Upholding the Australian Constitution Volume Thirteen

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Foreword

John Stone

The thirteenth Conference of The Samuel Griffith Society was held in Melbourne in August-September, 2001, the Centenary year of Australia's coming into being, on 1 January, 1901, as "one indissoluble federal Commonwealth under the Crown".

It seemed fitting therefore that this Conference should have as its principal (though as always, not sole) theme the commemoration, and as appropriate celebration, of 100 years of successful constitutional democracy in this country – "one nation for a continent, and one continent for a nation", as Edmund Barton so fittingly described it more than a century ago.

This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains the papers, and Dinner Addresses, delivered to that Conference, together with, as usual, the brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

Appropriately in these circumstances, Sir Harry's opening Dinner Address, *The Constitution: 100 Years on*, focused particularly on the extent to which the objectives of the Founding Fathers (as he said, they were all men) had been realized. He noted in that context their incontrovertible intention to create a *federal* Commonwealth – defined at the time by Sir Robert Garran as "a form of government in which sovereignty or political power is divided between the central and the local [i.e., State] governments, so that each of them within its own sphere is independent of the other". Sir Harry concluded however that, regrettably, "Federation in Australia is no longer what Griffith and Barton intended".

Aided and abetted (since the *Engineers' Case* in 1920) by a predominantly centralist High Court, Canberra has so abused both its power to impose conditions on financial grants to the States (s.96 of the Constitution), and the external affairs power (s.51(xxix)), that "the States are no longer supreme and independent within their own spheres".

Against that background it was highly appropriate that the first Conference paper following Sir Harry's address should have been that by the Hon Dr Frank McGrath. Dr McGrath drew attention to the strange (and to "the ordinary man", well-nigh incomprehensible) attitude taken by the High Court over the years to the *intentions* of those who formed our Constitution. In particular, he underlined the reluctance, or downright refusal, of the Court to draw upon the rich mine of information contained in the Hansard records of the Convention Debates.

Dr Bob Birrell's paper remarked upon the extraordinary achievement of the Founders. They, as he said, were the representatives of six proudly independent British Colonies, coming together voluntarily, and agreeing peaceably on a draft Constitution which they then put to the people of their separate jurisdictions for their approval. That approval having been duly given (after a small hitch initially in New South Wales), they took the document to the Imperial Government in London, where, with the most marginal alterations, it was fully accepted. "Forelock tuggers" indeed!

After a lapse of some little time, this Conference returned to one of the Society's recurring themes, "the Aboriginal question", with a fascinating paper by Keith Windschuttle exploding the Henry Reynolds (*et al*) myths about the Aboriginal/European relationship in the early days of settlement of Tasmania.

Dr John Forbes, in his scintillating paper, *Native Title Now*, not only brought us up to date with the present state of legal play in this sorry episode, but also, in the process, provided much worrying material as to the state of our Federal Court. The judicial activism indulged in there by a significant number of what can only be called "rogue Judges" was also the subject of extensive remark in Des Moore's paper, *Judicial Intervention: The Old Province for Law and Order*. As Sir Harry Gibbs said in his concluding remarks:

> "It is disturbing that … there is a perception that some Federal Judges decide according to their ideological biases rather than according to law. It tends to destroy respect for the law in general and the Federal Court in particular … This should be a matter of concern to those many Federal Court Judges whose reputation is beyond reproach".

One matter of some interest at this juncture in our constitutional history is the possibility of reviving the Founders' original provision for New Zealand to become part of the Australian federation. Professor Catley's lively paper, *The New Zealand Connection*, examined the pros and cons of such a development, concluding that the prospects for it were not hopeful.

As this foreword is written, during the last week of October, Australia is mid-way through a federal election campaign. One of the key aspects of that campaign is the issue of national sovereignty, which, as I said in my introductory remarks to the Conference (see p.xxiii), had during the week preceding the Conference "been more forcefully drawn to the attention of Australians generally than at any time … since World War II".

Yet another key aspect – though not, up till this moment, one which has received any public attention from either side of the campaign – is the republic question. Professor Flint's Dinner Address, *Mr Beazley and his Plebiscites*, eloquently warns us of the dangers in adopting this Napoleonic device; while two other papers, by John Paul and Sir David Smith, address, from different vantage points, aspects of the role of our Head of State, the Governor-General.

All of these papers deserve to be widely read and widely debated. Like its twelve predecessors, it is to that end that this Volume is dedicated.

Dinner Address
The Constitution: 100 Years On

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

In the public celebrations of the Centenary of Federation, little attention has been paid to the question whether the Constitution works satisfactorily. That is understandable. The focus of the celebration is on the establishment of the Commonwealth, and the interest and enthusiasm of the public is not likely to be increased by a discussion of constitutional principles and the nature of federalism.

The Constitution can not be understood by looking at its text alone; its meaning has been expounded by many decisions throughout 200 volumes of the Commonwealth Law Reports. What Edward Gibbon said in the 18th Century with regard to the law seems applicable to constitutional law today:

> "Few men without the spur of necessity, have resolution to force their way through the thorns and thickets of that gloomy labyrinth".

"Gloomy" may be too strong a word to apply to the constitutional decisions, but no one could deny them the epithet "labyrinthine". I find it necessary tonight to take only a few short steps into the labyrinth.

Even if, on examination, we were to find that the Constitution is less than perfect, we should still honour those men (the founding fathers) whose efforts succeeded in gaining the acceptance of the Constitution by the public in Australia and by the Imperial authorities in London. It seems to us now so natural that Australia should be one nation that we tend to forget that it was only by effort and sacrifice that those who strove for Federation were able to overcome the local jealousies, and reconcile the local interests, of the six Australian Colonies and to secure the agreement of the Imperial authorities to the form of Constitution on which the people of Australia had agreed.

The founding fathers – they were all men, of course – had the high purpose that, in Edmund Barton's words, there would be, for the first time in human history, a nation for a continent, and a continent for a nation. There were other arguments in favour of Federation – for example, the need for a unified defence force and the abolition of internal customs barriers – but they were subsidiary to the ideal that Australia should be one nation. The ideal has endured; it has withstood attempts at secession in the past, and one hopes that in the future, it will withstand misguided attempts to divide the nation by such things as the claim for Aboriginal sovereignty.

The founding fathers of our Constitution are not known to every school child in the way that the founders of the American Constitution are known in the United States. It is not unusual for distinguished Australians, other than sportsmen and bushrangers, to be consigned to oblivion, from which they are rescued only for the purpose of attempting to show that they had feet of clay.

A former Prime Minister described those who were responsible for the form which the Constitution took as "forelock tuggers". I assume that he meant that they were submissive to the English establishment. He seems to have resented the fact that they rejected the idea that Australia should have a republican Constitution – which would have been quite impossible to achieve at the time, and was in any case wanted only by a small minority – and that they provided for the Senate – without which the colonists would never have agreed to federate. The description does little justice to the Australian delegates who went to London to attempt to secure the passage of the *Constitution Act* and strongly resisted the attempts of the Colonial Office to amend the Constitution that had been drafted in Australia by Australians. They succeeded in all significant respects except one – they were forced to compromise on the question of the right to appeal to the Privy Council. One of the most influential of those delegates, Alfred Deakin, showed how little deferential he was by refusing not only a knighthood but also an honorary doctorate offered by Oxford. He had previously shown that he was not in awe of high-ranking English authority when he replied to a speech by the Prime Minister of Great Britain, Lord Salisbury, by "challenging [his] arguments one by one and mercilessly analysing the inconsistencies of his speech". He was certainly no "forelock tugger".

The preamble to the *Constitution Act* states that the people had agreed to unite in one indissoluble Federal Commonwealth under the Crown. It did not recite that the Constitution should be a democratic one, or that Australia should be governed by the rule of law. No doubt it was taken for granted that the Constitution would recognise those principles, and it did.

The Constitution is firmly democratic. Both Houses of Parliament must be directly elected by the people; the Senate is not, as has been suggested, unrepresentative, although the people of each State vote for Senators as one electorate. The democratic principle was extended to the amendment of the Constitution, which requires the agreement of a majority of all voters and a majority of voters in a majority of States. This requirement prevents a government which has secured even a large majority from using its temporary power to effect a permanent change to the Constitution. Whether this valuable safeguard has been eroded by the *Australia Act* is a question to which I shall later return.

The possible excesses to which democracy may degenerate are to some extent prevented by the checks and balances of the Constitution. The power of the Executive, which mainly dominates the House of Representatives, is checked by the Senate, which is not necessarily so dominated. The power of the Commonwealth is balanced against that of the States. The Constitution secures the rule of law, by entrenching the position of the High Court and the Federal Courts, and thus securing the independence of the Judiciary. A reader of the Constitution might be surprised to learn that it also may protect the Judiciary of the States, for implications have been found in the Constitution that might not be obvious to the uninitiated.

Under the Constitution, Australia has enjoyed stable and democratic government for a century during which many other nations, much older than Australia, have descended to despotism or anarchy. It is difficult to say how much this stability is owed to the Constitution, and how much to other factors, such as the comparative homogeneity of society in the past, the cultural traditions which we have inherited from Great Britain, and the protection of powerful allies. At least it can be said that the Constitution contributed to our stability and is probably an essential condition of it. A comparison with other countries shows the value of constitutional checks and balances in restraining extreme fluctuations of governmental policy.

Stable government is not always good government. It is hardly necessary to say that those who govern must take some of the blame for inefficiencies in government, but an unbalanced federation may largely contribute to inefficiency. When the framers of the Constitution declared that they intended to create a Federal Commonwealth, they meant, as Sir Robert Garran said, "a form of government in which sovereignty or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other". In other words, it was intended that the States should not be subordinate to the Commonwealth but coordinate with it. It follows, as Alexander Hamilton said in the *Federalist Papers*, that the State governments must be able to supply the finance necessary to perform their functions, just as the Commonwealth must have the same ability in respect of Commonwealth functions.

The framers of the Constitution endeavoured to give effect to these principles. They strictly defined the legislative powers of the Commonwealth, and where they thought that those powers might infringe on the powers of the States, they limited them, for example, in relation to banking, insurance, fisheries and industrial conciliation and arbitration. They restricted the application of the provisions regarding trial by jury, and freedom of religion, to Commonwealth laws. They prohibited the Commonwealth from taxing State property.

There was, however, one difficulty concerning financial relations which they could not surmount. It was regarded as essential that duties of customs should be uniform throughout Australia, and the Commonwealth was accordingly given exclusive power to impose duties of customs, and also, for no good reason, duties of excise as well. But in those days the States relied on duties of customs for revenue. Accordingly, temporary provision was made for the payment of the surplus revenue of the Commonwealth to the States, and a further provision, also apparently intended to be temporary, enabled the Commonwealth to grant financial assistance to any State on such terms and conditions as the Parliament thought fit.

In spite of this flaw in the pattern, a distinguished English economist was able to say that the Australian Constitution "conformed in a manner not reached anywhere else to the classic image of a federation with each level of government supreme and independent within its own sphere". That was what was intended by the majority of the delegates to the Constitutional Conventions. Sir Samuel Griffith dominated the Convention of 1891, and Edmund Barton was the leader of that of 1897, and no one who reads what they said at the Conventions, and in their judgments when they sat on the High Court, could have any doubt that they thought that the Constitution, which Griffith had played such a large part in drafting, provided for a classic federation of the kind described in the words of Sir Robert Garran to which I have referred.

As Robert Burns has told us:

"The best laid schemes o' mice and men
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy".

Federation in Australia is no longer what Griffith and Barton intended. As a result of decisions of the High Court, action by the Commonwealth, and to a lesser extent inaction by the States, the supremacy and independence of the States within their own sphere has suffered a double whammy, or, if you prefer a more Miltonic expression, has been struck by a two-handed engine.

In the first place, the powers of the Commonwealth have been given a wide effect which ignores the context which the Constitution itself provides. In particular, the external affairs power enables the Parliament to legislate not only to implement any treaty obligations, but also to carry out the recommendations and draft international conventions resolved upon by international bodies, even though the legislation operates entirely within Australia. It is now possible, given the necessary international foothold, which is all too readily available, for the Parliament to legislate with regard to anything. The power of the Parliament to intrude on the sphere of State activity is increased by its ability to impose conditions on its financial grants, since it has been held that there is virtually no limit to the kind of condition that can be imposed. The States are no longer supreme and independent within their own spheres.

Secondly, the wide meaning given to the expression "duties of excise", and the withdrawal of the States from the field of income tax, has meant that the States cannot raise the revenue necessary for their own purposes, but must rely on Commonwealth grants to enable them to perform their functions. Thus the States are responsible for spending monies which they do not raise and the Commonwealth raises monies which the States are responsible for spending.

The Goods and Services Tax may increase the total revenue payable to the States, but it does not remove this imbalance between the power to raise revenue and the responsibility for expenditure. Although the total amount of the Goods and Services Tax is notionally allocated to the States, no individual State has a guaranteed share in the revenue, since the distribution among the States will be made according to fiscal equalisation principles determined by the Commonwealth Grants Commission. Also the Commonwealth still has the power to affect the amounts payable to the States by determining the amounts of the conditional grants that will continue to be made.

Federations may take many forms, and those who favour the growth of central power may view with equanimity the way in which our Federation has developed with the resulting erosion of the independence of the States. However, the result is much inefficiency. There is a duplication of effort and control in many aspects of government. For example, both Commonwealth and States determine policy, and exercise powers of administration, with regard to health, education, transport and the environment, and each blames the other when things go wrong. The States are forced to resort to undesirable forms of taxation because their taxing powers are so limited. The need of the States to secure increased revenue from gambling has led to a considerable growth of facilities for gambling in Australia, with great harm to society, and particularly to its less affluent members.

It seems obvious enough that it would be desirable for the relations between Commonwealth and States to be put on a rational basis. There should be a redefinition of functions, so that, so far as possible, the States should have the sole power and responsibility in respect of such matters as are assigned to them. The taxing powers of the States should be increased to remove, or at least reduce, their reliance on the Commonwealth for financial assistance.

There would be little point in convening a Constitutional Convention to consider these matters, since recommendations made in the past have not been acted on, because of lack of bipartisan political support. The only hope of reshaping our Federation (judicial activism apart) would be if politicians of all major parties could put aside political differences for the purpose of working out anew which powers should be given to the Commonwealth and which to the States, and of deciding which powers to raise revenue should be possessed by the Commonwealth and which by the States. Some issues should be easy to decide – for example, to increase the power of the Commonwealth with regard to corporations, and to reduce it with regard to external affairs, and to reduce the scope of the excise power. Others, health and education for instance, would be more difficult and might require compromise. Financial relations might again be the lion in the path.

One suggestion, that the States might impose an income tax surcharge, would, together with a more restricted definition of excise, reduce the fiscal imbalance that I have mentioned. However, that suggestion would not necessarily appeal to the States, and if adopted it would mean that instead of having competitive income tax systems, the States would have to apply the Commonwealth taxation laws which, unfortunately, under governments of both political parties, and no doubt because of bureaucratic influence, have become so complex and voluminous that even experts have difficulty in understanding them. To achieve the desirable reform of the Constitution, it would be necessary for politicians of all major parties to have the vision and the will to undertake this task, and to reach an agreement that would make it possible that a referendum would be carried. Is this an impossible dream?

The assumption that I have made, that the Constitution can be altered only by referendum, may not be correct. The *Statute of Westminster* gave Australia power to repeal or amend Acts of Parliament of the United Kingdom in so far as they were part of the law of Australia, but s.8 of the Statute went on to provide that this power did not extend to the repeal or amendment of the Constitution or the *Constitution Act*. That provision limits the power given to the Commonwealth by s.51 (xxxviii) of the Constitution to exercise, at the request or with the concurrence of the Parliaments of the States, any power which could be exercised by the Parliament of the United Kingdom. It would seem to follow that if s.8 of the *Statute of Westminster* were repealed, the Commonwealth Parliament, acting at the request or with the consent of the Parliaments of all States, could amend the *Constitution Act*, and therefore the Constitution.

The *Australia Act* now provides that the *Statute of Westminster* may be amended by an Act of the Commonwealth Parliament passed at the request or with the concurrence of the Parliaments of all the States. Does this mean that if the Commonwealth obtained the concurrence of all States and amended the *Statute of Westminster*, it would be free to amend the Constitution by an Act of Parliament with which all States concurred? That is an alarming prospect; it would mean that if one political party secured government in the Commonwealth and all States, it could transform the Constitution in ways to which the people of Australia would never agree.

The explanatory Memorandum to the *Australia Bill* did not deal with this question. In introducing the Bill, the Attorney-General, Mr Lionel Bowen said: “Nothing can happen to the Constitution of Australia unless the people of Australia agree that it should happen”. Perhaps the High Court would concur, and would hold that the provisions of the Constitution itself now provide the only manner in which the Constitution could be amended. Who knows?

The reform of the Federal system does not seem to rank high on the agenda of any political party at present. The main interest in constitutional amendment seems to be to attempt to convert Australia into a republic. No one now seriously argues that the Constitution is in any way defective in its working so far as the Monarch and the Governor-General are concerned. A change to a republic would not increase the efficiency of the Constitution; it would have no more than a symbolic significance.

