament – a most significant element of the proposed constitutional alteration, one would have thought – was vigorously opposed by the republicans, not because it was inaccurate, for it was not, but because, as Andrew Robb had put it, it might provoke a negative reaction from voters!

Our next hurdle was the supposedly neutral education campaign. After the Taskforce officials had drafted the pamphlet which was to be distributed as part of this campaign, and it had been cleared by the Expert Panel, the two Ministers responsible for referendum arrangements – the Attorney-General, Daryl Williams, and the Special Minister of State, Senator Chris Ellison – made copies available to the "Yes" and "No" Committees and invited their comments.

The "No" Committee responded by pointing out what we regarded as serious errors of fact and of emphasis which we asked be removed from the pamphlet, as well as the omission of other matters which we believed were necessary to be included for a proper understanding of the referendum question. The details need not concern us here but our main objections may be summed up in a couple of extracts from our response to the Ministers.

In the matter of an incorrect description of the Queen we said:

> "We believe the description to be legally and constitutionally incorrect: the point will feature in our publicity campaign, and it therefore has no place in a neutral pamphlet. As the pamphlet is intended to be neutral, we do not presume to ask that it makes our claim for us – we shall do that ourselves in the course of the campaign – but nor should it make for the republicans a claim that will be central to their campaign and which we shall hotly dispute".

We were equally concerned about what we regarded as a misleading reference to the powers of the Governor-General viz-a-viz those of the President, and we said:

> "We have more than ninety years of legal and judicial opinions to support us, as well as decisions of past Prime Ministers and Governments from both sides of politics, and we shall resist most strongly any attempts to gloss over or misrepresent the Governor-General's true position under the Constitution or any aspect of the proposed republican model".

Our letter to the two Ministers included a number of suggested amendments to the pamphlet that would meet our objections, and ended by offering to provide them with documentation in support of our arguments.[7] To make sure that our material would be considered, we sent a copy of that documentation to the Taskforce anyway.

In due course we saw the final version of the neutral education pamphlet. While we were not given everything that we had asked for, some changes had been made and we were reasonably happy with the outcome. We also learned that the "Yes" Committee was furious when it saw the final version, and claimed that its campaign would be disadvantaged by it. Which only served to prove how right we were to object to the original draft, and to confirm our need to keep as close an eye on the departmental Taskforce as it was keeping on us.

Our next crisis involving the Taskforce related to an intended electronic blackout of referendum advertising. The Government had stipulated that the advertising campaigns of the "Yes" and "No" Committees would be limited to the four weeks immediately prior to the referendum, and we had planned our campaign to continue right up to and including polling day.

Commonwealth legislation administered by the Australian Broadcasting Authority – the *Broadcasting Act* – provides that, for federal elections, an advertising blackout will apply on all electronic media from midnight on the Wednesday before polling day to the end of polling day on the Saturday. But the Act contains no provision for a similar advertising blackout on the electronic media in the case of a federal referendum. Despite this, we were informed just two months before referendum day that an administrative decision had been taken by Taskforce officials to apply the election advertising blackout to the referendum.

This decision was a disastrous one for us. Not only were we already committed to an advertising campaign that was to take us right through to Saturday, 6 November: the decision also meant that we would spend the last three days of the campaign with both hands tied behind our backs. The Government had stipulated that the two committees would be limited to the $7.5 million of public money allocated to them and that they would not be permitted to spend other funds from private sources.

As I mentioned earlier, Australians for Constitutional Monarchy has never had access to the level of private funding available to the Australian Republican Movement, and what limited funds it did have had already been committed. With an electronic blackout in place, the "Yes" and "No" Committees would have to stop their advertising on the Wednesday before polling day. However, the Australian Republican Movement would be able to use its vast private funds to mount an advertising blitz in those last three days, with the monarchists unable to match it with any kind of response whatsoever. Not only did the decision of the Taskforce lack any basis in law: it was also manifestly discriminatory, unfair and damaging to the monarchist cause and to the "No" case, as evidenced by the loud complaints of our opponents when finally we were able to have it rescinded.

The final attempt to load the dice against us came from the Australian Electoral Commission, and here the system beat us. The referendum ballot paper required each voter to write the word "Yes" or the word "No" in a box alongside the question on the paper. One would think that this was a simple enough instruction requiring one of two very simple alternative responses. But that would be to underestimate the inventiveness of Australian voters, as well as that of the Australian Electoral Commission.

Shortly before the referendum, the Electoral Commission issued a booklet called *Guidelines to Scrutineers*. Amongst other things, it contained instructions as to what would constitute a formal vote. Examples of formal "Yes" votes, apart from the word "Yes", included the letter "Y" and the words "OK", "Sure", and "Definitely". Examples of formal "No" votes, apart from the word "No", included the letter "N" and the words "Never" and "Definitely not". In addition, scrutineers were instructed that a tick would be accepted as a valid "Yes" vote but that a cross would not be treated as a valid "No" vote and would be treated as an informal vote. To compound this extraordinary ruling, the word "No" crossed out and "Yes" or a tick written above it would constitute a formal "Yes" vote, and the word "Yes" crossed out and "No" written above it would constitute a formal "No" vote. Of course, scrutineers would have no way of knowing whether the alteration had occurred while the ballot paper was still in the hands of the voter or afterwards.

Having identified seven ways of saying "Yes" without using the word, and only four ways of

saying "No" without using the word, the Electoral Commission then gave the following instruction to scrutineers:

> "To be a formal vote, the answer to the question need only clearly express the voter's support for or opposition to that question's proposed constitutional change, in *a language or symbol the person conducting the scrutiny understands"*. (Emphasis added).

In other words, the validity of a particular vote could be dependent upon the linguistic skills, or the imagination, of each individual electoral official. These instructions must surely represent the most adventurous administrative interpretation one could ever hope to see of the simple legislative requirement to write "Yes'' or "No" on a ballot paper.

As there was no organisation with legal standing that would have enabled it to challenge these rulings by the Electoral Commission, an individual did so in his own name. When the case came before the Federal Court, the Judge ruled against the application "on the balance of convenience" – that is, the convenience of the Electoral Commission and its Divisional Returning Officers – and awarded costs to the Commission: the lawfulness of the Commission's interpretation of the legislation and of its instructions to scrutineers was simply not tested by the Court.

I now want to turn to the progress of the referendum campaign, as seen through the eyes of this member of the "No" Committee while we were spending $7.5 million of public money in an attempt to make the electorate aware of the issues and to help voters cast an informed vote. The national advertising campaign was to begin on 13 October, 1999 and end on polling day, 6 November, 1999. It was to involve the use of television, newspapers, radio and online internet. Special programmes were prepared for rural and regional, print handicapped, Aboriginal and Torres Strait Islander, and non-English speaking audiences, as well as for the different age groups in the community. The campaign was successful, and came in under budget. It resulted in the Keating/Turnbull republic being comprehensively rejected by the Australian people. That result was achieved in the face of a highly concentrated and one-sided Press campaign in support of the republic.

Given the overwhelming assumption by the media and the republicans that the republic was inevitable, it is interesting to note that an AC Nielsen poll held on 13 and 14 February, 1998, almost two years before the referendum, accurately predicted the final outcome. It reported that only 43 per cent of voters were prepared to back what it described as the compromise republican model.[8] As the "Yes" vote 21 months later was only 45 per cent, and allowing for the usual margin of error associated with opinion polls, the February, 1998 poll was a most accurate predictor of the referendum result.

And while I am acknowledging early accurate predictions, may I also salute our colleague John Stone who, fourteen weeks away from the referendum, predicted that the referendum would be defeated nationally and in all six States.[9] It was indeed, as John said at the time, "a very brave (in the Sir Humphrey Appleby sense of that word) prediction", the more so as the republicans have always had (and again I use John's words), "buckets of money, lots of superficially impressive support from various meretricious media 'personalities', and the support of virtually all the print and electronic media".

Three months out from the referendum our research had told us that between the committed "No" voters and the soft "No" voters on the one hand, and the committed "Yes" voters and the soft "Yes" voters on the other, lay a significant group of undecided voters. We had found that there were disturbingly high levels of ignorance and misunderstanding among voters. We had found that the more they were informed of, and the more they understood, the details of the proposed republican model, the more they would move towards the "No" case. We also had found that not only was it vital to provide that information, but that the quality, tone and style of that information were most important.

For example, we had found that voters not only wanted to hear the views and opinions of

ordinary folk like themselves, but that they positively did not trust, and did not want to hear, the views of celebrities and personalities and other high profile public figures. So you can imagine our delight when, towards the end of the campaign, the republicans went to air with that ridiculous double act of Whitlam and Fraser and their attempt to persuade the electorate that "It's time" for the republic. As I said earlier, the reaction seemed to be that any change to the Constitution that those two could agree upon had to be bad for the rest of us. Former Federal Minister, Peter Walsh, described it in these terms:

> "In the current debate, one of the many ironies is the Turnbull republic unity ticket of sorts, forged between Whitlam and Malcolm Fraser. Fraser, rejected by almost all Liberals, resembles a mangy stray dog, desperate for a pat on the head from anyone".[10]

So, we set about planning our campaign strategy. To begin with, we carefully put together the different types of advertisements we would use for the various elements of the media and the various sections of the community; we carefully selected the characters who would feature in those advertisements; we booked time and space in the various media formats; and we prepared our campaign launch that was to be held four weeks before polling day. Once the campaign was under way, we continually carried out market research, and we continually fine-tuned our materials and our strategies in the light of that research. Soon we would be accused of simply muddying the waters for the inevitable republic; but, as one policy research analyst was to put it in a study published five months after the referendum, we

> "... very quickly redefined the focus of the campaign. It moved from being a debate about the nationality of our Head of State to one about the proposed procedures for the appointment and dismissal of the President".[11]

In the meantime the media were conducting their own campaign for the republic. They occasionally published articles and letters to the editor contributed by supporters of a "No" vote, but there was no attempt at anything approaching balance, and supporters of a "Yes" vote were given open slather, as also were the journalists themselves and their editors. For example, when former Governor-General Sir Zelman Cowen and former Chief Justice Sir Anthony Mason signed an open letter for the republic, it was published on page 1 of *The Australian*. The open letter in reply, signed by, amongst others, former Governor-General Bill Hayden and former Chief Justice Sir Harry Gibbs, was published on page 10 of *The Australian*. This media campaign was so insidious, even intimidating, that our research revealed that, out in the community, while "Yes" voters seemed always ready to declare their voting intentions, "No" voters did not want other people to know how they intended to vote.

One of the best summaries of just what the media tried to do to and for the republican campaign came from the pen of Federal Minister Tony Abbott. In an article published just before the referendum, Abbott noted that:

> "The key difference between the republic referendum and every other vote is the way the media are openly campaigning for one side".[12]

He cited some particularly nasty and offensive examples of the one-sided nature of the debate: *The Daily Telegraph's* "Queen or Country" masthead; *The Australian's* "scales of justice" motif featuring a Crown *versus* a slouch hat; and that newspaper's offer of "Vote Yes" bumper stickers to readers. Even in republican Canberra, at least one newsagency refused to distribute these to customers when they learned that "Vote No" bumper stickers would not also be made available.

Abbott also quoted others who had drawn attention to the partisan nature of the media's campaign: former Governor of Victoria, Richard McGarvie, who said that the media had clearly taken sides, almost unanimously; media analyst Michael Warby, who said that no media coverage on any issue of the past 25 years had been as partisan, and who had suggested a new slogan for the anti-republican campaign – "Annoy the Media – Vote 'No' "; and Professor John Henningham, of the University of Queensland's School of Journalism, who had conducted an attitudinal survey that had provided hard data to support the argument that the media were trying to shape events rather

than report them.

Abbott concluded that there was:

> "... hard evidence to demonstrate that the media are quite unrepresentative of community thinking. The latest polls showing support for the 'Yes' case crumbling, just when media boosterism is reaching a crescendo, are significant straws in the wind".

And indeed they were.

Writing again just after the referendum, Abbott, himself a former journalist at *The Australian*, noted that:

> "The reputation of the media can hardly be enhanced by so consistently misreading the public mood, so unrelentingly barracking for the losing side – and by subsequently insisting that voters got it wrong. ... But if the media's job is to reflect (as well as to lead) a pluralist society, journalists as a class should be embarrassed at the way they have allowed ideological enthusiasm to get the better of professional detachment".[13]

Even the editor of *The West Australian*, himself a direct electionist republican, had this to say about *The Australian's* coverage of the referendum debate:

> "I think it's one of the lowest ebbs in Australian journalism because *The Australian's* become totally partisan. It's boosterism at its worst and it's propaganda that goes beyond the rights of a newspaper to have a point of view. It was semi-hysterical most days, and as it became apparent that the 'Yes' case was in trouble, it got more hysterical".[14]

And a senior British journalist, out here to cover the referendum for *The* (London) *Daily Telegraph,* sent back this comment:

> "I have rarely attended elections in any country, certainly not a democratic one, in which the newspapers have displayed more shameless bias. One and all, they determined that Australians should have a republic and they used every device towards that end".[15]

One-sided boosterism was not confined to the media, and Kerry Jones has given some chilling examples which, in a democracy such as ours, should have no place in the actions of publicly-funded community organisations. In her account of the referendum campaign, published only this week,[16] she describes how a stand at the Royal Easter Show, and the use of the Sydney Town Hall for a public rally, both available in previous years on many occasions as venues for hire by Australians for Constitutional Monarchy, were suddenly no longer available to them, yet they continued to be available to the republicans. To add insult to injury, in the last month of the campaign, flagpoles outside the Sydney Town Hall and across the city were bedecked with "Yes" banners. One can just imagine how those who approved this arrangement would have reacted had their opponents been in control of the City Council and used ratepayers' money to fund a similar display of "No" banners.

At the start of the final four weeks of the campaign, it was clear that we would have lost the referendum had it been held then. But now the "No" campaign was no longer dependent on the crumbs that grudgingly came our way from the tables of the media. Now we could pay our way, and we could have all the time and all the space we could afford.

No amount of campaigning was going to change the minds of voters who were rusted on to one or other side of the debate: the battle was for the undecided voters. We had encouraged ourselves to think that, once we started getting our message out, the undecided voters would come our way, and by the end of the first week of the official campaign, which was just three weeks before referendum day, we started to see the definite "No" votes moving ahead of the definite "Yes" votes for the first time, and we saw the prospect of a win on the national vote. As these "No" vote gains started appearing in all States, we began to hope for a better result than three – three on the States' vote. We could see more of the undecided votes coming to us. And the line that was being pushed by the "Yes" case, that a "No" vote was unpatriotic, had suddenly lost its earlier momentum.

Nevertheless, it was still too early to start feeling confident, and we knew that these results

needed to be interpreted with caution. The electorate was volatile, depending on what issue or message was dominating the media at any particular time. It was at this point that the Australian Republican Movement and the Australian Labor Party complained to the Australian Electoral Commission and to the Federation of Australian Commercial Television Stations, alleging that the "No" campaign advertisements were misleading and deceptive and therefore in breach of the *Referendum (Machinery Provisions) Act*. On advice from the Director of Public Prosecutions, these complaints were rejected. By now we knew that we were hurting our opponents.

By the third week the earlier warning about electorate volatility was borne out as we saw some of the previous gains decline slightly. However, the overall trend still favoured the "No" campaign, and we began to hope for a win in four States, as well as a small margin in our favour in the national vote.

With one week still to go, the trend towards a stronger "No" vote was confirmed, with strong "No" voters maintaining a good lead over strong "Yes" voters. More significantly, while the strong "No" vote had almost doubled since the start of our polling, the strong "Yes" vote had remained static. During the same period, large numbers of the earlier undecideds had become strong "No" voters. The campaign to attract young voters was paying off, and we appeared to have made ground with women and with certain ethnic voters. The typical "Yes" voter remained high income-earning, male, aged between 30 and 50. A "No" vote nationally and in five States now seemed likely.

At the "No" Committee's final meeting, two days before polling day, our polling predicted what turned out to be the final result – a win for "No" nationally and in all six States, with the Northern Territory as a bonus. This was an extraordinary result, given that our polling at the start of the campaign had seen the "Yes" vote at 43 per cent and the "No" vote at 30 per cent, with the remaining 27 per cent undecided. But once we were able to have equal access to the media and to get the details of the proposed changes to the Constitution across to the electorate, the "Yes" vote picked up only 2 of the 27 undecided percentage points, while the "No" vote picked up the other 25.

To put it another way, after years of being told by the Australian Republican Movement that the republic was inevitable, and after being subjected to a massive brainwashing exercise by the Australian media that the republic was inevitable, 27 per cent, or more than one quarter of the electorate, had been still undecided. After a four week advertising campaign in which both sides, for the first time, had equal access to the media, the "Yes" case had been able to convince only 7.4 per cent of the undecided voters and the "No" case had been able to convince a massive 92.6 per cent of the undecided voters. No doubt there about who received the better value for their $7.5 million.

As the total "No" vote was more than 55 per cent nationally, and more than 58 per cent in three States, it will require an 8 per cent swing for Australia to become a republic, assuming the republicans are able to agree on which of the three main republican models in contention – parliamentary election, popular election, and McGarvie – they next wish to put to the electorate.

As the final section of this post-mortem, I now wish to look at what the media themselves had to say after the referendum in which they too, as well as the Australian Republican Movement, had been so firmly rejected by their readers and their listeners and their viewers. In doing so, may I apologise in advance to Dr Nancy Stone for any inadvertent trespass, either by what I have said or am about to say, onto matters that she will cover in her paper tomorrow morning.

On the Monday following the Saturday referendum, with the final count in Victoria still in the balance, *The* (Sydney) *Daily Telegraph* had this to say in its editorial about the defeat of the referendum:

> "Not only is it a vote of confidence in the Queen, but the referendum result is a triumph for all that is genuine and homespun in the world of politics. In particular, it is a victory for the

prime minister, John Howard, who provided a consistent, softly spoken endorsement of the monarchy. While there was a respectable case for an elected head of state, it was silly for republicans to argue that Australians needed to ditch the Queen in order to show that they had 'come of age'. In doing so, they treated their countrymen like so many stroppy teenagers, embarrassed by having their parents around. In fact, Australians have demonstrated their maturity by rising above any such need to prove themselves. The campaign itself was conducted in an admirably friendly spirit. But, since the result, the republicans have behaved with an unedifying gracelessness".[17]

But most of the media simply went into denial about what really had happened. In editorials, opinion pages and in news items, the Australian people were told that we were on the way to hell in a hand-basket; we were warned of the opprobrium that the rest of the world would heap on our heads; and we were presented with a variety of scenarios for revisiting the republican issue so that next time we might get it right.

Monday morning's editorial in *The Australian* was headed *Referendum reflects a split society*, though it first acknowledged that the verdict had to "be accepted, for the referendum is the purest expression of democracy under our system of government".[18] But then it went on to describe this "purest expression of democracy" as reflecting the divisions in our society:

"....the cities and the bush; those who embrace, and gain from, change and those who are confused and left behind; the so-called élites and the battlers; knowledge-rich and knowledge-poor; highly educated and less well-educated; high income and low".

The Sydney Morning Herald took up the same theme in its editorial headed *A failure of leadership*, and attacked the Prime Minister, John Howard, for dividing the country – for bringing about a vote that:

"....reflects the divisions of our country – between city and bush, the prosperous and the strugglers, those with opportunity and those who resent the lack of it".[19]

But, excuse me, wasn't it another Prime Minister, Paul Keating, who had dredged up the idea of a republic out of nowhere and had tossed it onto the table as a distraction from his Government's problems? Wasn't it he who had divided the country over the issue, with his inflammatory insults directed at those who wished to preserve the constitutional *status quo?*

The Age also fell into line, with an editorial headed *The republic vision will endure*.[20] It, too, bemoaned:

"....a lost opportunity ... to demonstrate to ourselves, and to the world, who we are: a strong, independent and united country, whose national identity is built on notions of fairness and egalitarianism".

And it, too, blamed the Prime Minister, John Howard, for the failure of the referendum. No acknowledgment here of the referendum as the "purest expression of democracy", but instead a warning to the politicians "to prevent the defeat eroding national unity and confidence", and the clear implication that the people had got it wrong.

A similar line was taken in so-called news stories, and in articles and comments by senior journalists,[21] many of whom used their opinion pieces on the Monday morning to launch Opposition leader Kim Beazley's multi-plebiscite proposal, the details of which he has only recently released, one year later. The fact is that the Australian media in general, and *The Australian* newspaper in particular, not only misread the public mood and barracked openly and relentlessly and shamelessly for the losing side: they also further tarnished their damaged reputation by subsequently insisting that only the less-educated voters had voted "No"; that they had got it wrong; and that they had better get it right next time.

By way of contrast, on that frenetic Monday morning, Christopher Pearson was able to write:

"Some of the biggest losers from Saturday's result are the journalists who imagined themselves 'the instruments of Manifest Destiny' ".[22]

By the end of the first week, at least one Associate Editor at *The Age* was beginning to get matters into perspective. Rejecting the defeat of the republic as symptomatic of a cultural schism, Tony Parkinson wrote:

> "It requires a bleak and disdainful view of society to argue that a decisive majority of the electorate are stupid, gullible and short-sighted".[23]

And the editorial in the December, 1999 edition of *Quadrant* opened with this paragraph:

> "The voting on the referendums on 6th November was not really surprising. What was surprising was the astonishment and disappointment of those who invested so much emotion in them, especially the republican question. But its significance should not be underestimated, since it amounted to a wholesale rejection by a very substantial proportion of the electorate of the social and political agenda of the last twenty-five years. In particular, it marks the failure of the baby boom generation, despite its large relative size, to capture the support of the majority of the electorate".[24]

But undoubtedly the best summary of the referendum result was that of a Canadian journalist. In an article in the Canadian *National Post* five days after the referendum, Mark Steyn, who happened to dine with the Queen and the Duke of Edinburgh at Buckingham Palace on the eve of the referendum, noted that:

> "... the overwhelmingly republican press took defeat particularly hard. It seems Australians do resent a remote autocratic foreigner from thousands of miles away running the place and lording it over them. Unfortunately, it turned out to be Rupert Murdoch rather than Elizabeth Windsor. ... Even after the republican side had conceded, the Murdoch press seemed reluctant to accept the actual result. 'Queen "Hurt" By "No" Vote Despite Win' was the headline on *The Sunday Times of* London. Mr. Murdoch's poodle, anxious to please, began his report as follows: 'The Queen was hurt and disappointed by the strength of republican feeling in Australia .. .' "[25]

Steyn's article continues:

> "Come again? Her Majesty was 'hurt and disappointed'? How does *The Times* hack know? He was down the pub with her? She'd called him at home, choked up with tears, to confide her innermost feelings? As the only journalist on the planet present at Buckingham Palace on the eve of the big vote, I think I can speak with complete authority on this matter when I say: I haven't a clue as to the Royal Family's state of mind and private thoughts".

Steyn confesses that he kept trying to slip Australia into the conversation but it got him nowhere.

Then, in a warning to those republicans who had immediately begun to talk of the next time, Steyn had this message:

> "The defeated republican forces now say that next time the question should simply ask whether Australians favour a republic *per se* and leave it until later to work out whether it's going to be the Mary Robinson model or the Saddam Hussein model. The devil is in the details – and to demand that the electorate reject an actual, specific monarchy in favour of a vague, unspecified republic is as absurd as asking them to vote for a monarchy and reassuring them you'll let 'em know afterwards whether they'll be getting Elizabeth II, Emperor Bokassa or Mad King Ludwig of Bavaria".

None of this seemed to deter the Australian media, and over the following weeks and months we were besieged with articles about what went wrong and how to do it better next time. While some blamed Turnbull for the model and the republicans generally for their botched campaign, others blamed the anti-republicans for the success of their campaign and the electorate for being so stupid as to buy it. Opposition leader Kim Beazley floated the idea of actually trying to find out what sort of republican model the people might find acceptable, but he immediately ran into trouble with the Labor Premiers, with three of them advocating direct election and two of them opposed to it. In fact, New South Wales Premier Bob Carr went so far as to say that he believed that the monarchy was preferable to a direct election republic.[26]

And now, a year after the referendum, Opposition leader Kim Beazley has finally filled in the details of his plans for a ten-year campaign towards a republic, and a four-step process for achieving it.[27] Beazley's plan is based on a series of non-binding plebiscites over a number of years. His first plebiscite, so he hopes, would have us declare our Constitution no longer acceptable and ready for replacement. We would then spend several years trying to decide what sort of Constitution we would put in its place, and in the meantime we would go on being governed by a document which a majority of us would have been persuaded to declare no longer acceptable. And this constitutional limbo, so the man who would be Prime Minister tells us, would be preferable to continuing to govern ourselves under the Constitution which has given us a century of stable parliamentary democracy!

The Beazley plan would require, first of all, several terms of Labor Government and yet another comprehensive civics education campaign, as well as a "Yes" vote in the initial plebiscite that would ask voters whether they favoured Australia becoming a republic. It would then require a single model to emerge from the second plebiscite at which voters would be asked to choose between several different models. Here the issue gets a bit murky, for we now would have three models – not just parliamentary election and direct election, but also the McGarvie model, which some Labor Premiers have said would need to be in contention. And if one appeared as a clear favourite – a by no means certain prospect – it would still require bipartisan political support for it to get through the required referendum.

Yet even at the very seminar at which Beazley outlined his ten-year four-step plan, two other leading republicans – Professor George Winterton, a republican delegate to the 1998 Constitutional Convention, and Professor Greg Craven, also a republican delegate to the 1998 Constitutional Convention and a member of the "Yes" Case Committee for the 1999 Referendum – were still taking different positions from Beazley and from each other.[28] The republicans could not agree on a single model in February, 1998; they could not agree on a single model in November, 1999; and now they cannot agree on a single model in November, 2000. How they will ever agree on a single republican model in the future I cannot imagine.

Despite the overwhelming rejection of the republic at the referendum, and their own loss of credibility in the process, the media will not give up, and snide, even dishonest, references to the so-called inevitable republic still creep into news items. For example, only this week, in an ABC television news item about separate functions held in Sydney by Australians for Constitutional Monarchy and the Australian Republican Movement to mark the anniversary of the referendum, the voice-over commentary by the ABC news reader told viewers that the republic would continue to be an issue "because most Australians still wanted independence". Who said anything about ABC bias?

If there should still be an unanswered question it is this: why was the nation put through this pointless, fruitless, draining and expensive exercise? One Queensland anthropologist, Ron Brunton, writing in *The Courier Mail* this time last year, provided one answer when he wrote:

> "The republican push did not derive from a groundswell of popular sentiment. It was imposed from above, motivated at least in part by some rather shabby political considerations".[29]

We had been told that we lacked a national identity and that the republic would give us one. Old anti-British sectarian hatreds had been stirred up, and "loyalty" became a word of opprobrium. Eight superannuated diplomats had warned us about what the neighbours might think if we failed to embrace the republic. Expatriate Australians, some of whom haven't lived here for decades, also longed for a new national identity, no doubt so they could desert that one too.

But in the end most of us were not persuaded. Again to quote Brunton:

> "Unlike the élites, [most Australians] feel comfortable about their national identity. Their justifiable pride in being citizens of a decent and highly successful nation has not been compromised by Australia's status as a constitutional monarchy. After all, it wasn't

'Australia's heart' that was broken last Saturday night, but the hearts of Malcolm Turnbull and his mates. Given their role in our national life, it is not a good sign that our élites are so lacking in confidence. But it is hardly surprising. Many prominent people in politics, academia and the arts have achieved their positions through patronage networks which provide protection and advancement in exchange for loyalty and conformity. Such an environment encourages self-doubt, because people cannot be sure whether their success is a result of their own talents, or a consequence of their connections. ... Until they feel good about themselves, they will never feel comfortable and relaxed about Australia".

It was these same insecure élites who had warned us that, come the Olympic Games, we would be the laughing stock of the world if we hadn't changed our flag and our Constitution. Well, the world came to our "best ever" Olympic and Paralympic Games but they didn't laugh: they marvelled, they applauded and they congratulated. And when all the Games were over and our guests had departed, SOCOG's chief executive, Sandy Hollway, summed it all up when he said that the Australian people had shown the world "that we are a decent and cohesive society, that we are a fundamentally international society, and that we are unapologetic about our Australian culture".[30]

Perhaps republicans, and particularly republican journalists, should look back at what *The Canberra Times* journalist, Frank Cassidy, a republican delegate to the 1998 Constitutional Convention and A.C.T. Convenor for the Australian Republican Movement, wrote in the aftermath of the referendum.[31] In a lengthy opinion piece dated 1 January, 2000, Cassidy wrote of:

"....the still-warm body of last November's republic referendum, whose prolonged death throes still stir[s] up optimism for a rosy republican future, despite the unequivocal decision of the popular umpire. Wound-licking acolytes of the republic are soothing their grief with the belief that the narrow referendum loss was but a stumble on the inevitable road to success; that another round of debate and decision was on the radar and next time the same mistakes won't be made. But a quick glance at where we really are in time and space and a view towards the threats and promises on the horizon conspire, I believe, to throw cold water on republican optimism".

And Cassidy concluded:

"It's my reluctant view that in 100 years' time Australia will still not be a republic. We've had our chance. We missed it".

If Cassidy is right, and I hope he is, then my post-mortem is over and the republic is indeed dead: no pulse, no blood pressure, and with its brains in a jar on Kerry Jones's desk.

Endnotes:

1. Sir Paul Hasluck, 1969. Quoted in Mary Ryllis Clarke, *In Trust: The First Forty Years of the National Trust in Victoria, 1956-1996,* National Trust of Australia (Victoria), Melbourne, 1996, p. 28. Sir Paul Hasluck, then Governor-General, was speaking of historic buildings, but his observations could be said to be just as relevant to the Constitution.

2. Second Reading Speech, House of Representatives *Hansard,* 10 June, 1999, pp. 6656-6663.

3. Senate *Hansard*, 26 May, 1999, pp. 5931-2; and House of Representatives *Hansard*, 31 May, 1999, pp 5567-71.

4. Senate *Hansard,* 9 August, 1999, pp. 7033-40; and House of Representatives *Hansard,* 9

August, 1999, pp. 8061-8071.