A change to a republic would be an illusion of constitutional reform. On the other hand, it is clearly in the national interest to remove the duplication of effort and the divided responsibilities that have resulted from the distortion of the federal system. Our Constitution has served Australia well during the century of its existence, but the correction of the imbalance and overlapping between State and Commonwealth powers would be a substantial benefit to Australia.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this our thirteenth Conference. So far from that number having had any ill effects upon it – to date at any rate – I am delighted to tell you that, in terms of both attendance throughout and at the two Dinners in particular, this will have been our most successful Conference ever. It is to you, of course, that the credit goes for that, and on behalf of the Board of Management I thank you for your attendance. It will, I believe, be richly rewarded – as those of you who were present last night to hear our President's address, *The Constitution : 100 Years On*, already have been.

Our last Conference, as you will recall – and as you will recently have been reminded by the receipt of its Proceedings, Volume 12 in our series *Upholding the Australian Constitution* – dealt significantly with the whole issue of national sovereignty. In my introductory remarks on that occasion, I said that the issue was one "which, I firmly believe, is taking on a more and more important significance in the minds of Australians". It is remarkable, then, that we meet here this morning after a week in which that issue of national sovereignty has been more forcefully drawn to the attention of Australians generally than at any time, I think, since World War II. So what has been their reaction?

If one were to judge by the editorial attitudes of our so-called "quality" press, one would have to say that Australians have failed the test. True, even that section of the media continues to pay lip service to Australia's sovereign right to maintain the sanctity of its borders; but that principle is then immediately overborne by appeals to the so-called "human rights" of the illegal immigrants involved. Meanwhile "our ABC" – and even more shrilly, "our SBS" – have gone into over-drive in their accustomed roles as Australia's own Fifth Column.

All that is, of course, depressing. It is particularly so in this year 2001, as we celebrate the Centenary of our Federation, and of the great work – the Australian Constitution – which underlies that Federation. Yet, underneath that media and chattering class froth – or should that word be "scum"? – the real heart of Australia continues to beat. In the letter columns of our popular press, in every opinion poll so far taken (no matter how prejudicially the polling question may have been constructed), in talk-back radio particularly, we have seen a massive rallying of public opinion in support of the actions so far taken by the Government. Meanwhile the federal Opposition, after having initially provided full and praiseworthy support to the Government in those actions, has since been told by the New Class crowd who run it to "roll back" into line and put so-called "human rights" first.

All this has been happening, I remind you, as we foregather here in Melbourne this weekend for a Conference directed principally towards the Centenary of Federation. Two papers this morning, and three this afternoon, will directly address aspects of that topic. Two other papers this morning, by Keith Windschuttle and Dr John Forbes, will focus on a question – so-called Aboriginal land rights – which was never dreamed of in 1901. Today, of course, because of the judicial posturing of six Justices of the High Court in the *Mabo Case* in 1992, that matter presents not merely a leaden weight upon the operation of our economy but, potentially, even a threat to that national sovereignty to which I referred earlier.

This afternoon we shall return to the Centenary theme proper, with three papers seeking to assess the manner in which, in practice, the Federation has developed over the past century. The last of these papers, by that genuinely distinguished public servant, the Clerk of the Senate, Mr Harry Evans, which surveys *The Senate Today*, is of particular interest – not merely for its sturdy defence of one of Australia's most important constitutional institutions, but also because the impending federal election will produce an extremely interesting contest in respect of that Chamber of the Parliament.

Tonight, and again tomorrow morning, we shall return – not so much because we wish to, but rather, shall we say, at the behest of Mr Beazley – to the republic issue, and the associated issues of the Sovereign and our Head of State. All of that before concluding with what I promise will be a most forceful paper by Professor Catley on *The New Zealand Connection* (or as he might say, disconnection). To adapt that famous line of T.S. Eliot's, Professor Catley's paper will ensure that our Conference will end, not with a whimper but a bang.

So that, in brief, is the menu, and now it is time to fall to. Let me therefore hand over to the Chairman for our first session, Mr Bob Day, into whose capable hands I now commit you.

Chapter One:
Today's High Court and the Convention Debates[1]

Hon Dr Frank McGrath, AM, OBE

The decision in *Cole v. Whitfield*[2] reversed, after some 80 odd years, the rejection by the High Court of the use of the Convention Debates as an aid to the interpretation of the Constitution. This rejection went back to the earliest years of the High Court.

In 1904, during the address of counsel for the State of New South Wales in *The Municipality of Sydney v. The Commonwealth*,[3] it was noted that counsel proposed to quote from the Convention Debates a statement of opinion that the section under consideration (s.114 of the Constitution) only referred to future impositions of taxes. In relation to such use, Griffith CJ intervened:

> "I do not think that statements made in those debates should be referred to".[4]

Barton J supported him in the following terms:

> "Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole".[5]

In the same year, in *The State of Tasmania v. The Commonwealth,* again during counsel's address, the question of the relevance of reference to successive drafts of the Constitution, considered at the Conventions of 1891 and 1897-8, for the purpose of the interpretation of the Constitution was discussed. The answer given by Griffith CJ was:

> "We think that as a matter of history of legislation the draft bills which were prepared under the authority of the Parliaments of the several States may be referred to. That will cover the draft bills of 1891, 1897, and 1898. But the expressions of opinion of members of the Conventions should not be".[6]

In view of this ruling it is difficult to understand why the Court has excluded from use in the interpretation of the Constitution the bills drafted by Andrew Inglis Clark and Charles Cameron Kingston for use at the 1891 Convention.

Barton J in his judgment rejected any attempt to consider the actual intentions of the framers of the Constitution:

> "It seems to me plain enough that we cannot construe Acts of Parliament by what might possibly have entered into the minds of the framers had their attention been called to the construction afterwards sought to be placed on their language".[7]

He then went on to concede that:

> "… the intention of an instrument is to be gathered from the obvious facts of history – if we are to go outside the four corners of the instrument itself and the policy logically to be deduced from its express words".[8]

In dealing with the interpretation of s.93 of the Constitution Barton stated:

> "It seems to me that these facts of history throw some light upon the question whether the primary meaning of sec.93 is to be modified".[9]

O'Connor J asserted that the duty of the Court was to:

> "… declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State".[10]

He elucidated further:

"The intention of an enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute *aided by a consideration of the surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it*. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing the law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same. *You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it*".[11] (emphasis added)

Over the years, the Court continued its resistance to the use of the Convention Debates. In 1975 Barwick CJ stated :

"[I]t is settled doctrine in Australia that the records of the discussions in the Conventions and in the Legislatures of the Colonies will not be used as an aid to the construction of the Constitution".[12]

In the same case, Gibbs J (as he then was) expressed the reason for the rejection of statements in the Conventions:

"The question whether, in construing the Constitution, reference may be made to the debates at a constitutional convention, has been answered differently in the United States and in Australia. In the United States it has been held that such reference may be made. However, in Australia it has been accepted that in construing the Constitution, as in the case of any other statute, *although regard may be had to the state of things existing when the statute was passed, and therefore to historical facts and to earlier legislation*, it is not permissible to consider what was said in Parliament or at a constitutional convention by those who debated the measure, for one reason because it *cannot be certain that what any particular speaker said received the acquiescence of the majority of those present*".[13] (emphasis added)

Barwick CJ reiterated this view in 1981:

"The settled doctrine of the Court is that [Convention Debates] are not available in the construction of the Constitution: and, in my opinion, rightly so. An academic exercise to explain historically why the Constitution was cast in a particular form is one thing. To identify the meaning of the words in which the Constitution is expressed by examination of its discursive development is quite another. The former, in my opinion, has no place in the task of construing the text of the Constitution *except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved. But absent the possibility which such ambiguity may present, the task of deducing the meaning of the words constitutionally employed derives, in my opinion, no assistance from a consideration of the process by which that text came into being*".[14] (emphasis added)

Gibbs J (as he then was) expressed a similar and, perhaps, a more specific view in the same case:

"It would seem paradoxical if we, although forbidden to consider the debates of our own constitutional conventions *for the purpose of discovering what the delegates thought was the meaning of a particular provision accepted by them, should nevertheless, in construing s.116 indirectly give weight to the opinions of Thomas Jefferson as to the meaning of the similar words of the First Amendment*".[15] (emphasis added)

In cases where the Court considered that the Constitution was vague or ambiguous, extraneous evidence was permitted for the purpose of elucidating the evil that was to be remedied, or, where a term had a special meaning in 1900, its meaning at that date could also be sought outside the express word used in the Constitution.

It might be asked why it was that reference to historical facts was permissible, but reference to the matters discussed in the Convention Debates was not. The answer seems to lie in the fear that reference to individual expressions of opinion would be of no utility, where equally strong and opposing opinions on the same point could be found. This issue was considered by Sir Anthony Mason in 1986:

> "The objection usually made to the use of the Convention Debates is that we have no means of knowing whether remarks of a particular speaker commanded assent of the majority. The objection is not universally true and, even if it were true, it is a very slender reason for refusing to take account of the comments of the founders in the course of their deliberations on drafts of the Constitution.
>
> "One speaker may provide an unexpected insight or explain why a particular draft was not accepted. What is more, the debates are a primary source of material for commentaries by experts which the Court does not hesitate to use as an aid to interpretation".[16]

A recurring theme in opposition to the use of the Convention Debates was that, if such opinions were permissible, they would only be of value where a supporting opinion of the whole could be found. Later formulations of this view suggest that it would be impossible to find such an undivided opinion of the whole.

Michael Coper, whilst arguing against the prohibition of the use of the Convention Debates, and whilst doubting their utility, stated:

> "No doubt their examination will more readily facilitate an understanding of how a provision was arrived at than a revelation of the collective intent, a notion variously, and rightly, described by distinguished commentators as 'whimsical nonsense' and 'a mythical or ritual exercise'. But it is only whimsical nonsense if it is taken to imply the existence of a uniform subjective intention; if it is understood objectively to refer to the proper interpretation of the provision or provisions, arrived at after due consideration of the variety of factors outlined earlier, then the notion is harmless enough, if a little misleading. Amongst those factors the subjective intentions have a legitimate place, whether it is to reinforce a conclusion about the objective intention, or to hold to the view that the framers failed to achieve what they, or some of them, appeared to intend. In either case, it does not follow that because the subjective intentions are not compelling they should be excluded from consideration".[17]

What assistance can be gained from the Convention Debates?

The rejection of the Debates on the ground that no unanimous subjective intention can be found is, with respect, somewhat of a red herring. The Constitution was drafted during two Conventions, the last of which consisted of members chosen by the electors of all Colonies except Western Australia, which appointed its representatives from the Parliament of that Colony. The proceedings were conducted roughly on parliamentary lines, with debates being recorded in full in Hansard form. Each and every one of the sections of the Constitution were proposed, considered by special committees, subjected to a Drafting Committee, and then resubmitted to the Convention sitting as a Committee of the whole, where they were debated again and voted upon. Not every section was the subject of extensive debate. However, many of the Sections which have given trouble in later years were the subject of extensive debate, sometimes on more than one occasion. After initial consideration by the Convention, drafts were submitted to the Houses of Parliament of the Colonies, which made recommendations for change which were then considered by the Convention.

After all these discussions were concluded, a vote was taken on the final form of the specific provisions of the Constitution. To suggest that the detailed debates on the particular provisions should not be used, to assist in ascertaining the meaning of the specific provisions of the Constitution, rather suggests that the Members of the Conventions, even after extensive debate, did not know precisely what they were voting for or against. Consideration of the various extensive debates makes it quite clear that it is possible to gain a fairly definite view as to what the voting members understood the meaning and purpose of the particular provisions to be, whether they agreed with them or opposed them.

Such an approach can throw great light on the meaning and purpose of the provisions of the Constitution. It does not rely on the opinion of any particular person, nor does it endeavour to raise some impossible unanimous subjective intention on the part of the framers. It is surely the best possible way to ascertain what the High Court has always considered relevant, namely, the evil which the particular provision was designed to remedy, the nature of the subject matter to which the constitutional provisions were directed. Some examples will be given in the course of this paper to illustrate this approach.

Despite the legitimating of the use of the Convention Debates in interpreting the Constitution, the Court in *Cole v. Whitfield* specifically rejected any attempt to ascertain the actual intentions of the framers:

> "Reference to the history of s.92 may be made, *not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have*, but for the purpose *of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged*". (emphasis added)

Thus, it is clear that no substantial change in the Court's attitude to the use of extraneous matters of history as aids to the interpretation of the Constitution was contemplated by the judgment.

Various members of the Court did not always obey the strictures against the reliance on the individual opinions of members of the Conventions. Some members of the Court sought support from individual Founding Fathers, when emphasizing the nation-creating nature of the Constitution, in support of increased power for the Commonwealth Government, as the representative of the new nation. For example, Deane J (as he then was) made use of views expressed by Sir Henry Parkes during the 1891 Convention to counter a submission that a restrictive interpretation should be given to the "external affairs" power:

> "As early as the 1891 Convention, Sir Henry Parkes identified, as a basic object of the proposed federation, the creation of 'one great union government which shall act for the whole'. 'That government', he continued 'must, of course, be sufficiently strong to carry the name and the fame of Australia with unspotted beauty and with uncrippled power throughout the world. One great end, to my mind, of a federated Australia is that it must of necessity secure for Australia a place in the family of nations, which it can never attain while it is split up into separate colonies' ".[18]

This is precisely the type of use of the Convention Debates which the Court had specifically rejected over the years. In the quotation above the stress is upon union rather than federation. If anything is clear from the Convention Debates, it is that what was being created was not a union of the kind familiar in the United Kingdom, but a federation in which extensive provision was made for the protection of the independence and the integrity of the federating Colonies in their new guise as States of the Commonwealth. The very rejection of the Canadian form in favour of that of the Constitution of the United States of America, clearly reinforces this view.

How should the Convention Debates be used?

It is submitted that the use of the Convention Debates for the purpose of elucidating the meaning and purpose of the various sections of the Constitution, as understood by those who were called upon to vote for or against them, is a legitimate tool in aid of the interpretation of the Constitution. Such meaning and purpose can be elucidated, without necessarily infringing the strictures that the High Court has placed on the use of the opinions of individual members of the Conventions.

Has actual intention crept into the reasoning of the High Court?

In an article in 1994, Professor Schoff has persuasively argued that, in some recent judgments of the High Court, consideration of the actual intentions of the framers has in fact crept into the reasoning of the Court, or at least of some of its members. He analysed the expressions of opinion in the recent cases of *Capital Duplicators v. Australian Capital Territory (No 2); Port McDonnell Professional Fisherman's Association v. South Australia;* the *Corporations Act Case* and *Smith, Kline & French Laboratories v. Commonwealth,* together with *Sykes v. Cleary; Cheatrle v. The Queen; Re Tracey; Ex parte Ryan,* and *Mutual Pools and Staff v. Federal Commissioner of Taxation.* He concluded:

> "These cases demonstrate that subjective intentions, contemporary meaning, the subject of the language and the objectives of the movement towards federation all bleed into one another. Whether history in *Cole* is properly characterised as going to contemporary meaning, or the objectives of the movement towards federation, it nevertheless seems clear that subjective intentions intrude as well".[19]

He drew attention to the reference to *Cole v. Whitfield* in *Capital Duplicators v. ACT (No 2):*

> "In the course of its reconsideration (in *Cole v. Whitfield)*, the Court adopted an interpretation of the section (s.92), based partly on historical considerations, which gave effect to what was thought to be *the intention of the framers of the Constitution"*.[20] (emphasis added)

Schoff refers to the method used by Dawson J in the same case to ascertain the objectives of s.90 of the Constitution. He quoted Dawson J as stating that the objectives of the section were "the only safe guide to its true meaning". He then comments:

> "That may be so, but what emerges from the history is not abstract purpose, or mischief, rather it is 'the function which it was intended to perform' ". (emphasis added)
>
> Seeking the framers' actual intentions was the very thing proscribed by *Cole v. Whitfield.*
>
> In the *Corporations Case*, the majority asserted the positive intention of the framers:
>
> "There is thus no ground for thinking that s.51(xx) *was framed with the intention* of conferring on the Commonwealth the power to provide for the incorporation of companies. Indeed, the history of the paragraph plainly indicates that the draftsmen of the provision *did not contemplate* that it should confer any power otherwise than in respect of corporations already formed". (emphasis added)
>
> It was against this view that Deane J dissented:
>
> "It is not permissible to constrict the effect of the words by reference to the *intentions or understandings of those who participated in or observed the Convention Debates*".[21] (emphasis added)
>
> In conclusion Schoff summarised his critique:
>
> "The framers addressed certain subjects with certain intentions and the attempt to separate the subject and the intention is impossible; the distinction between the subject and the intended scope of the section must collapse".[22]

The "Living Force" theory of interpretation

The Justices who reject the primacy of the intentions of the framers tend to enunciate their viewpoint in terms of the "living force" theory of interpretation, enunciated by Andrew Inglis Clark.[23]

In *Theophanous v. Herald & Weekly Times Ltd,* Deane J argued that the legitimacy of the provisions of the Constitution "lay in their acceptance by the people":

> "Moreover to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations. Indeed, those errors of such a dead hand theory of construction were made plain by Inglis Clark in explaining why the Constitution was to be 'construed as having reference to varying circumstances and events' ".[24]

Toohey J also argued in McGinty that:

"The Constitution must be construed as a living force".[25]

The "living force" theory of constitutional interpretation derives from Andrew Inglis Clark, who, paradoxically, was the strongest advocate of the rights of the States protected by the Constitution. As Sir Anthony Mason commented in his foreword to the 1997 reprint of Clark's work on constitutional law:

> "The trend in favour of an expansive interpretation of Commonwealth legislative powers would not have pleased Inglis Clark".

The "living force" theory takes two forms. The first is that, in some way, the Constitution itself is a document which has a life of its own, and changes in response to changes in social developments, and in the values of the Australian community. Such a vague notion can be used to support almost any interpretation of the Constitution in contemporary circumstances.

The second is that the words of the Constitution should be interpreted and read by modern eyes, and that the intentions of the framers are totally irrelevant. If the framers understood the meaning and purpose of particular sections of the Constitution in a particular way, a different view of the meaning and purpose in the minds of the modern community should be substituted for the original view. An unkind view of such a theory would be to describe it as the anachronistic interpretation of the Constitution.

Kirby J in the *Hindmarsh Bridge Case* rejected the view that constitutional provisions should be considered in the light of what was understood in 1901:

> "In that century the concept of what it is, in the nature of law, that may be deemed 'necessary' and in a 'special' form for the people of a race, cannot and should not, be understood as it might have been in 1901. Such a static notion of constitutional interpretation completely misunderstands the function which is being performed".[26]

The motivation behind approaches such as these, which are supported by many legal academics and commentators, is to be found in the assertion that the framers of the Constitution intended the Constitution to be flexible in this way, and that it was never intended that constitutional change could only be achieved by the formal procedures of s.128. Impatience with the electorate's conservatism, coupled with the difficulty of achieving the double majority required by s.128, is a common complaint of those who regard the Constitution as out-dated.

Two examples where rejection of the relevance of the intentions of the framers has led to confusion and conflicting results

(1) Section 41 of the Constitution

Analysis of the Convention Debates on this particular section demonstrates a clear understanding of its meaning at the time it was passed by the Convention in 1897.

The original form of this section was moved by Frederick William Holder, the Treasurer of South Australia. He had been defeated on an earlier attempt to make specific provision for adult suffrage in the Constitution. He then moved what has become s.41, for the express purpose of protecting the voting rights of the women of South Australia, who had the right to vote for the Lower House of that State. In the clearest terms, he indicated that what he proposed was that any person who had the right to vote for the Lower House of any of the Colonies, at the time when the Constitution was implemented, or who acquired such a right up to the time when the Commonwealth government instituted a federal franchise, should be entitled to vote in federal elections.

This had the effect of protecting not only the voting rights of women, but also of those Aborigines who continued to retain the right to vote in this manner at the time when the federal franchise was instituted. After such time, the only persons who were entitled to vote would be those who were specifically enfranchised by the Commonwealth statute, subject to the continued right of those protected by s.41.

At the Melbourne session of the Convention in 1898, Barton, as head of the Drafting Committee, attempted to change the original form of this provision by limiting the right to those who had the right as at the date of the creation of the Commonwealth. The mover protested at this change, and was strongly supported by Charles Cameron Kingston, Premier of South Australia, who made it quite clear what the mover had specifically explained when he moved the section. The section was adopted on the clear understanding that it meant precisely what the mover had explained that he intended it to mean.

When the Commonwealth legislated for a federal franchise in 1902, it was the complete misunderstanding, or mis-statement, of the purpose covered by the section which contributed to the passing of that part of the federal Act which totally deprived Aborigines of the vote in the Commonwealth, except those protected by s.41. It was argued by those who desired to deprive Aborigines of the vote that, when the States felt that Aborigines were sufficiently mature to merit the vote, a State Act to give them the vote for the State House of Assembly would automatically give them the federal vote under s.41. Richard Edward O'Connor, who was the Leader of the Government in the Senate, tried in vain to explain that s.41 only protected those people who had, or acquired the vote for the Lower House of a State after the Commonwealth was established, but no later than the date on which the Commonwealth Government legislated for a federal franchise.

The contrary and mistaken view was adopted by Murphy J, who also interpreted the word "acquires" in the way the opponents of Aboriginal votes did in 1902.[27] It is interesting to note that Murphy J made use of the actual debate at the Convention in an attempt to argue that the rejection of an amendment which sought to make clear precisely what Frederick William Holder specifically intended the section, as moved by him, to mean, supported the view that the word "acquires" would apply to rights to vote acquired in the State even after the institution of a federal franchise. So much for the prohibition of the use of the Convention Debates before *Cole v. Whitfield.*

The High Court finally came to the same view of the section as that expounded in the Convention Debates by Frederick William Holder, and by O'Connor in the course of the debate on the federal franchise, but without reference to either of these circumstances. They achieved the same result by legal reasoning on the basis that it would be inconsistent with the Constitution if unilateral State action could actually alter the constitutional power of the Commonwealth Government to legislate in the field of a federal franchise.

(2) Section 51 (xxvi): The Special Laws power

The second example of the unnecessary problems which can arise from a refusal to interpret the Constitution in accordance with the meaning and purpose of particular provisions, as understood by those who framed and voted for them in the Conventions, is that of s.51(xxvi), the Special Laws power.[28]

Much time and argument has been devoted in the High Court, the Parliament, and the electorate, as to whether, or not, this power is one which empowers the Commonwealth to make "beneficial" laws in favour of the groups specified in the provision. On the basis that it was a power to enact "beneficial" legislation, it was argued during the 1967 constitutional referendum that the exclusion of Aborigines from the scope of its provisions was discriminatory against the interests of Aborigines. Doubts were expressed at the time, by such a respected lawyer as Professor Sawer, as to the effectiveness of the removal of the words of exclusion, to achieve the clear vesting of power in the Commonwealth to enact "beneficial" legislation in favour of Aborigines. Despite this, the change was approved at the referendum. The difficulties foreshadowed by Professor Sawer surfaced when the section came before the High Court for interpretation in the *Hindmarsh Island Bridge Case.*

Two major matters were debated in this case:

1. Whether or not the *Hindmarsh Island Bridge Act* could, or did, repeal in part the provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984.
2. Whether the *Hindmarsh Island Bridge Act*, or any part thereof, was invalid in that it was not supported by s.51(xxvi) of the Constitution.

All Justices except Kirby J held that the Act was not invalid. He argued that the term "special laws", in the minds of the framers of the Constitution, were not solely related to "non-beneficial" laws, because of the conflict of opinion during the Convention Debates. He accepted that non-beneficial laws as well as beneficial laws were within the scope of the power to make "special laws". However, he argued that the overall intention of the voters in 1967, when the words of exclusion of Aborigines were deleted, was to give the Commonwealth government power to enact beneficial laws in favour of Aborigines. He quoted with approval the strong words of Murphy J in the *Koowarta Case*:

> "A broad reading of this power is that it authorises any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass such laws. To hold otherwise would be to make a mockery of the decision of the people to delete from s.51(xxvi) the words 'other than the aboriginal race in any State' ".[29]

He also quoted favourably from the judgment of Brennan J (as he then was) in the *Tasmanian Dam Case:*

> "No doubt par (xxvi) in its original form was thought to authorise the making of laws discriminating adversely against particular groups. The approval of the proposed law for the amendment of par(xxvi) by deleting the words 'other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object is beneficial".[30]

It is a paradox that reliance is placed on the presumed intentions of the electors at the 1967 referendum, and yet the intentions of those who framed the original section at an elected Convention called for the purpose are rejected.

The posing of the description of "beneficial", and "non-beneficial", in relation to s.51(xxvi) completely obscures the original purpose of the section itself. A careful analysis of the Convention Debates on the provision demonstrates that the section was designed to meet what were seen as certain undesirable consequences of the entry of certain racial groups into the Australian community, either temporarily, or on a permanent basis. The section was not designed to inflict gratuitous harm on such groups. Neither was it concerned with legislation designed to benefit particular races. However, it was designed to enable laws of a special nature, not applicable to the general community, to ensure that such immigrant groups conformed to the laws and *mores* of the existing Australian community. The current concerns with the activities of some immigrant groups, in relation to drug dealing, extortion, and the gang rape of white Australian women, are similar to those of the Australian community in the 1890s in relation to the activities, both economic and social, of ethnic groups such as Chinese, Afghans, Pakistanis and Kanakas.

What provoked the need for such power was the local perception that these races were so culturally different that, without legislative provision, they would refuse to conform with the local laws, customs, and *mores* of the settled community. Today, similar concern is being strongly expressed that certain immigrant groups are engaging in activities which, whilst not regarded as improper or unusual in their own cultures, are either illegal or obnoxious to the views, customs and morals of the local community.

The following quotation from an article by Mark Barbeliuk in a local Sydney suburban newspaper could easily have been written in 1897:

> "Sure, there are more than our fair share of idiots, mugs, louts and losers from typical white, Anglo middle class backgrounds, but we have mechanisms and laws in place to generally deal with such home-grown problems.
>
> "You can be born here *but come from a social or ethnic background where the values are not those shared by most Australians*. If that is the case, *you need to be educated as to what is acceptable and unacceptable behavior in our community. If you come to this country to start your life over again, you need to respect the values of those who already live here and promote those values in your own children*".[31]

The fact that in 1901 these views were linked to notions of racial purity and "white Australia" does not alter the particular concerns which inspired the provisions of the section, and which find startlingly identical echoes in 2001.

Conclusions

1. Detailed study of the Convention Debates can reveal the meaning and purpose contemplated and understood by the framers of the Constitution of those provisions which were significantly debated.
2. Such use of the Debates does not conflict with the traditional approach to the interpretation of the Constitution in the light of the context in which the words of the instrument were adopted. It is the best means available to ascertain the subject matter upon which the detailed provisions of the Constitution were to operate. It is a far more reliable source than the secondary sources previously permitted, some of which were an indirect, and sometimes inaccurate, way of getting before the Court the substance of the Convention Debates themselves.
3. The accurate disclosure of the meaning and purpose of the various provisions, which the framers were called upon to support or oppose by their votes, could have saved much unnecessary time and argument, not only in the High Court, but also in the political arena. It would have avoided the divergence of view on the High Court as to the meaning of the word "acquires" in s.41. If accepted, it would also have resulted in a more open and honest approach to the whole question of Aboriginal voting rights in 1902.

4. An appreciation of the actual meaning and purpose of s.51(xxvi), as contemplated by the framers, would have led to a more rational, and less confusing, approach to the question of Commonwealth power in relation to Aborigines. Through the caution expressed by Professor Sawer, the constitutional reformers were on notice as to the unsuitable means adopted to achieve their desired result. The contemplated change would have been more effectively achieved by the original proposal by WC Wentworth, that s.51(xxvi) should be repealed, and replaced by a clear and precise provision giving power to the Commonwealth to enact legislation beneficial to Aborigines.

Endnotes:

1. The full title of Dr McGrath's paper as submitted was *The Use of the Convention Debates before the High Court after the Decision in* Cole v. Whitfield. That title is truncated here for convenience of presentation.

2. *Cole v. Whitfield* (1988) 165 CLR 360.

3. *The Municipality of Sydney v. The Commonwealth* (1904) 1 CLR 208.

4. *Ibid.,* p.213.

5. *Ibid.*

6. *The State of Tasmania v. The Commonwealth of Australia and the State of Victoria* (1904) 1 CLR 333.

7. *Ibid.,* p.348.

8. *Ibid.*, p.350.

9. *Ibid.*, p.355.

10. *Ibid.,* p.358.

11. *Ibid.,* p.359.

12. *AG (Cwth); ex rel. McKinlay v. Commonwealth* (1975)135 CLR 1, 17.

13. *Ibid.,* p.47.

14. *AG (Vic); ex rel. Black v. Commonwealth* (1981) 55 ALJR 155, 157.

15. *Ibid.,* p.167.

16. *The role of a constitutional court in a federation*, Sir Anthony Mason (1986), 16 *FLR,* Vol. 16, 1 at pp.25-26.

17. Michael Coper, *The Place of History in Constitutional Interpretation*, in *The Convention Debates, Indices and Commentaries,* Legal Books, Sydney (1986), pp.16-17.

18. *The Commonwealth v. Tasmania (The Tasmanian Dam Case)* (1983), 158 CLR 255. The reference to the 1891 Convention Debates is given as p.14. The correct page is p.27.

19. Paul Schoff, *The High Court and History: It still hasn't found(ed) what it's looking for*, in (1994) 5 PLR 253, p.261.

20. *Ibid.,* p.263.

21. *Corporations Act Case* (1990), 169 CLR 482 at 511.

22. Schoff, *op cit.,* p.270.

23. *Studies in Australian Constitutional Law* (1901), Andrew Inglis Clark, p.21. The Constitution:

> "… must be read and construed, not as containing a declaration of the will and intentions of men long since dead…but as declaring the will and intentions of the present inheritors of sovereign power. ... It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document".

24. *Theophanous v. Herald & Weekly Times Ltd* (1994), 168 CLR 340 at 171.

25. *McGinty v. The State of Western Australia* (1996), 185 CLR 140 at 200.

26. *Kartinyeri and Anor v. The Commonwealth of Australia (The Hindmarsh Island Bridge Case)* (1988) ACA 22, 56.

27. *R v. Pearson; Ex parte Sipka* (1983), 152 CLR 254,272.

28. Also, and perhaps more colloquially, known as the Race power. (Editor's note).

29. *Koowarta v. Bjelke-Petersen* (1983), 158 CLR at 180.

30. *The Tasmanian Dam Case, loc. cit.*, p.242.

31. *Educating to avoid the culture divide*, Mark Barbeliuk, *The St George and Sutherland Shire* Leader, 23 August, 2001, p.19.

Chapter Two:
Federation: Commemoration or Celebration?

Dr Bob Birrell

It would be fair to say that most Australians have remembered the Centenary of Federation in a perfunctory way. Ordinary people have been involved on the fringe, politely watching the odd parade. Meanwhile the cultural trendsetters in the broadsheets and the ABC have been notably quiet. It could have been worse. The last time there was any formal attempt to celebrate Australian achievement, during the Bicentenary, the response amongst Australia's intelligentsia was distinctly hostile.

We have not seen anything during the Centenary like the five volume *A People's History of Australia since 1788* published by Penguin. This denunciation of white settlement would have left readers in no doubt that they should be hanging their heads in shame at what their forebears did to Aborigines, women, the poor and so on. It is good to be able to record that the one major book relevant to Federation produced on the occasion of the Centenary is a fine work of scholarship and judicious warmth about the experience, by John Hirst, entitled *The Sentimental Nation*. Nevertheless it is my view that the accumulation of negative accounts about our past, and about Federation in particular, has set the tone for public lack of interest in the Centenary.

It is no wonder that even the proudest Australians seem to be rather muted in their feelings towards Federation, given what they have been told about it. Commentators critical of earlier proud stories of Australia's progress have dominated accounts of our history in the last couple of decades. The historians, journalists and public intellectuals in question are a guilt ridden generation, ashamed of their past.

One of the dominant themes in recent commentary on Federation is that the "Founding Fathers" were "forelock tugging courtiers to the British". According to this perspective, there was never any serious attempt to carve out an "Australian" identity distinct from Britain and its Empire. When leading figures amongst the Founding Fathers (notably Deakin) took over the reins of government in the early years of the Commonwealth, they are alleged to have swung Australia behind the Empire. It is said that this policy ultimately led to the sacrifice of tens of thousands of Australian men and women in an Imperial war.

Another theme is that once Federation was achieved, Australia's leaders pursued racist objectives, exemplified in the White Australia policy. As the Centenary of Federation Advisory Committee put it in 1994 (a Committee headed by former Victorian Premier, Joan Kirner and which included Philip Adams):

> "In 1901 the notion of unity was possible because of the dominance of monocultural values. Australians now want a concept of unity, which takes into account an unprecedented complexity, based on ethnicity, on beliefs, on cultural choices… Federation was a time when the indigenous people were to be formally excluded. Moreover, Federation was to usher in the era of 'White Australia' ".[1]

The first of these revisionist themes received much attention during the campaign to make Australia a Republic prior to the 1999 Referendum. The Republican leaders tried to convince voters that by voting for a Republic they would at last achieve a final and crucial symbolic break with Britain. It was asserted that by removing the Monarchy from our Constitution this would achieve what the Founding Fathers never sought, that is, true national independence. By contrast, the United States embraced a genuinely independent future when it fought a War of Independence against the Empire. As Castles and colleagues write:

> "Australia grew as part of the British Empire. Unlike the USA, India or Britain's other far flung possessions, Australia never managed a decent independence movement let alone a liberation struggle… The creation of a nation in a struggle for independence is usually the pre-eminent moment for the definition of national character, language, culture and myths. Australia has missed out on this".[2]

Most of the Republican leaders, including Malcolm Turnbull, Tom Keneally and Donald Horne fully shared this view of our history. They appealed to the patriotism of Australian voters by claiming that the attainment of a Republic would offer Australia the fresh start it lacked at the time of Federation.