5. Joint Select Committee on the Republic Referendum, *Advisory Report on Constitution Alteration (Establishment of Republic) Bill 1999 and Presidential Nominations Committee Bill 1999,* The Parliament of the Commonwealth of Australia, Canberra, August, 1999, p. vii.

6. House of Representatives *Hansard,* 9 August, 1999, p. 8159.

7. The documentation was based on material which was presented in a paper to the March, 1997 conference of The Samuel Griffith Society: see Sir David Smith, *The Role of the Governor-General*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 167-187.

8. Michael Millett, *Republican change fails test run – Hybrid adopted by convention would have been snubbed by voters, poll finds*, in *The Sydney Morning Herald*, 16 February, 1998.

9. John Stone, *The republic facing defeat in all six states*, in *The Adelaide Review,* August, 1999.

10. Peter Walsh, *1975 revisited*, in *The Adelaide Review,* November, 1999.

11. Richard Miles, *Matters of the heart and the heart of the matter: The constitutional referendum in Australian politics*, in *Alternative Law Journal*, Vol. 25, No. 2, April, 2000, p. 57.

12. Tony Abbott, *Annoy the media - vote "No"*, in *The Adelaide Review,* November, 1999.

13. Tony Abbott, *Biased press blots its copy*, in *The Weekend Australian,* 13-14 November, 1999.

14. Quoted by Matt Price, *No marks for campaign, says editor*, in *The Weekend Australian*, 13-14 November, 1999.

15. W.F. Deedes, *The people of Australia send Blair's Britain a useful message*, in *The Daily Telegraph* (London), 8 November, 1999.

16. Kerry Jones, *The People's Protest,* ACM Publishing, Sydney, 2000, pp. 184-5.

17. *A vote of confidence*, in *The Daily Telegraph* (Sydney), 8 November, 1999.

18. *Referendum reflects a split society*, in *The Australian,* 8 November, 1999.

19. *A failure of leadership*, in *The Sydney Morning Herald,* 8 November, 1999.

20. *The republic vision will endure*, in *The Age*, 8 November, 1999.

21. See, for example, Michelle Grattan, *Wiser heads will rule those broken hearts*, in *The Sydney Morning Herald,* 8 November, 1999; Mike Seccombe, *Beazley: we will deliver a republic*, in *The Sydney Morning Herald,* 8 November, 1999; Louise Dodson, *The referendum is over, but long live the republic*, in *The Australian Financial Review,* 8 November, 1999; Paul Kelly, *New class divide rooted in distrust*, in *The Australian*, 8 November, 1999; Mike

Steketee, *One Queen, two nations*, in *The Australian*, 8 November, 1999; Brendan Nicholson, *Beazley outlines plan for new vote*, in *The Age*, 8 November, 1999.

22. Christopher Pearson, *Plenty of red faces in this royal blue*, in *The Australian Financial Review,* 8 November, 1999.

23. Tony Parkinson, *Australia after the referendum*, in *The Age*, 13 November, 1999.

24. *Voting NO to the Baby Boomers*, in *Quadrant,* December, 1999, pp. 2-4.

25. Mark Steyn, *Australia picks a people's Queen over a politicians' President*, in *National Post* (Canada), 11 November, 1999.

26. *Republic: where will it go from her*e?, in *News Weekly*, 20 November, 1999; also Louise Dodson, '*Election' campaign needed for republic*, in *The Australian Financial Review*, 12 November, 1999.

27. Mike Steketee, *Beazley: Republic in ten years*, in *The Weekend Australian*, 7-8 October, 2000; also *Public has key role in Beazley plan for republic*, in *The Canberra Sunday Times*, 8 October, 2000.

28. Steketee, *ibid*.

29. Ron Brunton, *Insecure élites*, in *The Courier Mail*, 13 November, 1999.

30. Matthew Moore, *A heavy blow to the cultural cringe*, in *The Sydney Morning Herald*, 31 October, 2000.

31. Frank Cassidy, *Reigning on parade*, in *The Canberra Times*, 1 January, 2000.

Chapter Eight:
The Whitlam Years: A Retrospect

Peter Ryan, MM

When John Stone asked me to undertake this task this evening, he told me that The Samuel Griffith Society's decision to hold its twelfth Conference this weekend was taken without it then occurring to the Board that today, 11 November, 2000 is the 25th anniversary of the decision by the then Governor-General, the late Sir John Kerr, to "do his duty" – a duty forced upon him by the then Prime Minister, Gough Whitlam. The significance of this date having subsequently been brought to its attention, the Conference Convenor then looked around for someone with sufficient temerity to undertake this retrospective and, for reasons best known to himself, picked on me.

The interests of this Society are of course chiefly to do with our Australian Constitution, and there is no doubting the relevance of Mr Whitlam's career to constitutional issues in this country, great and small. I shall have a little more to say on that aspect later in my remarks, but since my chief exposure to "the Whitlam venture" (as the late Alan Reid entitled his rattling good book on that topic in 1976) lay in other than constitutional fields, I have thought it best to speak about matters which I know, or think I know, something about, rather than – as seems to be more and more the fashion these days – to purport to pontificate at large.

In his latest book, Donald Horne can't resist a catty quip about the prime ministership of his old mate, Gough Whitlam: "to put it gently, he was distracted by office". Not quite up to Barry Humphries, perhaps, but a shrewd thrust, at which Gough might well murmur, in echo of George Canning: "save, oh save me, from the candid friend".

Prodigious reader and of remarkable memory, Whitlam would certainly recall that Canning was briefly prime minister of England early in the 19th Century. Has Gough, I wonder, ever compared himself to Canning: wide-ranging, learned, witty, ferociously articulate, prone to odd and injudicious outbursts of temperament. Canning, with a want of judgment astonishing in a man so experienced, took to pistols in a duel with Castlereagh. More absurdly, Whitlam lost control and hurled a glass of water into Paul Hasluck's face, across the parliamentary table.

Not indeed the history, but the *flavour* of the Whitlam government, its Proustian essence, so to speak, lingers in two trifling yet enduring recollections I have of Gordon Bryant, old Labor stalwart and member of Gough's Cabinet. Strolling between old Parliament House and East Block one sunny day in 1987, Bryant said to me, more or less out of the blue: "It was a tragedy, the way we took fright over the economy. Gough had explained to us that modern society had solved all problems of wealth creation".

At that time, I served on a small committee of which Gordon Bryant (though no longer in Parliament) was vice-chairman. It met in Parliament House, and our work was usually over by 11 a.m. Then Gordon's genial voice would be heard: "Let me take you all to scones-and-jam-and-cream in the parliamentary dining room", and the seven or eight of us would follow him gratefully downstairs for refreshment. Gordon always signed the chit.

"It's generous of Gordon, to shout us as he does", I said one day to a member of the committee. This man had lived long in Canberra, and looked at me hard. "Next time", he said, "you watch more carefully. Gordon slips the bill straight across to the Parliamentary Librarian, who has to pay it out of the Library budget".

There you have, like specimens on a microscope slide, two diagnostic samples of the Whitlam government. The first: "Money grows on trees – oh well, somewhere then. Don't be pedantic". The second: "I get a lovely feeling when I do people a favour; it doesn't really matter

who pays".

I am not embarrassed to say that I voted enthusiastically for Whitlam at his successful election in 1972. Anyone who remembers Doctor Evatt and Arthur Calwell must concede Whitlam's achievement in refashioning the ALP from an unelectable squalid rabble. And across the floor compared to Gorton and McMahon, Gough looked good.

I liked him. In conversation, he had a ready grip of many subjects then of great interest to me: as a publisher, certain vexing problems of copyright law; as a writer, public lending right, in justice to authors who lost remuneration when their books were borrowed from libraries; as an ex-serviceman myself, it counted that Gough had actually flown as an RAAF navigator against the Japanese. (Though I often marvelled how he managed to telescope that tall frame down sufficiently to fit it into the aircraft.)

A vast reader, he was perhaps not exactly a scholar, but (like Menzies) he knew what scholarship was. I can imagine no other Australian political leader who would sponsor – as Whitlam did – the scholarly publication in four grand volumes of the full Minutes of his party Caucus, and of the ALP Federal Executive, back virtually to the start of Federation. (In preparing tonight's paper, I took those volumes down from the shelf, and felt an ancient pleasure re-reading Gough's warm personal inscription on the title page of my own copy.)

How did a man of such qualities – restorer of the Labor Party, embodiment of the hopes of so many ordinary Australians of broad sympathies and general good will – come to preside over a government whose short span of office was yet long enough to debauch the standards of Australian public life, to degrade the tone of high office, and to chip the foundations of our Constitution?

Hard questions. Before grappling with them, we should note in passing one necessary pre-condition for such sad consequences: Whitlam gained power just as members of the post-World War II generation attained what might (in charity) be called their maturity.

They were raised in a peacetime which their parents had secured with blood and privation; they took eternal prosperity as much for granted as their right to breathe. Whitlam flattered them with the gift of the vote at age eighteen. Between this laid-back "me, now" generation and Gough there was a neat fit. He made sure of that.

Misgivings stirred from the moment Whitlam grasped the Canberra reins. With the electoral count still incomplete in some seats, Gough and his deputy Lance Barnard hurled themselves into a short-lived two-man Labor government, sharing every ministerial portfolio between the pair of them. This was not illegal, but it foreshadowed a style. That style was frenzy, an atmosphere in which the "mandate for change" had to be seen as being pushed relentlessly ahead. Shades of Mao Tse Tung! In its first full year of office, the Whitlam government introduced into Parliament an unprecedented number of over 250 Bills.

The "mandate" was not to be allowed to have its progress impeded by any delicacies of traditional procedure or administrative propriety. High officials of long service to their country would be summoned like footmen to the presence of an imperious Prime Minister, and be given orders. The late Sir Frederick Wheeler, holder of the statutory office of Secretary to the Treasury, was once, he told me, so summoned and instructed to take an action which he declined, as being improper. Whitlam insisted that he proceed; Wheeler said that he would invoke the constitutional standing of his office, and demand an inquiry.

Under such acrimony, smoothly functioning government cannot long continue, nor did it. Ministerial "advisers" (aka toadies) proliferated at the expense of career public servants, who by long tradition had been dedicated to the provision of informed and impartial advice to governments of whatever stripe. Far from faultless though it was, that level of discreet "official government" kept the wheels oiled and the nuts and bolts tight for constitutional decency as well as democracy. During a change of government – during a crisis – that "official government" offered competence, calm and continuity – qualities of especial virtue in a federation. Under

Whitlam, it began to disappear – a legacy he left us which federal Australia did not need. Sir Paul Hasluck regarded Whitlam's demotion of the public service to a mere ministerial adjunct as one of the most baleful developments to threaten a hitherto successful three-quarter century of federation.

Australia's Constitution rests on the foundation of a federation of sovereign states. Whitlam's 1972 campaign manifesto disclosed no intention to overturn it, and he would not have been elected if it had. But the unstated, underlying cast of his mind soon emerged.

Petty, perhaps, but revealing, the envelopes of official mail from Canberra ceased to bear the name of the States in the address – merely the postcode.

Departments, entities and appointments which for decades had borne the title "Commonwealth ..." were re-named "Australian ..", with the none-too-subtle inference that anything else was *non*-Australian (and very likely *un*-Australian into the bargain).

Payment of Commonwealth financial grants directly to local government – straight from Canberra to cities and to shires – was an attempt at subversion of State powers. It would have undermined the ability of the States to carry out functions which were their constitutional responsibility, and might have reduced much of our everyday life to chaos. Municipal government is notoriously prone to corruption and inefficiency, yet even a pretence at proper Commonwealth accountability and audit would have added a whole new province to Canberra's empire of bureaucracy.

To these particular instances one might add, by way of example, four other instances where the Whitlam government consciously, and one would have to say deliberately, set out to subvert the "federal compact" between the Commonwealth and the States.

First, there was legislation providing two Senators for each of the Australian Capital Territory and the Northern Territory, despite the fact that, clearly, neither of those entities was a State. In 1975 this legislation was upheld by the High Court 4-3, on what might be seen as the deciding vote of Mr Justice Murphy, as that unworthy man had by then become (on which, see below).

In the same vein there was legislation providing for Members of the House of Representatives for the A.C.T. and the Northern Territory to be allocated on the same basis, and having the same voting powers, as Members representing State constituencies.

Then there were the various "regional centres", designed to provide alternative centres of authority to the States, set up by Tom Uren and his Department of Urban and Regional Development of blessed memory – Albury-Wodonga, Bathurst-Orange, and most ludicrous of all, Monarto. All of them – and particularly Monarto – sank without trace, but their failure does not affect the judgment as to their constitutionally mischievous intent.

On a much larger scale, there was the 1974 referendum seeking power for the Commonwealth to make laws governing prices and wages. As usual the people, once given a say in the matter, firmly rejected any thought of providing additional powers on either count to Canberra.

Above all, of course, was Whitlam's final effort to govern without parliamentary authority to spend, including his serious proposal, seriously pursued, to raise money from the banks by having the Executive government issue promissory notes. This latter proposal, so strangely reminiscent of the issuance of *assignats* by the French Revolutionaries on whom, at this stage, Whitlam appeared to be modelling himself, was all the stranger since, even had the banks agreed to provide funds in that manner, the Government would still have possessed *no authority to spend* the funds so provided. A man so steeped in Parliament, yet apparently unaware that that is what an Appropriations Bill is – an *authority to spend*; and that, so long as the Parliament refuses that authority, access to any amount of mere money makes no legal difference whatsoever. By that time, it almost seems, mere legality no longer mattered.

The fact is that constitutional and administrative sin under Whitlam spreads before us a

pasture so broad that we might graze there all night. Wiser, perhaps, if we concentrate on a single corner of the paddock, and see whether illumination comes from Whitlam's style of making appointments to the public service and to other official posts. When vacancies were to be filled, a quite new emphasis had by 1975 settled on party loyalty and ideological soundness as necessary criteria for appointment. To head the newly-created Department of the Media, Jim Spigelman stepped straight out of Gough Whitlam's own office; Peter Wilenski, who had never even served as a Second Division officer, was made Secretary of the Department of Labor and Immigration. But what of the character of Whitlam's appointments to the very highest offices? Of Senator Vince Gair as Ambassador to Ireland; of Senator Lionel Murphy to the High Court; of New South Wales Chief Justice Sir John Kerr to be Governor-General?

All became disastrous public embarrassments, each in his own distinctive way, yet all sharing one unhappy characteristic: none had been appointments straightforwardly made in the first place. The only defensible approach to filling a vacancy in high public office is to seek the person whose worth and qualities fit them best to do the job well: as simple as that. In the cases we are considering, the selection was skewed by ulterior motives, and deeply tainted by the low ends of politics; all were made by an administration characteristically prepared to abandon the decencies of means in its partisan pursuit of ends.

Vince Gair was a coarse and corrupt political bruiser. He was given an assisted passage out of the Queensland Labor Party, and then came to exercise his talent for exploitation on the Democratic Labor Party, many of whose more senior and serious members fervently wished him somewhere else. This was the Senator who, emerging piously from a parliamentary committee on pornography, produced from his pocket with a chuckle a sheaf of especially steamy postcards, and passed them around in the corridor for general delectation.

Whitlam made this man Australia's Ambassador to Ireland, and the Irish government was not amused. It had, after all, paid Australia the compliment of sending us such diplomatic scholars of distinction as Dr Eoin MacWhite; a grub like Gair was hardly a fair exchange. It was faintly like making Christopher Skase our Ambassador to Spain.

In his consideration of the appointment of Gair, we may reasonably doubt whether the proper dignity of foreign relations so much as crossed Whitlam's mind. All he wanted was Gair out of the way, and his replacement by a more acceptable Senator from Queensland. And even in that manoeuvre he was frustrated by a wilier operator, Queensland Premier Bjelke-Petersen. But Australia, in the world's eyes, appeared ridiculous and cheap. For the Whitlam government, our international reputation was a small thing beside the low requirements of domestic politics.

The Gair embarrassment was short-lived, but with the consequences of Lionel Murphy we still live; the final chapter will not be written until some time after the year 2016, when the Murphy Commission papers emerge from the seal of their extraordinary 30-year embargo by special Act of Parliament. (Prime Minister Hawke wanted them sealed in perpetuity, but the Senate frustrated his design.)

Murphy, a fellow member with Whitlam of the New South Wales bar, was a "reforming" Labor lawyer, and a larrikin. His associations with the dubious side of Sydney life were well known, nor did he abandon them when he went to Canberra. For example, when he held the Customs portfolio, he exercised his ministerial discretion in favour of the notorious Abe Saffron. And when Senator Murphy appeared on the loose in the Parliamentary Library after the dinner adjournment, male staff members kept an unobtrusive eye on the comfort of their female colleagues.

Murphy must receive credit for raising the relevance and performance of the Senate, but his term as Attorney-General is not something Australians should recall with pleasure. There was his extraordinary "raid" on the headquarters of ASIO, a body for which he himself held ministerial responsibility. That (like Gair) was an incident. But we still endure the consequences (and the costs) of his Family Court. This unwise constitutional innovation "stole" a jurisdiction from the States, endorsed new principles not merely of law but of morals, and created pools of irremediable

misery around the continent. And today, to mop up the messes, we are creating yet another judicial tier with the establishment of the Commonwealth Magistracy.

As first law officer of the Crown, Murphy gave his Cabinet colleagues very dubious guidance. With Whitlam resolved to continue in government even without parliamentary supply, his obliging Attorney-General gave a clean bill of health to extraneous finance, including the preposterous "Khemlani loans"; they were quite constitutional, said Murphy, because they were for "temporary purposes". This outrageous advice regarding what were purportedly 20 year borrowings (subsequently called by one of his Cabinet colleagues "a kerbside opinion") was given on Friday, 13 December, 1974. Murphy's reward was not long delayed: fifty-nine days later he was elevated to the High Court.

Here some of Murphy's judgments treat the Court, not as the disinterested guardian of the Australian Constitution, but as an alternative instrument for achieving Labor policy. Then he faced two criminal charges of having, some years earlier, attempted to pervert the course of justice. Acquitted by juries, he was within months engulfed by a parliamentary commission of inquiry into further allegations of a most scandalous kind.

Whitlam must have known that Murphy was not a fit and proper person for high judicial office; known, in fact, that he was a bad man. Did the appointment show that, in Whitlam's heart, he held the Australian Constitution in contempt, a mere inconvenience to be subverted the moment it impeded his imperial will?

Or was Donald Horne right, that Whitlam was "distracted by office"; too whirled about by the daily cyclones of national politics to take calm thought and counsel about an appointment to our highest Court? Alas, it may be so. When someone remonstrated that Murphy's elevation had lowered the tone of the Court, a jesting Whitlam is said to have replied: "True, comrade, true; but look how I have raised the tone of Cabinet".

Very funny, no doubt, as Whitlam could often be. But a comedian's hands are not always the best ones to meddle with the delicate organs of our federal Constitution.

First, an appalling Ambassador; second, a disastrous judge; a catastrophic Governor-General may seem to make three of a kind. But in fact Sir John Kerr is something quite different. Here was a man of true intellectual parts, experienced and able in the conduct of great affairs. When barely out of his twenties, he was an army Colonel, and accompanied the commander-in-chief, General Blamey, on an important mission to the War Office in London. He had the capacity and experience to handle the Australian Governor-Generalship, when Whitlam appointed him to it in July, 1974. The problem was his personality or, more precisely, the personalities of Kerr and Whitlam, brought into explosive apposition.

For the last two years of World War II, I served with Kerr in the Australian Army's Directorate of Research and Civil Affairs, and remained sporadically in touch with him until his death. While never doubting his capacities, and his power to charm when he wanted to, I judged him to be envious, devious and compulsively ambitious; he could also be an embarrassingly ugly drunk.

Many who knew him well recoiled from the news of his vice-regal appointment. On the very day it was announced I bumped – literally bumped – into my old friend Tom Fitzgerald of *Nation* fortnightly and *The Sydney Morning Herald*. At the instant of collision, without even an exchange of greetings, we both blurted out the identical words, almost as if we had rehearsed: "Gough's gone mad! Kerr will destroy him!"

Whitlam's judgment had been sound when he offered re-appointment to the incumbent Governor-General, Sir Paul Hasluck, and it was Australia's misfortune that Sir Paul, for personal reasons, could not accept. The explosion of November, 1975 was not inscribed prospectively in our history, as if in some Greek tragedy. There are cogent reasons to believe that a Governor-General steering a different course might have averted it. Hasluck himself thought so.

Perhaps Kerr drove a hard bargain; perhaps Whitlam was desperately keen to see his second

choice in residence in Yarralumla; perhaps both propositions are true. In any case, the salary, pension and perks of the Governor-General rose sharply on Kerr's appointment. Perhaps Whitlam believed that his new Head of State had been installed in an office so congenial to him (and to his wife), and on terms so attractive, that he would be for ever complaisant towards his benefactor. Hah! How very ill he understood his man!

Kerr and Whitlam both wrote books about 1975; so did Sir Garfield Barwick, Chief Justice of the day; so did others, including at least one learned member of The Samuel Griffith Society. To that great mixed body of scholarship and advocacy I can add two tiny points of what may perhaps be light.

The first one: as storm clouds presaging 11 November began to loom, and Whitlam grasped that the man in Yarralumla retained a powerful mind of his own, Gough began to refer to him as "my creature". "Kerr can do no other than as I advise him", he said. "He is my creature". As always happens, some "damned good-natured friend" was at hand to report the slight to Kerr.

The second one: years later, in reminiscent chat, Kerr returned to the fateful day. I report his exact words: "I was sitting that morning for Clifton Pugh, who was painting my portrait. The door opened a little and Dave [Sir David Smith, Official Secretary] motioned to me to come back to my study. The execution warrant was ready for me to sign for that feller Whitlam".

A chief reason for having a Constitution, and for insisting that it be maintained, is to protect us all from monstrous egos which have got off their chains.

Chapter Nine:
The Referendum Debate: A Note on Press Coverage

Dr Nancy Stone

The "quality" press played a large part in the debate preceding the republic referendum of 6 November, 1999. The Victorian group promoting the "No Republic" case asked me to examine every copy of *The Age* (and *The Sunday Age*) and *The Australian* during the 12-13 weeks to voting day, to enable some assessment of the manner in which those newspapers handled this important public debate. For this purpose, the numbers of column-centimetres of print (excluding head-lines) devoted to each side of the topic were carefully recorded.

The material was sub-divided into news/comment, editorials and opinion pieces, and the number of letters (full and brief) published, classifying each as pro - or anti-republic or neutral in tone. The results are given in the accompanying tables and bar-charts.

The way in which the material was classified into "Yes", "No" and "Neutral" is central to the outcome: one reader's bias is another's fair reporting. Editorials, opinion pieces and letters of course generally speak for themselves. It is the classification of news/comment which is bound to be most contentious. Accordingly examples are given, to invite evaluation of the accuracy of my assessment. (News and comment, formerly kept scrupulously separate, are now routinely merged by many journalists, hence their combination for present purposes).

News/comment took many forms:

- Simple reporting of facts, such as Brendan Nicholson's *Now or never: Costello* (*The Age*, 1/11, p.1) or Mike Steketee's *Poll unlocks the yes vote* (*The Australian*, 25/10, p.1). Both were classified as neutral.
- Articles slanted to the "Yes" or "No" case. Scott Emerson's *Two eras – one way forward* (*The Australian*, 6-7/11, p.9), which featured youthful Juliet Mitchell and centenarian Ted Smout, was clearly in the "Yes" category. *Whitlam pillories PM's fear* by Steve Connolly and Lyall Johnson (*The Age*, 28/10, p.4) was another such. By contrast, and despite its headline, Dennis Shanahan's *PM's case falls short on symbols* (*The Australian*, 27/10, p.6) presented the "No" case favourably.
- Articles of strongly "Yes" or "No" persuasion, yet with a segment devoted to the reverse or to a neutral stance. An example was *PM warned to stay out of debate* (Brendan Nicholson, *The Age*, 2/11, p.6), in which 25cm tended to the "Yes" side and 2cm to "No". Ben Holgate's *Cultural Spirits rally for republic* (*The Australian*, 5/11, p.19) had 41cm devoted to the "Yes" side, 4cm to "No" and 5cm were "Neutral". With all such "divided" articles, the appropriate lengths in centimetres were allocated to the tallies of "Yes", "No" and "Neutral".
- Opinion pieces masquerading as news/comment. A good example with a "Yes" bias was Paul Kelly's *Costello offers alternative vision for conservatives* (*The Australian*, 28/10, p.1).
- News/comment in the form of a puff from celebrities for the "Yes" vote. One of the most notable was *It's time but a republic wasn't meant to be easy* (Michael Gordon, *The Age*, 5/11, p.1), with a photograph of previous Prime Ministers Fraser and Whitlam triumphantly hand in hand with Premier Bracks. *Dad reigned at Winton's royal parade* (Matt Price, *The Australian*, 28/10, p.7) was another example.

Journalists notable for impartial reporting were Nicolas Rothwell (*The Australian*) and Tony Wright (*The Age*). By contrast, Graeme Leech, who edited most Melba columns in *The Australian*

during the period under review, would have to qualify as having presented the most consistently one-sided viewpoint.

During the three months prior to the vote two other major events occurred: East Timor's referendum and the subsequent unrest there, and the long drawn out Victorian State election. These events probably accounted for the dearth or even absence of republic material at certain times, especially in the Opinion sections.

Coming now to the results of this survey, and considering news/comment first, week by week, it may be said that there was not one week when column-centimetres in the "Yes" camp did not exceed those in the "No" camp, usually overwhelmingly.

This was true of both newspapers. Indeed, in only 4 of the 12 weeks did even "Neutral" exceed "Yes" in *The Australian*. In *The Age*, that balance was 7 weeks to 6.

Consider now the results in summary, embodied in the grand totals of column-centimetres for the full 12 or 13 week periods. (These appear for each newspaper in the bottom line of the appropriate table).

For *The Australian*, the sum total of news/comment on the "Yes" side was 4,246cm. The "No" total came to 1,468cm, and "Neutral" amounted to 4,276cm. Thus "Yes" overshadowed "No" by almost 3 to 1.

The pattern for *The Age* for news/comment was even more unequal, with "Yes" totalling 2,531cm, "No" 530cms and "Neutral" 2,835cm. The ratio of allotted space for "Yes" to "No" was close to 5 to 1 (although, as indicated above, the proportion of "Neutral" news/comment in *The Age* was slightly greater than the proportion of "Yes" material, whereas in the case of *The Australian*, "Yes" material actually even exceeded "Neutral").

It is obviously a newspaper's right to express its own view in its editorials, and it is no surprise that every relevant leading article in both papers, without exception, urged readers to vote "Yes".

In the opinion pieces, most readers would hope to see a roughly equal division for and against a proposition as fundamental as changing Australia's Constitution. However, space in both papers was allocated not much less than 2 to 1 in favour of the "Yes" case.

Happily, the spread of views among Letters to the Editor (presumably reflecting roughly the "balance" of letters received on the topic) was much more even, with *The Australian's* ratio 8 to 7 in favour of the "Yes" vote, and *The Age's* 6 to 5 in favour of the "No" vote.

In the event, the referendum was lost convincingly, and in every State as well as the Northern Territory. The advocacy of the "quality" press, as exemplified by *The Age* and *The Australian*, may have convinced inner city voters, but clearly failed to sway the wider population. Could it be that the urgency with which these newspapers (particularly *The Australian*) relentlessly pressed their case rebounded upon them? Or was it perhaps that the uniformity of views expressed simply made some readers suspicious? To paraphrase R W Emerson, "the louder they proclaimed the advantages of the republic, the faster we voters counted the blessings of the present system".

The Australian

Week Ending	News/Comment (i)			Editorials (ii)			Opinion Pieces (iii)			Numbers of Letters (iv)		
	Yes	No	Neutral	Yes	No	Neutral	Yes	No	Neutral	Yes	No	Neutral
22 Aug	120	109	125				198	55	38	4	10	4
29 Aug	91	40	138				56	97		4	5	
5 Sept	206	86	98	6			82	45		6		2
12 Sept	60	3	49			18				3	1	
19 Sept	156	18	125			16		49	41	2	7	1
26 Sept	131	46	84	18			162			7	3	
3 Oct	45	53	101	26		16	186	106	40	4	5	4
* 10 Oct	260	209	531	46			46	31	40	12	15	
17 Oct	758	260	551				185			10	10	1
24 Oct	663	163	384	24			179	67	56	13	9	1
31 Oct	1072	259	972	46			170	296	59	21	17	3
6 Nov	684	222	1118	140			603	285	25	71	54	3
Total of 12 weeks	4246	1468	4276	306		50	1867	1031	299	157	136	19

The Australian: referendum coverage, in column-centimetres (sections i, ii, iii) and numbers of letters (section iv). Articles read, 522.

* The 19 page booklet, *Royalty or republic: your guide to the referendum* was not surveyed.

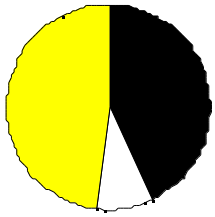
The Age

Week Ending	News/Comment (i)			Editorials (ii)			Opinion Pieces (iii)			Numbers of Letters (iv)		
	Yes	No	Neutral	Yes	No	Neutral	Yes	No	Neutral	Yes	No	Neutral
15 Aug	246		219	15			56			10	8	5
22 Aug	101	6	155				105			4	7	10
29 Aug	105	16	82	15			45	49		3	6	1
5 Sept	63	19	117	15			89	48		1	1	
12 Sept	77	17	75	15					41	1	1	1
19 Sept	52	13	32									
26 Sept	65	11	83			15	167	91				
3 Oct	129	33	189	26						1	1	2
10 Oct	126	121	291	16				49		2	7	
17 Oct	86	43	336				274	237		12	15	4
24 Oct	253	42	127	16			258	144		1	2	3
31 Oct	620	138	678	86			304	268	58	24	29	
6 Nov	608	71	451	16			500	208	156	41	40	6
Total of 13 weeks	2531	530	2835	220		15	1798	1094	255	100	117	32

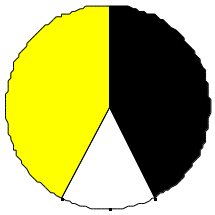
The Age: referendum coverage, in column-centimetres (sections i, ii, iii) and numbers of letters (section iv). Articles read, 331.