In the light of these comments it is hardly surprising that there is little reverence or even respect for the leading Founding Fathers these days. This includes Alfred Deakin, whose influence was central, both in the attainment of Federation and in putting into legislative form the vision accompanying Australian nationhood. Even in Melbourne, his home town, there is little to commemorate his memory (except a belated use of his name for the odd college or university). Remarkably, Deakin's grave in the St Kilda cemetery is virtually anonymous. There is not even an indication outside the cemetery that he is buried there, let alone any directions about how to find the modest site. Deakin has fared poorly in recent histories, most notably in Manning Clark's six volume *opus*. Clark regards Deakin as a stuffy establishment figure, against whom he juxtaposes Henry Lawson. The latter is said to be representative of all that was potentially progressive in Australia, and the former, the antithesis. This characterisation is misleading at best. Deakin played a crucial role in the legislative achievements of the first decade of the 20th Century, which was arguably the greatest era of social reform in Australia's history.

There is another factor which mutes any prospect of a celebration of the Centenary of Federation. For much of Australia's intelligentsia, any celebration of the event would be regarded as involvement in a nationalist rite. This goes against the grain of current intellectual fashions. Nationalism involves notions of peoplehood, that is of a community which thinks of itself as distinctive, and which shares certain common beliefs and heritage. It implies notions of over-riding loyalty to that community and an implication of willingness to sacrifice individual gain to its interests. Such ideals run directly counter to the predominant individualistic ethos within the intelligentsia, its support for minority rights and its hostility to any notion of an over-riding community responsibility.

The origin of Federation

There is no space here comprehensively to rebut the characterisation of Federation described above.[3] Rather, a couple of aspects central to this viewpoint will be explored. The first concerns the achievement of Federation and the alleged lack of any nationalist impetus in this achievement.

Consider the situation in the six Colonies of Australia at the end of the 19th Century. In each, authority was channelled upwards through an Imperial Governor to the British Government in London. By the late 1880s the Colonies had developed a form of local patriotism. They were jealous of their rights, even at times against Imperial wishes. The notion that they would willingly trade away fundamental rights, such as taxation, to an unknown Commonwealth Parliament seems absurd. Even today, after a hundred years of Federation and an accompanying spread of Australian patriotism at the expense of parochial State loyalties, it is almost impossible to get State governments willingly to forgo any of their powers to the Commonwealth. Yet at the time of Federation, the Colonies were persuaded to do just that. It is difficult to see how this could have occurred without a committed popular nationalist movement.

In fact there was such a movement. It was strongest in Victoria, where it was led by young "natives". The organisational focus was the Australian Natives Association (ANA). The strength of this movement in Victoria derived from that Colony's peculiar demography. The generation of men and women born of the 1850s gold-seeking migrants had come to maturity by the 1880s. They were ambitious to take over the reins from the immigrant generation, which dominated the senior ranks of politics, the law, education, religion and business. However, this aspiration was jeopardised by the lowly status associated with being native born. The "natives" were declared by visitors, immigrants and even some of their parents' generation to be inferior to those trained in the Imperial heartland. The indignation about this put down of their colonial origins, along with their solidarity as a native-born generation, helped lay the foundations for a nationalist movement.

The ANA leaders sought to turn their designation as native Australians from a disadvantage to an advantage. This they did by declaring that they, as Australian-born citizens, were representative of the "new world", free of the restrictive class, caste and religious divisions of the "old world". They defined themselves as the mirror reflection of the Empire. Their action constituted a symbolic break from Britain. This does not mean that they rejected their British heritage. Rather, they presented themselves as "Australian Britons", free from the alleged deficiencies of the old world.

Their up and coming leaders, of whom Deakin was amongst the foremost, associated themselves with progressive reform efforts within the Colony. The ANA embodied these ideals in its organisational structure. Though membership was limited to native-born males, the organisation insisted that there was to be no reference to religion or any other sectarian divisions within its ranks – unlike most of the other Friendly Societies established in the Colony at the time. One of the largest, for example, the Catholic Hibernian society, excluded non-Catholics from its ranks.

The achievement of Federation became a focus of the ANA's objectives. Federation came to symbolise their claims for dignity as native Australians. It was regarded as a key to the removal of the colonial tag. ANA members (and other native-born Australians) were able to link their personal aspirations to that of the national cause. It was this identity between self and nation which was at the core of the natives' zeal to work for Federation.

While the ANA made most of the running to put Federation on the political agenda in the 1890s, there was a parallel cultural movement centred around the Sydney *Bulletin.* This helped define the spirit of Australian nationalism. The writers and artists involved wanted to see the emergence of a distinct "Australian" culture, which they, of course, would play a key role in articulating. Like the ANA patriots, they wanted to remove the blanket of English culture which, at least in the eyes of the governing immigrant classes, was vastly more prestigious than the "Colonial" product. *The Bulletin*, under the leadership of its editor Archibald and literary page supremo, AG Stephens, deliberately cultivated an Australian ethos. They imagined its heart to be located in a "bush" setting. By so doing they added an unmistakably Australian sense of place, sharply differentiated from the green, orderly and misty British landscape. The values which allegedly prevailed in this setting were emphatically egalitarian – including disdain for authority. This too represented a deliberate inversion of British ways, and was consciously designed to differentiate Australians from their Imperial cousins.

A White Australia

In the eyes of Australia's contemporary intelligentsia, there is no more damning cause for denunciation of the Federal heritage than the actions of the first Commonwealth Parliament when it legislated for a White Australia. In retrospect it is a tragedy that Federation is so closely associated with this legislation. The underlying assumption was racist. The Federation Fathers believed that a hierarchy of races existed, in which both physical and social characteristics were bred into the separate racial groups. Thus one frequently finds references at the time that the Chinese race was inherently "servile" because multiple generations of its people had been forced to live this way by China's rulers.

This is, of course, totally false. None the less, belief in the idea was of great significance to Australian nation-builders. Alfred Deakin (in his role as the Commonwealth's first Attorney-General) introduced the "White Australia" legislation. He was a fervent nationalist committed to the objective of creating a nation built around an Australian "people", sharing common characteristics. As the following statement indicates, this precluded people who were "different":

> "A united race means not only that its members can intermix, intermarry and associate without degradation on either side, but implies one inspired by the same ideas, and an aspiration towards the same ideals, of a people possessing the same general cast of character, [and] tone of thought".[4]

But as noted, Deakin and most of his fellow patriots wanted to create a nation distinctive in its "new world" egalitarian ethos. They looked to the United States, the "Great Republic of the West" and saw the huge social divide between black and white, in which blacks were treated as an inferior race. Since there were to be no "second class citizens" in Australia, they determined that the Commonwealth should legislate so as to debar any immigration which might create such a divide here.

The link to Australia's social democratic ideals was quite explicit. As Deakin put it in 1903, White Australia:

> "… means equal laws and opportunities for all, it means protection against the underpaid labour of other lands; it means social justice as far as we can establish it, including just trading and the payment of fair wages…A White Australia is not a surface, but it is a reasoned policy which goes to the roots of national life, and by which the whole of our social, industrial, and political organisation is governed".[5]

At the time, "White Australia" was understood as a sacrifice. Unlike the United States or Britain throughout its many colonies, Australia would not depend on cheap coloured labour to get the rough work done. Australians would "roll up their sleeves" and do the work themselves, though on wages and conditions sufficient for a white worker to maintain his/her dignity. This was to be costly, as in the sugar industry. Once the Melanesian workers indentured to do the work had been repatriated, sugar planters had to be paid bounty sufficient to cover the costs of Australian workers. But it was a price they were prepared to pay.

Sadly, all that is remembered of this legislation today is its racist intent. The social democratic ideals behind it have been largely forgotten. Yet, as noted, the "White Australia" legislation was organically connected to the highly progressive labour legislation passed during Deakin's period as Prime Minister. Australia was unique amongst western nations at the time (other than New Zealand) in the extent to which the various Arbitration Courts and Wages Boards established at the Commonwealth and State levels intervened in the market place to ensure that workers received "fair and reasonable" wages and conditions.

The highly interventionist labour legislation of the time was subsequently to breed a restrictive and defensive mentality towards industrial innovation within the workforce. Nevertheless, in its context, it was a fine outcome of Federation nationalism. It expressed the ideal that the national community, via the state, should take responsibility for ensuring that there really were no second class citizens in Australia. This and other achievements of the era have been lost sight of or rejected outright by contemporary commentators. Ordinary people still hold to a vague pride in their past. But it is a struggle. This gulf between people and cultural leaders was to contribute to the rejection of the Republican campaign, as I now hope to demonstrate.

The Republican issue

Some 55 per cent of the Australians who voted at the November, 1999 Republican Referendum opposed the proposition that an Australian should be Head of State. This is a major puzzle, since opinion polls before and after the Referendum showed that most Australians favoured an Australian becoming Head of State. The plum was ripe for the picking. Yet the Republican movement failed to capitalise on these favourable circumstances. The Republican leaders, themselves, have put the blame on their opponents. They are accused of campaigning on the absence of a direct election option to mobilise opposition. This, the Republicans see as unprincipled, since the Monarchists did not want any form of Republic.

There is some basis for this interpretation, since according to a careful post-Referenda opinion poll, just over half of the electorate who favoured direct election (as opposed to parliamentary appointment or the maintenance of the existing Monarchical arrangement) voted "No". These "direct electionists" were well down the track to accepting the Republican proposition, yet when it came to the vote, a little over half them voted "No".[6] If a few more had voted "Yes" we would now be a Republic.

Nevertheless the "direct election" explanation for the Referendum's failure is a shallow one. One must ask why, despite all the obvious constitutional issues raised by an attempt to graft an elected President on our Westminster system, over half the electorate nevertheless favoured this option. Also, when faced with the possibility that by voting "No" they would sink any form of Republic, they were prepared to do so. An alternative explanation is that they voted in this way because they did not like the ethos associated with the Republican movement.

That movement was closely associated with former Prime Minister Keating. He put the issue on the agenda at the same time as his Government was projecting Australia down a globalising pathway, which Keating himself linked to an aggressive ideological campaign to recast Australia as an Asian oriented, multicultural community. The major leaders of the movement, including Malcolm Turnbull, Tom Keneally and Neville Wran were Sydney based and well known for their connections with this agenda. Equally, there is no doubt about popular disaffection for this vision of Australia. It was shown at the ballot box in the course of the 1996 federal election.

If this argument were correct, one would expect many voters to favour the direct election model, since under this constitutional arrangement they, rather than the political élites they distrusted, would determine who became Head of State. It is also plausible that what lay behind this distrust was differences about the desired direction for Australia.

The circumstantial evidence for this view is strong. The post-Referendum poll referred to above asked electors about their views towards Australia. This was done by asking them to respond to a series of propositions like, "I would rather be a citizen of Australia than any other country in the world". Subsequent analysis showed that the more patriotic the voter (defined as those who strongly agreed with such propositions), the more likely he or she was to vote "No".[7] Conversely, voters who were the least patriotic on this dimension were the most likely to vote "Yes". This is remarkable, because the Republican campaign was built around the simple idea that patriotic Australians should endorse an Australian Head of State. This clearly did not happen. The reason is not because "patriots" were heavily located in the Monarchist camp. They were just as likely to favour an Australian Head of State as other voters.

As noted earlier, one of the themes in Republican advocacy during 1999 was that a "Yes" vote would help symbolically to complete the emancipation of Australia from British influence. The appeal behind this message to ordinary voters, or so the Republican leaders imagined, was that once complete, this symbolic break would help launch Australia into a more progressive future. The problem from the point of view of winning a majority for this cause was that the notion of a "fresh start", at least as associated with the Keating vision, resonated much more with those critical of Australia's past than it did with those who identified with it.

Analysis of the socio-economic characteristics of "Yes" and "No" voters showed that it was bifurcated along metro / regional and tertiary élite/other lines. Some 55 per cent of major city voters supported the Referendum as against 39 per cent of other voters. Seventy per cent of those with tertiary education said they voted "Yes", versus only 41 per cent of those with no post-school qualifications. Migrants (other than the UK-born) voted overwhelmingly "Yes", while a majority of the Australian-born (52.4 per cent) voted "No".[8]

It is doubtful that many "No" voters would have been aware of how systematically some Republican leaders were intent on exploiting the Republican cause to help advance the Keating agenda. Nevertheless, a new blueprint is in the making. Leading Republicans have been articulating a view of Australian nationalism which exorcises the humiliations of the past by declaring that the new "Australian identity" they favour will have *no* distinctive or cherished heritage. The new Republic, in this thinking, will be post-modern, free of any over-arching communal loyalty or identity. Rather, the nation will become a procedural shell built around core values of respect for diversity, democracy and the rule of law. Within this shell, citizens will be able to pursue their diverse objectives free of the constraints of conformity to any nation-wide notion of peoplehood.

It is remarkable how far this conception has advanced in intelligentsia circles. It even gained the imprimatur of a Coalition-appointed inquiry into Citizenship which reported in February, 2000.[9] This inquiry, on which Donald Horne was an influential member, addressed the issue of Australia's identity. Any form of nationalism as defined above was rejected. Instead, the notion of a new compact of "non-Nationalistic" values was advanced as follows:

> "The Council considered it might be better to proclaim core civic values for all Australians to respect as the basis of our citizenship. In other words, it might be better to proclaim not a 'national identity', but a national civic 'compact'. Such a compact could be in practice a statement that represents a form of 'understanding' or 'agreement' amongst Australians setting out [a] commitment to our shared values which have evolved over many years".[10]

This was to include the procedural values described above, such as "a commitment to principles of tolerance and fairness", and "a commitment to acceptance of cultural diversity", as well as "the unique status of Aboriginal and Torres Strait Islander peoples".

In the event, the Coalition did accept some of the Committee's recommendations. The most notable was that for the repeal of s.17 of the *Australian Citizenship Act* 1948, which provided for the loss of Australian citizenship on acquisition of another citizenship. But the recommendation for government support and publicity for the proposed "Australian compact" was rejected.[11]

Endnotes:

1. *2001: A report from Australia*, Centenary of Federation Advisory Committee, AGPS, 1994, p.3.

2. Stephen Castles *et al*., *Mistaken Identity*, in *Multiculturalism and the Demise of Nationalism in Australia,* second edition, Pluto Press, Sydney, 1990, p.7.

3. This is attempted in Bob Birrell, *Federation; the Secret Story*, Duffy and Snellgrove, Sydney, 2001.

4. *Commonwealth Parliamentary Debates*, 12 September, 1901, cited in Birrell, *ibid*., p.287.

5. Quoted in Birrell, *ibid*., p.200.

6. *Ibid*., p.329.

7. *Ibid*., p.328.

8. *Ibid*., p.332.

9. *Australian Citizenship for a New Century*, A Report by the Australian Citizenship Council, Commonwealth of Australia, 2000.

10. *Ibid*., pp.10-11.

11. *Australian Citizenship… A Common Bond*, Government Response to the Report of the Australian Citizenship Council, May, 2001, pp.8-9.

Chapter Three:
History, Anthropology and the Politics of Aboriginal Society

Keith Windschuttle

After the High Court's *Mabo* judgment in 1992, Henry Reynolds, who describes himself as "an historian and advocate for indigenous rights",[1] commented on its future implications. He said the judgment was a major landmark in the "decolonising" of Australian law and society. It was, none the less, only a beginning to the process of redressing the legal injustice to Australia's indigenous people. "Now the time has come", he said, "to move on to tackle the question of Aboriginal sovereignty". The High Court had determined that Aborigines had a form of land tenure before colonisation. This had survived the British declaration of sovereignty in 1788. How, Reynolds asked, did land ownership survive without some accompanying form of sovereignty? The very existence of land tenure, he said, implied a form of Aboriginal law and government.[2]

About the same time, the visiting Canadian legal academic, Patrick Macklem, observed that in his *Mabo* judgment, Justice Brennan had rejected the principle that Britain had used to justify its dispossession of Aboriginal land. This was the belief that the Australian Aborigines were insufficiently civilised to merit being regarded as having sovereign authority over their land. Judged by today's standards, Brennan said, such a law was unjust. Macklem observed that the same test Brennan had applied to land rights should also be applied to political rights. "Just as it is unjust to deny the validity of Aboriginal rights with respect to land based on the fallacy of European superiority", Macklem contended, "it is also unjust to deny the validity of Aboriginal rights of governance on the same fallacy". Therefore, he went on:

> "Aboriginal rights of governance ought to be recognised as surviving the assertion of Crown sovereignty according to the same principle of justice governing the survival of Aboriginal rights with respect to land".[3]

This argument is the basis for the current demand for a treaty between Aborigines and the rest of Australia. The goal of the treaty is to complete what Aboriginal activists call the "unfinished business" of colonisation. Its principal aim is to restore Aboriginal governance or sovereignty. According to an Aboriginal and Torres Strait Islander Commission (ATSIC) booklet published in May this year:

> "Aboriginal sovereignty refers to the ability of indigenous peoples to act as a nation or nations. This includes the ability to be self-determining and to exercise self-government. Even though Australian governments and courts have never recognised indigenous sovereignty, many indigenous peoples believe that we have never given up sovereignty and retain it even if it has not been recognised by the Australian state".[4]

Moreover, ATSIC is serious about the goal of self-government. In the same document, it asks the question: "Is a treaty about setting up a 'black state'?", and replies:

> "Treaties in other countries have provided for indigenous self-government. It is likely that Aboriginal peoples and Torres Strait Islander peoples would want to negotiate self-government in relation to traditional lands as part of a treaty in Australia".[5]

In short, the answer to a black state is "Yes".

There are some Aborigines, like the current ATSIC chairman Geoff Clark and his colleague Michael Mansell, respectively deputy chairman and secretary of the organisation called the Aboriginal Provisional Government, who argue that self-government involves secession from the Commonwealth. They want to establish "a nation exercising total jurisdiction over its communities to the exclusion of all others". There are other activists, however, who are wary of demanding outright secession and who seek an outcome more politically acceptable to mainstream Australia. They see a black state as having similar powers to the existing Australian States, or to that of a largely self-governing territory like Norfolk Island.[6]

Where would this more limited black state be located? No one has yet drawn up a map, but there are now large tracts of Aboriginal owned land stretching across the centre of the continent from the Great Australian Bight north almost to Darwin. Add some sizeable enclaves in Western Australia, Arnhem Land and Queensland, and you have a territory already larger than Victoria.

In other words, the logical extension of the arguments used by the judges in the *Mabo Case* amounts to a very radical realignment of the Australian political framework. As Professor Garth Nettheim has observed, these arguments question the very legitimacy of the original British sovereignty of the Australian continent, and thus the legitimacy of its heir, the Commonwealth of Australia.[7]

However, there is a major legal problem involved here. This is to find a judicial forum in which to argue it. In its *Mabo* judgments, the High Court unanimously confirmed that the validity of the sovereignty of the Crown was not justiciable in Australian courts. The acquisition of sovereignty was an Act of State that the High Court could not review. Moreover, Aborigines cannot take a case of this kind to the International Court of Justice because only a state can invoke this jurisdiction. So Aboriginal activists appear to face a Catch 22: in order to argue before a court that they constitute a state, they first have to be accepted as a state. This is why they regard a treaty as so important. Short of open insurrection, a treaty is the most politically effective way of realising an Aboriginal state.

The proponents of a treaty expect little from the conservative side of politics but are pinning their hopes on a future Labor government. ATSIC says it would first seek a treaty that endorsed broad principles, such as "the right to self-determination" and "the protection of indigenous laws and culture". Motherhood statements like these would then be left to the courts to interpret into political reality. In other words, once the Commonwealth has signed the treaty, the details would be out of the hands of our democratic process. The courts would decide ATSIC demands such as "ownership of land, waters and resources; reparations and compensation; self-government; constitutional recognition".[8] ATSIC is plainly looking to a judiciary stacked with sympathetic activists like Sir William Deane and Sir Ronald Wilson.

Even though the *Mabo* judgment and the subsequent legislation by the Keating Government in 1993 appear to have settled the issue of land rights for the time being, the existence of pre-colonial land tenure still remains vital to the next stage of Aboriginal political demands: the quest for sovereignty. However, if pre-colonial Aborigines did not have a concept of land ownership, and did not act in ways that implied land ownership, then the argument for sovereignty loses its most crucial premise. Without it, claims about the continued existence of pre-colonial Aboriginal government and laws would have to be made independently, a much harder thing to do.

The *Mabo* judgment did not analyse the actual existence of land tenure on the mainland of Australia. Once it had established this existed on the island of Mer in the Torres Strait, the judgment simply declared that this should be extended to the whole of the continent. Justice Brennan expressly rejected the course of inquiring whether the Meriam people were "higher on the scale of social organisation" than mainland Aborigines. The court steered clear of anthropological texts and confined its argumentation, as far as possible, to questions of law. It simply made the assumption that on the mainland, amongst hunter-gatherer Aboriginal tribes, some form of land ownership existed in principle. Whether it exists in fact, and exactly where it exists in particular, were questions to be determined on a case by case basis. This is what Keating's 1993 post-*Mabo* legislation provided for. Those most qualified to establish the facts of native title are historians and anthropologists. So, by extension, the existence of Aboriginal sovereignty is ultimately a question for historical and anthropological investigation too. Hence, Aboriginal politics now hinges on the veracity of historians and anthropologists.

I am currently engaged in a long project that is questioning the credibility of these two groups of scholars on the Aboriginal question. My long-term interest is not actually in Aboriginal politics. It is primarily to set straight the record of Australian history by closely examining the evidence for the current orthodoxy. It seems obvious to me that, given what else we know about the conduct and the culture of the early British colonisers of this continent, the claims by historians that they engaged in systematic massacres and genocide of the Aborigines would have been totally out of character. None the less, this has to be established empirically. Last year I gave a preview of this project in a series of articles in *Quadrant*. I am now examining the whole record of frontier conflict from 1788 to the 1920s.

I am not giving anything away here by saying that on balance, and despite some notable exceptions, neither our historians nor our anthropologists can be trusted to tell the truth about Aboriginal affairs.

I will start with the anthropologists. Today, many of them openly acknowledge the aim of their discipline is to serve the interests of Aboriginal communities. In his 1997 general text, *Continent of Hunter-Gatherers: New Perspectives in Australian Prehistory*, Harry Lourandos criticises earlier anthropologists for failing to recognise the dynamism of traditional Aboriginal culture. However, he says the current generation of scholars is now producing research to counteract this and to help "empower" Aboriginal communities. "This book", Lourandos writes, "attempts to redress the unequal relations between the people whose history is being studied … and the rest of us".[9]

One of the first of this new breed was Rhys Jones, who made his name in the 1970s with the prehistory of Tasmania. Before the Tasmanian Aborigines were rounded up in the 1830s and shipped off to a mission on Flinders Island, there was very little anthropological fieldwork done among them. All we have are a few brief observations by visiting Frenchmen and the diaries of the five years spent in the field by George Augustus Robinson, the man who did all the rounding up. But the disadvantage of the brevity of the evidence is matched by the advantage that it is finite. Anyone can read all the evidence in a reasonable amount of time and check to see if the currently accepted conclusions really do follow.

The most comprehensive survey of the Tasmanian evidence was done by Rhys Jones in 1974 for Norman Tindale's monumental volume, *The Aboriginal Tribes of Australia*. Before colonisation in 1803, Jones says, Tasmania had nine major tribal groups. Each tribe was composed of five or six bands who, in their seasonal movements, often entered and passed through the territory of neighbouring and even distant tribes along well-defined roads. Some of these bands regularly traversed almost the entire island, north to south and east to west.

Despite this mobility, Jones argues, each of the bands had a keen sense of possession and the exclusive use of its own territory, as well as the notion of trespass. They responded with violence to unwelcome incursions into their own country. Jones writes:

"Movements outside this territory, and of alien bands into it, were carefully sanctioned … Trespass was usually a challenge to or punished by war".[10]

If this interpretation is correct, the Aborigines certainly had the concept and practice of the ownership of their territory, just as the *Mabo* judges assumed. The problem with this argument, however, is that the evidence Jones himself presents does not support it.

Jones has gone through the 1,000 published pages of Robinson's diaries and extracted information about each tribal group's location, language, population, seasonal movements and political relationships. He has used this information to compile a profile of each of the nine tribes he identifies. So it is possible to look at his summary of information about each tribe to see how possessive it was about its territory and how often it engaged in conflicts with other tribes over breaches of its territorial sovereignty. If you do this you find that Jones's own analysis of tribal conflicts offers only one case where territorial intrusion might have led to conflict. But when you go back to the original source and check the relevant diary entry, you find Robinson does not suggest any reason at all for this sole incident. Jones makes the supposition that the Aborigines concerned were "intruders" on the territory of their attackers, but there is no indication in Robinson's diary that this was so.[11]

Moreover, if you go through all Robinson's diary entries, you find there are numerous references to internecine conflicts between Aboriginal bands and plenty of reasons given for them. My own tally of the causes of inter-tribal conflict in the diaries is:

- Disputes over women: 10.
- Long-standing vendettas: 5.
- Conflicts over goods, including game, ochre and guns: 3.
- Tribal honour: 2.

However, the offence of trespass is conspicuous by its absence. I read the whole of Robinson's Tasmanian diaries looking for confirmation of Jones's statement that "trespass was usually a challenge to or punished by war", but could find none. I double-checked all the index entries that might be relevant. None of these 66 index references provided even one example of trespass provoking violence. There are no statements of the kind: "we fought them because they came onto our territory", or any variants thereof.

This absence is itself strong evidence that the culture of the Tasmanian Aborigines did not have such a concept. Robinson's diaries clearly indicate that some Aborigines did identify themselves with certain territories, to which they had an emotional affinity, though not a connection we might call cultural or religious. They indicate just as plainly that British notions of the exclusive possession of that same territory, and the defence of it by force or any other sanction, were not part of the Aborigines' mental universe. In short, despite Jones's claims, the ethnographic evidence does not support the notion that the Tasmanian Aborigines, either conceptually or in practice, exercised the *ownership* of land.

In 1968, the Commonwealth government issued a mining lease to the company Nabalco on the Gove Peninsula so that it could extract aluminium. The lease took up part of the Arnhem Land Aboriginal Reserve. In response, Aborigines from the nearby Yirrkala Methodist Mission sued both the Commonwealth and Nabalco for unlawful invasion of their land. The case was heard in the Supreme Court of the Northern Territory by Justice Sir Richard Blackburn. Two of the witnesses were the anthropologists Professor William Stanner and Professor Ronald Berndt. These are two of the most distinguished anthropologists Australia has produced. Stanner and Berndt told Justice Blackburn that Aboriginal social structure was based on its relation to the territory inherited by each clan. Within each clan were smaller groups called bands. These were the food-gathering groups in which people lived. Most of the time, each band inhabited a territory owned by the male members of its clan.

Ten Aboriginal witnesses from eight different Northern Territory clans then appeared before the hearing. Not one of them agreed with Stanner or Berndt about the structure of their bands or their clan organisation, or of their notion of exclusive identification with a particular territory. Justice Blackburn summarised the Aboriginal evidence as follows:

> "None of the witnesses said that in the days before the Mission he lived chiefly in his clan territory… The people of each clan were deeply conscious of their clan kinship and of the spiritual significance of a particular land to their clan. On the other hand, … it was of no importance whether or not the members of a band had any relationships to each other, or conducted their food-gathering and communal living upon territory linked to any particular clan".[12]

Justice Blackburn decided that the Aborigines concerned did not have a proprietary interest in the land subject to the lease, that is, they did not have a concept of owning it.

This public conflict between what these eminent anthropologists claimed Aborigines had told them about their relationships to the land, and what the Aborigines themselves told the court, was obviously a major embarrassment for the anthropological profession. In discussing this case, Les Hiatt has said he believed that Stanner and Berndt gave this evidence because they thought it would serve the interests of the Aborigines in winning the case. "I have a letter from Stanner", Hiatt writes, "that would bear such an interpretation".[13] According to a number of anthropological studies cited by Hiatt, before white contact there was great variation among Aboriginal groups in terms of their identification with, and possession of, certain tracts of land. Aboriginal identity could derive from a language, a prominent person, either matrilineal or patrilineal descent, sacred sites, *or* a tract of land.[14]

Two weeks ago, the new Premier of Western Australia, Dr Geoff Gallop, ceded 26,000 square kilometres of land to the Tjurabalan people, in a negotiated settlement before their land rights claim went to the Federal Court where their evidence could be publicly heard. Gallop said he was doing this because the existing procedures were taking too long to recognise Aborigines as the owners of the land. At the handover ceremony, Gallop told the Tjurabalan people: "This country belongs to you and you belong to this country".[15] Without hearing the evidence, however, Gallop had no right to make such a presumption. His statement is merely romantic mythology.

Without surveying all the literature about Aboriginal concepts of land ownership, there are two conclusions we can confidently draw from the two examples I've provided here from Tasmania and Arnhem Land. First, before British colonisation, *some* Aboriginal groups did *not* have either the concept or the practice of land ownership. Second, some anthropologists are prepared to publicly misrepresent the evidence to claim they did.

How you approach cases where the experts and professionals, whom you would normally trust to tell the truth, are prepared to manufacture data to suit the occasion, is a difficult question. Until it is resolved, there must remain a shadow over the whole credibility of the discipline of anthropology.

Since the Blackburn judgment, land rights legislation has avoided the concept of English-law ownership by defining traditional ownership in terms of common spiritual affiliations, spiritual responsibilities and mere occupancy. While this might suffice in the case of native title, it does not resolve the more radical issue of sovereignty. The fact that some Aboriginal groups did not have either the concept or practice of land ownership means that those activists who now want to argue that Aborigines had their own government and laws cannot do so simply by a deduction from the existence of Aboriginal land rights. Spiritual affiliations and responsibilities for sacred sites held by various clans do not imply anything as secular or as radical as an Aboriginal government. In short, the argument by activists that Aboriginal *sovereignty* automatically flows from the 1992 *Mabo* judgment does not follow.

Justice Blackburn's 1971 judgment is also of considerable importance to the historical profession. In rejecting Aboriginal land rights in Australia, Blackburn discussed at length the differences between the colonisation of Australia and New Zealand. He said:

> "One of the reasons for the fact that a system of native land law exists in New Zealand and does not exist in Australia is that in New Zealand the government had several times to wage armed conflict with organised bands of natives, which never occurred in Australia".[16]

Since that statement was made, a major industry has emerged in this country to prove it wrong. In the 1970s, Henry Reynolds produced a number of articles and monographs with the theme of "the unrecorded battlefields" of Australia. In 1981 he wrote the book *The Other Side of the Frontier*, and has since produced ten other books plus an ABC television documentary series, all of which have the same argument: faced with white invasion, the Aborigines responded by mounting guerilla warfare in a patriotic defence of their territory. As the frontier shifted across the continent from 1788 to the 1920s, Aborigines resisted all the way. Reynolds has now produced a whole school of followers. Like the new breed of anthropologists, these historians have no compunction about acknowledging their aim of putting scholarship into the service of Aboriginal political interests.

My own project is not only to provide a more realistic account of the degree of violence done to Aborigines during colonisation, but also to examine the question of frontier warfare. I intend to examine this question in every State and Territory.

So far, I have concluded work on Tasmania. This is where the proponents of the guerilla warfare thesis think they have their strongest case. There was a series of hostilities during what they call the Black War of 1824 to 1831, when a total of 185 white settlers and their convict servants were killed and 213 were wounded by Aborigines over eight years. Henry Reynolds calls this "the biggest internal threat that Australia has ever had",[17] and he has been lobbying for some years for the Australian National War Memorial in Canberra to honour the 500 Aboriginal guerilla fighters he says were killed on their home soil in defence of their country. Apart from the total of white casualties, however, all of these claims are false. My own tally of the credible Aboriginal death toll is less than one hundred.

I have come to a quite different interpretation of the causes of the hostilities of this period. I will conclude today by reading to you the summary of my project's arguments against the frontier warfare thesis in Van Diemen's Land:

> "The hostilities of the Tasmanian Aborigines did not amount to either conventional or guerilla warfare. In their first three years, 1824-1826, the hostilities were almost entirely confined to the action of a small group of Aboriginal bushrangers, who had two leaders. One of them, Musquito, was a native of Sydney who had no ethnic or cultural connection to the Tasmanian people or to any territory on the island; the other, Black Tom, was a detribalised Aborigine reared since childhood in a white household in Hobart Town. Moreover, the hostilities began at a time when white farms and pastoral property had not yet seriously deprived the Aborigines of very much land or barred them from passage over it. At the time, the settlers occupied only 3.1 per cent of the island, most of it unfenced.
>
> "For the entire period of the 'Black War' from 1824 to 1831, there is no credible evidence that the Aborigines had any military, political or patriotic objectives. Nor did they have any military or other kind of organisation. They never engaged in anything that could be defined as warfare. Almost all their victims were unarmed settlers, stock-keepers and their families in isolated locations. Ten per cent of casualties were white women and children.

"As far as we can tell from the ethnographic evidence, the Aborigines did not have the kind of relationship to the land that would lead them to wage sustained warfare in its defence. If they had had strong territorial instincts, the Aborigines would have displayed them in the first twenty years of British colonisation when they would have been most affronted. In these two decades, however, the Aborigines made little attempt to resist the trespass of the intruders. Several bands willingly came in to the white settlement seeking food and household goods. They were never starving or even seriously deprived of traditional food. In fact, the evidence shows that, at the height of the hostilities, native game abounded throughout the whole of the island.

"Instead, the motives of the Aborigines lay in a combination of revenge and plunder. A small number wanted to revenge themselves on white colonists who had injured them or killed their kinfolk. This revenge took the form of indiscriminate violence against any white people they encountered. However, the principal reason for Aboriginal violence was their desire for British consumer goods, especially flour, sugar, tea, blankets and bedding. Excluded from the labour force and having no way except begging of legally acquiring what to them were luxury products, the Aborigines chose to plunder them from the huts and homesteads of settlers instead, and to kill any whites they found in their way. The actions of the Aborigines were not noble: they never rose beyond robbery, arson, assault and murder".