Totals Over 13 Week Period
Prior to Referendum

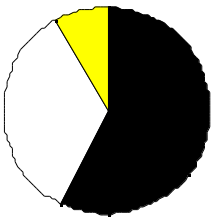
The Age **: News/Comment Totals**



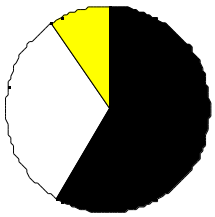
The Australian **: News/Comment Totals**



The Age **: Opinion Piece Totals**



The Australian **: Opinion Piece Totals**



Chapter Ten:
The Inner Metropolitan Republic

Malcolm Mackerras

Perhaps it may be best to start with these overall voting statistics of the republic referendum. First, there were 12,392,040 electors enrolled to vote and the turnout was 95.1 per cent. Second, the total formal vote was 11,683,811 and the informal vote was 101,189. That meant the total votes cast were 11,785,000. Third, there were 42 seats voting 'Yes' (25 Labor and 17 Liberal) and 106 voting 'No'. In other words, majorities in 72 per cent of the seats said 'No'. Fourth, electoral divisions voting 'No' covered 7,686,103 sq km and those voting 'Yes' 6,259 sq km. Expressed in another way, seats voting 'No' covered 99.9 per cent of the area of Australia and seats voting 'Yes' covered 0.1 of one per cent of that area.

As is clear from the above, I say that electorates voting 'Yes' were exclusively from Australia's inner metropolitan areas. That is why I am calling this paper *The Inner Metropolitan Republic.* It needs to be admitted, however, that the Australian Electoral Commission does not define all those 42 divisions as 'Inner Metropolitan'. Rather, it defines 27 as being such, while 13 (Aston, Berowra, Boothby, Bruce, Calwell, Deakin, Fowler, Hotham, Jagajaga, Maribyrnong, Menzies, Ryan and Scullin) are defined as 'Outer Metropolitan'. Two seats, Cunningham and Newcastle, are defined as 'Provincial'. For more information see Table 4, below.

In the cases of Cunningham and Newcastle the AEC description as 'Provincial' is very difficult to defend. I would have thought the description 'Inner Metropolitan Wollongong and Newcastle' would be appropriate. It is a striking fact that Cunningham and Newcastle voted 'Yes' while all the outer metropolitan Newcastle and Wollongong divisions (Charlton, Dobell, Hughes, Robertson, Shortland and Throsby) voted 'No'.

In the cases of the 13 AEC 'Outer Metropolitan' seats which voted 'Yes', I can see how Ryan in Brisbane (238 sq km), Berowra in Sydney (463 sq km) and Calwell in Melbourne (234 sq km) might merit that description. However, the AEC describes both ACT electorates as 'Inner Metropolitan'. Canberra has an area of 1,900 sq km and Fraser has an area of 535 sq km. For that reason my picture of the 42 seats voting 'Yes' is that every one of them may sensibly be regarded as inner metropolitan. No wonder they combine to cover only 0.1 of one per cent of Australia's land mass!

Altogether 14 seats classified as 'Inner Metropolitan' by the AEC voted 'No'. They were Banks, Blaxland (Paul Keating's old seat), Cook, Fremantle (Carmen Lawrence!), Hindmarsh, Lilley, Moreton, Parramatta, Perth, Port Adelaide (Mick Young's old seat), Reid, Stirling, Swan and Tangney. Still, while monarchists may rejoice at the result in a seat like Blaxland, it has to be admitted that the Queen was, as they would say, 'done like a dinner' throughout inner metropolitan Australia – and in every State.

Meanwhile the republic was massively rejected everywhere else.

The above observations may sound rather partisan. Tables 1 and 2 record the situation in formal terms.

Table 1: Formal Votes and Percentages for Republic Referendum

State/Territory	'Yes'		'No'		Total Formal
	Votes	%	Votes	%	
New South Wales	1,817,380	46.4	2,096,562	53.6	3,913,942
Victoria	1,489,536	49.8	1,499,138	50.2	2,988,674
Queensland	784,060	37.4	1,309,992	62.6	2,094,052
Western Australia	458,306	41.5	646,520	58.5	1,104,826
South Australia	425,869	43.6	551,575	56.4	977,444
Tasmania	126,271	40.4	186,513	59.6	312,784
Australian Capital Territory	127,211	63.3	73,850	36.7	201,061
Northern Territory	44,391	48.8	46,637	51.2	91,028
Australia	5,273,024	45.1	6,410,787	54.9	11,683,811

Table 2: Formal Votes and Percentages for Preamble Referendum

State/Territory	'Yes'		'No'		Total Formal
	Votes	%	Votes	%	
New South Wales	1,647,378	42.1	2,261,960	57.9	3,909,338
Victoria	1,268,044	42.5	1,718,331	57.5	2,986,375
Queensland	686,644	32.8	1,405,841	67.2	2,092,485
Western Australia	383,477	34.7	720,542	65.3	1,104,019
South Australia	371,965	38.1	604,245	61.9	976,210
Tasmania	111,415	35.7	200,906	64.3	312,321
Australian Capital Territory	87,629	43.6	113,293	56.4	200,922
Northern Territory	35,011	38.5	55,880	61.5	90,891
Australia	4,591,563	39.3	7,080,998	60.7	11,672,561

Since two questions were put to the people the Preamble result is also recorded here. The fact that the formal vote was some 11,000 less for the Preamble is another way of saying that the Preamble's informal vote was some 11,000 greater than for the republic. It can be seen from Table 3 opposite that its 45.1 per cent affirmative vote gave the republic a rank of 30 out of the 44 referendum questions put since Federation. In other words, there were 14 proposals getting less overall support than the republic which, in any event, was markedly more successful than the Preamble. The dismal defeat of the Preamble was shown by its 39.3 per cent affirmative vote, placing it at number 38 when ranked by national 'Yes' percentages. In not a single electorate (not even in Bennelong) was support for the Preamble greater than for the republic. Now please excuse me for writing no more about it. The less said about the Preamble the better!

If readers should wonder why only *formal* votes and percentages are shown, there is a good reason. It relates to the accepted interpretation of section 128 of the Constitution. The fourth paragraph of that section actually reads:

> "And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent".

When I first read those words (as long ago as 1951) I assumed that the 'Yes' vote must exceed the combination of 'No' and informal votes both nationally and in four States. Otherwise the proposal would be deemed to have failed. Certainly the words create that impression.

Table 3: Referendum Results Ranked by National 'Yes' Percentages

	Subject	Date	Government	% 'Yes'
1	Aboriginals	May 1967	Non-Labor	90.8
2	Senate elections	Dec 1906	Non-Labor	82.7
3	Retirement of judges	May 1977	Non-Labor	80.1
4	Referendums	May 1977	Non-Labor	77.7
5	State debts	Nov 1928	Non-Labor	74.3
6	Senate casual vacancies	May 1977	Non-Labor	73.3
7	Simultaneous elections	May 1977	Non-Labor	62.2
8	State debts	Apr 1910	Non-Labor	54.9
9	Social services	Sep 1946	Labor	54.4
10	Aviation	Mar 1937	Non-Labor	53.6
11	Marketing of primary products	Sep 1946	Labor	50.6
12	Terms of senators	Dec 1984	Labor	50.6
13	Industrial employment	Sep 1946	Labor	50.3
14	Trusts	May 1913	Labor	49.8
15	Legislative powers	Dec 1919	Non-Labor	49.7
16	Trade and commerce	May 1913	Labor	49.4
17	Communism	Sep 1951	Non-Labor	49.4
18	Corporations	May 1913	Labor	49.3
19	Industrial matters	May 1913	Labor	49.3
20	Nationalisation of monopolies	May 1913	Labor	49.3
21	Railway disputes	May 1913	Labor	49.1
22	Finance	Apr 1910	Non-Labor	49.0
23	Nationalisation of monopolies	Dec 1919	Non-Labor	48.6
24	Simultaneous elections	May 1974	Labor	48.3
25	Altering constitution	May 1974	Labor	48.0
26	Democratic elections	May 1974	Labor	47.2
27	Interchange of powers	Dec 1984	Labor	47.1
28	Local government bodies	May 1974	Labor	46.9
29	Reconstruction, democratic rights	Aug 1944	Labor	46.0
30	Republic	Nov 1999	Non-Labor	45.1
31	Prices	Dec 1973	Labor	43.8
32	Industry and commerce	Sep 1926	Non-Labor	43.5
33	Essential services	Sep 1926	Non-Labor	42.8
34	Rents and prices	May 1948	Labor	40.7
35	Parliament	May 1967	Non-Labor	40.3
36	Monopolies	Apr 1911	Labor	39.9
37	Legislative powers	Apr 1911	Labor	39.4
38	Preamble	Nov 1999	Non-Labor	39.3
39	Fair elections	Sep 1988	Labor	37.6
40	Marketing	Mar 1937	Non-Labor	36.3
41	Incomes	Dec 1973	Labor	34.4
42	Local government	Sep 1988	Labor	33.6
43	Parliamentary terms	Sep 1988	Labor	32.9
44	Rights and freedoms	Sep 1988	Labor	30.8

Note: Due to the majority of States requirement, all proposals supported by less than 54 per cent nationally were defeated. However, of the nine highest 'Yes' percentages only eight were carried. The 1977 simultaneous elections proposal was defeated because of 'No' majorities in Queensland, Western Australia and Tasmania.

However, I checked the records and found that in September, 1946 the social services amendment was deemed to have been carried in all six States. Yet in three States it was not true that 'a majority of the electors voting approve the proposed law'. In Queensland the affirmative vote was 299,205, the negative vote 284,465 with 28,500 informals. In South Australia the affirmative vote was 197,395, the negative vote 184,172 with 17,734 informals. In Tasmania the affirmative vote was 67,463, the negative vote 65,924 with 11,493 informals. On an apparent literalist interpretation the social services amendment would never have been carried. It 'failed' in three States.

The explanation is that the relevant part of section 128 has always been *interpreted* as though it reads as follows:

> "And if in a majority of the States a majority of the electors *casting a formal vote* approve the proposed law, and if a majority of all the electors *casting a formal vote* also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent".

Constitutionally speaking, informal votes have exactly the same status as votes not cast at all. Therefore, let me ignore informal votes entirely. However, when I use the expression 'the accepted interpretation of section 128' (see above) it should be noted that at least one man will dissent from me vehemently. Mr Justice Ken Handley (Court of Appeal, Supreme Court of New South Wales) has given me details of a Scottish case in 1921 (*Latham v. Glasgow Corporation*) which he claims settles the argument. The judges wrote:

> "In terms of subsection (3) of section 2 of the Act of 1913, the effect of the poll depends on whether or not certain percentages of the total 'votes recorded' are in favour of a resolution or resolutions to a certain effect. The question which is raised is: What is the meaning of the expression 'votes recorded'?"

In brief, the judges decided the proposal had not been carried because the combination of negative and informal votes was high enough to counter the 'Yes' votes. When our High Court makes a similar finding in some future Australian case I shall change my analytical practices.

The 45.1 per cent affirmative vote means that the republic would have gained an overall national majority with a mere five per cent lift in its support. However, that would not have carried the republic proposal.

There are, in fact, seven different vote values in an Australian referendum. Seen from the pro-republic perspective the unfortunate fact is that, by and large, their support was greatest where vote values were least. By contrast, opposition to the proposal was strongest (again, by and large) in the States with the best vote values. A vote cast in either the Australian Capital Territory or the Northern Territory has the same value as each other. However, such a vote has the least value of all since it is counted nationally but not by State. Of the seven values, therefore, the Territory vote is the least valuable. The second least valuable vote is that cast in New South Wales. At the other extreme of value is the vote cast in Tasmania. If we combine the two votes (ACT plus Northern Territory) we get 58.7 per cent Territory support for the republic. In other words the only affirmative vote among the seven was the one with the least value! On the theory of uniform swing, a national 'Yes' vote of 54 per cent would have seen success for the republic. It would then have carried the four States needed for passage – Victoria, New South Wales, South Australia and Western Australia. That would have left Queensland and Tasmania as the dissenting States.

It is often asked why the Australian Capital Territory was the only jurisdiction to record an affirmative vote. Throughout this paper readers will come to understand that the ACT has every feature which would predict its high republican vote. The three

Table 4: Electoral Divisions by 'Yes' and 'No'and by AEC Description

	'Yes'	'No'	Total
NSW and ACT			
Inner metropolitan	13	5	18
Outer metropolitan	2	9	11
Provincial	2	5	7
Rural	–	16	16
Total	17	35	52
Victoria			
Inner metropolitan	9	–	9
Outer metropolitan	9	6	15
Provincial	–	4	4
Rural	–	9	9
Total	18	19	37
The rest			
Inner metropolitan	5	9	14
Outer metropolitan	2	14	16
Provincial	–	9	9
Rural	–	20	20
Total	7	52	59
Australia			
Inner metropolitan	27	14	41
Outer metropolitan	13	29	42
Provincial	2	18	20
Rural	–	45	45
Total	42	106	148

Table 5: Electoral Divisions by 'Yes' and 'No' by Party

	'Yes'	'No'	Total
Labor	25	42	67
Liberal	17	47	64
National	–	16	16
Independent	–	1	1
Total	42	106	148

main characteristics are those of residence, socio-economic status and party. The republic was always a Labor cause, and the ACT is the most strongly Labor of the eight jurisdictions. The referendum result, however, was one in which the 'Yes' vote was essentially an inner metropolitan phenomenon with a link to high socio-economic status. As the most Labor, most inner metropolitan, jurisdiction, with high indexes of relative socio-economic advantage, the referendum vote in the ACT should cause no surprise.

Before I leave the ACT (for the time being) it is worth noting a point from Table 6 below. The combined votes of the adjoining seats of Sydney and Grayndler give a higher 'Yes' percentage than the combined votes of Canberra and Fraser. The combined votes of adjoining Melbourne and Melbourne Ports give an even higher affirmative percentage. Thus we can say that inner metropolitan Labor seats in Melbourne, Sydney and Canberra provided the heartland of support for the republic.

The point about place of residence is so clear from the aggregate data that recourse to opinion poll findings has not yet been necessary in my analysis. From now on that changes. I rely increasingly on the findings of the opinion polls. I contend that the second best predictor of the vote is by political party.

On the day (6 November, 1999) of the referendum itself *The Weekend Australian* carried the results of the Newspoll taken on 3-4 November. Overall they showed a 'Yes' vote of 47 per

cent, a 'No' vote of 50 per cent and three per cent uncommitted. That was a moderately accurate prediction of the outcome, albeit an under-estimate of the magnitude of the republic's defeat.

Table 6: Electoral Divisions Voting 'Yes'

	Seat	AEC Description	Area (sq km)	% 'Yes'
Labor seats				
1	Melbourne (Vic)	Inner Metropolitan	54	70.9
2	Sydney (NSW)	Inner Metropolitan	63	67.9
3	Melbourne Ports (Vic)	Inner Metropolitan	43	65.9
4	Grayndler (NSW)	Inner Metropolitan	29	64.8
5	Fraser (ACT)	Inner Metropolitan	535	64.5
6	Canberra (ACT)	Inner Metropolitan	1,900	62.1
7	Batman (Vic)	Inner Metropolitan	54	61.2
8	Wills (Vic)	Inner Metropolitan	52	58.7
9	Brisbane (Qld)	Inner Metropolitan	72	57.3
10	Chisholm (Vic)	Inner Metropolitan	60	57.3
11	Gellibrand (Vic)	Inner Metropolitan	75	56.9
12	Jagajaga (Vic)	Outer Metropolitan	84	56.8
13	Maribyrnong (Vic)	Outer Metropolitan	64	56.8
14	Lowe (NSW)	Inner Metropolitan	53	56.6
15	Scullin (Vic)	Outer Metropolitan	104	56.3
16	Kingsford-Smith (NSW)	Inner Metropolitan	90	55.2
17	Bruce (Vic)	Outer Metropolitan	64	54.5
18	Watson (NSW)	Inner Metropolitan	33	54.4
19	Hotham (Vic)	Outer Metropolitan	71	54.2
20	Calwell (Vic)	Outer Metropolitan	234	53.9
21	Cunningham (NSW)	Provincial	356	53.6
22	Denison (Tas)	Inner Metropolitan	222	52.4
23	Fowler (NSW)	Outer Metropolitan	53	51.9
24	Barton (NSW)	Inner Metropolitan	39	51.8
25	Newcastle (NSW)	Provincial	127	51.0
Average 'Yes' in Labor 'Yes' seats				57.9

Liberal seats				
1	Kooyong (Vic)	Inner Metropolitan	49	64.2
2	Higgins (Vic)	Inner Metropolitan	39	63.7
3	North Sydney (NSW)	Inner Metropolitan	42	61.3
4	Wentworth (NSW)	Inner Metropolitan	26	60.2
5	Menzies (Vic)	Outer Metropolitan	116	59.9
6	Goldstein (Vic)	Inner Metropolitan	48	58.0
7	Adelaide (SA)	Inner Metropolitan	66	56.4
8	Bradfield (NSW)	Inner Metropolitan	98	55.6
9	Curtin (WA)	Inner Metropolitan	93	55.5
10	Ryan (Qld)	Outer Metropolitan	238	55.3
11	Bennelong (NSW)	Inner Metropolitan	55	54.6
12	Warringah (NSW)	Inner Metropolitan	61	54.5
13	Sturt (SA)	Inner Metropolitan	65	53.7
14	Deakin (Vic)	Outer Metropolitan	59	52.9

15	Boothby (SA)	Outer Metropolitan	109	51.9
16	Berowra (NSW)	Outer Metropolitan	463	51.7
17	Aston (Vic)	Outer Metropolitan	101	51.6
Average 'Yes' in Liberal 'Yes' seats				56.5

Total Area of 'Yes' Seats: 6,259 sq kms
Total Area of 'No' Seats: 7,686,103 sq kms

However, the truly interesting finding is on page 8 of *The Weekend Australian.* It showed Labor voters as splitting 61-38 in favour of the republic (with one per cent uncommitted), while Coalition voters split 62-35 against (with three per cent uncommitted). When the votes were actually counted the results were fully consistent with such a finding.

A useful exercise is to translate the October, 1998 general election vote into the November, 1999 republic referendum. I estimate that, of those who gave their two-party preferred vote to Labor in 1998, the split in 1999 was 57-43 in favour of the republic. Of those who gave their two-party preferred vote to the Liberals in 1998 the split in 1999 was 65-35 against. Finally, I estimate that 80 per cent of the 1998 National Party vote was cast against the republic in 1999.

In the absence of opinion poll findings the data in Tables 7 and 8 might not be so persuasive. However, when combining the two I think the estimates of the preceding paragraph are highly plausible. The terms 'Safe Labor' and 'Safe Liberal' refer to all those seats above 10 per cent on the Mackerras pendulum. For example, on the Labor side the strongest 'Safe Labor' seat was Batman and the weakest Fremantle. For the Liberal Party the strongest 'safe Liberal' seat was Bradfield and the weakest Indi. (Note: reference to the pendulum is to the one published immediately after the 1998 general election. Thus Bradfield was the strongest Liberal seat. However, boundary changes made recently weaken the Liberal vote in Bradfield. Thus the strongest Liberal seat going into the 2001 general election is the Victorian Division of Murray. By the same process the strongest Labor seat is Fowler, to which further references are made below).

On the night of the referendum John Howard was made to suffer from continual sneering references by broadcasters to 'the Republic of Bennelong'. As Table 6 shows, it was indeed the case that his inner metropolitan Sydney seat of Bennelong was one of the 17 Liberal seats to vote 'Yes'. However, it is clear that the Prime Minister had good reason to be pleased by the results, taken overall. With the exception of 'Safe Labor' seats, all categories turned in an overall negative vote. It is true that 'Safe Liberal' seats, taken as a whole, did not vote as solidly 'No' in 1999 as they had voted Liberal in 1998, as may be seen by comparing Tables 7 and 8. However, taking all the 64 Liberal seats together we find that the Liberal two-party preferred vote in 1998 was 57.2 per cent, while the 'No' vote in those seats in 1999 was 55.3 per cent. I shall return to the case of Bennelong in due course.

Virtually every Labor member of Parliament and office-holder advocated a 'Yes' vote. Consequently it should have been possible for the Labor Party to do better than persuade only 57 per cent of its 1998 supporters to vote affirmatively. That failure is

Table 7: Aggregates of Two-Party Preferred Votes by Types of Seat, 3 October, 1998

Seat Type	Number	Votes Preferring Labor		Votes Preferring Liberal-National	
		Votes	%	Votes	%
Safe Labor	36	1,826,903	67.3	886,584	32.7
Fairly safe and marginal Labor	31	1,257,986	54.2	1,060,895	45.8
Fairly safe and marginal Liberal	48	1,638,680	45.4	1,968,960	54.6
Safe Liberal	16	428,317	35.2	788,028	64.8
Independent	1	34,068	46.8	38,744	53.2
National Party	16	486,850	41.3	693,048	58.7
Total	148	5,672,804	51.1	5,436,259	48.9

Note: These aggregates are 65,223 votes higher than those of the AEC. The reason is that these totals include an estimate for the 65,223 formal votes cast in Newcastle. The AEC totals of 5,630,409 for Labor and Lib-Nat 5,413,431 are those for 147 contests only. The missing seat of Newcastle is caused by the fact that there was no Coalition candidate at the supplementary election on 21 November, 1998. A candidate for the 3 October election died before polling day.

Table 8: Aggregates of Republic Votes by Types of Seat, 6 November, 1999

Seat Type	Number	'Yes'		'No'	
		Votes	%	Votes	%
Safe Labor	36	1,477,580	51.4	1,396,615	48.6
Fairly safe and marginal Labor	31	1,091,302	45.0	1,331,151	55.0
Fairly safe and marginal Liberal	48	1,708,956	44.9	2,099,345	55.1
Safe Liberal	16	563,859	44.1	713,874	55.9
Independent	1	27,938	36.9	47,788	63.1
National Party	16	403,389	32.9	822,014	67.1
Total	148	5,273,024	45.1	6,410,787	54.9

the essential reason why the republic was defeated. It is best illustrated by what happened in the safe Labor seats, as shown in Table 9. The right-hand column in that Table, 'Relative Socio-Economic Advantage Rank', is a concept to which I shall return. The correlation is clear. The greater the socio-economic advantage of the seat the more likely it was to vote 'Yes'.

The drop from the Labor vote of 67.3 per cent in safe Labor seats in 1998 (Table 7) to the 'Yes' vote of 51.4 per cent (Table 8) was very far from uniform. In the inner metropolitan 'Safe Labor' seats of Melbourne, Sydney, Grayndler, Fraser, Canberra and Kingsford-Smith the average drop was only two per cent. At the other extremity were the 15 'Safe Labor' seats set out in Table 10. Comparison of Tables 9 and 10 shows that the single most extreme case was Bonython, which turned in the highest 'No' percentage of all the 36 'Safe Labor' seats, as well as showing the biggest defection from the Labor vote. Bonython is also the most disadvantaged socio-economically.

Table 9: 'Yes' Percentages in Safe Labor Seats

	Seat	AEC Description	% 'Yes'	Relative Socio-economic Advantage Rank
1	Melbourne (Vic)	Inner Metropolitan	70.9	4
2	Sydney (NSW)	Inner Metropolitan	67.9	3
3	Grayndler (NSW)	Inner Metropolitan	64.8	12
4	Fraser (ACT)	Inner Metropolitan	64.5	2
5	Canberra (ACT)	Inner Metropolitan	62.1	1
6	Batman (Vic)	Inner Metropolitan	61.2	22
7	Wills (Vic)	Inner Metropolitan	58.7	17
8	Gellibrand (Vic)	Inner Metropolitan	56.9	27
9	Maribyrnong (Vic)	Outer Metropolitan	56.8	14
10	Scullin (Vic)	Outer Metropolitan	56.3	19
11	Kingsford-Smith (NSW)	Inner Metropolitan	55.2	9
12	Watson (NSW)	Inner Metropolitan	54.4	26
13	Hotham (Vic)	Outer Metropolitan	54.2	10
14	Calwell (Vic)	Outer Metropolitan	53.9	21
15	Cunningham (NSW)	Provincial	53.6	7
16	Denison (Tas)	Inner Metropolitan	52.4	6
17	Fowler (NSW)	Outer Metropolitan	51.9	35
18	Newcastle (NSW)	Provincial	51.0	11
19	Prospect (NSW)	Outer Metropolitan	49.8	25
20	Reid (NSW)	Inner Metropolitan	49.0	33
21	Blaxland (NSW)	Inner Metropolitan	49.0	32
22	Lalor (Vic)	Outer Metropolitan	48.7	23
23	Holt (Vic)	Outer Metropolitan	48.7	28
24	Fremantle (WA)	Inner Metropolitan	48.3	5
25	Port Adelaide (SA)	Inner Metropolitan	47.5	30
26	Perth (WA)	Inner Metropolitan	47.4	8
27	Throsby (NSW)	Provincial	46.9	29
28	Shortland (NSW)	Provincial	45.4	18
29	Corio (Vic)	Provincial	44.5	24
30	Charlton (NSW)	Provincial	43.7	13
31	Chifley (NSW)	Outer Metropolitan	42.2	34
32	Werriwa (NSW)	Outer Metropolitan	41.8	31
33	Hunter (NSW)	Rural	36.8	20
34	Brand (WA)	Provincial	33.7	16
35	Lyons (Tas)	Rural	33.5	15
36	Bonython (SA)	Outer Metropolitan	33.3	36

Table 10: Rank Order of Loss of 'Yes' Vote

	Seat	AEC Description	'Yes'/'No' Majority	Loss (a)
1	Bonython (SA)	Outer Metropolitan	No	31.2
2	Chifley (NSW)	Outer Metropolitan	No	28.7
3	Brand (WA)	Provincial	No	28.6
4	Hunter (NSW)	Rural	No	27.9
5	Lyons (Tas)	Rural	No	27.1
6	Throsby (NSW)	Provincial	No	25.6
7	Fowler (NSW)	Outer Metropolitan	Yes	24.4
8	Blaxland (NSW)	Inner Metropolitan	No	23.1
9	Reid (NSW)	Inner Metropolitan	No	22.6
10	Lalor (Vic)	Outer Metropolitan	No	21.1
11	Werriwa (NSW)	Outer Metropolitan	No	20.9
12	Prospect (NSW)	Outer Metropolitan	No	19.9
13	Charlton (NSW)	Provincial	No	19.3
14	Gellibrand (Vic)	Inner Metropolitan	Yes	19.0
15	Port Adelaide (SA)	Inner Metropolitan	No	18.6
Average			No	23.9

(a) The term 'Loss' refers to the reduction from the Labor share of the two-party preferred vote in 1998 to the 'Yes' percentage in 1999. For example, in Gellibrand in 1998 Labor had 75.9 per cent of the two-party preferred vote. The 'Yes' vote in 1999 was 56.9 per cent so the loss was 19 per cent.

Kim Beazley was made to suffer the indignity of losing the referendum as well as having a disastrous defeat in his own seat of Brand (see Table 9). John Howard had to put up with sneers about 'the Republic of Bennelong' as well as watch 17 of the 64 Liberal seats turn in 'Yes' majorities (see Tables 4 and 5). There was, however, one leader who had every reason to smile. John Anderson succeeded in getting every one of his party's seats to vote 'No'. The extent of his success is shown in Table 11B below. In only one National Party seat did the 'No' vote fall below 60 per cent. That was in Richmond (NSW) where the member, Larry Anthony, was a self-proclaimed republican and advocate for a 'Yes' vote.

Before I go on to the National Party seats, permit me an aside. Several monarchist friends of mine watched the referendum-night coverages on television. They claim to have been struck by the republican bias of the commentators. I cannot express any view because I did not see any television that night. One point should, however, be made in defence of the commentators. If it is true that repeated references were made to 'the Republic of Bennelong' and no references were made to 'the Kingdom of Brand', that could be easily explained by the fact that the polls in Brand closed three hours later than in Bennelong.

I said above that 'I estimate that 80 per cent of the 1998 National Party vote was cast against the republic in 1999'. A major

Table 11: John Anderson—Total Success in 'No' Advocacy

A. Two-Party Preferred Votes in National Seats, 3 October, 1998

Seat	Votes Preferring Labor		Votes Preferring National	
	Votes	%	Votes	%
New South Wales				
Cowper	32,002	43.6	41,335	56.4
Farrer	24,493	35.4	44,733	64.6
Gwydir	24,330	36.4	42,480	63.6
Lyne	30,650	40.3	45,451	59.7
New England	25,377	37.1	43,086	62.9
Page	35,724	47.6	39,265	52.4
Parkes	33,617	45.9	39,638	54.1
Richmond	40,013	49.2	41,270	50.8
Riverina	25,801	34.7	48,552	65.3
Victoria				
Gippsland	30,445	41.2	43,506	58.8
Mallee	23,109	30.6	52,328	69.4
Queensland				
Dawson	35,375	45.6	42,228	54.4
Hinkler	35,933	49.7	36,423	50.3
Kennedy	29,341	38.8	46,254	64.4
Wide Bay	33,814	47.1	37,923	52.9
Total National Party seats	486,850	41.3	693,048	58.7

B. Republic Referendum Votes in National Seats, 6 November, 1999

Seat	'Yes'		'No'	
	Votes	%	Votes	%
New South Wales				
Cowper (4.2)	30,100	39.4	46,319	60.6
Farrer (1.5)	24,008	33.9	46,823	66.1
Gwydir (8.6)	19,274	27.8	50,081	72.2
Lyne (1.9)	31,045	38.4	49,785	61.6
New England (4.5)	23,328	32.6	48,203	67.4
Page (8.8)	29,925	38.8	47,213	61.2
Parkes (15.4)	22,592	30.5	51,549	69.5
Richmond (3.1)	39,208	46.1	45,790	53.9
Riverina (1.2)	25,701	33.5	51,017	66.5
Victoria				
Gippsland (6.3)	27,335	34.9	51,092	65.1
Mallee (1.8)	22,395	28.8	55,426	71.2
Queensland				
Dawson (14.6)	25,167	31.0	55,945	69.0
Hinkler (19.1)	22,989	30.6	52,031	69.4
Kennedy (9.0)	23,326	29.8	54,977	70.2
Maronoa (12.8)	17,944	22.8	60,610	77.2
Wide Bay (21.4)	19,052	25.7	55,153	74.3
Total National Party seats (8.4)	403,389	32.9	822,014	67.1

Note: The figure in brackets beside the name of each seat is the percentage differential between both (a) the Labor vote and the 'Yes' vote, and (b) the National and 'No' votes. In every seat the 'Yes' percentage was lower than the 1998 Labor percentage of the two-party preferred vote.

problem with estimating the National Party separately from the Liberals is that opinion polls typically lump the two together under the heading 'Coalition'. Where polls do distinguish, there is a strong tendency to over-estimate the Liberals and under-estimate the Nationals because voters do not really differentiate the two. That leads typically to very small and, therefore, unreliable samples of National Party voters. In the light of Tables 11A and 11B and such opinion polling as has been done, the 80 per cent figure is highly plausible, if unprovable.