The idea that Aborigines, either in Tasmania or on the mainland, were patriots engaged in a valiant defence of their territory against the firepower of British imperialism did not originate in Australian history. It is a piece of ideology derived from the anti-colonial movements of Asia and Africa in the 1950s and '60s. It has nothing to do with the mentality of tribal hunter-gatherers of the late 18th and early 19th Centuries. In other words, the underlying inspiration for modern Aboriginal politics, the notion of resistance to white invasion, does not derive from traditional Aboriginal culture either. It is a continuation of the radical politics of the Sixties by other means.

Endnotes:

1. *The Weekend Australian Magazine*, 25-26 August, 2001, p.50.

2. Henry Reynolds, *After Mabo, What About Aboriginal Sovereignty?*, in *Australian Humanities Review*, April-June, 1996 (www.lib.latrobe.edu.au/AHR/).

3. Patrick Macklem, *Indigenous Peoples and the Canadian Constitution: Lessons for Australia*, Paper to Conference on Indigenous People in National Constitutions, Canberra, May, 1993, p.41.

4. Aboriginal and Torres Strait Islander Commission, *Treaty: Let's Get it Right,* ATSIC National Treaty Support Group, May, 2001, p.17.

5. *Ibid.*, p.16.

6. Henry Reynolds, *Aboriginal Sovereignty*, Allen and Unwin, Sydney, 1996, pp.182-3.

7. Garth Nettheim, *A Response to Henry Reynolds*, in *Australian Humanities Review*, April-June, 1996.

8. ATSIC, *op. cit.*, p.8.

9. Harry Lourandos, *Continent of Hunter-Gatherers: New Perspectives in Australian Prehistory*, Cambridge University Press, Melbourne, 1997, pp.xiv-xvi.

10. Jones, *Tasmanian Tribes*, Appendix to Norman Tindale, *Aboriginal Tribes of Australia*, Australian National University Press, Canberra, 1974, p.328.

11. Jones, *Tasmanian Tribes*, *loc. cit.*, p.334; Robinson, diary, 26 September, 1830, *Friendly Mission*, (ed. NJB Plomley), Tasmanian Historical Research Association, Hobart, 1966, p.220.

12. Justice Blackburn, *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia*, 1971, in Jean Malor (ed.) *Federal Law Reports*, Vol. 17, Law Book Company, Sydney, pp.169-71.

13. LR Hiatt, *Arguments About Aborigines*, Cambridge University Press, Melbourne, 1996, p.190, n.50.

14. *Ibid.*, pp.23-6, 32-3.

15. *The Australian*, 21 August, 2001.

16. Blackburn, *loc. cit.*, at p.239.

17. Henry Reynolds, *A War to Remember,* in *The Weekend Australian*, 1-2 April, 1995.

Chapter Four:
Native Title Now

Dr John Forbes

There are causes that seem to entitle their promoters to parade as worthier and more enlightened than the rest of us. Aboriginal "land rights" had this *cachet* by 1970.

Mabo the First

Events of the last thirty years are still "native title now". In 1971 Woodward, QC led the first attempt to take the cause to the courts: *Milirrpum v. Nabalco*. But our judges were not yet accustomed to political litigation. As a political gesture, however, *Milirrpum* was not in vain. Woodward and Gerard Brennan were commissioned to devise land rights for the Northern Territory – statutory rights to fit into the legal system without upsetting the land law of Australia. They designed a new kind of Crown grant, the Aboriginal land trust, but not in time for Mr Whitlam to take the credit; in 1976 Malcolm Fraser put the *Aboriginal Land Rights (Northern Territory) Act* through Parliament and now almost half the Territory is subject to it.

The grand plan was to make the Northern Territory Act a national scheme, but the Hawke Government got cold feet, leaving it open for six judges to seek a place in history, as they saw it, in a re-run of *Milirrpum: Mabo v. Queensland* (No 2). Land rights enthusiasts organised it in the name of a Townsville university employee. The statement of claim was amended and re-amended until finally, as Toohey J noted, it was "formulated during the [High Court] hearing" itself. Apparently this chopping and changing of the story did not affect its credibility in any way.

The High Court decided to collect some evidence before legislating. The task was assigned to a Queensland judge. He was sharply critical of Eddie Mabo, some of his witnesses, and Europeans' "noble savage" romances that glossed over the less appealing aspects of traditional island life. But the High Court largely ignored the trial judge's report as it transformed a claim to a tiny Torres Strait island into vague judicial legislation for Australian Aborigines, who were not parties to the cause. In blithe disregard of judicial method the court answered questions that did not arise. What the Hawke Government had decided not to do was done by judges free from electoral responsibility. It is doubtful whether they expected their decrees to be workable, but they were a means to force governments to legislate, and citizens to "negotiate", regardless of the fact that the Northern Territory and several States already had more intelligible and less disruptive "land rights" in place.

At first *Mabo* affected only Crown lands not leased to private interests, or so Brennan J, its chief architect, said. But confusion reigned supreme and the *Native Title Act* 1993 ("the *NTA*") did little to resolve it. The *NTA*'s main contribution was a statutory injunction called the "right to negotiate". It made *Mabo* a more potent means of securing "voluntary" settlements from governments, farmers, miners and developers. The *NTA* also extended *Mabo* to areas offshore. A billion-dollar "land acquisition fund" was established for people who were unlikely to profit from *Mabo.*

***Mabo* extended**

The judges had not finished yet. For Christmas, 1995 they gave us the *Wik* decision, greatly enlarging the amount of Australia open to native title claims. Contrary to the Brennan version of *Mabo*, it was now revealed that many Crown leases were not really leases, because they do not confer the exclusive possession that rules out native title. Why not? Because governments 50 or 100 years ago overlooked the possibility that in 1992 judges would be disposed to make radical changes to our land law – Catch 22, because most of the relevant laws and leases were made long before *Mabo* was thought of.

This is Kirby J's rationalisation of *Wik*:

> "The present must revisit the past to produce a result, wholly unexpected at the time [with] ... an inescapable degree of artificiality".

Sir Humphrey Appleby could hardly put it better. Brennan J dissented, disowning his overgrown child, but the genie was out of the bottle. Six months later Malcolm Fraser deplored the runaway effects and unintended consequences of his Northern Territory Act.[1] (That was before Malcolm began to compete with Governor-General Deane as Conscience of the Nation). The media was already describing native title claimants as "traditional owners".

Then *Mabo* was matched by a ministerial fiat under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984. In the name of "secret women's business", Minister Robert Tickner banned construction of a Hindmarsh Island bridge for 25 years. So secret was the "business" in Tickner's reverent eyes that he did not look for evidence of it before he imposed the ban.

For that legal howler the ban was set aside. Thereupon the zealous politician abandoned his original adviser (an academic lady from Melbourne) and recruited a female Federal Court judge to conduct another inquiry. That plan backfired for constitutional reasons, after the judicial lady spent a great deal of money: *Wilson v. The Commonwealth* (1996). After more extravagant litigation and much public acrimony a Royal Commission concluded that the "secret business" was fabricated. The ALP Opposition then supported an amendment to exempt Hindmarsh from further "heritage" claims.

But taxpayers had not finished paying for "secret business". Back in the High Court it was argued that laws for the special benefit of Aborigines can never be amended down or repealed: *Kartinyeri v. The Commonwealth* (1998). That bold challenge failed, but the rest is *not* history. Late last month a Federal Court judge held that the "secret business" might not be a sham after all: *Chapman v. Luminis Pty Ltd* (No 5) 22 August, 2001.

One of the few clear points in *Mabo* is that freehold land is immune from native title. But when legal aid flows freely almost anything is "arguable". In a 1998 case sponsored by the Northern Land Council the High Court was asked to rule that when a freehold is compulsorily resumed (as for a hospital) it is open to native title claims again. The patience of Michael McHugh, a not-so-enthusiastic member of the *Mabo* majority, was now exhausted:

> "You are trying to argue this case ... without paying any attention to what the Court said in *Mabo*. ... So far as I was concerned, my view [there] was that native title would apply only to unalienated Crown land. If, for example, I thought it was going to apply to freehold, [or] leaseholds, I [may well] have joined Justice Dawson [in dissent], and it may well be that that was also the view of other members of the Court ... If [native title over Crown leases] had ... been ... part of the *Mabo* issue – again, I am not sure ... whether I would have subscribed to the *Mabo* doctrine".

But he did. It seemed like a good idea at the time, and the brethren were so excited about it:

> "But in the setting of the time, and given the reservations in *Mabo*, it seemed to me proper that the Court should take the step that it did, because it was going to affect basically unalienated Crown land".[2]

This exercise in litigious politics failed, and for once the High Court was unanimous: *Fejo v. Northern Territory* (1998).

Mabo goes to sea

The next politico-legal foray was the *Croker Island Case*, sponsored by the Northern Land Council: *Yarmirr v. Northern Territory* (1998). Exclusive fishing rights were claimed over a wide sweep of ocean off Darwin; and for good measure, title to the seabed and minerals under it. Substantially the claim failed. The consolation prize was a non-exclusive, non-commercial fishing right, but no seabed or minerals.

Inevitably, there was a publicly-funded appeal. Off went the plaintiffs to three judges of the Federal Court. That tribunal has no special Appeal Court; any three of its forty-odd judges may constitute a "full court". An ex-industrial lawyer, for instance, may hear an appeal in a legal area in which he has little or no experience. It would be interesting to know how panels for the Federal Court's more political cases are selected, and whether there is lobbying to be on them.

However, the Croker Island appeal was dismissed by two votes to one, Merkel J dissenting. Ronald Merkel was appointed to the Federal Court in 1996, having shown special interest in "native" litigation. In October, 1994, as a barrister, he addressed a three-day conference of "stolen children" on ways and means of seeking damages against governments and welfare agencies.[3] According to another Queen's Counsel that address "kindled and inflamed feelings of great injustice ... when that was not the case, and raised their hopes of substantial financial compensation ... [later] dashed by the courts".

As a matter of professional prudence and propriety, "no barrister should give advice to a large gathering of people, each of whom has a different story".[4] In August, 1999 the Victorian Solicitor-General objected to Merkel's sitting on the *Yorta* appeal (below). He was a member of the Koori Heritage Trust for almost three years after he joined the court that has a near-monopoly of "native" litigation. It was also objected that Merkel, as a barrister, had advised the Yorta Yorta clan.[5] He was absent from the appeal.

A second Croker Island appeal was heard by the High Court last February. Judgment is reserved.

Claiming the Riverina

In 1998 the Croker Island judge, Olney J, heard another ambitious action: *Yorta Yorta People v. Victoria and Others*. The plaintiffs claimed native title over about 2,000 square kilometres of long-settled lands along the Victoria-NSW border, including the towns of Shepparton, Echuca and Wangaratta. They were supported by 56 Aboriginal witnesses and two anthropologists. The defendants called two of the very few anthropologists prepared to question native title claims, namely Kenneth Maddock and Ronald Brunton. According to Maddock, there was "at most ... a shadowy and vestigial survival" of the "traditional laws and customs" of the Yorta Yorta.

Olney does not subscribe to the view that native title claims must be approached with credulous reverence. He refused to "play the role of social engineer ... according to contemporary notions of political correctness". He detected "two senior members of the claimant group ... telling deliberate lies", and found some of their supporters equally unimpressive: "Evidence based on oral tradition does not gain in strength or credit through embellishment". He discounted, albeit gently, the credit of the claimants' chief anthropologist:

> "Mr Hagen ... spent 5 weeks working with the applicants. In evidence he conceded that his active participation in the conduct of the proceedings indicates a close association with the applicants and perhaps [sic] a degree of partisanship ... Mr Hagen conceded that the only evidence he had concerning the boundaries ... was ... supplied by the applicants themselves. That information must necessarily be regarded as ... [a] recent invention".[6]

A witness for the claimants testified: "We are trying to ... put everything back together ... a lot of our stuff is lying dormant but we could fire that up again". But Olney did not "regard [him] as a reliable witness but rather as one prone to avoid direct answers to straightforward questions". Generally the judge was unimpressed by recent efforts to de-assimilate, re-tribalise, or "revive the lost culture". In a passage that has miraculously escaped charges of blasphemy he wrote:

> "The main ... contemporary activity by members of the claimant group has to do with the protection of what are regarded as sacred sites ... Oven mounds, shell middens and scarred trees ... [But the] shell middens are nothing more than accumulations of the remains of shell fish frequently found on the banks of rivers ... there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved".

It is a tenet of romantic primitivism that Aborigines were model conservators of the environment and natural resources. With respect to fishing the evidence in *Yorta* is to the contrary.

Even so, the *zeitgeist* may have induced some compromise if the defendant States had not had the good fortune to turn up a significant document from 1881. It was a petition to the Governor of New South Wales, signed by forty-odd ancestors of the plaintiffs, indicating that they had abandoned their traditional lifestyle. It read in part:

> "We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families".

After 114 days' hearing, 201 witnesses, and a transcript of 11,664 pages, Olney J gave judgment on 18 December, 1998. His reasons are admirably concise – just forty-odd pages compared with hundreds in *Ward and Cubillo* (below). The action was dismissed. Any relevant native title had been extinguished:

> "When the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared".

In the light of the solemn petition Olney concluded:

> "It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had ... ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the ... claim".

He noted – the irony was no doubt unintended – that "Yorta [is] a word for 'No' amongst people of this area". It remained for taxpayers to bear costs of several million dollars.

The Yorta appealed, arguing that the trial judge had not taken a sufficiently broad and benign view of "surviving and continuing" traditions: *Yorta Yorta Aboriginal Community v. State of Victoria* (2001). But a majority of the Full Court (Branson and Katz JJ) disagreed. In their opinion there was "more than adequate" proof that the relevant traditions and connections to land no longer existed:

> "So long as there is evidence which is open to an interpretation that supports the finding of the trial judge, we consider this court should not interfere with the findings".

However, they offered this encouragement to claimants when their opponents have less luck in the search for evidence in rebuttal:

> "In circumstances where it is impractical to continue a physical presence [a group] may nevertheless maintain its spiritual and cultural connection with the land in other ways. Whether it has done so will be a question of fact".

Black CJ dissented, contending that native title can survive "profound changes" in the manner in which people of Aboriginal background choose to live. Despite the admissions in 1881 he was convinced that "a spiritual and cultural connection with the land" had been maintained since the First Fleet landed at Sydney Cove. Recently revived expeditions for "bush tucker" were persuasive, even if "the hunter obtained his ordinary sustenance ... at a supermarket"!

Meanwhile a case about crocodiles wound its costly way to the High Court: *Yanner v. Eaton* (1999). In 1994 Jason (aka Murrandoo) Yanner slew two crocodiles without the licence required by Queensland's fauna protection laws. The State Court of Appeal rejected a claim that he, as a part-Aborigine, was entitled by tradition to ignore those laws, but the High Court accepted it. So the hunt remained "traditional" despite the use of a metal motor boat, and the storage of the meat in a large modern refrigerator. Evidently this is what is meant by a "spiritual" approach to what are alleged to be pre-1788 customs. According to Gummow J (as echoed by Black CJ in *Yorta*): "This was an evolved or altered form of traditional behaviour", and "... hunting with a motor vehicle or a firearm is an adaptation of a traditional right to hunt". However, native title defences to unlawful fishing charges were rejected by State courts in *Mason v. Tritton* (NSW 1994) and *Dillon v. Davies* (Tasmania 1998).

No less ambitious than *Yorta* was an action promoted by the Kimberley Land Council entitled *Ward v. Western Australia* (1998). Three weeks before the *Yorta* judgment, Lee J gave two clans sweeping native title rights over 7,900 square kilometres of north-west Australia, including Lake Argyle and the Ord River irrigation scheme, and parts of the Northern Territory's Keep River National Park. The award included all "resources" in that mineral-rich area. (Lee coyly avoided the word "minerals".) Just what "traditional laws and customs" had to do with diamonds and minerals deep in the earth and recoverable only by modern mining technology was not adequately explained.

Western Australia and the Territory challenged Lee's imaginative decrees: *Western Australia v. Ward* (2000). Beaumont and Von Doussa JJ substantially allowed the appeal, with North J, a former industrial advocate, dissenting. Native title over remote areas and some pastoral leases was allowed to stand, except where lessees had enclosed or improved their land. But contrary to Lee's judgment it was extinguished in the Ord River irrigation area and the Argyle Diamond project, where modern land uses were "completely inconsistent with the continued enjoyment of native title". Moreover any native title to minerals was extinguished by legislation long before *Mabo* was thought of. (The position is the same in Queensland – *Wik Peoples v. State of Queensland* (1996) – and the Northern Territory: *Yarmirr v. Northern Territory* (1998). This writer expressed the same opinion in 1993.[7])

But as in *Yorta*, crucial ambiguities were preserved. A "spiritual" connection to land may suffice if access has been denied, or if the claimant group has so "dwindled" that it cannot maintain a physical presence. Spiritual connection is a matter of "fact and degree", as assessed by the federal judge who is assigned to the case. If those *dicta* seem vague, ponder these: "The degree of specificity required in a determination ... is likely to vary from case to case". Lee J was entitled to find a "spiritual" connection with some of the land claimed because "none of the witnesses for the [claimants] said that their connections with the land had ceased". Would they be likely to, with others listening? Where else does the absence of an admission that "X" is non-existent amount to proof that "X" exists?