In Table 9 above there was a right-hand column headed 'Relative Socio-economic Advantage Rank'. Questions of social class, income and occupation are essentially ones of socio-economic advantage and disadvantage. Included in the relationship also are educational attainment (or lack of it), levels of skill, property ownership (or lack of it) and race. For example, Aboriginal Australians and Torres Strait Islanders are the most disadvantaged, but renters and one-parent families are also disadvantaged. It is interesting, therefore, to measure the referendum vote against these criteria. Fortunately the Australian Bureau of Statistics has measurements of socio-economic advantage, economic resources, education and occupation. The Parliamentary Library produced, nearly a year before the referendum, its publication *Socio-Economic Indexes for Electoral Divisions* (Current Issues Brief, Number 4, 1998-99, December, 1998).

Back in Table 9 the 36 safe Labor seats were ranked by 'Yes' percentage and relative socio-economic advantage/disadvantage. The table showed that, of those seats, Bonython was the most disadvantaged (ranked at 36), Fowler the second most disadvantaged (35) and Chifley the third most (34).

It should be noted that the ranks in *Socio-Economic Indexes for Electoral Divisions* do not merely apply to the safe Labor seats. Of *all* the 148 electoral divisions, Bonython, Fowler and Chifley are the three most disadvantaged. Table 10 shows that these three electorates were striking cases of Labor's failure to persuade its own voters to say 'Yes'. However, a look at the other end of the scale is, perhaps, more interesting. Table 12 shows the 34 electoral Divisions with the highest Indexes of Relative Socio-economic Advantage, together with the party holding the seat and how it voted in the republic referendum. Notice the absence of Tasmania and the Northern Territory from the list. First, however, a quotation from page 2 of the publication explaining the index:

> "The Index of Relative Socio-economic Advantage includes variables that measure relative social and economic well-being. Indicators included are: high income families; professional occupations; tertiary educational qualifications; dwellings owned or being purchased; dwellings with a large number of bedrooms and a large number of motor vehicles. A higher score on this index means that the Electoral Division has a relatively large proportion of people with the above attributes (i.e., high incomes, professional occupations, tertiary qualifications, etc.). Conversely, a lower score on this index means that the Electoral Division has a relatively low proportion of people with these characteristics".

It will be noticed that 24 of the seats in Table 12 voted 'Yes' (16 Liberal and eight Labor) while only 10 voted 'No'. In other words, whereas all 148 electorates Australia-wide split more than two-to-one in favour of 'No', the 34 'rich' electorates split more than two-to-one in favour of 'Yes'. It is no surprise to learn that all 10 negative voting, high socio-economic advantage electorates are Liberal-held. The totals for the 16 'Yes'-voting 'rich' Liberal seats (Bradfield, Kooyong, Ryan, Berowra, North Sydney, Menzies,

Table 12: Electoral Divisions with the Highest Indexes of Relative Socio-economic Advantage

Rank	Division	Party	'Yes' or 'No'	Index
1	Bradfield (NSW)	Liberal	Yes	1261.4
2	Mitchell (NSW)	Liberal	No	1176.3
3	Kooyong (Vic)	Liberal	Yes	1168.2
4	Ryan (Qld)	Liberal	Yes	1151.0
5	Berowra (NSW)	Liberal	Yes	1149.0
6	North Sydney (NSW)	Liberal	Yes	1145.5
7	Menzies (Vic)	Liberal	Yes	1145.2
8	Curtin (WA)	Liberal	Yes	1143.0
9	Higgins (Vic)	Liberal	Yes	1123.6
10	Warringah (NSW)	Liberal	Yes	1120.2
11	Goldstein (Vic)	Liberal	Yes	1111.3
12	Tangney (WA)	Liberal	No	1110.9
13	Wentworth (NSW)	Liberal	Yes	1098.2
14	Canberra (ACT)	**Labor**	Yes	1097.5
15	*Fraser* (ACT)	**Labor**	Yes	1091.6
16	Bennelong (NSW)	Liberal	Yes	1083.7
17	Mackellar (NSW)	Liberal	No	1081.5
18	Hughes (NSW)	Liberal	No	1076.1
19	Cook (NSW)	Liberal	No	1068.5
20	Melbourne Ports (Vic)	**Labor**	Yes	1068.5
21	Jagajaga (Vic)	**Labor**	Yes	1065.6
22	Mayo (SA)	Liberal	No	1061.1
23	Chisholm ((Vic)	**Labor**	Yes	1060.5
24	*Moore*(WA)	Liberal	No	1060.3
25	*Pearce* (WA)	Liberal	No	1056.8
26	Aston (Vic)	Liberal	Yes	1055.4
27	Boothby (SA)	Liberal	Yes	1053.2
28	Lowe (NSW)	**Labor**	Yes	1052.8
29	*Moreton* (Qld)	Liberal	No	1048.5
30	Sydney (NSW)	**Labor**	Yes	1043.3
31	Brisbane (Qld)	**Labor**	Yes	1043.1
32	Deakin (Vic)	Liberal	Yes	1042.2
33	Sturt (SA)	Liberal	Yes	1041.7
34	*Macquarie* (NSW)	Liberal	No	1039.1

Note: Divisions only appearing in Table 12 are shown in italics. They are Fraser, Moore, Pearce, Moreton and Macquarie.

Curtin, Higgins, Warringah, Goldstein, Wentworth, Bennelong, Aston, Boothby, Deakin and Sturt, mean index 1118.3) were 732,045 for 'Yes' (56.5 per cent) and 563,303 for 'No' (43.5 per cent). The totals for the 10 'rich' 'No'-voting Liberal seats (Mitchell, Tangney, Mackellar, Hughes, Cook, Mayo, Moore, Pearce, Moreton and Macquarie, mean index 1079.1) were 433,024 for 'No' (54 per cent) and 369,564 for 'Yes' (46 per cent). The total votes for the eight 'rich' Labor seats (Canberra, Fraser, Melbourne Ports, Jagajaga, Chisholm, Lowe, Sydney and Brisbane, mean index 1065.4) were 422,615 for 'Yes' (61.1 per cent) and 268,608 for 'No' (38.9 per cent). A crude analysis might be to say that the genus 'Yes' voter lives in an inner metropolitan suburb of Sydney (say, in Lowe or Sydney) or Melbourne (say, in Chisholm or Melbourne Ports) or Canberra, votes Labor, has a job with a 'high' income, a university degree, a middle-upper occupational status, is not old and was not born in the United Kingdom.

It will be noticed that the electorates named in the preceding sentence are Labor-held. Consequently the federal member was advocating an affirmative vote. Such was also the case for most of the Liberal seats where the member was saying 'Yes', for example Kooyong, North Sydney, Higgins and Curtin. Perhaps the most interesting cases, therefore, are the two 'Yes'-voting upper socio-economic advantaged Liberal seats held by the 'arch monarchist' members Tony Abbott and John Howard. It will be noticed that Warringah holds 10th place and 'the Republic of Bennelong' 16th place in Table 12 showing seats with the highest indexes of relative socio-economic advantage.

In conversations with me each of Tony Abbott and John Howard has made this claim:

> "I estimate that about two-thirds of those who voted *for me* in October, 1998 took my advice and voted against the republic in November, 1999".

I (Malcolm Mackerras, that is) agree with that estimate, which is based on the view that the Labor voters in that kind of seat voted so solidly 'Yes' that each man could claim that a substantial majority of those who had voted *for him* at the general election took his advice and voted 'No' at the referendum.

Consider the case of Bennelong, where the two-party preferred vote in 1998 had been 42,075 Liberal and 33,013 Labor. At the referendum the 'Yes' vote was 43,950 and the 'No' vote 36,508. If nine out of ten of those 33,000 Labor voters did vote for the republic then the 'Yes' Liberal vote would have been, say, 12,000. On that basis, in other words, probably about two-thirds of those who had voted *for him* at the election did take the Prime Minister's advice at the referendum.

My analysis of voting at the 40 polling places within Bennelong and 34 polling places within Warringah does nothing to undercut the claim of either man. If we take the nine polling places within Bennelong where the general election vote was weakest for John Howard, we find the 'Yes' vote was 56.2 per cent compared with 54.6 per cent for Bennelong as a whole. If we take the seven polling places within Warringah where the general election vote was weakest for Tony Abbott, we find the 'Yes' vote was 54.1 per cent compared with 54.5 per cent for Warringah as a whole. In Warringah, however, a pattern can be found which does not exist in Bennelong. In Warringah, the further the polling place lay from the Sydney CBD the more likely it was to vote 'No'. Thus the outlying polling places of Allambie, Allambie Heights, Beacon Hill, Brookvale, Dee Why Central, Forestville East and North Manly voted 'No'. By contrast, Mosman West was the only inner city polling place in Warringah to reject the republic.

The seat which may be called 'the Republic of Warringah' is a Sydney Liberal seat with a monarchist member and it demonstrated the inner-outer polling place patterns described in the preceding paragraph. I decided to check the patterns of Griffith and Lilley in Brisbane, and Perth and Swan in Perth. All four have republican Labor members and all four voted 'No'. (To display my lack of bias I should refer to 'the Kingdom of Griffith', etcetera – especially as this is a paper for The Samuel Griffith Society!) Nevertheless, all of Warringah, Griffith, Lilley, Perth and Swan have this geographic feature in common. They stretch from the CBD (or very close to it) to suburbs quite distant from it. In all five electorates, the further the polling place lay from the CBD the more likely it was to vote 'No'. Thus on every criterion by which it can be tested, the titling of this paper as *The Inner Metropolitan Republic* can be justified.

Let me call the 34 seats in Table 12 the 'Rich List' and make two further observations about it. The first is to compare Table 12 with Table 6, which gave details of the 42 seats which voted affirmatively. That table listed 25 Labor seats voting 'Yes', of which *only eight are also on the 'Rich List'.* (Sydney, Melbourne Ports, Fraser, Canberra, Brisbane, Chisholm, Jagajaga and Lowe). Then Table 6 gave 17 Liberal seats voting 'Yes', of which *only Adelaide is not on the 'Rich List'.*

The second observation about Table 12 is to notice how closely it correlates with Table 13, which shows all the seats where the 'Yes' percentage in 1999 was higher than Labor's share of the

two-party preferred vote in 1998. Of the 34 seats on the 'Rich List' in Table 12, only five do not appear in The 'Yes' Gain Table 13. (The seats are Fraser, which voted 'Yes', and Moore, Pearce, Moreton and Macquarie, which voted 'No'). Conversely there are only five seats appearing in The 'Yes' Gain Table which are not on the 'Rich List'. (The seats are Adelaide, which voted 'Yes', and Murray, Moncrieff, Hindmarsh and Casey, which voted 'No').

At the other end of the scale it is possible to compile an equivalent 'Poor List'. I have taken the 15 highest ranked (i.e., poorest) seats from the table 'Electoral Divisions Ranked by the Index of Relative Socio-Economic Disadvantage' from the same publication *Socio-Economic Indexes for Electoral Divisions.* The 15 seats on such a list comprise ten held by Labor (Bonython, Fowler, Chifley, Gellibrand, Port Adelaide, Oxley, Throsby, Reid, Blaxland and Braddon), four held by the National Party (Wide Bay, Cowper, Gwydir and Hinkler) and one held by the Liberal Party (Grey). Only two of these 15 seats voted for the republic (Fowler and Gellibrand), and in all cases the 'Yes' vote

Table 13: The 'Yes' Gain Table

Rank	Division	Party	'Yes' Gain	'Yes' % higher than Labor's	
				% Labor 2PPV	% 'Yes'
1	Bradfield (NSW)	Liberal	28.8	26.8	55.6
2	Kooyong (Vic)	Liberal	25.6	38.6	64.2
3	North Sydney (NSW)	Liberal	23.5	37.8	61.3
4	Higgins (Vic)	Liberal	23.3	40.4	63.7
5	Curtin (WA)	Liberal	18.8	36.7	55.5
6	Warringah (NSW)	Liberal	17.5	37.0	54.5
7	Mitchell (NSW)	Liberal	16.7	30.2	46.9
8	Wentworth (NSW)	Liberal	16.5	43.7	60.2
9	Goldstein (Vic)	Liberal	16.1	41.9	58.0
10	Menzies (Vic)	Liberal	15.3	44.6	59.9
11	Berowra (NSW)	Liberal	15.2	36.5	51.7
12	Mackellar (NSW)	Liberal	15.0	34.4	49.4
13	Ryan (Qld)	Liberal	14.8	40.5	55.3
14	Sturt (SA)	Liberal	11.0	42.7	53.7
15	Bennelong (NSW)	Liberal	10.6	44.0	54.6
16	Melbourne Ports (Vic)	**Labor**	10.1	55.8	65.9
17	Boothby (SA)	Liberal	9.3	42.6	51.9
18	Mayo (SA)	Liberal	9.1	40.1	49.2
19	*Adelaide* (SA)	Liberal	7.3	49.1	56.4
20	Cook (NSW)	Liberal	6.0	41.1	47.1
21	Aston (Vic)	Liberal	5.8	45.8	51.6
22	Chisholm ((Vic)	**Labor**	5.2	52.1	57.3
23	Deakin (Vic)	Liberal	4.8	48.1	52.9
24	Hughes (NSW)	Liberal	4.7	44.5	49.2
25	Brisbane (Qld)	**Labor**	2.7	54.6	57.3
26	*Murray* (Vic)	Liberal	2.6	27.9	30.5
27	Tangney (WA)	Liberal	2.4	44.1	46.5
28	Lowe (NSW)	**Labor**	2.0	54.6	56.6
29	Canberra (ACT)	**Labor**	2.0	60.1	62.1
30	*Moncrieff* (Qld)	Liberal	1.8	37.2	39.0
31	Sydney (NSW)	**Labor**	1.0	66.9	67.9
32	Jagajaga (Vic)	**Labor**	0.9	55.9	56.8
33	*Hindmarsh* (SA)	Liberal	0.7	48.8	49.5
34	*Casey* (Vic)	Liberal	0.3	45.1	45.4

Note: Divisions only appearing in Table 13 are shown in italics. They are Adelaide, Murray, Moncrieff, Hindmarsh and Casey.

was well below the Labor share of the two-party preferred vote in 1998.

If we look back to Tables 9 and 10 we notice that Bonython and Chifley were the two seats where the Labor Party most conspicuously failed to persuade its supporters to vote 'Yes'. In Fowler and Gellibrand, too, the failure was there – but not enough to deny 'Yes' a majority. What, then, are the characteristics of Bonython, Chifley, Fowler and Gellibrand (all safe Labor seats on the 'Poor List') which should produce such divergent results? Here again I turn to the Parliamentary Library and the publication *Electorate Rankings: Census 1996* (Background Paper No. 14, 1997-98, March, 1998).

On the referendum vote, Chifley is the one closest to the typical electorate. With an Australia-wide 'Yes' vote of 45.1 per cent, we find Chifley on 42.2 per cent. By contrast, Gellibrand on 56.9 per cent and Fowler on 51.9 per cent were well above Australia as a whole. Bonython on 33.3 per cent was well below. It so happens that an examination of the rankings of relative socio-economic disadvantage shows Chifley as the seat among the four usually closest to the median ranking number 74. However, that is not always the case. For example, the population of Chifley is notably young. Only 5.6 per cent of its population was aged 65 years and over, compared with seat number 74 at 12.4 per cent. The median age of Chifley was 28, the third lowest in the country, whereas at seat number 74 the median age was 34. Another unusual characteristic of Chifley lies under the heading 'Proportion of One Parent Families with Dependent Children'. The Chifley figure is 15.1 per cent, the highest in Australia. Bonython comes in third at 14.4 per cent.

The three safe Labor seats other than Chifley (Bonython, Gellibrand and Fowler) provide an interesting contrast. In Bonython only 19.9 per cent of the population was of the Catholic religion. In Gellibrand and Fowler the figures were 33.8 per cent and 32.2 per cent, respectively. The proportion of persons of non-Christian religion in Bonython was 2.5 per cent. In Fowler the figure was 20.3 per cent, the highest in Australia. In Gellibrand the figure was 9.8 per cent, the 11th highest. The proportion of persons of 'No Religion' in Bonython was 28.3 per cent, the highest in the country.

In terms of place of birth, Fowler was highest in Australia by proportion of persons born overseas, being the only electorate where a majority of the population was in that category. On that score the percentages for Fowler, Gellibrand, Chifley and Bonython were 51.3 per cent, 40.1 per cent, 30.6 per cent and 28.1 per cent, respectively. Every one of the top dozen electorates by birth in the United Kingdom and Ireland turned in a 'No' majority. Surprise! Surprise! Among these, Bonython came in at number four, the proportions for Moore, Brand, Canning and Bonython being 22.4 per cent, 19.8 per cent, 18.2 per cent and 16.3 per cent, respectively. In Chifley, very close to the median, the figure was five per cent, while in Gellibrand and Fowler the proportions were 3.7 per cent and 2.4 per cent, respectively. Gellibrand and Fowler were in the top 15 by birth in Southern Europe, Gellibrand (fifth) at 13.2 per cent and Fowler (15th) at 8.9 per cent.

However, where Fowler and Gellibrand really stand out are in the descriptions 'Proportion of Persons Born in South East Asia' (Fowler first, Gellibrand second); 'Proportion of Persons Born in Non-English Speaking Countries' (Fowler first, Gellibrand eighth); 'Proportion of Persons Born Overseas and Australian-Born persons with Overseas-Born Parents' (Fowler first, Gellibrand 10th, with Fowler the only electorate where more than two-thirds of the population met that description); 'Proportion of Persons Not Fluent in English' (Fowler first, Gellibrand third); and 'Proportion of Persons Speaking a Language Other Than English at Home' (Fowler first, Gellibrand ninth, with Fowler the only electorate where more than 60 per cent of the population met that description).

The inferences from the foregoing are clear. Very poor electorates like Gellibrand and Fowler will vote 'Yes' because of their high ethnicity and relatively high non-Christianity and (where Christian) Catholicity. By contrast, a very poor electorate like Bonython will vote solidly 'No' because of high proportions born in the United Kingdom and low Catholicity. Yet all three

are among the four electorates with the highest unemployment rates. At the 1996 census the unemployment rates of Fowler, Bonython and Gellibrand were 17.9 per cent, 16.2 per cent and 16.1 per cent, respectively. There was only one other seat with an unemployment rate above 15 per cent, namely the National Party seat of Cowper (NSW) which, of course, also rejected the republic.

Finally I return to the title of this paper, which says it all. This was quintessentially *The Inner Metropolitan Republic.* A part of Sydney such as the Division of Fowler was correctly described by the Australian Electoral Commission as 'Outer Metropolitan'. Fowler voted for the republic, however, only because of its exceptionally high ethnicity.

Chapter Eleven:
A Black Arm-Band for Australia's 20th Century?

Professor Geoffrey Blainey, AC

Has the Commonwealth of Australia been more a story of success than of failure in its first century? Until at least the 1970s most Australian politicians, commentators, historians, political scientists, medical researchers and members of a host of other professions would have voted Australia as overall a success. The average Australian man and woman would have similarly voted 'Yes'. In the last twenty years or more the doubters have multiplied. Historians are prominent in the ranks of the doubters.

In my own judgment the nation's successes, in its first century as a federation, outweigh its failures by a large margin. Which successes and failures would I single out? Building on colonial achievements, the Commonwealth in its first years was an experimental pioneer of democracy. It was almost certainly the first nation in the world in which women possessed both the right to vote and to stand for Parliament. During its first century as a united nation Australia solved its internal disagreements and disputes by discussion and debate, and not by force. Measured by the modern and non-Athenian sense of the word "democracy", it was the world's first. This is a remarkable achievement when one considers that less than fifty years later a widely-acclaimed goal was to make the entire world "safe for democracy": what was an experiment was becoming a global axiom.

Along with New Zealand, Australia was a path-finder in the welfare state and the idea of caring for those who, largely through no fault of their own, could not care for themselves. Australia was therefore one of the first nations to learn how difficult it was to find the appropriate balance between offering what is now called a safety net, so vital in an urban society, and at the same time deterring people from using the net as a sleeping hammock. This is one of the reasons why Australia, by world standards, was more a success story in the material sense during the years 1850 to 1890 than in the most successful forty years of the 20th Century. Amongst other things, in those favoured years 1850-90 the goal of self-help was valued the more, and the incentives were also higher.

In a world increasingly mesmerised by spectator sport, Australia's relatively small population achieved a remarkable sporting record, though Finland at one time and New Zealand at another time would at least be comparable. On the other hand, some critics might say that Australia's laid-back work culture of the weekdays would have been more successful if it had imbibed some of the competitive attitude of the sports culture which presided over the weekends. Yet again, the attitude towards leisure would be seen by some as one of Australia's triumphs. In the eyes of many commentators, one of Australia's successes was to devise a partly-outdoor way of life that combined ample space, ample leisure and a favourable standard of living. Another success is that it is a courteous and convivial country. People can still talk to strangers, though less often than in earlier decades.

In the 20th Century, as in earlier decades. the nation could take pride in its inventiveness. For a small nation Australia was inventive in a wide variety of fields, from agriculture to medicine, and from engineering to the fine arts.

Some of these inventions the Australian people hardly know about. Thus, in the global history of metallurgy, which is one of mankind's most valuable skills, the three or four great innovations of all time would include the flotation process. Mainly invented and applied at Broken Hill in the years 1902 to 1914, and the achievement of trained metallurgists as well as humble millmen, this remarkable bubble-centred process is now used on a large scale in every

corner of every continent to extract minerals.

Australia has also been quick to apply and adapt imported technologies, whether in aviation or the internet. It has been a remarkable supplier of minerals, foods and fibres to the outside world – commodities often produced in the face of high obstacles. That maybe 40 times as many people now live in this continent as lived here in 1788, and that five times as many people live here as in 1901, is a story of high success by most criteria. I do not subscribe to the view that Australia now is over-populated, though the arguments of the dark-green critics merit attention.

Another achievement of the nation is simply its survival. One of the main purposes of a nation is to defend itself, to stay alive. Australia, unlike so many other nations of European peoples, was not conquered in the 20th Century. Large numbers of young Australians were willing to defend their country and that of their allies; and Gallipoli is part of a powerful tradition which honours sacrifice. At the same time Australia was not so well prepared for the Second World War as for the First World War, and that helps to explain why thousands of Australians became prisoners of war in south east Asia.

There is also a facet of the Second World War which is easily forgotten. In the darkest period of the war, the Allied side was frail indeed, and for a time the Allies three main surviving nations were Britain, Canada and Australia. It is now almost forgotten that Australia's industrial war effort between 1939 and 1945 was extraordinary, preparing the way for so much of the long period of industrialisation that followed. It is also now almost forgotten that Australia mass-produced military aircraft before it mass-produced the Holden car. I was heartened to read Brian Toohey, the journalist, responding to those who claimed that the staging of the Sydney Olympics, an impressive achievement, was possible only because of Australia's new economic maturity or its recent multicultural background or its new sense of self-esteem. Toohey hinted that the industrial war effort in the early 1940s was a more formidable and more sophisticated venture in construction than Homebush, its rail links and its surrounds.

I conclude that Australia since 1901 has been more a success story than a failure. Others might reach my conclusion by a different route. Others, especially those wearing the black arm-bands, will not support my conclusion.

It was John Stone who suggested that at this morning's session I should primarily assess the adequacy of the Black Arm-Band School of History as a description of Australia since 1901. First, I must offer a word about the origin of this phrase.

The recent *The Oxford Companion to Australian History* has an entry under the heading "Black-armband history", written by the historian Mark McKenna, and implying that I took the phrase from Aboriginal history. No doubt he had gleaned that idea from other historians and felt entitled to pass on what was now "common knowledge". He also noted that as early as 1970, and especially in 1988, some black Australians wore black arm-bands as "a symbol of the historical dispossession of Aboriginal people". Inga Clendinnen in her recent Boyer lectures on the ABC seemed rather vexed that I had borrowed a phrase from the Aborigines and then turned it against them. I hasten to add that the phrase was neither borrowed from the Aborigines nor was it, in the way I used it, anti-Aboriginal. It seems to have been converted into an anti-Aboriginal phrase by historians, politicians and commentators who then complained in public that it was anti-Aboriginal.

May I briefly explain the origin of the phrase I coined. I quote from a letter I wrote on 14 August this year, at the request of the historian Mark McKenna after he learned orally in London that he had misunderstood the origins of my phrase:

> "Dear Mark, Thank you for the gracious letter.
>
> "I first used the phrase 'Black Arm-band' on Wednesday 28 April, 1993 in the Latham Memorial Lecture in Sydney. It aroused no interest at the time. Indeed it had no popular usage, so far as I know, until Mr Howard used the phrase three or so years later.
>
> "It was early in the football season, and I took the phrase from the very old custom, in

Australian Rules Football, of players wearing a black arm-band to honour an old player and official who died in the previous week. By chance, today, when your letter arrived from London, *The Age* showed on page one a photo of a player wearing a black arm-band. I enclose it".

I went on to add that the custom of wearing black arm-bands at a time of mourning belongs essentially to white, not black, Australian traditions.

My phrase, "black arm-band" would have died the slow death of most phrases but for the fact that Mr Howard, soon after he became Prime Minister in 1996, used it in the annual Sir Robert Menzies Lecture at Monash University. He did not attribute the phrase to me but he used it in a reasonable context, and I have no complaint of his enunciation of the phrase. Moreover he did not use it in the way which is increasingly attributed to him by opponents in public: he did not use it to wipe out misdeeds from the past. He pointed to some of the misdeeds. Thus he wrote:

"Injustices were done in Australia, and no-one should obscure or minimise them. We need to acknowledge as a nation the realities of what European settlement has meant for the first Australians, the Aboriginals and Torres Strait Islanders, and in particular the assault on their traditions and the physical abuse they endured".

Those sentences were immediately forgotten. It is easier to abuse opponents if you frequently misrepresent their position.

Suddenly the phrase, the black arm-band view, was hyperactive. Many people on the left, especially academics and politicians and journalists, were indignant. Some Aboriginal leaders were also indignant. Because Mr Howard had used it, they thought that it must be slanted, historically, and might even be racist and discriminatory. It was soon learned that the phrase had originally been coined by me. That did not cool the indignation. The idea of actually reading my article or the context in which Mr Howard alluded to my phrase did not seem to occur to those historians most interested in the idea.

In the first seven years after coining the phrase I doubt whether I was once asked by a member of the media or an historian how the phrase had been coined, let alone what it meant. As it happened, the phrase was deemed by many academics and members of the media and left wing politicians – those who were most interested in it – to be a reference solely to Aborigines, and was often deemed to have a racist overtone. In fact, the phrase referred not simply to Aborigines but also to the Chinese, Kanakas, women, the environment – indeed to many facets of Australian history, and especially to the balance of the negative compared to the positive.

As for the idea that my phrase was essentially anti-Aboriginal, may I quote a passage (because nobody else ever has quoted it) from my original speech:

"After the British arrived, the treatment of Aborigines was often lamentable: the frequent contempt for their culture, sometimes the contempt for the colour of their skin, the removal of their freedoms and usually the breaking of their precious link with their tribal homelands. And also the killing of them, in ones and tens and even occasionally in the hundred".

I even said in the original speech that "it may be that as many as 20,000 Aborigines were killed, predominantly by Europeans but sometimes by Aborigines enrolled as troopers". This was the speech that Noel Pearson, EG Whitlam, Henry Reynolds, Lois O'Donoghue, the Boyer lecturer, Mrs Holmes a'Court, Phillip Adams and dozens of others have totally misunderstood.

I used the wearing of the black arm-band to refer not simply to the treatment of Aborigines. I also used it to refer, amongst other things, to the treatment of the environment. I accept that the treatment of the environment is one of the defects in Australian history. I do not need to dwell on this defect: on the extinction of a variety of species of birds and animals, on the growing salinity of the soil on the plains of the south-west of WA and the Riverina and northern Victoria, on the excessive clearing of unusual forests, on the silting of rivers. And yet the harming of the environment, especially in the south-east quarter of the continent, is the price of success in

another sphere: the extraordinary economic development in the face of high obstacles, whether low and erratic rainfall, puzzling geology, hungry soils, long distances, and unfamiliar vegetation.

It is to the credit of Australians in the last third of the 20th Century that they began to feel more concern for the natural environment. It is also to the credit of an earlier generation of Australians that they had battled so hard in the face of a difficult environment. It should be added that the treatment of the environment by human beings in nearly every part of the world has been defective if you see the environment as an entity commanding high respect. But if you see human beings and civilisation as also deserving high respect, then the rise of civilisation was possible only because earlier generations succeeded in mastering to some degree, and altering, the environment. Nothing did more to alter the natural environment around the world than that great step forward in human history, the domesticating of plants and animals some 10,000 years ago. The black arm-band school of history sometimes tends to forget what has happened through a long period of environmental history and to imply that Australia in recent times was almost uniquely blameworthy.

The black arm-band view of history implies that Australia's failures exceed its successes, and that the treatment of the environment and the Aborigines are two of the facets which, in total, are so shameful that they outweigh the nation's successes. I concede that in these two facets the scope for blame is legitimate and wide, but I see mitigating factors which historians have some obligation to consider, especially when discussing relations between Aborigines and other Australians.