A High Court appeal in *Ward* was completed on 16 March this year. Judgment is reserved.

Uncertainty about pastoral leases increased in April, 2000 when a full Federal Court held that a soldier settlement lease in western New South Wales, granted in 1953, is open to native title. There are 8,494 similar leases covering almost half the State.

"Stolen Children"

The "stolen child" cases are closely associated with native title litigation. Each type of action pursues "indigenous" separatism, grievances and financial ambitions in courts instead of Parliaments. In "stolen child" cases, however, the historical perspective is shorter, and the prospects of testing claimants' stories are better, although defendants still confront stories of 50 or 60 years ago. At all events there is less scope for the anthropologists, whose advocacy is so helpful where land is involved.

This form of politico-legal activity began in 1997 with a claim that the Northern Territory's child-welfare laws of the 1940s violated certain "implied rights" in the Commonwealth Constitution: *Kruger v. Commonwealth* (1997). The case was planned when the Mason-Brennan court's enthusiasm for "implied rights" was high, but by the time *Kruger* was heard that fashion was waning. The suggested "implications" were not visible to Their Honours and so the action failed. A makeweight plea of "genocide" was rejected on two grounds: there is no such cause of action in Australian law, and there was no evidence of an intention to destroy any ethnic, religious or racial group.

After *Kruger* it was decided that private law actions for compensation were a better bet. First off the rank was an action in the New South Wales Supreme Court: *Williams v. The Minister, Aboriginal Land Rights Act* (1999). Before the hearing ended it had ceased to be a case of a "stolen child"; the plaintiff had to admit that her mother voluntarily placed her in care. The action was hastily re-designed as a claim for damages for ill-treatment resulting in mental illness.

Abadee J, who had the invidious duty of dismissing the action, made an initial effort to mollify its publicists and promoters: "I am particularly conscious of the sensitive, indeed controversial nature of the issues ...". He disclaimed the language of "a different Australia", such as "illegitimate", "half caste", and even "fair skinned". Perhaps people had been brought in to glower and murmur in the public gallery, a common enough practice in these cases.

But the soothing overture gave way to sharper notes. Abadee J refused to judge the 1940s "through the so-called enlightened ... views of the 1990s". There had been inexcusable delay in commencing the action, occasioning serious prejudice to the defence. Grave and inflammatory allegations were maintained long after they became untenable. Williams' complaints of sexual assaults and racial prejudice were false. The judge went out of his way to vindicate people who had cared for her as a child: "No criticism of [them] for failing to take proper care is justified on the evidence before me". Williams had had "every chance to prove her case" in a hearing lasting almost four weeks but had failed to do so, despite the extraordinary privilege of giving evidence in writing without cross-examination. An appeal to the High Court was dismissed on 22 June, 2001.

Enormous resources were invested in *Cubillo and Gunner v. The Commonwealth* (2000), the flagship of the "stolen child" fleet so far. The plaintiffs alleged that in 1947 and 1956 respectively they were made wards of state and kept in church homes against their parents' will. They claimed heavy damages for wrongful imprisonment and breaches of duties of care. The claims could have been nipped in the bud for long and inexcusable delay – even longer than in *Williams*. "So much time has passed", said O'Loughlin J, "[and] so many witnesses are dead, that it is not possible to proceed with confidence". But proceed he did, mindful, no doubt, of protests that would be orchestrated if he struck the action out. Eventually delay was one of the grounds for dismissal, but only after a trial lasting 94 days, huge outlays of court resources and legal aid, and a judgment of 485 pages. Judges do not usually write books to explain why they have sent plaintiffs away empty-handed.

As in *Williams*, "exceptionally serious accusations ... were made ... [and] maintained until the last moment". The judge remarked that the Wilson-Dodson *Bringing Them Home* report was "not referred to ... by any [party]". As in *Williams*, there was an initial display of "cultural sensitivity", but the judgment contains more robust criticisms than placebos. There was no substance to the invalidity argument. The plaintiffs had failed to prove any wrongful removal or detention, and there was no evidence of any policy of removing part-Aboriginal children without regard to their welfare:

> "Many of the children who lived in the [same home as Cubillo] were there because it was the wish of their families ... There were part-Aboriginal children residing in [another home] ... whose parents were paying ... an amount towards their board and keep. These payments were a clear indication that those children were [there] ... with the informed consent [of their parents]".

It is a judicial act of grace, in rejecting a witness's evidence, to abstain from expressly calling him a liar, even when he is. So at first O'Loughlin attributed false evidence to subconscious rearrangements of reality:

> "I do not think that the evidence of either Mrs Cubillo or Mr Gunner was deliberately untruthful but ... I am concerned that they have unconsciously engaged in exercises of reconstruction, based not on what they knew at the time, but on what they have convinced themselves must have happened, *or what others may have told them*". [emphasis added]

But in due course there was plainer speech:

> "[Mrs Cubillo's] evidence on [removal] cannot be accepted as reliable ... there were aspects of her story which caused me concern. She had earlier said ... that she had little knowledge of English as a small child. ... Nevertheless she claimed she was able to remember that Mr McGinness said to Mr Harney that she was a 'half caste'. I find it difficult to accept that she would have been able to understand and remember such a statement...
>
> "I am satisfied that Mrs Cubillo has engaged in an exercise of reconstruction. *Perhaps* she did it subconsciously. However, there are too many contradictions in her evidence to accept her description [of removal]". [emphasis added]

Cubillo complained that she was not allowed to visit her family. But they knew where she was, and other children were allowed to spend holidays with their relatives. If Cubillo's family ties were as strong as she claimed, why didn't she do the same?

> "As so often happened when an embarrassing question was put to her, Mrs Cubillo gave a disjointed answer ... *[She] saw the trap.* If Olive Kennedy could regularly visit her family, why could Mrs Cubillo not visit hers?". [emphasis added]

Cubillo claimed that for years when she was in a church home, her mother visited her often. When asked how her mother travelled to Darwin for that purpose Cubillo said that she obtained lifts in a delivery truck. Other evidence showed that the truck was available for a few months only. Cubillo then said that her mother walked to and from Darwin. When reminded that the trip was 65 kilometres each way:

> "Mrs Cubillo replied that she did not know the distance .... There then followed a frustrating series of questions and answers designed to extract ... a concession that it would have taken a considerable time to walk that distance. Mrs Cubillo [knew] that it would not have been possible for Maisie to have made a regular habit of walking such distances. She sought to avoid the issue".

She was asked about a conference in October, 1994 when Merkel, QC (now of the Federal Court) encouraged the "stolen generation" to sue. She agreed that she was there but claimed she "didn't understand the legal jargon". O'Loughlin J did not believe her:

> "I do not accept this passage of false modesty ... I am satisfied that she would have well understood the purpose of the conference ... She was very defensive ... Her demeanour, at this stage, was not impressive".

Another question was whether Cubillo was interviewed by an organiser named Katona in 1990. Katona produced a record of the meeting, but:

> " Surprisingly, [Cubillo] vehemently rejected it to the point of rudeness. ... [she] denied, most strenuously, that she had ever spoken to Katona ... [This is] most difficult to accept".

Finally judicial patience was exhausted. No longer was it a case of subconscious "exercises of reconstruction":

> "There [is] no room for a gentle finding that there may have been a lapse of memory. ... I must conclude that Mrs Cubillo *deliberately* attempted to mislead the court". [emphasis added]

The credit of witnesses in native title cases may often be similarly affected, but it is usually much harder to check.

The judgment presents the plaintiff Gunner as "sullen and moody" and a "very unreliable witness". "Simple questions that were capable of simple answers were converted into confused ramblings", although Gunner had worked as a law clerk. Initially he claimed that his family rejected him when he left the church home, but under cross-examination "he told an entirely different and contradictory story". All in all:

> "There were many areas in the evidence of Mr Gunner that were, for one reason or another, unsatisfactory. They were, in some cases, so unsatisfactory that I would not rely on them without independent corroboration".

The trial judge in *Mabo* said the same about the man who gave his name to that case. Other evidence for Cubillo and Gunner was not impressive:

> "Under cross-examination Mr Lane became first defensive, then truculent. He has instituted proceedings in the High Court claiming compensation against the Commonwealth, allegedly because he is a member of 'the Stolen Generation'. ... However, when a copy of the writ was put to him he denied that he had ever given instructions for its issue. Mr Lane is not illiterate".

There was the unexplained absence of available and potentially important witnesses. There was evidence that when Gunner was a baby, his mother (Topsy) rejected him. O'Loughlin J remarked:

> "[W]ho better than Topsy's sisters to give evidence to the contrary? Their absence suggested that their evidence would not support a finding of non-consensual removal [and] was most noticeable".

It was an over-arching purpose of the action to advertise the claim that hundreds, even thousands were "stolen", but only eight Aborigines testified for the plaintiffs. Four of them conceded that "they had been placed in the institution at the request of their parents". The plaintiffs had ready access to other "stolen children" but they were not presented to the court.

Fifty-odd years after the events in question, the Commonwealth was naturally unable to call many of the people who administered Aboriginal welfare at the time. Many of their records had perished – some in the Japanese air raids on Darwin in 1942. But surviving documents impressed the judge as "powerful reminders that there were European people in the Northern Territory in the 1940s who were dedicated [to] the health and education of Aboriginal people". Two former welfare officers still living were Messrs Penhall and Lovegrove. The judge referred to Lovegrove in glowing terms:

> "I came to realise that I was listening to a man who had dedicated his life to the betterment of the Aboriginal people. I am happy to accept his evidence, without qualification ... Mr Lovegrove said, and I accept, that he never received an instruction to bring in a part-Aboriginal child irrespective of the wishes of the child's family. ... His evidence goes a long way towards a conclusion that, in his time, there was no widespread practice of forcibly removing part-Aboriginal children from their mothers".

The plaintiffs complained that after they emerged from State care they were unable to resume their traditional way of life. But Gunner admitted under cross-examination that he made no serious effort to do so:

> "He knew in 1969 where to find his mother [and] his community ... but he did not go back until 1991 – 22 years later. He complained that he is not an initiated man but the evidence established ... that he could undergo the initiation ceremonies if he wanted to".

Mrs Cubillo's efforts to de-assimilate were even more perfunctory:

"One would expect some effort to be made if, as she said, she wanted to know more about her tribal life. She knew before she left the [church] home where her family was located. No reason was advanced ... that would explain ... why ... she did not make any attempt to return to her relatives ... She has had the opportunity since she was about 17 ... to return to the tribal life ... but she has elected to stay wholly within an urban environment ... Everything about Mrs Cubillo points to her having a strong urban background. ... [and a desire] to succeed in a western culture. [No relative of hers] was living a truly tribal life".

Supercilious critics of our nation's history make little allowance for the conditions and *bona fide* beliefs of times past, as Geoffrey Blainey has patiently and lucidly explained.[8] According to the judgment, what were the relevant conditions in the Territory when Cubillo and Gunner were children? In 1953 the Administrator of the Territory reported that only about 800 Aborigines were still living a "fully tribalised life", and that it was "in the process of disintegration". Between 1950 and 1957 a total of 46 Aboriginal children were taken into care, including 18 in 1950. (Thus fewer than 5 children per year were removed in the period 1951-1957). Three of them told the court "how pleased they were that they had the opportunity of a western education", and four others agreed that "they had been placed in the institution at the request of their parents".

There was considerable evidence of rejection of half-caste children by Aboriginal communities at the time. One witness said that he was accepted well enough, but "regrettably the evidence of other witnesses told a different story of rejection and, at times, death". Gunner himself "had a belief for many years that his mother tried to kill him when he was a baby", and one of his own witnesses said that she rejected him. The widow of the manager of Utopia Station, where Gunner was born, produced old diaries reading:

"This baby [Gunner] was completely neglected and looked to be almost starving ... Baby unconscious today, Jimmy was going to bury him! He dug the grave ready ... [My husband] stopped them".

An Aboriginal witness swore that when her mother and a white man had another child, he "was put down by my mother while he was a baby ... that's when they do away with you". The judge found that the same witness "grew up believing that her mother wanted to kill her; [she] struck her with a stick, damaging one of her eyes". A defence witness, who "spoke glowingly" of one of the church homes concerned, "still carries the scar on her head from the blow that her mother gave her with a firestick .... [She said] she had witnessed Aboriginal mothers kill their unwanted half-caste babies". Will the current, cavalier use of the word "genocide" be applied to these practices?

The conditions from which the children were taken were neither healthy nor romantic. An Aboriginal witness said that when she was taken into care she was living "in a humpy with dogs and filth". Mr Penhall, the former patrol officer who tried in vain to address the Wilson-Dodson inquiry, described Aboriginal camps of the 1940s as:

"... extremely primitive. Most of them were living in very poor conditions, in windbreaks, and just with some branches put across the prevailing wind. They'd be sleeping in groups with small fires ... empty tins ... bones of dead animals or animals that they'd had ... everywhere. There were flies everywhere. The old women would not go very far to urinate ... [it was] squalor".

The judge tried to end on a conciliatory note:

"I have great sympathy ... [with] men and women who thought of themselves as well-meaning and well-intentioned and who today would be characterised by many as badly misguided ... . Those people thought that they were acting in the best interests of the child [but] subsequent events have shown that they were wrong".

The sentiment is admirable, but the suggestion of misguided intervention is hardly consistent with His Honour's findings and the evidence of camp conditions fifty years ago.

A Federal Court appeal in *Cubillo and Gunner* was dismissed on 31 August, 2001, the day before this paper was presented. It appears that counsel for the appellants did not ask the court to second-guess the trial judge's findings of fact. Therefore the question of an Australian *Delgamuukw* did not then arise.

Delgamuukw is a decision of the Canadian Supreme Court (an epicentre of political correctness) that is much admired by native title enthusiasts such as the new President of the Native Title Tribunal.[9] Judges in British Columbia rejected a native title claim after a long and painstaking trial and appeal, but the Supreme Court perfunctorily ordered a new trial. It wants judges in the less politicised courts below to take a more devout and credulous approach to the "oral histories" of claimants and their attendant anthropologists. The Chief Justice of British Columbia had looked too carefully at legends of doubtful antiquity and the symbiotic relationships between claimants and their expert witnesses. His approach to westernised "traditional laws and customs" was (as some of our federal judges would say) "frozen in time". He would never be a member of a well-chosen native title tribunal.

But despite efforts of the Mason-Brennan High Court, Canadian and Australian jurisprudence are not yet identical. It will be hard to reverse *Yorta* and *Ward* if judges of appeal take the orthodox approach to findings of fact and assessments of credit by trial judges. But there are probably some federal judges itching to "do a *Delgamuukw*". "User-friendly" standards of proof will be assured if "indigenous" litigation is handed over to tribunals staffed, as some fashionable ones already are, by people with the "correct" bias. A campaign for a special tribunal with power to award up to $500,000 per "stolen child" enjoyed many column-inches and ample ABC air time a few weeks ago.

Traditional violence?

Ever since *Mabo* there has been a constant flow of press releases from well-funded publicists of Aboriginal affairs. No grievance has been too large or too small for the media mills, be it the latest ambit claim to land, the "racist" name of a brand of cheese, or the "deep offence" caused by a grandstand named after a football star of 70-odd years ago. Mayhem in Aboriginal "communities" was mentioned now and then – as one more thing for which others are to blame. But Europeans hadn't had much time to influence "traditional laws and customs" when Watkin Tench, officer of marines, and a man well-disposed towards the Aborigines, wrote in his diary for 1789:

> "[T]he women are in all respects treated with savage barbarity. Condemned not only to carry the children but all other burthens, they meet in return for submission only with blows, kicks and every other mark of brutality. When an [Aborigine] is provoked by a woman, he either spears her or knocks her down on the spot. On this occasion he always strikes on the head, using indiscriminately a hatchet, a club, or any other weapon which may chance to be in his hand".[10]

Quite suddenly, about the middle of this year, campaign journalism took a surprising turn. Temporarily at least, "indigenous violence" became a permissible topic of public discussion and a state of affairs for which "indigenes" themselves might be responsible. (It is now *de rigeur* to use "indigenous" as a synonym for "Aboriginal", to the exclusion of millions of the Australian-born.) Headlines were given to allegations by well-assimilated, well-placed women that Aboriginal oligarchs are ignoring or suppressing evidence of internecine rape, child abuse and endemic violence.[11] A Brisbane journalist who is normally an honorary publicist for ATSIC joined the chorus of concern, quoting a specialist in Aboriginal affairs:

> "[V]iolence against women, including rape and murder, is endemic in traditional black society. ... This was well known before political correctness took over anthropology".[12]

It was recalled that female members of the "Boni Robertson committee" (which investigated the problem for the Queensland government) "were flogged by black men and forced off the committee". The same article described:

> "... a research project into the health of a large Aboriginal community in Northern Australia. The (male) black leaders told the researchers they were welcome provided they didn't talk to any women. ... the ban was to stop the researchers from finding out the incredible violence to which the women are subjected. The person who told me this refused to allow anything that might identify him to be published. If it was, he and his colleagues would never be able to work with Aborigines again".[13]

The closing words are strikingly similar to private explanations of why so few anthropologists are critical of native title claims. In June this year it was reported that some Aboriginal "leaders" to whom white supporters attribute great moral authority have convictions for, or are accused of, rape or other violent crimes. Such a record or reputation is evidently no bar to high positions and generous perquisites in "indigenous" politics. But can one be confident that violence is seldom offered towards, or feared by people in "communities" making native title claims?