My view on Aboriginal history is not orthodox, but I have held it for a long time while listening carefully to the criticisms sometimes directed towards it. As I am sometimes said to be the only Australian to write both a history of Aboriginal Australia and a history of modern Australia, I do not feel that I am totally out of my depth, though I remain conscious of how much there is still to learn and how much already known is still worthy of debate.

My view is that in 1788 Aboriginal and British cultures were so far apart that, even with the best will on both sides, a long series of misunderstandings were bound to arise; that in attitudes to possessions, to kinship, to land, and to work, the Aborigines were as poorly equipped for the society they were forced to join as the British would have been ill-equipped if they had had to join the Aboriginal societies and abandon their own culture and religion. In short, Aboriginal disadvantage – for participating in the new life – was there from the start but was compounded by what happened later. The Maoris, living in a sedentary as distinct from a nomadic or semi-nomadic society, had far less disadvantage. As a sedentary people, they were far less divided than the Aborigines, and more powerful militarily. As a sedentary people, they were more capable of adapting to the new intruding world. As a result, they occupied a less unhappy position within white society than did most Aborigines in 1901.

In the to and fro of political debate it is understandable that Aboriginal leaders, and their white supporters, should place nearly all of the blame on Australian society for the serious Aboriginal disadvantages "since the British colonisation". But those Australians, black or white, who wish to understand the present position, and to improve on it, should be wary of such a simplistic and racially-loaded argument; an argument which even appears in the latest brochures issued by the Council for Aboriginal Reconciliation. Indeed, the self-respect of Aborigines would suffer another blow if Australians generally were equally to apply – and unfortunately some do – such a simplistic and racially-loaded line of argument to the long Aboriginal history before 1788.

Aborigines are right to demand a better deal, right to draw attention to urgent grievances and disadvantages. They are entitled to take pride in much of their history, entitled to be treated as equal. But perhaps some of the blame which they – and their wide range of other supporters – place on the Australian nation is unrealistic.

One elementary fact should enter the discussion. Through no fault of their own, the Aboriginal peoples were partly disadvantaged, by their own history as a people and by their long

isolation or relative isolation from the outside world. It is significant that the same kind of British officials and settlers, coming to the southern hemisphere in the 19th Century, conceded an early treaty and early land rights for the indigenous inhabitants of New Zealand, but not for those of Australia. They also accorded voting rights to Maoris far more readily than to Aborigines.

Why did the British settlers have such different attitudes to the people on contrasting sides of the Tasman Sea? The cultural background, and the political and economic way of life, of the nomadic Aborigines compared to the sedentary New Zealanders was so difficult to understand. Moreover, in the early years of British settlement or invasion, the Aborigines, through no fault of their own, rarely were able to take advantage of the opportunities offered by the incoming society. Many were offered schooling, many were offered the chance to farm, many were offered the chance to live in towns, but such opportunities meant little or nothing to them, for their old way of life was so far removed from the alternative and imperfectly-glimpsed life placed before them.

For Aborigines, the dearth of voting rights as well as the absence of land rights stem from the same dilemma. It is a strong – and understandable – grievance that for maybe half of the 20th Century the Australian nation deprived many Aborigines , perhaps even most, of the right to vote. What proportion of adult Aborigines had the right to vote in 1900, 1930 and 1960 is not known. In recent years it has been widely claimed, especially in daily newspapers, that Aborigines had no vote until the 1967 federal referendum, but this claim is untrue. Many Aborigines had the vote in the 19th Century – there were no legal restrictions in several of the six colonies – and many Aborigines had the right to vote in the first federal election. At the same time there was a variety of restrictions, differing from colony to colony and from State to State, limiting the right of certain Aborigines to vote.

Beyond doubt the Aborigines usually had a low ranking in the civic culture of the 1890s, when the founders of the federation drew up a Commonwealth Constitution which did not treat Aborigines, and especially those of total Aboriginal ancestry, as equals. Why did the Aborigines, electorally, rank low? I have not seen the reasons set out but an attempt to state them is worthwhile.

Firstly, throughout the world the system of democracy was new and experimental. Democracy was feeling its way step by step, and Australia was a leader in those steps. In the world as a whole in 1900 the overwhelming majority of adult people did not have the right to vote. Even in Australia, a leader in democracy, about half of the population did not have a right to vote. Thus, when the Commonwealth Constitution was shaped, most women, white or black, did not have the vote. Therefore the depriving of many Aborigines of the right to vote was not so abnormal.

Secondly, the ideology of Australia's experimental democracy was different from the ideology of today's democracy. Thus, in the early stages of Australian democracy some categories of people – for instance, public servants – were excluded from the vote because they were seen as special beneficiaries of the government. Full-blooded Aborigines, more than poor white people, were seen as special beneficiaries, and were viewed, unlike most able-bodied white people, as possessing a special right to welfare even before the rise of the welfare state. Noticeably in the first Commonwealth *Electoral Act* of 1902, there were even limitations on the electoral rights of white civil servants. Residents of Canberra, the national capital, for long were limited in their electoral rights.

There was a third reason for the lower standing of Aborigines in the new democratic culture. Aborigines were the least educated group of Australians at the very time when literacy was regarded as almost an essential prerequisite for the running of a democratic nation. My understanding – and I could be mistaken – is that those Aborigines most likely to lack electoral rights in the first half of the 20th Century were those who were closest to the traditional way of life, and therefore were lacking in literacy as well as in participation in mainstream life. Generally

this electoral exclusion was based more on cultural differences, or on perceived cultural differences, than on race. Thus Maoris living in Australia had the right to vote, and this right was specifically spelled out by the Commonwealth Parliament in 1902.

Two additional reasons for excluding numerous Aborigines from participation in elections must be added. Undoubtedly, racially-based feelings were directed towards them. On the other hand, these feelings were not predominant, and such a conclusion is suggested partly by the fact that Maoris resident in Australia were given the right to vote.

The relative lack of voting rights – and the rise of the erroneous idea that Aborigines never had the right to vote until 1967 – especially vexed Aborigines who came of age in the period when distinct and articulate Aboriginal protests began to echo throughout the land. And who could blame them for their sense of grievance? Likewise, this same electoral history of the treatment of Aborigines is, in the eyes of many of today's students, incredible and unforgivable. But rarely if ever is a realistic attempt made to explain to those students, or to Aboriginal leaders of today, the experimental nature and the cultural assumptions of Australia's system of parliamentary democracy in and around 1900. The black arm-band view of history rests partly on a failure to understand facets of the past.

The black arm-band view can also be seen in the way historians, writing in the last decade, view Aboriginal history before 1788 and all-Australian history after 1788. Criticisms of the behaviour of traditional Aboriginal society are now rare. And yet if the same standards of judgment were applied before or after 1788, Aboriginal society would be seen to have its grave defects just as its successor had its grave defects.

Over a long period of time there is a valid case for indignation and regret about the European treatment of Aborigines – and even the Aboriginal treatment of Aborigines when the continent was their own – but a sense of proportion is needed. Thus in the last quarter century a massive effort has been made by the Australian nation to redress injustices; and Aboriginal leaders have played a strong part in that effort. The national effort embraces land rights and mineral rights, tertiary education, health, sport, the Aboriginal arts, the creation of the Aboriginal super organisation ATSIC, and even the benign definitions of Aboriginality. The tragedy is that a lot of the help, and outback health is a strong example, has not really succeeded. In several fields Aborigines have been singled out for affirmative action, and there is a case for it – so long as the fragile morality of it is recognised by its supporters. The danger is that a later generation will see affirmative action, when carelessly implemented, as close to a combination of racism and hypocrisy. As we know only too well, a later generation will sometimes be tempted to see its predecessors in a less friendly light than the predecessors saw themselves.

Today I am not tackling a full range of the relevant topics, for time is short. Likewise I barely touched on the thorny topic of immigration in my speech of 1993. A few additional words are called for. There is no doubt that many Australians who, all in all, tend to despise the past of their own country do so because of the White Australia policy. This policy will continue to be an embarrassment to many Australians, especially to those of Chinese descent, for the Chinese and to a lesser extent the Japanese were the targets of what were often intemperate and sometimes venomous attacks. It is perfectly valid for the wearers of the black arm-band to devote a measured amount of indignation to the White Australia policy, but they also have a responsibility to explain why the policy was created.

Today most historians and teachers of history assume that a century or more ago the Chinese were innately peace-loving, whereas the white Australians were innately racist and sometimes violent. In the period 1850-1900, however, anti-foreigner feeling sometimes ran hot in China. Indeed, it was much more dangerous to be an Australian woman in China than it was to be a Chinese man in Australia. This does not condone Australian golddiggers' behaviour at Lambing Flat or other scenes of riot on the goldfields. But a little knowledge of what happened in China does make one wonder at the oft-repeated assumption that there was something unusually

racist about Australians, as distinct from the Chinese and other Asian peoples in 1900 and earlier.

It is sometimes argued that in 1901 the founding fathers of the Federation should have set up what is now called a multicultural society, and that all the Chinese and Japanese and Indians who wanted to settle here should have had the same chance of migrating as, say, the Irish or the Germans. As many Australians of 1901 had experienced a multicultural society on their own goldfields, and had concluded that in the conditions of those times it didn't work, they were not very likely to enter lightly again on such an experiment. It would of course have been most uplifting if they had decided on such an experiment. But no democratic society had so far tried such an experiment and at the same time given the newcomers voting rights.

It is easy to denounce the immigration policies of 1901 and earlier years. But what was the alternative? The critics of 1901 are usually silent about the alternatives; and yet the craft and art of politics is essentially the art of weighing the alternatives. Is it, for example, proposed by modern critics that in 1901, and earlier, the Chinese should have been allowed to enter Australia in large numbers and, at the same, receive voting rights and citizenship? Or were they to settle here but be deprived of voting rights until such time as they became property-holders or literate in the English language? When compulsory military training for young males was implemented a few years before the First World War, should Chinese Australians of the same age have been exempt if they spoke no English? As Australia, in addition, was then embarking on the welfare state and the bold experiment of setting a minimum wage for factory workers, should it have endangered the success of that experiment by allowing a new influx of Chinese who, with the eager support of many employers, would have been tempted to work for low wages at the very time when there was a legislative assault on low wages? Or, as a compromise, should an annual quota have been imposed on the incoming Chinese, with the compensating clause that they be permitted to take out citizenship and receive voting rights after a certain time in Australia?

These, and allied questions, are difficult for a historian to answer today, and to answer in the light of the political and social practicalities of 1901, or even in the light of the high ideals of the year 2000. I doubt whether I have seen these questions, and the alternatives embodied, seriously tackled by the new school of historians who write or imply that large numbers of immigrants from Asia should have been allowed to land and stay.

How the new Commonwealth of Australia shaped its immigration rules was not surprising in the context of the times and in the light of the trio of facts: that it was a new democracy, a new welfare state, and a concept of citizenship which – unlike our own – called for citizens to share in the custodianship of the nation, called for an undivided loyalty now considered to be excessive, and called for some sharing of responsibilities in time of war or preparation for war.

On the other hand, many critics might say, "I wish the immigration policy had been articulated with more courtesy and humanity". Surely they are right in so saying. Moreover they are correct in regretting that the old White Australia policy, though long overthrown, still leaves us with a bad name in parts of Asia and especially in Asian newspaper offices.

But the damning legacy in Asia has been needlessly aggravated by the various Australian politicians, sociologists, historians, clergy and journalists – larger in influence than in number – who have positively encouraged Asian critics to recall or denounce Australia's former immigration policy, while failing to add – for the cultural cringe is alive and well – that many Asian policies on migration and citizenship are highly restrictive. Moreover, some of these critics do not quite understand what might have been, in the second half of the 19th Century, the unpalatable alternatives to the White Australia policy. It is not unfair to ask these critics to spell out their own policy preferences: would they, for example, prefer to have seen a diminution of democracy in Australia in 1901, or a halt to the welfare state in 1901, so that an unrestrictive immigration policy could have been implemented? In essence, neither the infant welfare state, nor the belief in extending the foundations of democracy laid in the 1850s, might have flourished if large scale Asian immigration had been allowed throughout the period from say 1850 to 1940.

The dismantling of the restrictive immigration policy, from the 1960s, was a legitimate and wise response to new conditions and times. Perhaps, however, the creation of that policy in 1901 – and the policy has its parallels in Asian nations even today – was also a wise response to unusual conditions and to a thorny dilemma which has now slipped from slight.

A wide range of Australian rhetoric in 1901 loaded the dice against the Chinese and Japanese to a degree that was, at times, patently unfair and untrue. And yet the present criticism of how former Australian legislators set about their legislative tasks in 1901 probably represents a similar loading of the dice – with an emphatic conclusion that is hardly fair.

As human beings we sometimes move from one extreme to another. A task of the historian, a difficult task, is to audit those extreme swings of opinion. In my view those historians, politicians and commentators – and even those High Court Justices – who now wear the black arm-bands, tend to offer an unfair assessment of that earlier Australia. Criticisms, often strong criticisms, can fairly be made of Australia since or before 1900. But on the balance, the nation's story is more a success than a failure, unless by chance the failures on certain fronts are exaggerated.

Chapter Twelve:
A Century of Achievement

Professor David Flint, AM

I was recently asked to speak at a graduation at one of our larger universities.

A graduation is a solemn moment. It marks the happy conclusion of one of those significant parts in the lives of our young men and women.

An ideal address should congratulate and encourage the graduates, and contain a message which is relevant to and of interest to all of them, as well as their families and friends.

So I attempted to do this. Whether I succeeded I do not know. But as we were then, as we are now, in the process of celebrating the events leading up to the foundation of our Commonwealth, I thought that this would be an ideal subject.

I reminded the graduates that when Governor Arthur Phillip first came to these shores he soon realised that his task would not be easy. The colony would not soon be self-sustaining, as the imperial authorities had believed. He accepted he had to take difficult decisions. I told the graduates that if they were to visit what is now the Governor's Office in Macquarie Street, they would see there the 19th Century office of the Prime Minister of New South Wales, as the Premier used to be known. And next door the Cabinet Room. If they were to visit the Parliament too, they would appreciate how very soon after the foundations of the penal colony the full panoply of Parliament and the Westminster system, and democracy itself, took root here. Indeed, I told them, we were soon to be in the vanguard of the world's democracies, with universal male suffrage, the vote for women and the secret ballot.

There are only four other countries which could claim to have a longer unbroken democratic history. And it is relevant that we celebrate this year the fact that, one hundred years ago, a federal Constitution was drafted in Australia, by Australians and approved by the Australian people, for the very first federation whose borders would encompass a whole continent.

The foundation of our federal Commonwealth was an extraordinary achievement. Sir John Quick, one of our Founding Fathers, played a significant role in it. He saw that by the 1890s the federation movement had to be saved from the political morass into which it had fallen. At Corowa in 1893, he proposed that the people had to be directly involved in the election of a convention to draft the Constitution, and that the people should finally determine whether to approve it. It was the acceptance of this principle that ensured that the federal movement would succeed. Sir John Quick was to write subsequently, with Robert Garran, in what is, even today, the magisterial commentary on the Constitution:

> "Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood. The States of America, or Switzerland, or Germany were drawn together under the shadow of war. Even the Canadian provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth, the fifth great Federation of the world, came into voluntary being through a deep conviction of national unity. We may well be proud of the statesmen who constructed a Constitution which – whatever may be its faults and its shortcomings – has proved acceptable to a large majority of the people of five great communities scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble Social Compact".[1]

Our Federation was born on the very first day of the new Century, 1 January, 1901. In that year Australia had the highest income per head in the world, an honour it shared with another former settled colony, Argentina. I make no criticism of Argentina, a fine country and a fine people. But she has been a less happy land than ours. Since 1930 military dictatorships have alternated with democratic governments, with cruel results for her people. Shortly after our own constitutional crisis in 1975 – which resulted in no loss of life – an Argentine military junta waged a "dirty war" against its own people. This resulted in many thousands of "disappeared", a euphemism for tortured and murdered by the military. And now Argentinians' income per head has declined to less than half of ours. She was to play no significant role in the defence of freedom in either the first or second World Wars.

In the meantime we in Australia have always remained a democracy. We remain among the world's most successful economies. And just as we achieve outstanding results on the sporting field, although a small country, so too we have made an outstanding contribution to the cause of liberty and freedom worldwide. With a population one-quarter of what it is today, it is sad to recall that more serving Australians died in the First World War than those of any of the other non-European powers involved. These include South Africa, India, Canada and even that great power with its vast population the United States. And all of the Australians were volunteers. In the Second World War, Australia was one of that tiny coalition of powers which resisted Hitler from the very beginning.

This tradition has continued, through Korea to so many peace-keeping interventions. More recently, Australia played a significant role in helping the people of East Timor. This in many ways made some amends for our role in recognising the forced incorporation of that territory into the Republic of Indonesia.

In July of this year the British Parliament invited the Australian Parliament to celebrate with it the enactment of the *Constitution of Australia Act* on 9 July, 1899. And also to honour Australia for its great contributions to the Commonwealth over the century. The *Constitution of Australia Act* was a British Act which, subject to a compromise principally concerning the Privy Council, gave effect to the Constitution which had already been drafted in Australia by Australians, and which was approved by the Australian people.

The highlights of that week, for me, were two-fold.

First, the Federation Guard, the men and women of our defence forces, especially those wearing the slouch hat, guarding the great palaces of London.

Second, the ecumenical service for Australia in Westminster Abbey. There were many magnificent moments in that service. As I was fortunate enough to draw a ticket for that, let me mention three.

One was immediately after the procession of the clergy and the Sovereign, which was announced by a great trumpet fanfare, the Royal Anthem, and the hymn, "Praise my soul the King of Heaven, to his feet thy tribute bring". As the hymn continued, I could see an Australian flag coming slowly up the Nave towards the Sanctuary. Protected by a flag party of three, they seemed so lonely in that vast Abbey. I could just see the slouch hat of the soldier, the caps of the sailor and the airman. Slowly they came up the Nave, with that symbol of our nation, the symbol which has comforted and encouraged us, in peace and in war, in wealth and in depression, in joy and in sadness.

And while the congregation continued:

"Angels help us to adore Him

Ye behold Him face to face..."

The Dean came forward to receive the flag, our flag, the flag under which so many had fought and died. And they carefully placed it in its cradle in the Sanctuary, by the high altar and near the Sovereign.

The flag party retired, slowly, while the hymn concluded:

"Sun and moon, bow down before Him;
Dwellers all in time and space.
Praise Him! Praise Him!
Praise with us the God of grace".

Then later, Richard Walley, a cape about his shoulders, and with bare legs and feet, went up to the Sanctuary and played the didgeridoo. This must have been the first time this ancient instrument, with its strange timeless sounds, echoed around that very old but not so ancient building. And each time he passed before his Sovereign he stopped, he turned, and he bowed low, gracefully and naturally.

Then there was the address given by The Most Reverend Peter Hollingworth, AO, Archbishop of Brisbane. His theme was deeply spiritual. He said:

> "...We Australians have yet to discover fully the power and life giving presence of God the Holy Spirit brooding over us and our land.
>
> "When we do, we will be able to embrace the idea of Australia as 'the Great South Land of the Holy Spirit', *Australia del Espiritu Sancto*, as Spanish Navigator Pedro Ferdandez de Quiros named it.
>
> "Our destiny is to be a 'spiritual Commonwealth', a people of many traditions bonded together in the spirit by our sense of place and a desire to order our life together in justice and charity".

Our success in this, he says, will depend on the extent we "drink of the cup of salvation and call upon the Name of the Lord" of History who, in partnership with us, is "gradually transforming *Terra Australis Incognito* into the Great Southern Land of the Holy Spirit".

There were other moments in that service, for example, Yvonne Kenny's singing of Mozart's *Laudate Domini*.

Australia Week celebrated a significant moment which leads up to the celebrations on the first day of the New Year, and of the new century, when all the church bells of all of Australia will peal in unison in honour of the centenary of our Federation.

When we celebrate those first one hundred years, we will be celebrating a century of achievement. But we will not be celebrating a century of perfection.

It is right and proper that we not hide our failings and our weaknesses.

One of the liturgies close to the hearts of many Australians requires its worshippers to admit, humbly and upon their knees:

"We have left undone those things which we ought to have done,
"And we have done those things which we ought not to have done,
"And there is no health in us".

It is good to reflect on our failures. But it is not good to become obsessed by them, or to exaggerate them.

Perhaps our greatest failings were in racial matters – White Australia, and especially, with the Aboriginal people.

But there was also another failing, and this not of the people at large, but a select circle from that small but powerful priestlike class, the Justices of the High Court.

Let me speak to that first, before I turn to our race relations.

The Constitution of 1901 would never have been approved by the people unless its terms settled as precisely as possible the division of powers between the Commonwealth and the States. And consistent with the democratic principle that Quick forged at Corowa, the Constitution provided that change could only be effected by the precise details of any proposal being laid before the people, and approved by them nationally and federally. By nationally, I mean by the overall approval of the people across the Commonwealth, and by federally, I mean by the approval of the people in a majority of States.

Now some people will tell you that this produces too much rigidity in the Constitution.

This view is usually based on the fact that Australians have not readily approved referenda proposing change to the Constitution. Of the 44 proposals for change made over this century, Australians have approved eight. By way of comparison, 25 changes have been made to the Constitution of the United States. But ten of these – the Bill of Rights – were made in 1791, and were necessary to secure its ratification. So from 1791 there have been fifteen changes to the US Constitution. Fifteen in two centuries, compared to eight in our one century. A comparable record, I would say, especially if one excludes the two American amendments on Prohibition, one to impose it and one to remove it!

And it must be remembered too that in Australia, unlike Switzerland, the people cannot themselves propose a constitutional change by way of an initiative. Nor can the States. Only the Houses of the federal Parliament can propose constitutional change. It is not surprising then that most proposals for constitutional change have been either to increase Commonwealth powers, or reduce the Senate's power and influence. In other words, to change the federal balance.

The people rarely want this. As Australia is a democracy, forged on John Quick's principle that the people are the final judge of constitutional change, it would be reasonable to assume that the people's clear wish should be respected. But there is a view in certain circles that there are those who know better than the people. Such a view is often found in political circles, the law, and the media. Thus Mr Kim Beazley, MP, Leader of the Opposition, observed:

> "Ours is a remarkably adaptable country, whose take up of new technology is among the fastest in the world, whose universal education aims have been admired worldwide, and yet our people continually resist attempts to strip the barnacles from a 100-year old Constitution. Over the last century, the people have only agreed to eight changes to the Constitution, out of 44 proposals put by government for change".[2]

John Quick and Robert Garran, wise men that they were, anticipated this idea that governments and others know better. They believed that the safeguard that the people be fully informed on any proposed constitutional change, and that they must approve it both nationally and federally, was a proper and appropriate constitutional safeguard. As such, they believed it is:

> "… necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible and inevitable".[3]

Now as I have said, the people had agreed at Federation, and they have confirmed ever since, that the Commonwealth Parliament is to be a Parliament of *limited* powers; that is, those powers enumerated in the Constitution and no other powers. Only four powers would be exclusively the Commonwealth's (these are set out in ss. 52 and 90). In addition there would be a range of powers set out in a list, available to both the Commonwealth and the States. All the rest would be *reserved* to the States. So Federal/State powers were to be in balance.

In the first decade, the States were protected by the High Court finding there were two implications in the Constitution. The first was evident if you accept the fact that it was clearly intended that the Constitution would reserve certain powers to the States. So the implication was that the Court must have regard to those powers reserved to the States before the ambit of any Commonwealth power could be determined. (This was called the doctrine of the reserved powers.)

The second was that the Commonwealth and the States were immune from the legislation of the other – the doctrine of implied inter-governmental immunities. These two doctrines ensured a proper place for the States in the federation. This was changed in the *Engineers Case*[4] in 1920 by the High Court, now dominated by Sir Isaac Isaacs, widely believed to be a centralist. Sir Samuel Griffith had left the Court in 1919, and Justice Barton and Justice O'Connor had died. Sir Samuel Griffith himself died in 1920, after the hearing of *Engineers,* but before the judgments.

Since then, the powers of the Commonwealth are to be ascertained according to their "natural and ordinary meaning", without the obvious implication that you must balance these against the reserved powers of the States. As a result, those powers reserved to the States are not to be interpreted according to their natural powers and ordinary meaning! State powers just have to give way to Commonwealth powers. So it does not matter how much a Commonwealth power intrudes into an area of State responsibility, say education, hospitals or law and order. So the scales are no longer in balance. The High Court has put its hand – heavily – on the scale marked "Federal powers".

After a few decades the High Court realised that this method of interpretation could even destroy the States (*Melbourne Corporation Case*[5] in 1947). So they found, after all, another implication. This applied to invalidate a federal law which discriminated against a State, or which operated to destroy or curtail the continued existence of the States or their capacity to govern. But it is rare that the Court will find a federal power will be so limited in relation to a State power.

On top of this the High Court has more recently given an interpretation to the power to legislate with respect to external affairs (s.51 (xxix)) which would have astounded the Founding Fathers. The power can now expand into and even take over any State responsibility.

The Court seems to be saying – although some of the judges seem to have some reservations about sham treaties – that if the government enters into a treaty with, say, Fiji and Papua New Guinea on the rules about garbage collection, this allows the federal Parliament to pass legislation to give effect to those rules on garbage collection throughout Australia. But garbage collection is not a federal power. This was never, ever intended, and this change to the Constitution was never, ever agreed to by the people. And "external affairs" also include matters not covered by treaties.

This incursion of federal powers into areas of State responsibility has been exacerbated by removing from the States their financial independence. I refer in particular to the problem of what is called "vertical fiscal imbalance". This is the phenomenon whereby the States provide services such as hospitals, schools and the police, but are not responsible for the collection of much of their income. The States raise about 20 per cent of the total Australian tax revenue, but spend 40 per cent. To bridge this gap they have become mendicants on the Commonwealth. It is a fact that children become responsible adults by earning their own, and managing their own income. They move from dependence to independence. Since 1901 the States have been moved from independence to a state of dependence. They no longer have to explain to their electorates why they need access to taxation and how they spend that money. That is *not* how this democracy was supposed to function.

As the Founding Fathers of the United States pointed out:

> "In a federation, the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants".[6]

In 1942 the States lost their right to levy income tax. Although subsequently restored in theory, the political moment had passed for a separate State income tax. In the last decade the High Court has taken away any possibility of State taxes on goods. This is the result of the Court's interpretation of s.90, which gives the Commonwealth the exclusive power to "impose duties of customs and excise".

This section was to secure the customs union I referred to above – that is, a common external tariff and no customs duties on goods crossing State frontiers. So that, for example, the customs houses on the Murray River would be closed down. But not so that the States would become mendicants on the Commonwealth.

When the Founding Fathers referred to "customs" and "excise", the natural and ordinary meanings of these two words were clear. (I have used the phrase "natural and ordinary meaning" because that was central to the High Court decision in the *Engineers' Case* which so significantly shifted the constitutional balance against the States.) Customs are levied on goods coming into a country. "Excises" are taxes on the production and manufacture of goods. The purpose of s.90

was to prevent States imposing a different rate of excise on goods coming from other States. But in 1993 and 1997 the High Court decided that an excise was more than that. The Court said it was "an inland tax on a step in (the) production, manufacture, sale or distribution of goods".[7]

This extended interpretation of "excise" was never intended by the Founding Fathers. It has the consequence that a State tax on goods is invalid. Now the Howard Government has sought to overcome this problem. In an act of rare and statesmanlike generosity, the Government has agreed that *all* of the proceeds of the GST will go to the States. An attempt has been made to entrench this and make any change subject to the consent of the States.

The mistake of the Founding Fathers was to assume that the High Court would always act with judicial restraint. This is easy to say now, but no one had seen the extreme judicial activism which some American judges were to exhibit in the 20th Century.

It has been said of judges that they have the choice between accepting the doctrine of judicial restraint or having popular control imposed on them. That is, if they want to be legislators and not judges, they should stand for Parliament. Alternatively, judges should be elected, or at least be subject to some democratic control. The election of judges is sure to turn them into political judges, so that they then are tempted to decide at least some cases not according to the facts and the law, but according to what they believe to be their chances of re-election. So that is undesirable. Better to make sure they are judges and not politicians.

The Americans favour either electing their judges or requiring the confirmation of judicial appointments by the Senate. Because many US Supreme Court Justices in the latter part of the 20th Century decided they were legislators and could change the Constitution as they wished, confirmation by the Senate became a formidable political process. Unfortunately this does not ensure that the best judges are appointed. In fact it has sometimes achieved the opposite. It is now used to attempt to ensure that the judges' politics are the same as the confirming majority. Senate confirmation here would have the same effect. And the frequently suggested creation of a Judicial Commission to select judges would probably only ensure judges held views similar to those on the Commission.

The desirable solution seems to ensure the best judges, ones who will apply and not alter the Constitution, are appointed. In recent years an attempt has been made to appoint judges who do not seem to be activists. But what would stop a future federal government from appointing activist judges, or those who have a strong centralist inclination, either consciously or unconsciously? Perhaps the States should have been constitutionally involved in both the appointment and the removal of the judges, either with appointments or by allowing *ad hoc* judges appointed by the States to join the Court in relevant cases, as in the International Court. Or alternatively, the facultative initiative could have been introduced to allow the people to review all new laws, whether by the legislature or by the courts. Our Founders had assumed the Justices would act with judicial restraint, which they did for the first twenty years. This is surely the best way to ensure that the High Court is not politicised.

White Australia Policy

The Australian century can also be criticised for its attitude to immigrants from Asia.

The most virulent opponent of Asian immigration was the republican journal *The Bulletin.* On 22 June, 1901, it attacked the Colonial Secretary, Joseph Chamberlain, who had blocked certain Queensland legislation banning coloured labour:

> "If Judas Chamberlain can find a black, or brown or yellow race...that has as high a standard of civilisation and intelligence as the white, that is progressive ... as brave, sturdy, as good nation building material, and that can intermarry with the whites without the mixed progeny showing signs of deterioration, that race is welcome".

One of the first laws passed after Federation instituted the White Australia policy. This allowed Asian immigrants established here to stay, but was intended to stop further immigration.

To allay British objections, a discretionary dictation test in any European language could be administered by customs officials.

Yet immigrants still came through. My own maternal grandparents, and their children, arrived in Sydney from Batavia, now Jakarta, in 1917. A dictation test was administered – on this occasion in English, fortunately one of the at least four languages in which they were fluent. They passed, including my mother, who was still a child.

While the White Australian policy seems outrageous by our standards, it was not so different from the barriers to Asian immigration erected in other countries, including the United States and Canada. It is not so different from the immigration policies still applied by some countries today, and which are rarely criticised. In any event it was gradually relaxed after the Second World War and no longer applied in any real sense by the mid-sixties.

Australians can be least proud of the policy concerning the Aboriginal people. And with the advent of self-government, the restraining influence of more liberal Colonial Secretaries and Governors was removed.

There is a widespread belief, reported in the media, that the 1967 referendum gave the Aboriginal people, for the first time, Australian citizenship and the right to vote. The truth is not so clear cut. They were already citizens. Moreover the right to vote was granted in a piecemeal way, in four States at least in law if not in practice, before Federation.

The 1967 referendum was first about removing provisions from the Constitution against counting Aboriginal people (then considered mainly nomadic) in reckoning the numbers of people. It was also to give the federal Parliament a power to legislate with respect to Aboriginal people. This referendum was a bipartisan measure, and was approved by a record affirmative vote of 90.77 per cent.

This vote was the clearest indication of an overwhelming view among Australians that the Aboriginal people were entitled to be treated as the equals of other Australians. The extent to which the Aboriginals have been accorded this status is the subject of continuing debate.

The noted French historian and anthropologist, Emmanuel Todd[8] argues that the leading indicator of the degree of the acceptance of minorities within a society is the degree of female exogamy – that is, the extent to which female members of the minority marry out of their group. In Australia, the 1996 census[9] demonstrated that 64 per cent of "indigenous couple families" were unions between non-indigenous and indigenous partners. These families were almost evenly divided between those where the mother was indigenous and those where the father was indigenous. This indicates a rate of female exogamy among aboriginal people of about 32 per cent. This is far higher than those minorities which Todd evaluates, including black Americans in the United States, 1.3 per cent; Turks in Germany, 7 per cent; or Algerians in France, perhaps 23 per cent, although the statistics probably inflate this, because French citizens of Algerian descent are treated as French.

This is not an unreasonable test, even if it may encourage a charge that those who rely on it are reviving the assimilationist policies of the past. At the very least, these statistics must constitute a balance against others which compare adversely such matters as the health and the life expectancy of Aboriginal people with other Australians.

In any event, it is clear that there is hardly any support for a policy which would be intended to differentiate adversely against the Aboriginal people.

The question remains about the proper assessment of past policies. The final judgment on that, if a final judgment can ever be made in this world, will be made by Australian historians in an objective search for the truth. But the ancient Latin saying remains true:

"*Infecta facta fieri nequent, facta infecta fieri nequent*".

"Things that have not happened cannot be made to happen; things that have happened cannot be undone".

Assessments of our past treatment of the Aboriginal people range across a broad spectrum.

Expatriate Australians – Germaine Greer, Robert Hughes and Philip Knightley – are among the harshest critics. Robert Hughes says:

> "No country colonised by Europeans has treated its indigenous minority more inhumanely, and the legacy associated with colonialisation for Australian blacks has been terrible".

This was inserted not into a journal of opinion but into the *Official Souvenir Program* for the Sydney Olympics, 2000! While it says little about the rigour of Mr Hughes' survey of centuries of European colonialism, it says much about Australia's liberal attitudes to freedom of speech.

In a recent critique of the views of those who assert a genocidal intent in, and effect of Australia's indigenous policies, Keith Windschuttle[10] cites Philip Knightley's conclusion:

> "It remains one of the mysteries of history that Australia was able to get away with a racist policy that included segregation and dispossession and bordered on slavery and genocide, practices unknown in the civilised world in the first half of the twentieth century until Nazi Germany turned on the Jews in the 1930s".

Of course there were bloody disputes brought on by the occupation of land by white settlers which impinged on the traditional wanderings of the Aboriginal people, or who may have regarded the white men's flocks as legitimate prey.

Certainly there were individuals, and even officials, who committed unspeakable crimes against the Aboriginal people. There is no evidence that the Australian treatment of the Aboriginal people ever approached the barbarity of the Nazi's treatment of Jews, Gypsies and others, including homosexuals and the mentally ill. In the case of these unfortunates, the Nazi policy was for a "final solution" – a term which in itself stifles everything that is good in man and in his institutions.

The Nazi policy was for the liquidation, the physical destruction of all people of that race or group by agents of the state aided by the police and the public service in accordance with the decisions and directions of the highest state authorities.

To repeat, there is no evidence that the crimes committed against the Aboriginal people were ever committed as government policy. And there is overwhelming evidence to the contrary. Indeed, from the beginning of the penal colony, the authorities were to insist on the application of the rule of law – at least the criminal law – to all men and women, of all races and colours. That this was to be imperfectly applied, and that there were to be legal restrictions on Aboriginal people, often for paternalistic reasons, is a matter of great regret. But it does not equate to some form of Nazism at the heart of white Australia.

The application of the rule of law was demonstrated cogently in the final grave words of the judge when sentencing the white perpetrators of the massacre of Aboriginal people at Myall Creek in 1838 – over 160 years ago. These words demonstrate that even then, the principle that the rule of law must in Australian society prevail whatever the race or colour of the victim or offender, was fully upheld.

Mr Justice Burton pronounced these words:

> "Prisoners at the bar ... you have been found guilty of the murder of men, women and children.
>
> "The circumstances of the murders of which you have been found guilty are of such singular atrocity that I am persuaded that you long ago must have expected what the result would be. This is not the case where a single individual has met his death by violent means; this is not the case, as has too often stained indelibly the annals of this Colony, where death has ensued from a drunken quarrel; this is not the case, when, as this session the Court has been pained to hear, the blood of a human being and the intoxicating liquor were mingled on the same floor; this is not the case where the life or property of an individual has been attacked, ever so weakly and arms have been resorted to.
>
> "No such extenuating circumstances as these, if any consider them extenuating, have taken

place. This is not the case of the murder of one individual, but of many – men, women, and children, old men and babes hanging at their mothers' breasts, to the number in all, according to the evidence, probably of thirty individuals, whose bodies on one occasion were murdered – poor defenceless human beings...

"I cannot expect that any words of mine can reach your hearts, but I hope that the grace of God may reach them, for nothing else can reach those hardened hearts which could surround that fatal pile, and slay the fathers, mothers, and the infants...

"I cannot but look at you with commiseration; you were all transported to this Colony, although some of you have since become free; you were removed from a Christian country and placed in a dangerous and tempting situation; you were entirely removed from the benefit of the ordinances of religion; you were one hundred and fifty miles from the nearest Police station on which you could rely for protection – by which you could have been controlled.

"I cannot but deplore that you should have been placed in such a situation – that such circumstances should have existed, and above all, that you should have committed such a crime. But this commiseration must not interfere with the stern duty, which as a Judge the law enforces on me, which is to order that you, and each of you, be removed to the place whence you came and thence to a place of public execution, and that at such time as His Excellency, the Governor shall appoint you be hanged by the neck until your bodies be dead, and may the Lord have mercy on your souls".

Let me remind you that this is a judge, in 1838, sentencing to death white men for the murder of Aborigines.

What greater evidence of a society under the rule of law for all, and for all races and colours, can there be than these words? And this in the early part of the 19th Century. These words are more than sufficient not only to deny, but to unmask, the unjustified attempt by some to paint our country as a genocidal hell.

In conclusion, it has been a remarkable century, and one of which we can be proud.

So soon after Federation, this young country was to be tested in that terrible Great War. It was in answering that challenge that our nation came of age. Our great national poet A.B. "Banjo" Paterson captures that in these verses from *Australia Today* (1916):

"They came from the lower levels
Deep down in the Brilliant mine;
From the wastes where the whirlwind revels
Whirling the leaves of pine .....
On the Western stations, far and wide,
There's many an empty pen,
For the 'ringers' have cast the machines aside
And answered the call for men .....
For the men have gone, as a man must go,
At the call of the rolling drums;
For the men have sworn that the Turks shall know
When the old battalion comes .....
Brotherhood never was like it;
Friendship is not the word;
But deep in that body of marching men
The soul of a nation stirred.
And like one man with a single thought
Cheery and confident;
Ready for all that the future brought,
The old battalion went.

Column of companies by the right,
Steady in strong array,
With the sun on the bayonets gleaming bright,
The battalion marched away.
How shall we tell of their landing
By the hills where the foe were spread,
And the track of the old battalion
Was marked by the Turkish dead?
With the dash that discipline teaches
Though the hail of the shrapnel flew,
And the forts were raking the beaches,
And the toll of the dead mean grew.
They fixed their grip on the gaunt hillside
With a pluck that has won them fame;
And the home-folks know that the dead men died
For the pride of Australia's name.
Column of companies by the right,
To the beat of the rolling drums;
With honours gained in a stirring fight
The old Battalion comes!"

Endnotes:

1. John Quick & Robert Rannelph Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted by Legal Books, 1955 at 225.

2. Honourable Kim Beazley, *Planning for a New Republic*, Notre Dame University, Fremantle, 7 October, 2000.

3. Quick and Garran, *op.cit*.,at 988.

4. (1920) Commonwealth Law Reports, 129.

5. (1947) 74 Commonwealth Law Reports, 31.

6. *Federalist Papers* No. xxxii, 1788, reprinted 1979, The Eastern Press, Norwalk, Connecticut.

7. *Capital Duplicators Pty Ltd v. Australian Capital Territory (No.2)*.

8. *Le Destin des Immigrés*, Seuil, Paris, 1994.

9. John Taylor, *Policy Implications of Indigenous Population Change 1994-1996*, (1997) Vol.5, No.4, *People and Place*, 1.

10. Philip Knightley, *Australia*: *A Biography of a Nation*, quoted in Keith Windschuttle, *The Myths of Frontier Massacres in Australian History*, in *Quadrant*, October, 2000.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I think you will agree that we have had another successful Conference.

On the subject of Sovereignty, we had four strong papers from Mr John Stone, the Honourable Peter Walsh, the Honourable Max Bradford and Mr Ray Evans. Those papers left us in no doubt that by unwisely entering into treaties which have not advanced the national interest, our governments have surrendered parts of our sovereignty or, as Mr Evans would prefer, have weakened our will to defend our sovereignty. The damaging effect has not been merely trivial, as Mr Evans' discussion of the *Kyoto Protocol* has shown. Mr Bradford's paper on the New Zealand experience with ILO supports this view, and the Australian experience will very likely have been the same as that of New Zealand.

There are two changes to the Constitution that are highly desirable, although I am not confident that either change will be made in my life time. It should be provided that no treaty can be ratified without the approval of the Senate, perhaps by a 2/3 majority. The external affairs power should be limited to prevent the use of that power simply to give effect to international agreements, except with the consent of the States. In the absence of amendments of this kind, at least it is to be hoped that governments will ensure that no treaty is ratified without proper consideration by a Parliamentary Committee whose duty will be to ensure that no treaty will be entered into unless it is in the interests of Australia to do so.

On the topic of mandatory sentencing, we had two well balanced papers by Ms Ruth McColl, SC and the Honourable Denis Burke. In spite of Mr Burke's impressive argument, I remain of the view that as a matter of principle it is wrong to provide for a sentence that must be applied irrespective of the circumstances of the case. In my opinion, mandatory sentences are equally wrong in principle when applied to cases of murder or drink driving as in any other cases. It is easy to suggest circumstances which in the case of any crime should lead to a sentence less than that mandated by law.

The absence of judicial discretion in sentencing will inevitably lead to injustice in some cases. However, as Mr Burke showed, this will not always be the case, and in some cases in which mandatory sentences were imposed, the sentences were appropriate and the nature of the case was misrepresented by the media.

It is a matter for regret that it should be thought that judicial officers imposed sentences that are capriciously low, but if this is the case, a bad system should not be imposed because a good one is working badly. One remedy lies in the more determined prosecution of appeals with, if necessary, amendment to the law to make such appeals more readily available. Also more care should be taken to ensure that only persons suitable for appointment should be elevated to the bench.

Other papers referred to two anniversaries of events that took place in November. The first of these was the anniversary of the referendum that defeated the move to a republic.

Sir David Smith gave us some important details of the campaign against the change proposed by the referendum and informed us of the obstacles which the advocates of the "No" case had to surmount. Those obstacles included the bias of the media, and the extent of the bias was demonstrated clearly by Dr Nancy Stone, whose analysis of material in *The Australian* and *The Age* indicated how the news, comment and opinion in those papers heavily favoured the republican case.

Professor Malcolm Mackerras gave us an interesting analysis of the voting. One can only

speculate as to the reason why those who supported a republic were generally people who were wealthier or lived closer to city centres than the “No” supporters.

The second anniversary was that of the dismissal of the Whitlam government. Mr Peter Ryan's paper, read by Mr Purvis, gave us a frank commentary, in his own inimitable style, on some of the persons involved in those events.

The final topic was the last 100 years of Australian history. As we expected, Professor Geoffrey Blainey, AC gave us a stimulating and indeed inspiring address. It should be widely read, particularly by those who teach our young to denigrate Australia and to believe that Australia was uniquely racial, and that our treatment of Aboriginals was uniformly inspired by malice.

May I add a footnote in relation to the expression “the black arm-band”; before World War Two it was a requirement that black arm-bands should be worn with judicial robes during periods of court mourning. I think that I have read that the same was true of military uniforms, at least in some circumstances.

Professor David Flint also lived up to our expectations with his account of a century which, as he stated, was one of success but not of perfection. He too gave us examples of the grossly exaggerated criticisms of our treatment of the Aboriginals, although he recognised that the clash of cultures had tragic consequences for them. I should point out, what Professor Flint implicitly recognized, that the fact that the High Court has in effect re-written parts of the Constitution is not an isolated phenomenon. The same has been true in the United States and Canada. I shall not attempt to explain why this has been so.

I am not paying a mere formal courtesy to Mr John Stone and Dr Nancy Stone when I thank them for all that they have done in organising this Conference. Without their efforts the Conferences would not be the successes that they have been. I thank you again, John and Nancy Stone.

And thank you all; by your attendance you have contributed to our success. I hope to see you at our next Conference.

Appendix I:
Address Launching Volume 11 of *Upholding the Australian Constitution*

Hon Peter Walsh, AO

The principal theme of the Conference Proceedings being launched today, is the referenda on which the people will vote 22 days hence. Both content and timing are appropriate. In addition we have another excellent and alarming essay by Dr John Forbes on the arrogance of sections of the judiciary. I will return to that later.

Professor Craven's odd man out contribution says:

> "The Monarchy is not an end in itself. Rather it merely is one means towards the fundamental end of preserving our unique constitutional order".

For somewhat different reasons I have long held a similar view. Whether Australia calls itself a constitutional monarchy or republic is a matter of monumental unimportance. In recent decades, this country's fundamental problems have been foreign debt, unemployment and growing disparity in market incomes; more recently, ambulance chaser lawyers. (A current, but hopefully ephemeral, concern about politics in the Indonesian archipelago should be added.)

Not since 1930, at the latest, has a British Monarch tried to interfere in Australian politics. One Governor-General did in 1975. Another did this week. Wednesday's frolic in London by Messrs Yu, Dodson and others was arranged by the Governor-General. Whether Sir William's compliance in this attempt to have the Queen meddle in Australian politics was endorsed by the Government, I do not know. If not, will he please explain?

Lest this be interpreted as an attack on the Vice-Regal institution, let me say that Sir John and Sir William – both personal choices of Prime Ministers, Whitlam and Keating – would have been appointed President in an ARM republic. Indeed, Janet Holmes 'a Court and others are proclaiming Sir William to be a perfect potential President. In his dinner address (page xxv) Professor Flint does demonstrate – ironically by quoting Gough Whitlam – that the Prime Minister could more easily dismiss a President than a Governor-General.

None of the debate – if that is what it should be called – has convinced me that to be a republic, or not, is a matter of profound importance. The arrogance of the Turnbull republicans "debate by assertion" style, fudging of terms like "Head of State", and their attempts to fool the people by rigging the question to conceal the fact that politicians will elect their President, is not likely to have gained support.

Kerry Jones of ACM ensured the ARM would have no monopoly on intellectual distortion, beating up a scare campaign about the 57 constitutional amendments the ARM proposal will entail.

More important is the fatally flawed logic of the "Yes" argument. The Queen, they insist, is the Head of State. The Prime Minister certainly cannot sack the Queen, but would be able, alone, to sack the President. But they insist that the proposed change will not increase the Prime Minister's power! Again, please explain.

One contributor has profoundly changed his mind. Professor Craven has been a monarchist, a McGarvieite and is now a Turnbull republican. His long, and persuasively argued, defence of this change is that, due to time, ethnic compositional changes, the debauched House of Windsor and so on, the Monarchy is doomed. If we don't vote "Yes" this time we will inevitably get an elected President. To avoid this, even monarchists should vote "Yes". Leaving aside the fact that we will never have an elected President unless we vote for it, Professor Craven's argument has been somewhat derailed by Kim Beazley's recent assurance that the ARM proposal is merely a stepping stone to an elected people's President.

Long serving previous Governor-Generals' secretary Sir David Smith attacks both Craven's apostasy and Sir Anthony Mason's "robust" invention of a constitutional convention that "the Governor-General ceases to function whenever the Queen is in Australia". He has also told us that "a former Chief Justice of the High Court became a republican at the age of eight because he disapproved of body line bowling". Apparently the Chief Justice in question is Mason. The latter's greater sin is in being a judicial supremacist harbouring a platonic contempt for parliamentary democracy – who, moreover, got an opportunity to implement some of his doctrine.

Geoffrey Partington, though conceding that zeal for the Crown in 19th Century Australia was probably weaker among Irish Catholics, rejects as "crude and false" Thomas Kenneally's stereotype of Australian history as "continued cantankerous sectarian strife", and the conventional wisdom that hostility to the British Monarchy first took root in the bosom of the Irish Catholic church. He cites, among others, Cardinal Moran, first Irish-born Archbishop of Sydney, praising "...our Colonial Administration, linked as it is to the Crown of Great Britain, as the most perfect form of republican government".

Even if the inbuilt double barrier to constitutional change is disregarded, it seems likely that for now and the near future the Monarchy will survive, if only by default – that is, monarchists plus republicans who do not like the specific republic proposed will have the numbers. Unfair that outcome might be, but I do not believe it justifies Professor Craven's plea to vote for what you do not want. A preferential vote with three or more choices would defeat the monarchy but would have no legal relevance. Even if it did, I doubt that the ARM élitists would be willing to trust the people. And anyway, I still don't believe it matters much.

What *does* matter is the Preamble.

Many years ago a friend of mine moved, at a Labor Party conference in Western Australia, what he called the "All purpose Conference motion". I will read it. It says:

> "To enhance the viability and thrust of integrated social, political and cultural modes, Labor will undertake, where appropriate to:
>
> 1. Resource to the maximum extent feasible, having regard to the needs of the broader sectors of the community, all policies and programmes which possess attributes which encourage diversity and equality, irrespective of race, ethnicity, gender, gender preference, creed, age, impairment or social origin.
> 2. Progress the advent and closely monitor the development and evaluation of, necessary processes and procedures by which innovative linkages between multi- and bilingual consumer recipients are contributed to, having in mind the desirability of securing comprehensive and meaningful opportunities for all peoples".

The Preamble reminds me of that "all purpose Conference motion" – every feel-good cliché anyone can think of. Though some people failed to recognise it as such, the all purpose motion was a send up. The Preamble, by contrast, is supposed to be taken seriously. Michael Warby (p. 77) sent up the "paradoxes":

> "First there is something so important (it requires) the effort of a constitutional referendum to consider it.
>
> "Yet this is something 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 so important that the words of our unofficial poet laureate have to be amended for legal reasons.
>
> "Yet it is so unimportant that it need not bother with such elementary constraints as good English expression".

(Pedants might also question its factual rigour. The concept of "nation" did not exist in Australia until at least the 18th Century. Even if it did, it is unlikely that 18th Century Aborigines were "the nation's first people". Lest hard archaeological evidence put that beyond doubt, excavations at Kow Swamp in Victoria were stopped, and specimens already recovered have been

hidden).

Chief sponsors of the Preamble hope and expect legal significance will be "discovered". As well known preambulators McKenna and Winterton wrote recently:

> "A Preamble which declared all the things we believed but prevented the courts drawing on them is a grand exercise in window dressing".[1]

In his Issues paper on this matter Sir Harry Gibbs quoted s.125A of the enabling legislation, which states that the Preamble "...shall not be considered in interpreting this Constitution or the laws in force in the Commonwealth...".

I doubt however whether Sir Harry, among others, is absolutely convinced that a mere Statute will necessarily defer a High Court which has already overturned 150 years of legal precedent, probably got customary Melanesian land law wrong, and announced that its version of Melanesian land law also applied on the mainland – an answer the Court had not been asked to give and on which it heard no evidence – from doing whatever it chooses to do.

A subsequent Chief Justice was reported to have criticised the federal Government for its stated intention to cap the volume of appeals to the Federal Court judges who, as John Forbes says "... (seem to) fervently believe that they are the only true arbiters of illegal immigration and refugee status" – a conclusion the Court endorsed in the *Teoh Case.* Sir Gerard Brennan said:

> "If, in particular cases, it be thought that a judge of the Federal Court has overreached his or her jurisdiction in setting aside a decision made under the *Migration Act,* the remedy is to appeal, not to endeavour to immunise all decisions under that Act from operation of the *rule of law".*[2]

Judgespeak for judicial caprice and supremacy.

Chief Justice Brennan has gone, but Justice Kirby, whose views make Brennan seem like a parliamentary democrat, has arrived. Kirby was quoted last year by Pierpont as saying in 1993, *inter alia:*

> "It took a court decision *(Mabo)* to right a shocking failure of the democratic system. I have no doubt that history will judge kindly the decision of the High Court, contrasting the judges' sense of justice with the hypocrisy and neglect of 150 years of our parliamentary institutions".[3]

In Kirby's mind, unprovable conjecture about the view of future generations gives legitimacy to contemporary judicial decisions. Prior to last week and the *Yanner Case*, it seemed unlikely he would have the numbers on today's Court. Against that sort of judicial arrogance there can probably be no absolute defence. But avoid giving them excuses. "No" to the Preamble.

I have not mentioned Gary Johns or a couple of other thoughtful papers. Though I have gone on for long enough, I must especially commend John Forbes' exposure of class action scams and other judicial atrocities. Of the Family and Federal Courts he said:

> "There are now one hundred federal judges, and the 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".

Forbes notes that concentration of judicial power came about in just two decades. Lionel Murphy started it. No Government or Attorney-General has yet tried to curb it.

It is with the greatest pleasure that I launch this eleventh volume of the Society's Proceedings.

Endnotes:

1. *The Australian*, 22 April, 1999.

2. *The Australian Financial Review*, 26 November, 1998 (emphasis added).

3. *The Australian Financial Review*, 9 January, 1998.

Appendix II:
Civil Identity and the Anglosphere in Australia

Professor Kenneth Minogue.

The Hudson Institute in the United States has recently been considering setting up a unit to study what it calls the "Anglosphere", an idea explored by the writer James Bennett. The Anglosphere refers to something common to all of those countries which were strongly influenced by the British. It assumes that such countries share some elements of a common morality. They speak the same language, of course, but this intercommunicability extends beyond mere vocabulary to the terms of mutual understanding. On Bennett's view, this leads to societies in which a high level of trust is possible between people not directly known to each other, and to a consequent richness of social and economic initiative.

The notion of an Anglosphere is clearly an exercise in self-identification, and it raises the question of what it is and how we might explain it. English historical evolution would clearly be important. It might well be taken as a form of social capital, but is not to be identified with what political scientists called "political culture"; it is more fundamental than that.

The English language has become global, and the kind of civic identity which has given Anglophone countries their enviable power and stability has also been widely copied, but it is harder to acquire a culture than learn a language. Australians have had the good fortune to inherit it, but as we shall see, this kind of civil identity is subject to continual change. In order to explain what I take its character to be, I must first make some remarks about the – alas – all too fashionable idea of identity.

1. History as the key to identity

We must begin by throwing overboard the journalistic idea of identity as whatever a nation, or a person, wakes up one morning and decides to be. A lot of what people say about their own identity is the source of dangerous illusions. The kind of geographical fundamentalism that leads publicists to say that Australia is an Asian nation, or Britain essentially European, for example, merely responds to a political anxiety taking the form of a fear of isolation from neighbours. The odd thing is how prevalent this kind of anxiety has become in a world in which modern transport has rendered mere closeness of decreasing importance.

What we should expect from an opinion about identity is some light on the springs of action that reveal the character of someone. This means that the current vogue for imagining that one can "reinvent" oneself merely reveals a shallow grip on reality, as if people actually were what they imagine themselves to be on New Year's Day.

In happier times, of course, people took their identities for granted, unless they were unfortunates suffering from what psychiatrists call an "identity crisis". This happy innocence was lost as identity became a political issue during the ideological frenzies of the last two centuries. Enthusiasts conceived the notion that it was possible by a revolution to seize the levers of power and transform the character of entire peoples. Communists tried making over whole societies into what they imagined were perfect communities, and the Nazis tried to create a racially pure state. Perhaps the most absurd example of this national disorientation was Mussolini persuading the Italians that they were a race of warriors. Such disorientation is a mistake about reality which can have the most serious consequences.

Identity is not something to be treated lightly. Nor is it treated lightly by those who have suffered from serious disorientation. The generation of Germans emerging from the ruins of 1945 had a vibrant sense of what they were capable of, and they were determined not to repeat those

mistakes. The sad fact is that political wisdom about identity seldom long outlasts the generation that felt the pain.

Identity is the revelation of character, and it emerges much less from what people say than from what they do. What people say about themselves is cheap compared to how they act when challenged. And identities are constantly in flux. Australian nationalists often look back on the way Australians responded to the two World Wars as a tragic mistake about where Australia's real interests lay. They see support for Britain as a mistake, partly caused by a surviving subjection to imperial demands.

What involvement with Britain and the Allies actually signified was that most Australians at that time thought of themselves essentially as both Australian and as part of the British Empire. And it was in pursuance of that conception of their identity that they exhibited the virtues – especially the courage and resourcefulness of the Anzacs – which have continued to nourish Australian self-understanding to this day. Only a shallow partisanship would think these virtues compromised by the fact that they attached to a loyalty at variance with what Australian nationalists are inclined to hold today.

The point about identity is that it is capable of surprising us. Given human vanity, it is hardly surprising that we often find we lack the virtues we thought we had, but sometimes we surprise ourselves by being better than we imagined. Any national identity is, of course, a rough and ready construction out of the immensely varied responses we make to life. Philosophically, the very idea of identity – both individual and national – has been under attack. Is the person who committed the crime the same as the person who faces the punishment? Perhaps not, but there is no doubt that remorse can last a lifetime and punishment often deters people from repeating a crime.

That individuals have selves, souls, characters – in a word, identities – is one of the postulates of Western civilisation, and for all the pretentious disdain for things called "stereotypes", we talk confidently about the character of a person and the national characteristics of peoples. This is not less useful because some of the beliefs are false. Identities are contestable judgments to be argued about, and philosophical scepticism is largely irrelevant to this area of practical judgment. Our assumptions about identity are in fact so much instinctive to us that we call "mad" precisely those individuals who cannot sustain a "self".

An important element of identity is negative. It is particularly true in the moral sphere that we show what we actually are by being careful not to be what we are not. We do not steal from the till because we do not want to be recognised as having the identity "thief", and we refrain from eating pork because we have the identity "Jew" or "Muslim".

It is fundamental that we can only acquire a real identity by becoming one sort of necessarily limited thing. Because one becomes a carpenter one cannot become a historian or a brain surgeon. To follow one direction is not to travel another. In being – shall we say? – robust, practical, inventive and resilient, Australians by and large sacrifice elements of delicacy and sensitivity. You cannot be everything. And with every virtue, there tends to come a corresponding vice or defect. The most prudent are seldom the most generous. And it is a further reason identity must be a limitation that, in the human world, identities invariably contain internal tensions each of which checks the other. After the Revolution, the French were long torn between glory and piety, between state and church. British history is full of tensions between Anglicans and Dissenters, between Whig and Tory. In all the British settler colonies, nationalist and loyalist impulses have always come into conflict.

The tensions and limitations inseparable from complex identities can often lead to the prevalent Western pathology of self-hatred. Xavier Herbert notoriously thought poorly of his fellow Australians, and harsh words have been said by Australians about other Australians in the republican debate. Again, there is obvious relish when the Communist Oxford historian Christopher Hill writes: "Now that England's historic destiny has whimpered to its close ...". With

which Manning Clark's attitude to Australia might usefully be compared.

It is worth rehearsing these elementary points about identity not only because the word has acquired a dangerous vogue, but because, although grand ideological projects of national self-transformation are out of fashion, we are still at the mercy of political fantasists who want to declare some favoured definition of the people they rule. Paul Keating was notable for this propensity, and the ludicrous Tony Blair, with his talk of "modernisation" and "Cool Britannia", is a current example in Britain. No doubt there are occasions when a statesman must become a leader of his country, and by fiat declare an identity to fit dangerous circumstances, however uncertain the realities may be. In that situation, the declaration determines reality itself. Abraham Lincoln and Winston Churchill are examples of this kind of response to a political crisis. Lesser men should not attempt it.

What I now propose to consider is what I shall call the "civil identity" which emerged in Britain and was carried abroad by the settlers who spread the "Anglosphere" over the globe.

2. The Civic Culture of the English

On St George's Day, 1961, Enoch Powell made a speech in which he remarked that the basis of English identity is:

> "... the palace near the great city which the Romans built at a ford at the River Thames, a palace with many chambers and one lofty hall ... to which men resorted out of all England to speak on behalf of their fellows, a thing called Parliament".

Powell was concerned not with Britain but with England, and the distinction is one which keeps tripping up anyone who ventures into this field. Yet for my purposes, England stands for Britain, because the *political* history of the British Isles has revolved around the British monarchy to an extent unique in European history. England has dominated the British Isles both politically and demographically. The Celts, especially the Scots and the Irish, have not always been happy about this, and the result has been an alternation between the unity and disunity of the British Isles, an alternation which continues.

Powell's remark makes clear that whatever unity was achieved has always been focused, to an extraordinary degree, around the sovereignty of Westminster. The Anglo-Saxon heptarchy became united under Wessex, then under the Danes and finally under William the Conqueror, and British history from that time on has been the story of an evolving national sovereignty. We follow the kings and their quarrels with barons and Parliaments, the absorption with difficulty of Scotland and Ireland, the expansion of the English over the globe and their recent contraction, but at all points it is a story focused around the one political centre. It is quite remarkably autonomous.

A comparison with Italy or Germany will make the point clear. To follow the story of the Germans, one must pursue the Holy Roman Empire, the rise of the Hapsburgs, the character of the many principalities of Germany at least until the 19th Century, the emergence of Prussia, and the coming of German unity and its consequences. There is little in the way of a continuing centre. The same is true of Italy until modern times. Even France, whose national development in some respects parallels that of Britain, never achieved until a couple of centuries ago the sort of national cohesion that the English had created by about the time of the Tudors.

England was autonomous above all in its legal institutions, and this dated from about the reign of Henry III in the 13th Century. As the immortal Maitland remarks at the end of the 19th Century:

> "....from the beginning of Edward's [the first] reign, English law becomes always more insular, and English lawyers become more and more utterly ignorant of any law but their own. Thus English law was saved from Romanism; by this we lost much – but we gained much also. The loss, we may say, was juristic; if our lawyers had known more of Roman law, our law – in particular, our land law – would never have become the unprincipled labyrinth

that it became. The gain, we may say, was constitutional, was political: Roman law, here as elsewhere, would sooner or later have brought absolutism in its train".[1]

I take the view, with J.H.Hexter and others, that this separation was what Hegel would call "world-historical". It became a matter of global significance. Constitutional balance survived and prospered in England at a time when the rest of Europe went absolutist. It was there and waiting in the 19th Century, when Europe had had one nasty dose of absolutism and many Europeans were looking for a way of avoiding the choice between Jacobinism and some version of the *ancien régime*. And there before them, as a possible constitutional direction, was the Anglosphere: a set of peoples living free and under law.

It is not, of course, that the absolutism of European states was arbitrary and lawless. They had their own traditions of consultation and accountability, but these traditions were significantly less open than those of the English, and this fact was recognised by figures such as Voltaire and Montesquieu from the 18th Century onwards.

3. Politics in the Anglosphere

Before we move to explaining how this civic identity fits together, we need briefly to consider the political development of the Anglosphere. Our question becomes: Why did it not remain a single political entity? The answer lies in an element of self-government built in to the character of an English monarchy. Here was a system in which a powerful monarchical executive was always counterbalanced by the social weight of notables on the one hand, and the political institution of Parliament on the other. This balance looks easier to sustain than it actually is. It collapsed into civil war under Charles I, in large part because of political incompetence, and it degenerated into a kind of civil war under George III.

Americans construed the War of Independence in terms of the Enlightenment rhetoric of rights and the pursuit of happiness, but historically it seems to be another version of the forms of conflicts that have marked English politics back at least to Magna Carta and Simon de Montfort. Because Britain and the American colonies were separated by the Atlantic, and because those colonies had developed a distinct social culture of their own, the outcome was a new country, and in some ways a new order of things. But that outcome was unmistakably a replication of the original civic identity: rule by a monarchical president balanced by a strong legislature. The tradition has continued to this day.

British politicians from the 19th Century onwards recognised (as for example in the Durham Report) that this thirst for independence was part of the political culture of the empire, though for more than a century, imperial grandeur was such as to tempt some thinkers into conceiving of the empire as if it could also be an economy. That conception would have involved a specialisation in which the British did the manufacturing and the colonial countries the agriculture, a division of labour which would have crippled their economic development. It would also have made the elements of the empire dangerously dependent on unforeseeable political events. The unforeseeable happened for Australia and New Zealand with the Japanese war from December, 1941, and for Britain as it thought to solve its economic and other problems by acceding to the European Economic Communities (as they then were) in 1972. But political divergence did not qualify the fact that the countries of the Anglosphere remained tenaciously English in their civic identity. Let us now consider what this identity was.

4. England as a legal entity

English civic identity is explicable in terms of two related postulates – law and distance – which, properly understood, merge into each other as the moral practice of individuality.

In the course of the Middle Ages, England became a remarkably coherent state in which the law reached to its most remote corners. The Norman and Plantagenet kings created the most resilient of all forms of civil cohesion: namely, institutional consent. Royal courts toured the

country enforcing justice by the use of a jury system which involved large numbers of people in civic obligations. Whereas what ultimately became representative institutions on the Continent commonly fitted into a scheme of three Estates (Nobility, Clergy, and City-dweller or Third Estate), English society was more complex, and generated a distinction between Lords and Commons. Historians of the 13th Century and even earlier can talk without palpable absurdity of people called "the middle class".

Violent as the mediaeval period often was, the law had a remarkable reach, and Parliament – then basically a court as the High Court of Parliament – was its apex. The principle of consent was so far built in to this form of monarchical government that the lords of the realm had a right to bring a King to order if they felt he was misgoverning them, and this they did on numerous occasions, Magna Carta at the beginning of the turbulent 13th Century being merely the most famous.

By the 14th Century Fortescue distinguished the King of France as exercising *dominium regale*, from the King of England who exercised *dominium politicum et regale*, a more complex and consensual government. Fortescue himself served Henry VI, a feeble ruler, and England was soon to know more masterful Kings, such as Edward IV and soon Henry VII, the first of the Tudors. But a basic dislike of the arbitrary exercise of power remained a powerful theme of English political culture.

So far, then, my argument is that the English civil identity which Australia inherited, and which reveals the character of a people, was based upon the rule of law in a sense different even from the law-governed realms of the Continent. And it is this difference we must specify.

An association of people living under law is interestingly distinct from other social forms. It means that each person must socially construe each other person as significantly a fellow-subject. The point can perhaps be illustrated by a remark made when the corruption of this culture was well advanced: "If", wrote the novelist EM Forster in *Two Cheers for Democracy* (1937), "I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country". To betray one's country is, of course, to betray all one's friends, for friendship is, in a sense, the career grade of association under the rule of law. One has, no doubt, natural affinities for lovers, family, co-religionists and so on, but in the practical business of life, the impartialities appropriate to a fellow subject must play a vital, and in some areas (choosing candidates, for example) an overriding part in moral conduct.

A relationship between fellow subjects is, as Michael Oakeshott has observed, slightly "watery", though it is still a moral one.[2] It entails a certain *distance* between individuals. Indeed, we may agree with many writers in finding individualism as the basic mode of association between English speaking peoples. Individualism assumes a certain distance between people. Attacks on this civic culture identify this distance with bad things such as fragmentation, atomism and alienation, but this is a mistake. What it actually means is that relations between people are conscious and chosen, with the result that they are often vastly tougher than the natural bonds of clan or tribe.

It happens that distance has often been a contingent feature of English life. It was the practice in Tudor times for aristocratic families to send their sons away as pages to other households. The nurse and the governess became prominent figures in wealthy households. All too soon for many young Englishmen at a later time, family gave way to boarding school, where disciplines were strict. In the 19th Century, when parents discovered the pleasures of sending their sons away, they set up boarding schools for their daughters as well. Space became a central part of the English understanding of moral and social life.

An Englishman's home, it used to be said, was his castle. When Virginia Woolf wanted to state the conditions for the flourishing of feminine creativity, she did not bother with claptrap about rights, but thought it involved "a room of one's own". The English conception of freedom has only recently succumbed to the machinery of rights; indeed, according to the radical Tony

Benn (originally Lord Stanisgate), the English don't have any rights. Alas, these days rights have been showered upon them like sweets at children's parties.

Every guaranteed right, of course, sets up the conditions of its own control. What the English traditionally had is a space within the law in which, having complied with their duties, they could conduct themselves entirely as they wished. They have always found this much preferable to having their rights defined for them by some authority. What authorities define, they can redefine, or remove. Initiative comes most easily from having a free space rather than having a right.

Many things follow from this postulate of distance. The first is that there is a much greater element of *chosenness* in English civil association than in societies in which tribal, clannish, family or ethnic association pre-empt an individual's judgment of those he should associate with and support. Having to choose one's associates, as part of the practice of individualism, sharpens one's nose for character and personality. Similarly, distance is the soil in which eccentricity may grow. These are characteristics which have marked the development of the English novel, by contrast with the rather more metaphysically oriented Continental novel. Political parties are essentially free associations of individuals, which is the reason other cultures often have difficulty making them work.

What facilitates distance between people is formality, a character derived from law in the sense that law (like morality) is concerned with the formal conditions in terms of human association. There is a proper way of doing things, and among those who share the same conventions, it may often be indicated less by a definition than by a casual "not done". Formality obviously contrasts with violence, and it constitutes a discipline of the emotions, a channel which alone allows them to express themselves without excessive social friction. David Stove has suggested of cricket that "it requires gentlemanliness, and teaches it".[3] It is notable that while the human race has no doubt played games since the beginning of time, the formalisation of games only happened in England in the course of the 19th Century.

Formality and distance jointly entail the fact that the English have a taste for dealing with other individuals as equals. The contrast here is with other civilisations, in which a moral response to others must begin with discovering where each party stands in some notional hierarchy. Such civilisations often have a command of etiquette which the rough and ready Anglophone can only envy, but they certainly do not incorporate equality in the English sense.

In the Anglosphere, the first thing even the most snobbish person appreciates in another is his or her specific individuality. This individuality could not emerge if such a person were above all concerned to ingratiate himself with those he met. Uriah Heeps are a notable embarrassment in English life, and "creep" is one of the strongest terms of dismissal. No classical Greek ever disliked prostration with the passion the English bring to dislike those who give them excessive respect. This has had notable consequences for the position of women in English life. And it is this taste which is one of the central characteristics of the "gentleman", widely recognised as an archetypal English figure, and one not found in its perfection outside the Isles. [4]

I have earlier remarked that in matters of identity, there is no virtue without a corresponding vice, and in explaining the significance of distance in English political culture, we must recognise that many people encountering this culture find it cold and remote – by contrast with other visitors, often from more enclosed societies, who find it immensely liberating. It is perhaps a little odd that many Australians dislike the English of the home counties as rather "stand-offish", and find the British only become tolerable as one moves from south to north – which commonly means, as one moves away from the English towards the rather warmer Celts.

Again, one of the common beliefs about England is that it is an intensely class bound society. Certainly there is no less in England than elsewhere of those indicators human beings invariably create in order to feel superior to each other. But class is a strange and alien territory to foreigners, and much that is attributed to class is actually a form of the reserve I have suggested as

lying at the base of English life. Appearances can be misleading. "Continentals", George Mikas famously remarked, "have a sex life. The English have hot water bottles". Yet it has recently been reported that there are more crimes of passion per capita in Britain than elsewhere. God knows who did the counting.

We have, then, moved from the rule of law to the postulate of distance as the key to English civility, but we have by no means exhausted the significance of this particular understanding of the practice of being human. It determines the moral life of the English. One might consider that a moral practice so much shaped by law would be particularly rule-bound, but this would be a failure to understand the peculiarity of the very law by which the English are ruled. It is the common law, in which principles are elicited from a sequence of earlier cases.

In other words, the basic principle of English law is not command but coherence. The moral life in English civility consists less in compliance with rules (though it does, of course, include that too) than in constantly finding a coherence between one's obligations and one's desires. Here, the ultimate source of the basic principle is Christianity, but it is most explicit less in Christian writings than in those of sceptical philosophers. Reason, said Hobbes, is merely a scout to spy out the land, and David Hume (*pour épater les bourgeois* in part) remarked that reason not only is, but also ought to be, a slave of the passions. Reason in both these cases is some overriding rule, and the passions are the set of desires that constitute an individual's project or plan of life. It often takes foreigners to make these meanings explicit, and in the 20th Century it was the Austrian Hayek who rejected the rationalist "top down" morality of central Europe in favour of the English (or, given his favourite 18th Century sources, Scottish) system of internal coherence.

What makes it plausible to elicit the essence of English political civility from the rule of law is that the law was, for the upper classes of Britain, their basic form of education. They were required to serve on juries, as Justices of the Peace, and as electors to Parliament. An interesting example of the way in which monarchical dominion gave way to the usages of consent is the decline of the Sheriff (the King's representative in each county) and the rise of the Justice of the Peace. The form taken by legal processes was adversarial. The rights and wrongs of an accusation were subject to debate.

About the 17th Century, juries changed their character. They came less and less to be involved in judicial proceedings as witnesses, and more as judges of fact, deciding between different interpretations of events put before them by lawyers. The outcome of a criminal trial, on which the defendant's life would depend, rested upon something very like a game. Until quite late (till the 19th Century in fact), the alternative technically available to a defendant was trial by battle. In other European countries, the aim of a trial was to get at the truth of the matter, which is one of the reasons why torture was used abroad and not (except for limited purposes in the Star Chamber) in England. The English rejected the idea of inquisition on the ground that, while a trial may get at the facts, truth itself is bottomlessly ambiguous.

Here then is the briefest sketch of what I take to be a general understanding of the civic identity of the English, as it has been diffused throughout the Anglosphere. Law and distance are its key postulates, and a great deal more could clearly be drawn from them. The English attitude to distance has, for example, been part of the reason why they have spread so abundantly over the globe: between 1815 and 1913, it is estimated that 25 million people emigrated from the British Isles. Many of them, as Australians will be particularly aware, left their country for their country's good, and others were driven by the spur of need. But what these people all had was a certain resourcefulness which Michael Oakeshott calls "the civil condition". It allowed them to replicate this kind of open civil texture wherever they went.

In encapsulating "the civil condition" on one occasion, Oakeshott used a fable borrowed from Schopenhauer which supplies a perfect image of what it is:

> "There was once, so Schopenhauer tells us, a colony of porcupines. They were wont to huddle together on a cold winter's day and, thus wrapped in communal warmth, escape being

frozen. But, plagued with the pricks of each other's quills, they drew apart. And every time the desire for warmth brought them together again, the same calamity overtook them. Thus they remained distracted between two misfortunes, able neither to tolerate nor to do without one another, until they discovered that when they stood at a certain distance from one another they could both delight in one another's individuality and enjoy one another's company. They did not attribute any metaphysical significance to this distance, nor did they imagine it to be an independent source of happiness, like finding a friend. They recognised it to be a relationship in terms of substantive enjoyment but of contingent considerabilities they must determine for themselves. Unknown to themselves, they had invented civil association".[5]

5. Changes in Australia's Civic Culture

I now want to change gear, by considering how Australia has modified this inherited identity. This is necessarily a much more contentious exercise. One has to explore this theme in terms of social conventions and political culture as expressed in contemporary rhetoric, and we can only scratch the surface. But two general points may immediately be made.

The first is that this civic culture is largely unaffected by the fact that large numbers of immigrants have settled in Australia from Asia and other parts of Europe. English civil identity has always been remarkably open, and to participate in politics and society in Australia necessarily requires assimilation to the civic culture I have described. Everyone soon takes on board Magna Carta and the rule of law, even if (given the present level of education) they have never heard of these things. The last set of foreigners who made any difference as foreigners were the Normans, and they came as conquerors. A useful comparison in exploring this form of life would be the case of India, in which an Anglospheric political culture fused in interesting ways with a civilisation quite different in many respects (it has, for example, little history and less politics). Yet the fusion seems to have been a great success.

The second point is simply that the individualism of this civil identity is very commonly misunderstood throughout the English speaking world as the vices of atomism, alienation and fragmentation. Contemporary rhetoric is full of praise for "community" (which is turning into a moral rather than a sociological term), and contempt for the supposed selfishness of individualism, as if (to continue the fable above) the porcupines had lost their quills. Here concept is being confused with value.

Some of the changes which have affected Australia have resulted from rearrangements of internal tensions within British civic culture; most notably, perhaps, the stronger place of Irish attitudes, and the fact that Catholic and Protestant tensions continued rather longer in Australia than in Britain (except, of course, for Ireland). But of the main changes that I think worth noticing, one results from Australia's sensitivity to international currents of thought, and one is genuinely indigenous.

The indigenous modification may be explicated in terms of the rhetoric of "*cringe*". Cringe is clearly an aggressive variant of the idea of equality, expressing contempt for those who give exaggerated respect to others. It refers to a supposed propensity of Australians to defer to foreign reputation in such a way as to make it impossible for them to recognise Australian talent. It is a variant of the complaint that a prophet has no honour in his own country. Using foreign reputation for local leverage is in fact an old game, but in Australia this familiar charge acquired a more than usually lethal quality because it was advanced as the contemptible cause of political, social and cultural attitudes thought to be merely dependent. In radical politics, R.G.Menzies became the symbol of an Australian policy supposedly subservient to that of Britain.[6]

Cringe was, then, merely an adaptation for local partisanship of one element of the English civil culture I have been describing. It was usually ascribed to a colonial past, something Australians now had to transcend. Australians of an earlier generation, such as Len Hume and Max

Hartwell, have been appropriately derisive of the whole idea, and speaking as one who grew up in Australia in the 1940s I can say that excessive respect for foreigners was not our problem; arrogance perhaps, humility not.

The point, however, is that this rhetoric is part of a larger complex of thought and feeling. If "cringe" is to be taken as a vice, then there must be some specific understanding of a corresponding virtue, and it takes the form of self-ascribed independence of mind, which we might appropriately call "*swagger*". The attraction of republicanism for many people was the notion that a republican Australia would be more independent, would at last stand on its own feet, that a new constitutional deal would transform an Australian population which many republicans regarded as pretty comprehensively unsound. It may be remembered that Communists used both to flatter the masses by notionally deriving all virtue and wisdom from them, and at the same time despise them as hopelessly sunk in false consciousness. The dialectic of cringe and swagger is not unrelated to this élite pathology.

The basic point to make is, of course, that both cringe and swagger, the underestimation of others and the overestimation of oneself, are higher level attitudes irrelevant to the question of truth: namely, is this or that admired foreigner worth the admiration (or denigration) offered? But these attitudes are illustrations of the way in which the fundamentals of civil culture generate a continuous stream of rhetorical froth.

Let us turn now to the way in which widespread political changes in the Anglosphere have modified the civil identity I have analysed. Democracy in these countries has led governments increasingly to dispose of the wealth of Western states and to regulate the social and economic life of their subjects. Economic enterprise, the conduct of firms, clubs, universities, the arts and sport have all felt the shaping power of governments. Indeed, it is hard to find anything untouched by this passion to incorporate everything within some "national strategy" or other. Both the private sphere of the family and the internal space of subjective attitudes have been the object of official plans to construct a better society. And the basic engine of this movement has been the egalitarian principle that whatever the rich and enterprising have created must also be provided for the poor and unfortunate. This is a programme which has so much the appearance of a political version of the Sermon on the Mount that many clergymen have been induced to forget about sin and direct their energies to worshipping so benevolent a power.

The clerical response is important because the changing role of government has transformed our moral landscape. Who is it that we must admire as keeping good causes going? Obviously the government, which taxes us in order to provide health, education, welfare and even opera, drama and music. Governments not only sustain law and order, but also enforce admirable attitudes such as respecting people different from us who might become the victims of prejudice. Democracy infallibly creates government as moral exemplar.

The process amounts, if we consider it in terms of current ideas of morality, to the nationalisation of virtue, but it has been done by stealth. No government ever actually said to its electors:

> "Let us nationalise your prudence by giving you guaranteed pensions, your charity by making the help you might give to neighbours more efficient, your rationality by legislating against irrational prejudices you might carry in your head, etc.",

but this is what has happened. The individual is left with about 60 per cent of what he or she earns, and much of that is understandably taken up by personal and familial necessities. Even some of that 60 per cent is described in terms of tax "allowances" which a government remits for good cause to individuals.

The result is that we steadily acquire an image of the world in which we live as a contrast between moral government and immoral society. It is, after all, the thing called "society" (which is to say, you and me) that is often castigated for racism, sexism, homophobia and the current litany of sins. Correspondingly, individuals are regularly attacked as greedy and selfish. Upmarket

commentators yearn for something called "community", in which we (or our government) would be basically concerned for our brothers and sisters.

It is of course absurd to imagine that governments are morally superior to the peoples they rule; not merely absurd, but also dangerous. And the absurdity of this picture has called forth a countervailing image in which politicians are regarded as themselves greedy and deceitful. The more they talk of their benevolence, to adapt Emerson, the more the people count their spoons.

Everybody knows that governments have over-extended themselves, that their nationalisation of virtue has actually destroyed moral relations in society, and that a system that trumpets its virtue merely reveals its corruption. But perhaps it must be said that the contrast between virtuous governments and vicious politicians is simultaneously one between different parts of Australian society. It is the people, as evidenced by their judgments in referenda, who are increasingly disillusioned with politicians, and it is the media where we find commentators forever suggesting uplifting ways for governments to behave. And the proposals always involve an increase in the power of authority.

It is in pursuit of the conception of government as moral exemplar that Australia has signed up to international treaties locking the moral fashions of today into place so as to subject future generations to international harassment and bullying. Moral vanity is a powerful force in governments, who realise very well that the resulting disasters will happen after they are gone. It is true indeed, that many of these lines of conduct (usually formulated in the servile language of rights) are concerned to establish sanctions against pretty primitive and unsophisticated forms of conduct – domestic violence against females, bashing "gays", and so on. But they constitute a significant transfer of power away from the people towards the judiciary, and away from Australia towards weirdly unpredictable committees of international bureaucrats and politicians. And they feed the taste for collective moral attitudinising in which individuals, without in any way cultivating their own virtues, demand that governments should apologise for the sins of earlier generations.

The basic civil identity Australia inherited generated a political culture that was entirely clear on the fact that in politics *everything* involves both power and justice. The present corruption consists in the unbalanced belief that in public life there can be purely moral relations between collectivities, relations in which the element of power is entirely absent. Today, victimhood (which begins as a purely moral conception) *is* power. I do not know of any political situation which can seriously be treated as if it were nothing else but a moral issue.

6. The Australian Disorientation

My aim has been to describe a tradition and one or two of its adventures. One value of attempting to do this is that the Anglosphere is probably the most successful political tradition in the modern world. You cannot put the reasons for such success into a formula, but taking our bearings from such a tradition might at least have the virtue of encouraging a kind of thoughtfulness that might weaken the moral faddishness of contemporary political discussion. A certain distance, we have seen, has been central to the Anglospheric tradition, and that has included distance from the current enthusiasms which have done so much harm in our century. Just consider how much of contemporary politics consists in undoing the follies of the recent past.

The original English had several advantages we all lack.Their education was largely conducted in Latin (and to some extent Greek). Their mental world included not only the English but the Greek and Roman experiences. In such a civilisation, distance and detachment are possible. Further, in a Christian culture, the idea of God in some degree counterbalanced that of society. Australians largely lack this cultural substance, and fanatics demanding relevance are bent on narrowing them even further, bending their thoughts to a single right-thinking orthodoxy. This is so much to lack inner lives and substance that, after the recent referendum, some journalists were raising their eyes to heaven and crying out that Australia would be a laughing stock in the eyes of

the world. That was egocentricity gone mad. But it is far from being the only sign of national disorientation in Australia.

Endnotes:

1. FW Maitland, *The Constitutional History of England*, Cambridge University Press, pp. 21-2.

2. See particularly the second essay, *On the civil condition*, in Michael Oakeshott, *On Human Conduct*, Clarendon Press: Oxford, 1975.

3. David Stove, *Cricket versus Republicanism, and other essays*, Quakers Hill Press, Sydney, p. 1.

4. But as against this last judgment, see Shirley Robin Letwin, *The Gentleman in Trollope: Individuality and Moral Conduct,* Macmillan, London, 1982, especially the *coup de théatre* on p. 74, in which the archetypal English "gentleman" in Trollope's novels turns out to be Mme Max Goesler, a Viennese Jewess.

5. Michael Oakeshott, *Talking Politics*, in *Rationalism in Politics and other essays*, foreword by Timothy Fuller, Liberty Press: Indianapolis, 1991, p. 461.

6. Thus in a recent book on Australians in Britain (Stephen Alomes, *When London Calls*, Cambridge University Press, 1999) the author can hardly mention Menzies without an accompanying sneer.

Melbourne, 21 February, 2000.

Appendix III:
National Sovereignty versus Internationalism:
The Importance of Repealability

Professor Kenneth Minogue

The Coming Assassination of National Sovereignty

Recent events have dramatised a new trend in the way mankind arranges its affairs. In 1999, for example, the NATO alliance waged something called a "humanitarian war" against Yugoslavia. As a result, the province of Kosovo was detached from Yugoslav (in effect Serbian) control and occupied by international agencies.

Back in 1945, when the United Nations was being established, the inviolability of national sovereignty had been accepted as a necessary condition of international cooperation. Without that guarantee, sovereign states would not even have begun to cooperate in adumbrating a world order. Even then, however, the institution of sovereignty, which is the abstract concept signifying the fact that nation states are independent of any superior legislative authority, had long been under attack. Critics regarded independence as the condition that made possible aggressive war and the violation of rights. By 1999, however, the higher media visibility of brutal oppression, combined with rapidly changing opinions about international law, had brought Western states to the point where violations of individual rights in Kosovo became a ground for military intervention.

The significance of this evolution is in no way diminished by the fact that the whole event has turned out to be far short of a resounding moral triumph. Political divisions prevented the war being waged under the rubric of the United Nations, which is why the inappropriate umbrella of NATO was used. Some umbrella there had to be, lest "humanitarian intervention" should seem indistinguishable from old fashioned imperialist aggression. The lack of popular enthusiasm for the project in the participating countries led to a military campaign being conducted by remote aerial warfare. None of these democracies wanted to risk their soldiers becoming casualties. And the arrival of U.N. agencies, once the war itself had ended, has turned out to be very far from initiating a reign of justice in Kosovo. It will take the long perspectives of history to understand this complex event, but there is no doubt that a new doctrine about the relation between sovereignty and human rights had at last been put into practice.

Kosovo was not, however, the only straw in the wind. The detention of General Pinochet in Great Britain, as lawyers from Spain, Belgium and Switzerland sought to extradite him to stand trial for alleged war crimes, was another case of the long arm of something a little like international legality flexing its muscles. And in Australia in early 2000, uproar followed the enacting of mandatory sentencing for crimes in Western Australia and the Northern Territory. Some Australians found this practice (as one columnist put it in *The Sydney Morning Herald* of 20 February, 2000) "barbaric". Here, as in the earlier case of the Aboriginal "stolen children" issue, opponents and critics of the Australian federal government sought to institutionalise the question. Were human rights being violated? Was mandatory sentencing in conflict with the rule of law? Critics appealed over the head of the governments involved to the United Nations Commissioner for Human Rights, Mary Robinson.

I am not concerned with the substance of any of these issues. What I do want to bring out is the underlying issue, which I take to be the project of imposing a kind of revived *ius gentium* (with teeth, as it were) on the current practice of national sovereignty. This is an area in which a political theorist needs to tread carefully, since it involves issues of international law. On the

other hand, international law consists of a great variety of rules having very variable degrees of authority. Much of it, in fact, seems to be little else except political theory dressed in legal garb.

Hence I shall advance, for purposes of clarification, a bold and extreme thesis about what is going on: namely, that assassins are gathering around the very idea of national sovereignty. My argument can thus borrow the familiar structure of a mystery story, involving a murderer and a victim. The victim is the sovereign nation-state, the assassins group themselves together as a set of self-described humanitarians. Let us take each of these figures in turn.

What Makes the Sovereign State Unique ?

The victim is "sovereignty", a term referring to the absolute power and authority disposed of by the rulers of a modern state as they regulate the public affairs of their peoples. The Netherlands, for example, is a civil association of individuals living on a determinate territory, an association which has generated a government that makes law and implements policies for the benefit of its subjects. In 1940, the German army marched into the Netherlands and controlled the country until the Germans were driven out in 1945, but the Dutch government retained legitimacy in exile in London. Sovereignty thus involves both power and authority. It expresses the independence of a set of people able to rule themselves, people who will not tolerate any superior exercising power over them without consent.[1]

Sovereignty is to be conceived of as the single concentrated authority emanating from a Constitution. The contrast is with the arrangements of mediaeval Europe, in which authority was dispersed between monarchs, the Catholic Church, nobles, and sometimes also relatively independent towns. Historically, sovereignty emerged in the later Middles Ages when governments, mostly monarchies, extinguished their partners in government and concentrated all authority in their own hands.

We may observe two things about this immensely complicated process. The first is that it responded in part to a growing sense of individualism among European peoples. Such individualism was most evident in the towns, which is why these events are sometimes understood as being a "bourgeois revolution". The second point is that in England particularly (the case most relevant to Australia, of course) the absolute power of sovereignty could only be achieved in a process of national integration. In other European countries, sovereign power accrued above all to the monarch. It was the solution to the problem of internal dissension, for (as Hobbes remarked) it takes two to make a conflict. In England under the Tudors, this power belonged to the King-in-Parliament, and in the course of the next century it became clear that Parliament was the decisive element in this mix. Part of the reason for this was that, while other European states tended to be articulated into "estates" of the realm, the English could plausibly claim to constitute a single people. The House of Commons never represented any notional "third estate". It was an assembly speaking for a much more complex society.

Sovereignty is the abstract essence of something called the "nation-state", which is, in some ways, an absurd expression. Britain, for example, contains at least four clearly articulated nations: Welsh, Scots and Irish along with the English (and, some would add, the Cornish, and perhaps even other regionally distinct areas). Some of them periodically generate a "nationalism", which is to say a political movement demanding that whatever recognises itself as a nation ought to have the sovereign prerogative of statehood.

The point about "nation states" (such as Britain or France, or Australia), however, is that they seldom or never consist just of one "nation". They are all, in a technical sense, empires. But in times of crisis, they are capable of generating a passionate unity (overriding the attachments of the component parts) which resembles the unity of nations themselves. This is sometimes, misleadingly, called "nationalism", but is actually what we generally recognise as patriotism. It is a common but serious mistake in politics to confuse patriotism with nationalism. It may well be this muddle which has given currency to the mistake of thinking that states have only recently

become "multicultural". Such a mistake is popular as propaganda for the project of incorporating "minorities" as the units out of which states are built. It is a project for subjecting democratic civil societies to a tyranny of corporate privilege.

The European nation-state was a notable invention. It expressed the emergence of a new kind of human being altogether – an *individual*, which is to say, a human being accustomed to pursuing his own desires and inclinations in compliance with the abstract rules of law. Just as the classical Greeks developed the idea of the citizen, which is to say a city dweller who participated in collective self-rule, so modern Europe brought forth the individual, and sovereignty was its political correlate.

In such a state, fellow subjects might not be brothers, or comrades, but they were people who in some sense spoke the same language, and with whom each could co-operate with any other in freely chosen enterprises. Whereas in most other forms of social organisation, such as the tribe or the despotism, co-operation was only possible with those who shared one's religion, clanhood or ethnicity, European individuals found it easy to co-operate with each other. In such societies, as Hegel rightly put it, "all were free", and the resulting association of these individuals gave Europeans' society a tensile strength which allowed them in time to spread technology and institutions that came to dominate the world.

Sovereign states were so successful, in fact, that by the 20th Century all the peoples of the world had mimicked the nation-state form of organisation. They all had Presidents, Parliaments, judges, elections, etc., or at least the appearance of these things. Often, in fact, these states were the merest caricatures of the constitutionally articulated and generally democratic states of the West. What immediately fascinated non-Western rulers was the sheer power that sovereign nationhood could confer upon rulers. What they seldom understood were the hidden practices of limitation and restraint on which this power depended. The tragic fact today would seem to be that many even in Western states are also losing this understanding.

Sovereignty and Repealability

Now what, if we may press the question, was the point of sovereignty ? The obvious answer was that it enabled rulers to make valid law binding on their subjects. This power is so conspicuous that it is quite common to identify sovereignty with that bit of a modern state's Constitution which has the authority to make law. AV Dicey, for example, argued that in Britain the sovereign power resided in "the Queen in Parliament". This formula certainly points to important realities in British politics, but it also makes it difficult to discover what sovereignty is in, for example, federal states. And that is why it is best to consider that sovereignty is the authority to make law found in the constitutionality of the state as a whole.

The significant point about the emergence of sovereignty, however, is less that it enables authority to make law, than that it allows them to *unmake* it. In the 16th Century, a generation of Europeans emerged who regarded the vast resources locked up in Church property as a barrier to their own ambitions. The thing called the "Reformation" was (like most other human movements) a remarkable mixture of spiritual enthusiasm and material aspirations. What these people sought was a form of authority that would facilitate their dismantling of an establishment which was found to be frustrating their ambitions. Sovereignty was the instrument they needed in going about this revolutionary business of dismantling an establishment.

The unintended consequence of this rapacious adventure was the creation of the modern state with which we are familiar. Modern legislatures are forums that make and unmake (more making than unmaking, it must be admitted) the rules under which we live. No modern society could operate without this sovereign power, which allows us to dispose of the past without actively violating it. Governments dissolve old institutions and create new ones, refashion the bonds of marriage, exercise the prerogative of pardon, respond to changing moral attitudes to such things as homosexuality or abortion, modify the Constitution under which they live, invoke compulsory

purchase to override property rights, and all the other things which, wisely or unwisely, we get up to.

Such is the institution which has created the modern world, and brought many good things in its train. But there is no doubt that such an immense power, even though constitutionally and democratically limited, offers many temptations to corrupt misuse. Further, the opportunities for economic enterprise only possible within a modern state have also created a highly unequal society, in which the fact that virtually everyone is, in historical terms, much better off has not diminished the discontent of the less successful. The result is that the politics of modern states is a constant preoccupation with one or other form of discontent, with democratic politics constantly called in to change the consequences of economic competition.

The fact is that the state has many enemies, and that they are already half-persuaded that sovereignty is bad because it does not always work to their advantage. It is not merely that liberals are suspicious of its propensity to oppress, but anarchists think that government is itself the main threat to freedom. Socialists love its marvellous managerial possibilities, but seek to transform it into something else. Communists want to destroy it and create a true community. Democrats believe that it needs to be transformed. In other words, the state has a very great number of enemies.

Here we have, then, the typical victim of a murder mystery: an entity with enough enemies to generate a great number of suspects. And what is perhaps most interesting about these enemies is that they all believe that the death of the state will lead to a once and for all perfectioning of the way we live. All are hostile to sovereignty, which is to say, they do not believe that there will be any need for repealability once their ideal has been achieved.

But this is far from the whole story. Many of the despotisms and tribalisms of the non-Western world adopted, in the course of the 20th Century, the external forms and usages of the nation state, and in the process learned how to be more efficiently oppressive to their subjects and neighbours than they had been before. They were often distinctly light on on the question of what Westerners called “human rights”. Civil wars and internal oppressions multiplied.

When to these considerations is added the way in which such states as Germany and Czarist Russia were taken over by universalist doctrines, leading to many evils, it becomes understandable that some people should have come to the conclusion that the sovereign independence of the rulers of states was at best the necessary condition of many evils, and at worst the actual cause of them. Sovereignty must, like Carthage, be destroyed. This is why in the 20th Century many thinkers came to espouse the idea that supranational authorities, embryonic world governments as it were, should be empowered to enforce decent moral standards, formulated in terms of rights and international law, on sovereign states.

The Murderous Ambitions of Humanitarianism

Such, in our abstract mystery, is the victim of this attempted coup. Let us now turn to the assassin. In the Kosovo case, the NATO allies decided (as they had in earlier stages of the disintegration of the Yugoslav federation) that they could not stand back and see Albanians suffering the violation of their human rights. Our assassin thus initially presents the appearance of a movement speaking for humanity itself. It is constituted by a self-appointed set of concerned humanitarians. But it hardly needs to be said that there is a large gap between the moral justifications of any political movement, and the actual calculations which determine how it acts. No less contestable is the theory of modern global development, which argues that interdependence has rendered the sovereignty of states obsolescent. In arguing that sovereignty has become an irrelevant, indeed obstructive, hangover from the past, humanitarians present themselves less as assassins, than as executioners of the verdict of history.

Such is the negative element in the humanitarian project. The positive project is nothing less than that of transforming the human situation. It aims to remove the oppressions of torture

and poverty so that each individual on the planet can be assured of what activists often call "a good quality of life", and what philosophers refer to these days as "flourishing". Each person must be given what one might call a "quality assured" life.

This is obviously a secular vision – religious concerns are merely lifestyle choices within it – and there is a sense in which one might well think it a highly desirable utopia. One could hardly say that it is a noble vision, however, because it treats the inhabitants of the globe as a set of victims who must be provided with these desirabilities. Humanity is to be the passive beneficiary of a perfection supplied by an élite of busy humanitarians.

Still, given the horrors that take place in many parts of the world, humanitarianism is a very understandable aspiration. And as it operates in contemporary politics, it takes the form of internationalism, since its most evident character is the aspiration to transcend sovereign national independence and replace it with rights enforced by a benign world authority. Internationalism is a political movement, and its exponents are, as it were, the patriots of a *patria* which does not yet exist. Since most people seem instinctively to prefer their own values to those of foreigners, our next question must be to ask: who advances the project of internationalism?

The answer is that internationalism appeals to a self-consciously enlightened public opinion, an opinion whose doctrines descend, indeed, from the movement which actually called itself the Enlightenment. This is a public opinion prone to express its preferences in terms of abstractions such as rights, peace, negotiation, equality, rule of law, inclusion, etcetera. It is evidently a rationalist cast of mind, which treats every defect in the human condition as a problem for which lawyers and experts (lawyers especially) can always find a solution.

To say this is to say that internationalist activists have commonly been trained at universities in the social sciences, but have understood their training as having transcended the academic disciplines (which recognise that every logic of inquiry has its own specific limitations) in favour of a more general ideological orientation. This orientation rejects the current world order as radically imperfect, and aims at salvation by implementing whatever the favoured abstractions currently seem to intimate. Implementing such policies commonly collides, however, with the instincts and prejudices of most of the populations even of Western countries, and this is the reason I have on occasions referred to this area of public opinion as "Olympian".[2]

The Olympians look upon the rest of humanity rather as the divinities of Mount Olympus looked upon the all too human Greeks. The Australian version of what in fact is an immemorial split in the human race pits the contempt of Sydney and Melbourne intellectuals against the supposedly prejudiced Territorians and Western Australians, whose frustrations led them to implement a policy of mandatory sentencing for any third criminal act. Olympians are political actors constituted by the self-ascribed rationality of the general opinions they hold, of whom one might say, with Coriolanus on the plebs, that rubbing the poor itch of their opinions has given them scabs.

Here, then, in the Olympians we have a new class, as they have been called, consisting of academics, journalists, lawyers, teachers, clergymen, politicians and administrators. They are not only prepared to take issue with their own governments, but positively take a pride in doing so. Such dissidence is thought to express a virtue above the mere parochialities of local patriotism. But as political actors seeking to transform the world, Olympians have several disadvantages. One of them is that they are not a very warlike set of people. They are crusaders of the pen rather than the sword. Today the levers of power in Western societies give Olympians access to a military power to which (except when they need it) they are essentially hostile. Their ultimate aim is to create a world that won't need soldiers – indeed, even now they are trying to turn warriors into a different kind of thing called a "peace keeper".

There is another problem impeding their project of perfecting the world. Almost all of them are to be found in Western countries. They are all the products of Western liberalism. Their challenge lies in presenting an essentially Western middle class view of the world as if it expressed

the essence of humanity itself. On the other hand, in their doctrines of rights and their recourse to international law, they do at least have instruments capable of disrupting other societies. Their secret weapon against non-Western societies is women, who have a great deal to gain from Westernisation.

Acute readers may already have recognised a contradiction in my account of the Olympians who sustain the humanitarian movement. On the one hand they stand for humanity itself, and therefore espouse equality, but on the other hand they conceive of themselves as having a rather superior status. But we need not dwell greatly on this point, for it merely reveals that we are dealing with something entirely familiar: namely, a new version of the Marxist doctrine of the vanguard of the proletariat.

The Attack on the State

It is now time to draw some of these threads together. Our focus is on the sovereign state, which is under attack from two directions.

Internally, the modern state presents the picture of a high taxing authority much given to excessive control over the projects of its subjects. Indeed, its fatal temptation has always been to impose upon its unfortunate subjects some national ideal, and whether the ideal involves the conquest of other states, or the conquest of abstractions such as poverty, hardly matters if we judge it in terms of the threat to individual freedom. There is no doubt that the state is a bloodstained and oppressive monster not easily to be defended by a rational liberal. Olympians will always find plenty of support in assailing the state, and consequently in assailing sovereignty itself.

Externally, the state is under attack by internationalist humanitarians who want to subject it to the authority of global organisations acting to guarantee human rights, punish those who have committed genocide or war crimes, open up free trade, protect the environment from pollution, prevent mankind's cruelty to animals, and spread the benefits of modern medicine to the less fortunate of the world. This may be an ambitious, perhaps even an absurd programme, but there is no doubt that it has a powerful rational appeal.

What stands in the path of these utopian visions is the fact that reality is more specific than the abstractions in terms of which the doctrine is framed. The most serious evils in the contemporary world hardly ever involve sovereign states in the West; they almost invariably occur in political units which can hardly be described as states in the Western sense at all. Many African, and some Asian and Latin American states come into this class, along with strange perversions of European civility such as those of Nazi Germany and Communist Russia, in which universalist doctrines (themselves actually internationalist in character) entirely shattered constitutional restraint.

In established Western states, whose current defects are trivial by comparison with some other civilisations, the main internationalist attack is directed less at the state itself, which has often turned out to be (in these terms) "on message", than at the thing called "society", which basically signifies the attitudes of the peoples themselves. By contrast with the forms of political incorrectness found among the people, the legal processes and legislative agencies that have been set up in most Western countries exhibit all the virtuous rationalist managerialism an Olympian could desire. In other words, this form of salvation is being advanced both by the entrenchment of political correctness in Western law, and by the spread of human rights through accession to international treaty.

This is the clue to what is actually happening. What confronts us is a new order advanced through a new kind of politics practiced by a new class. And it is an order significantly hostile to democracy. One of the major current adventures of this new politics is the European Union, which is being created by a pan-European oligarchy that frankly recognises that there is a "democratic deficit" in its arrangements, but is certainly in no hurry to do anything about it.

An anti-democratic rationalism is the dominant mood of contemporary politics in the West. Its politics cannot be understood except in terms of such abstractions as environmentalism, rights, equality, multiculturalism and other policies whose creators are experts in what is thought to be the knowledge of arcane matters, and which are notionally for the people, but certainly not by the people. Thus, mandatory sentencing in some Australian states has democratic support, but encounters passionate Olympian opposition because it removes power and discretion from the members of the new class who are seeking to perfect the world.

In philosophical terms, the Olympian project seeks to move politics away from the concept of will, which emerged with the sovereign state, towards something a little like reason – morality, perhaps, or some ideal model to be copied. One might put the point more briskly. The Humanitarian project (like the Communist dream of the withering away of the state) seeks to abolish politics altogether, because politics is unpredictable, and the *demos* is never to be entirely trusted to have the right opinions. And this raises the question of how the humanitarian project manages to suppress politics and subject modern societies to a supposed pattern of perfection. The talk is all of democracy, the reality invariably that of moral authoritarianism.

Techniques for Stifling the Voice of the *Demos*

We may mention several ways in which popular opinion is being marginalised in order to transform the state into a different kind of association.

The first is in using the law as an instrument of the Humanitarian project by way of unscrupulous changes in the interpretation of words. Here we encounter one of the greater paradoxes of our time: that the law, which previously guaranteed our freedom, now tends to subvert it.

Law as the guarantor of freedom in the past depended on two things. One was a highly technical skill of interpretation by those who developed the English common law, and the other was a powerful sense of vocational limitation, which respected the separation of law from politics, and the subordination of law to the will of the legislature.

The salvationist project undermined this virtue by diffusing into every branch of jurisprudence the axiom that everything is politics. This was a marvellously relaxing principle. It led judges to indulge their moral and political convictions by imaginative feats of legal interpretation. Given the erosion of vocational commitment, words can carry almost any meaning at all, and this corruption can be indulged by judges in the happy belief that they are behaving in an "ethical" way. What the US Supreme Court has done with freedom of expression justifies the Internet joke that the Court has decided, by 8 to 1, that the American people are unfit to govern.

A second device for avoiding popular discontent with government is the passing of some moralistic Act whose implementation is confided to an independent agency set up to give the maximum discretion in the way it implements whatever the desirability may be. Affirmative action agencies and unfair dismissal tribunals are notable examples throughout the English-speaking world. In Britain, when Orange Order parades became a topic embarrassingly hot for a government to handle, a Parades Commission was set up with the power to decide which parades could go ahead without too much damage to public order. Those who criticised its decisions were attacked as rejecting the rule of law. But a decision on policy is not, of course, the same thing as a law.

The real arena of Olympian advance is in supranational organisations such as the European Union, whose techniques are exemplary. Here broad general policies can be agreed by officials on their abstract merits, and then imposed on member states, who often find that the small print of implementation contains unsuspected implications. Governments are then able to say, quite correctly, that their hands are tied. In many cases, rulers and their civil servants are happy conspiring in a process which removes power from the people. The complexity of law in any case

begets the despotism of the lawyer. Democracy perishes when local opposition gets overridden by a superior institution acting in the name of some higher moral ideal.

The ultimate arena for Olympian striving is to be found in the treaties in which international organisations define a set of ideals to which states may voluntarily sign up. The devilish power of this device lies in the fact that the government signing up earns the applause of the articulate, and is confident it will have passed from office by the time the embarrassments begin to appear. The talk is about rights, and especially equal rights, which are engines used to break down the actual preferences of the individuals in civil society. Those preferences may well in some cases be deplorable: they may often express racial or religious animosities. Using the authority of law and the power of government to override these preferences is a "quick fix", which can achieve something like instant inclusiveness, but is very far from being costless to the texture of civil society. A homogenised society can only be created at the expense of the more vigorous virtues of individuality.

One marker of this development is the revival of the term "governance" as a soothing alternative to "government". As the state has moved into every sphere of life, its subjects have become hopelessly entangled in a web of regulation, guidelines, codifications and rights, the source of all of which becomes increasingly obscure. Bureaucratic complexity easily defeated accountability. We find ourselves living inside a kind of power blubber called "governance". We toss and turn, and hurl ourselves at what constricts us, but we never seem able to get at the accountable source of what imprisons us. We can no longer ask (as we could with government), "Who did it?"

The End of Repealability

It is characteristic of this attempt to imprison us within a framework of rules whose provenance is obscure, that it prefers international treaty to national legislation, and constitutional provision to mere enactment. The reason is that the Olympians are moral enthusiasts who have persuaded themselves that their moral preferences are the pinnacle of human moral progress, and are therefore suitable to be entrenched beyond any possibility that some later popular backlash might weaken or destroy them. This is the sense in which the humanitarian movement is profoundly hostile, not only to popular opinion, but to democracy itself. And Olympian rhetoric makes any repeal of any of these rules and codes almost unthinkable. It does so by formulating its principle in terms of rights. A right is always presented as a gift from authority to the people, and who would want to take away any good thing that has been given? It would be an invitation to uproar.

Does it make any sense to ask if one may be liberated from a right? Contemporary legislation seems positively addicted to solving all problems by throwing rights at them. But every right imposes duties on other people, and these duties may well become onerous. Economic and social rights often impose heavy financial costs on the taxpayer. Equal rights abolishing discrimination can impose intolerable burdens on clubs, industrial enterprises, the media, and virtually any form of public enterprise. A universal right to higher education, for example, is destructive to universities, which require unusual talents in the students they take in.

But my argument that a power of repeal is becoming increasingly essential can best be illustrated from the way in which governments have tied their hands by signing up to high-toned international treaties. The British government, for example, has recently been agonising over asylum seekers who turned up in a plane hijacked in Afghanistan. The problem results in part from the 1951 *U.N. Convention on Refugees*, which was created in response to a world in which refugees were quite small in numbers. Today they are part of a mass movement of peoples. The British government acceded to this Convention by treaty. Must it now repudiate the treaty? Or must it seek to persuade other countries to agree in modifying it? Or must it try to persuade international lawyers to reinterpret its provisions so as to be more suitable to British policy ? One embarrassment is that under the Convention, no criminal conviction, including one for hijacking,

counts as a reason for denying asylum. The only exclusion is for crimes against humanity or against international peace.

Again, the British Government (by contrast with the French) has failed to exercise its option to exclude the military from the *Strasbourg Declaration of Human Rights* which it is enacting into domestic law. The number of lawyers in the army has doubled in the last decade (partly because of implementing the rights of women) and the numbers will double again before long. This causes no serious problems in quiet times, but a future government might well find that this commitment directly damages the *salus populi*. Or, for an account of the problems likely to arise from the *U.N. Convention on the Rights of the Child*, see Barry Mailey's *Importing Wooden Horses*.[3]

There is little doubt that the embarrassments caused by international agreements are beginning to multiply – especially in areas such as minerals and the environment, where regulation takes for granted scientific judgments many of which will certainly be revised as time goes by.

History is thus, in a sense, repeating itself. In the Middle Ages, a large and obstructive ecclesiastical establishment was an incubus restricting the aspirations and energies of the English, and the problem was solved by the development of the practice of sovereignty. We are now in the presence of a new establishment, which increasingly ties our hands, and which can boast only the most rudimentary equipment for responding to the needs of a changing world.

The Danger of the Emerging World Order

We began with something like a mystery: who is trying to kill sovereignty and the nation state ? We have discovered that there are many suspects both within and without the state, but that the real situation is that sovereignty is to be killed in order to turn the state into something that will subserve the Olympian ambition to create a world guaranteeing a good quality of life to every individual on the planet.

Given the crooked timber of humanity, there is something slightly mad about this ambition, but that does not prevent it being used to acquire power in the service of transforming the order of human life. The present multiplicity of sovereign states, in some degree capable of co-operating for their common benefit, is being replaced by a comprehensive legal order adumbrating a single basic form of life. This framework is to be locked onto our complex human world. And it is basically happening because the benign self-limitation of the articulate professions has been lost in their hubristic ambition to create a perfect world.

Lawyers, bureaucrats, clergymen, journalists and even scientists have often lost specific skills along with their vocational sense, but compensate by espousing a kind of moralised politics. Judicial review now invades substance instead of guarding the form that secures our freedom. Most of those corrupted have not yet recognised that they do not agree on what perfection is, and that few things are more ruthless than the conflicts of perfectionists. While we may think it justified by the evil conduct of some non-Western states, it bears most heavily upon those states that need it least. This is the vicious circle in which we are involved: that Western regulation will only work properly in Western circumstances.

There is, however, a wider significance to the emerging world order. In attacking the state, expect, for example, some vicious mayhem as humanitarians tangle with the *sharia*, another image of perfection.

There is no doubt, of course, that the world needs a balance between law and politics. Pure democracy, for example, with its bias towards majorities, might well be suspected of lacking restraint in dealing with a minority Aboriginal problem. Yet the legal system in the Northern Territory of Australia had so enraged the leader of that Territory that, in an incautious moment, he described it as "corrupt". This dogfight represents in miniature a conflict that is building up throughout the Western world. And it arises from the collapse of self discipline in the liberal vocations. The basic corruption is in politics trying to pass itself off as legality, religion, or truth.

It is but one of the ironies of this emerging situation that the humanitarian is above all concerned to destroy the individual who has so long sustained the state. The populations of European states in the past were self-governing in two ways. They enjoyed democratic citizenship, but they had also largely internalised the skill of living in terms of the rule of law. They enjoyed religions to guide them and projects of their own to animate them. The religions are today being marginalised, and replaced by a civil religion of humanitarianism and tolerance, a religion being energetically promoted in the schools. The individual projects which once gave vitality to Western society are being broken on the wheel of government control.

Governments want to help us. They want to be our partners. They want to subsidise us, and to regulate us, and eventually to control us. And in this endeavour they respond far less to what we want, than to their alliance with the internationalist movement that seeks to homogenise the world. We live, less and less, in a world suitable for individualists (they are regularly accused of greed and selfishness), and our situation can only get worse unless, as a beginning, sovereignty revives the possibility of repeal.

Australians above all remember the guns of Singapore, which faced the wrong way to meet the actual challenge. In the 20th Century, we mistrusted the state for its oppressions, and looked to the law as our guarantor against arbitrariness and despotism. New movements have created new threats to freedom which are adept at disguising their real character. What we must in this new century recognise are the residual virtues of the state (largely found in its democratic and responsive character) and the fatal corruption of the law by politics.

Sydney, 25 February, 2000.

Endnotes:

1. The Netherlands is now, of course, part of the European Union, and has thus delegated large areas of its sovereign authority to an outside body. The mechanism of this delegation has been the *Treaty of Rome*. Quite to what extent the members of the Union have given up their sovereignty is a difficult question. In the case of Britain, I think it might still be possible for Parliament to repeal the *European Communities Act* of 1972 and repudiate the *Treaty of Rome* and its successors, but whether Britain has given up its sovereignty is uncertain. What is certainly false is the common idea that Britain has "pooled" its sovereignty with others. Sovereignty can be delegated, or transferred, but it cannot be pooled.

2. Kenneth R Minogue, *Olympianism and the Denigration of Nationality*, in Claudio Veliz (ed.), *The Worth of Nations*, The University Professors: Boston University, 1993.

3. Barry Mailey, *Importing Wooden Horses* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), pp.201-220.

Appendix IV:
Contributors

1. Addresses

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 (1939-42), and the AIF (1942-45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1962-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). 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.

Professor Kenneth MINOGUE was born in New Zealand and, after arrival in Australia, was educated at Sydney High School and the University of Sydney (BA Hons, 1950) before continuing his studies at the London School of Economics. Appointed to a teaching position there in 1956, he became Professor of Political Science (1984-95) until his retirement. Apart from numerous articles in scholarly journals and elsewhere, he has published a number of books, including *The Liberal Mind* (1963), *The Concept of a University* (1974) and *Politics: A Very Short Introduction* (1995). His study of the Maori question, *Waitangi: Morality and Reality* (1998) provides a refreshingly open-eyed look at New Zealand's growing problems in that area.

Peter RYAN, MM was initially educated at Malvern Grammar School. He joined the Victorian Crown Law Department at 16, and in 1941 (aged 18), enlisted in the Army. He spent 18 months on special intelligence work in New Guinea behind the Japanese lines, winning the Military Medal and being mentioned in dispatches, before going on to become an officer in the Army's Directorate of Research and Civil Affairs. After the war he graduated in History from Melbourne University before becoming director of Melbourne University Press (1962-88). Since then he has been, and remains, Secretary of the Victorian Board of Examiners for Barristers and Solicitors. Apart from numerous articles in the press, *Quadrant* and elsewhere, he has written several books, including *Fear Drive my Feet* (1959), *Black Bonanza* (1991) and *Lines of Fire* (1997).

2. Conference Contributors

Professor Geoffrey BLAINEY was educated at Ballarat High School, Wesley College and the University of Melbourne, where he subsequently took up what was to prove an illustrious career both as an academic historian and an author. After 15 years in the Economic History department (1962-77), the last nine of them as Professor of Economic History, he became the Ernest Scott Professor of History in 1977. In 1987 he retired from this post (and as Dean of the Faculty of Arts) in the face of the storm of malignant criticism arising from his public remarks about the serious future problems being created for Australia by our immigration and official multiculturalism policies. Both before that time, and since, he has been a prolific author, with such works as *The Peaks of Lyell* (1954), *Mines in the Spinifex* (1960), *The Tyranny of Distance* (1966), *Triumph of the Nomads* (1975), and so on, up till his recent best-seller, *A Short History of the World*. He is today a Governor of the Ian Potter Foundation, a member of the Council of the Australian War Memorial, and a member of the Centenary of Federation Council, among many other activities.

Hon Max BRADFORD graduated from the University of Canterbury with an M.Comm

degree before working in the N.Z. Treasury (1966-68), the International Monetary Fund (1969-73), and again the Treasury (1973-77), before moving to the private sector (N.Z. Employers' Federation, 1978-85; N.Z. Bankers' Association, 1985-87). After a period as Secretary-General of the N.Z. National Party (1987-89) he was elected to the N.Z. Parliament as the Member for Tarawera in 1990. During the 1996-99 Parliament he held a number of posts in the N.Z. Cabinet, including as Minister of Revenue, Energy, Labour, Immigration and Business Development (1996-97); Minister of Defence (1997-98), Minister for Enterprise and Commerce (including the Department of Labour) (1998-99) and Minister for Tertiary Education (1999). Since the November, 1999 election and the change of Government, he has represented Rotorua.

Hon Denis BURKE, MLA, spent 25 years (1969-94) in the Australian Army, commencing as a National Serviceman and concluding as Commanding Officer (Lieutenant-Colonel) of 2nd Cavalry Regiment, Darwin. In June, 1994 he was elected to the Northern Territory Legislative Assembly for the (Darwin) seat of Brennan on behalf of the Country-Liberal Party. After a Ministerial career commencing a year later and spanning a range of ministries (including Attorney-General, Health, Family and Children's Services, and Industry and Business) he became Chief Minister (and Attorney-General and Minister for Constitutional Development) in February, 1999.

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 (1961–68) and then lectured in Engineering, first at the Gordon Institute of Technology and then at Deakin University (1976–82), 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 (1973–75) of its journal. He was one of the founders of The H R Nicholls Society in 1985 and has been its President since 1989. He has been Treasurer of The Samuel Griffith Society since its inception in 1992, and in 2000 he became one of the founders of the Lavoisier Group.

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 (1962–72) 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 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. In 1999 he became, and remains, National Convenor for Australians for Constitutional Monarchy.

Associate Professor Malcolm MACKERRAS was educated at St Aloysius College, Milson's Point and Sydney Grammar School. While employed by BHP (1957–60) 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 (1960–67), ministerial assistant (1967) and economist with the Chamber of Manufactures (1968–70), he moved into academia, initially at the Australian National University (1970–73), then at the Royal Military College, Duntroon (1974–86). 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.

Ruth MCCOLL, SC is a graduate of the University of Sydney (BA, 1973; LLB, 1975). After working in the NSW Crown Solicitor's Office (1975-80) she became a Barrister of the Supreme Court of NSW in 1980, practising principally in Commercial Law (including Corporations Law) and Defamation and becoming Senior Counsel in 1994. A member of the NSW Bar Council since 1981, she was elected President of that body in December, 1999. She has held posts in the NSW Bar Association (including editing its journal, *Bar News*, during 1985-2000); the Women Lawyers' Association of NSW (President, 1996-97); the NSW Law Reform Commission; and others, too numerous to mention.

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 Scholar in the Faculty of Law, the Australian National University. In February, 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in 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 (1967–70). In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. In 1996–97 he served as a member of the Defence Efficiency Review into the efficiency and effectiveness of the Australian Defence Force. In 1999 he was a member of the Victorian Committee for the No Republic Campaign. He now writes for *The Adelaide Review*.

Dr Nancy STONE, after gaining First Class Honours in Chemistry for her B.Sc. degree (1950), and then her M.Sc. in Biochemistry (1951) from the University of W.A., was awarded a Hackett Studentship for study at Cambridge University, where she completed her Ph.D. in Biochemistry in 1955. After marriage in 1954 she worked – sometimes full-time, sometimes part-time – as a research biochemist in London and, in three separate stints, at the Australian National University, Canberra, retiring in 1987. Since 1992 she has been the Secretary of The Samuel Griffith Society.

The Hon. Peter WALSH, AO was educated at Doodlakine School, W.A. and subsequently, while working on the family wheat and sheep farm there, as an external student in Economics at the University of W.A., but did not complete his degree. After seeking election as the Labor candidate for Moore in the 1969 and 1972 elections, he was elected as a Senator for W.A. in May, 1974. Between 1977 and 1983 he served as shadow Minister for Primary Industry, for Finance, and for Resources and Energy before becoming, in 1983, Minister for Resources and Energy (1983-84) in the Hawke Government. In 1984 he was appointed Minister for Finance, resigning from that post after the 1990 federal election, and from the Senate in 1993. His memoirs, *Confessions of a Failed Finance Minister*, were published in 1995. He contributes a monthly column to *The Adelaide Review*, and in 2000 became President of the recently formed Lavoisier Group.