Vagueness upon vagueness persists

The vaguer a law the more scope for judicial discretion and the greater the opportunities for judges, if so inclined, to act as politicians. It is bad enough when law depends on one vague concept, but the law of native title piles vagueness upon vagueness in a geometric progression of uncertainty. The ever-expanding law of negligence is a comparative haven of certitude.

"Native Title Now?" is a question to which ten years of judicial circumlocution, public disputation, interminable litigation and haemorrhages of legal aid offer precious few answers. More and more laws give *de facto* legislative power to judges, especially in come-lately federal tribunals. Sometimes Parliament is to blame, but not on this occasion. The federal judiciary took unto itself the power to create and expand native title. That judiciary includes some people who are hardly inhibited by traditional restraints and conventions. Perhaps this was a consideration when the Keating Government overrode State courts to give federal judges a near-monopoly of "indigenous" litigation.

Native title law involves at least five Delphic concepts: "Aborigine", "community", "traditional laws and customs", "connection with land" and "native title" itself. There is much room for forensic and judicial manoeuvre.

"Aborigine"

Obviously this racial category is *Mabo* bedrock. Yet the word on which native title and all its prophets depend remains egregiously vague. Special laws for Aborigines have a circular non-definition: " 'Aboriginal peoples' means peoples of the Aboriginal race of Australia". Whatever "Aborigine" does mean it denotes a rapidly expanding class. In Tasmania alone, according to census records, Aborigines numbered 671 in 1971, and 13,783 in 1996. Michael Mansell recently said what only an Aboriginal activist would be permitted to say: there are more "phoney" Aborigines in Tasmania than real ones and many falsely claim the badge for monetary gain.[14]

Federal Court judge Drummond wrestled with the term in *Gibbs v. Capewell* (1995). Gibbs challenged the right of Capewell (an associate of ATSIC's Ray Robinson) to contest an ATSIC election, on the ground that Capewell is not an Aborigine. Drummond tactfully decided that the term includes all who have some "Aboriginal genetic material". A person who has only a *soupcon* of it will qualify if he claims to be an Aborigine and has the acceptance of an Aboriginal community. (Whose acceptance? A majority's, or the acceptance of self-styled or media-anointed "leaders"?) But given such acceptance, it seems that European ancestry or culture, however dominant, are immaterial, although one federal judge does not agree:

> "[It was] argued that it would be absurd to hold Mr Wouters not to have been an Aboriginal because his mother was one. If that principle is correct, then there will never come a point at which, as generations pass and Aboriginal blood is diluted, one can postulate of an individual that he is not an Aboriginal. He was the child of one partly Aboriginal parent and one European parent and I cannot accept that such a person is necessarily an Aboriginal".

And the bold spirit held that Wouters, who had "light skin and blond hair" was *not* an Aborigine "despite ... a significant infusion of Aboriginal genes": *Queensland v. Wyvill* (1989).

In 1998 the question came before Merkel J, a former ATSIC adviser, in *Shaw v. Wolf*. It was alleged that eight people seeking ATSIC posts in Hobart were not really "Aborigines". Merkel tiptoed through a minefield of political correctness to take refuge in a legal technicality, namely a reversal of the onus of proof. The professed Aborigines did not have to prove their racial qualification; their challenger had to prove the negative, and the standard of proof was high, because a negative answer could have "a severe and deeply personal impact on ... entitlement to participate in programs for the benefit of Aboriginal persons". Despite Merkel's hurdles two respondents failed the racial test. The evidence must have been overwhelming.

But it's another matter when some "indigenes" think that others have too large a slice of the special cake, or are becoming so numerous that the slices will be small. "Toyota dreaming" is a phrase that the Warlpiri of central Australia apply to more assimilated brethren whom they think are "in it for the money", and live ordinary suburban lives.[15] A part-Aborigine put it this way in a letter to *The Australian*:

> "The definition of an Aborigine is not foolproof ... Too many non-Aboriginal people are claiming Aboriginal heritage so as to access indigenous programs. There has to be a line drawn between white and black ... since ATSIC commenced, there has been enough funding to start up a small country".[16]

In December last year Aborigines in the Wide Bay district of Queensland complained that one hundred locals of Sri Lankan descent had received money, cheap housing loans, study grants and preference in employment by posing as Aborigines. One pretender was charged with illegal fishing and ran a native title defence. Diligent prosecutors proved that he had no Aboriginal ancestry at all. He was duly convicted and lost an appeal funded by Aboriginal Legal Aid.[17] This charade led ATSIC's Ray Robinson to claim that up to 15 per cent of all "Aborigines" "are not genuine".[18] Another Aboriginal bureaucrat said that the abuse was "rampant".[19] Interesting assessments if, as we may assume, they were based on the present hyper-elastic "definition".

American Indians seek to restrict their ranks to people of 50 per cent "Indian" descent.[20] It seems logical, if not yet permissible, to suggest that our race-based laws also require a more precise definition of the chosen race.

"Community"

Nowadays this heart-warming word is used by many interest groups to suggest a unity and numerical strength that are often missing. Native title discourse see-saws constantly between "the Aboriginal community" (a patent fiction), and myriad local "communities" and sub-"communities" with names seldom heard before. Which community's immemorial "laws and customs" are to govern a particular claim?

In *Ward v. Western Australia* (2000) Lee J relied on *dicta* in *Mabo* which can be adjusted, *à la* Humpty Dumpty, as the occasion requires:

> "[Brennan J] contemplated that ... there could be within [a] community smaller groups, even individuals, that enjoyed particular rights".

Each judge left it to claimants to decide where the eligible "community" begins and ends, so that absent a suitable agreement we have another province of "native" litigation.

In fact, a good deal of public money has already been spent on conflicting views of "community". In 1995 ATSIC proposed to spend $10 million on land acquisitions in the Northern Territory and only $2 million in other parts of Australia. A rival group had the plan condemned as an abuse of statutory authority: *NSW Aboriginal Land Council v. ATSIC*. In 1999 a South Australian subsidiary of ATSIC received a grant smaller than its neighbour's and demanded to know why. It took a Federal Court action to find out – a rather expensive and unfriendly form of communal dialogue: *Oak Valley (Maralinga) Inc v. ATSIC*.

What happens if a "community" fades away? According to *Mabo*, native title dies with it. But Olney J had a more encouraging idea in *Wandarang Peoples v. Northern Territory* (2000). Waving aside evidence that no one spoke the Wandarang dialect any more, he adopted an anthropologist's suggestion that a dwindling clan can be "topped up" (so to speak) by incorporating outsiders. An indigenous version of chain immigration?

"Traditional laws and customs"

This mantra appears *ad infinitum* in native title scripture. The difference between "laws" and "customs" in a culture without written records or analytical jurisprudence is far from clear. Perhaps it is just another instance of lawyers declining to use one word when two will do.

Be that as it may, the phrase is as slippery as any of the *Mabo* concepts. "It is immaterial", said Brennan J in that case, "that the laws and customs have undergone some change since the Crown acquired sovereignty, provided the general nature of the connection between the indigenous people and the land remains". "An indigenous society," according to his colleague Toohey J, "cannot, as it were, surrender its rights by modifying its way of life". But what are the limits to judicial indulgence? When does "some change" become a change of kind? An upgrade from windbreak to bungalow? From spear to automatic rifle? From bark canoe to power boat? From Shanks' pony to four-wheel-drive? When does separatism become make-believe, and assimilation substantial and irreversible? How European can "laws and customs" become, and still be deemed "indigenous"?

There is a ready-made judicial "put down" for those who are unwilling to stretch "laws and customs" so far as the school of Brennan, Deane and Toohey. They are guilty of the heresy of expecting such practices to be "frozen in time". Black CJ detected this heterodoxy in the *Yorta* majority. So did North J, the odd man out in *Ward v. Western Australia*. But is it not the separatist dogma that is "frozen in time" when it refuses to consider how dilute Aboriginal ancestry or lifestyle may be? A journalist of Aboriginal background acknowledges what native title enthusiasts deny:

> "We need to throw off notions of racial essentialism. ... The Aboriginal middle class adopt the symbols ... of black society ... living comfortably alongside their white friends, ... then, when it suits ... they drop their aitches, drape themselves in the Aboriginal flag, adopt Koori slang, and romanticise ... I've grown tired of hearing Aborigines raised in the comfort of suburbia returning to the birthplace of their grandparents for a day and telling us what 'an amazing experience' it was ... An immutable, homogeneous Aboriginal identity is untenable".[21]

"Connections" with land

Given sufficient judicial imagination, "connections" can be as tenacious as some republicans, including *Mabo* judges, clinging to their knighthoods:

> "Native title to particular land ... and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land".
>
> Thus Brennan J, in *Mabo*. His brother Toohey J was expansive but no more enlightening:

> "The nature, extent or degree of the Aborigines' physical presence on the land they occupied ... is to be determined in each case by a subjective test. ... [A] nomadic lifestyle is not inconsistent with occupancy. ... [Title cannot be ruled out] merely on the ground that more than one group utilises land. Either each smaller group could be said to have title, comprising the right to shared use of land in accordance with traditional use; or traditional title vests in the larger 'society' comprising all the rightful occupiers. Moreover, since occupancy is a question of fact, the 'society' in occupation need not correspond to the most significant cultural group among the indigenous people. ... Because rights and duties *inter se* cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law".

Even as it allowed the appeal in *Ward v. Western Australia* the Federal Court majority stressed that a "spiritual" connection may suffice. This view was endorsed by the *Yorta* majority, with the unhelpful addition that a "spiritual" connection is "a question of fact, involving matters of degree". Black CJ found a traditional connection in *Yorta* despite the solemn admissions that were made 120 years ago. If "traditional connection" can stretch to *Yorta*, to what case can it not be stretched? How long is a piece of elastic? As I submitted to this Society in 1998:

> "Students of native title should spend less time on speculative theory and more time observing those who are appointed to hear the crucial early cases ... Let there be no illusions about where the main power resides. It will be exercised less by courts of appeal than by judges sitting alone. There is no more autocratic function than fact-finding by a trial judge".

It is hardly surprising that the federal Attorney-General believes that "Australia is still deeply confused by native title" ten years after *Mabo*.[22] The concept of "spiritual connection" is an issue before the High Court in *Ward v. Western Australia*. Judgment is reserved.

Some "connections" seem to weaken soon after the contest is over, or a financial settlement is reached. Two years after the Yalanji clan gained hunting rights over 25,000 hectares north of Cairns, not one beneficiary had used those rights or tended the "sacred sites" featured in the claim. A member of the clan explained that the neglect was due to "the pressures of modern life", and "substance abuse". After all, he added: "To people who are sitting in bars or doing drugs, that land would be three and a half hours out of their life".[23]

"Native title"

The meaning of this phrase is no clearer now than it was in 1992. It may be anything between ownership and some occasional, ephemeral right of access. In every contested case it depends on the story of the plaintiffs, the support of their "experts", the willingness and capacity of governments and other respondents to test the claim, and the receptiveness of the federal judge assigned to the case. If the case is not seriously contested it means whatever a compliant government allows it to mean.

The treatment of evidence

There are judicial reflections on the credit of Aboriginal witnesses in the trial judge's report in *Mabo*, and in *Yorta, Williams* and *Cubillo*. They are more than sufficient to indicate that rigorous examination of native title evidence is warranted. The value of anthropological evidence has been considered elsewhere.[24] *Mabo* gave anthropologists a new forensic importance; with a few noble exceptions they have been witness-advocates *par excellence*. Political and financial ties to the Aboriginal bureaucracies for which many of them work must be properly assessed, or native title claims will remain extremely difficult to contest. Olney J made some allowance for the experts' bias in *Yorta*, but fashion favours the suspension of disbelief. Here is piety in the extreme:

> "The best evidence lies in the hearts and minds of the people most intimately connected to Aboriginal culture, namely the Aboriginal people themselves. Expert evidence from anthropologists and others is of significance .... However, it seems to me that the full story lies in the hearts and minds of the people". [*Ejai v. Commonwealth and Western Australia* (1994), Owen J.]

How could such "evidence" ever be rebutted?

The following remarks of Paul Memmott, native title witness and director of an Aboriginal research "centre" at Queensland University may be added to other evidence "as to credit":

> "Solicitors will normally recommend against including [in our reports] any list of interviewees and any reference to original field research materials, as this may aid discovery by any opposition ... I would consider [it] wise to omit ... lists of informants [and] references to interviews that will allow anthropologists' documents to be subpoenaed; [and] the identifiable views of claimants upon which such individuals may be examined in a later court *but which may be unreasonable to expect them to sustain* ... People should have the right to change their mind on certain matters (especially controversial ... matters). It is wise to present the information in such a way ... that can take into account the loss, adaptation *and re-invention* of particular laws and customs in response to processes of cultural and lifestyle change".[25]

Displays of progressive virtue aside, it is much more comfortable to accept "indigenous" evidence than to reject it. If the answer has to be "No" – even a qualified "No" – great care is usually taken to deflect anticipated abuse. Very few cases feature trials, judgments and appeals of such inordinate length as those in *Ward*, *Cubillo* or *Yorta* – prime examples of a few, effectively wealthy litigants consuming disproportionate amounts of court time.

Even such fatuous proceedings as *Nulyarimma v. Thompson* (1999) were treated with great solemnity. The plaintiff sought warrants for the arrest of the Prime Minister and Deputy Prime Minister for the "crime of genocide". The "crime" consisted of support for the 1998 amendments to the *Native Title Act*! The short answer – to say nothing of abuse of process – was that there is no such crime in Australian law. A Master of the A.C.T. court threw the matter out, but before admitting that he was right three federal judges heard the appellant at great length, and Wilcox J gave a gratuitous display of moral superiority:

> "Anybody who considers Australian history since 1788 will readily perceive why some people think that it is appropriate to use the term genocide to describe the conduct of the non-indigenes".

There followed a homily on dispossession and demoralisation and the repetition of a "moving and eloquent" (and completely irrelevant) story of the rape of a mother by white men, and her removal to a church home. Then this peroration:

> "Many of us non-indigenous Australians have much to regret in relation to the manner in which our forbears treated indigenous people; possibly far more than we can ever know".

Wilcox distinguished himself at the height of the 1996 federal election campaign by making a public attack on the Liberal Party's industrial relations policy. He recently found a critic of a litigious ATSIC subsidiary guilty of contempt of court.

The industry consolidates

As its exegetes are fond of reminding us, native title is here to stay. Industries and careers built on it have had ten years to grow and consolidate. Land claims and "stolen child" claims are *raisons d'etre* for a well-endowed "indigenous" bureaucracy and a Byzantine network of subsidiaries – lawyers, "working groups", "cultural monitors", expert witnesses and academic empire-builders. When a regional corporation in Queensland lost its native title functions to a company that is the *alter ego* of ATSIC's Ray Robinson, the consequent loss of income reduced its full time staff from 30-odd to three.[26] For many lawyers, "indigenous" litigation competes with immigration law as a source of income, moral display and political opportunism. Native title is a fashionable option in entrepreneurial law schools with ultra-high pass rates and honours to match. Only a "bill of rights" is now needed to absorb their over-production of alumni. Federal tribunals, a politicised vanguard of an increasingly politicised legal system, oversee it all.

***Mabo* as licensing regime**

Even the promoters of native title admit that proving it in court is slow and inordinately expensive. In *Ward v. Western Australia* the hearing lasted 83 days, produced 9,000 pages of transcript and a judgment of almost 300 pages. Statistics of the *Yorta* exercise were set out earlier. ATSIC chairman Clark describes the "culture of litigation" as unsustainable, although his clients do not pay for it.[27] When those who litigate at other people's expense begin to notice the cost the position is surely serious. However, Clark's aim is not to reduce *Mabo* claims but to shift them, with the "stolen children", to special tribunals like the Northern Territory land rights commission, which seldom if ever says "No".

Native title has been criticised by friends and foes as non-negotiable property of little commercial value. But a strategic claim and a flourish of the "right to negotiate" can be highly productive of money or money's worth from governments anxious to be "correct" or to foster development, and private interests desperate to avoid years of hyper-expensive, unpredictable litigation. The greater the cost, delay and uncertainty of litigation, the stronger the incentive to pay "go away money". However flimsy a claim, once it is filed in court there are costs that will never be recovered, to say nothing of time and energy that could be far better spent. If a small personal injuries claim will cost the defendant $5,000 (win or lose) there is a strong inducement to offer $3,000 just to "go away", especially if the plaintiff will almost certainly appeal if he loses at first instance.

"Go away" payments are now a well-established feature of the native title scene, and "indigenous land use agreements" ("ILUAs") were introduced in 1998 to encourage them. Securing a regional ILUA and resolving any local objections to it can be as tortuous as litigation, but once it is in place the dreaded "right to negotiate" is suspended (for a consideration) whether or not the claim is ever proved. Indeed, when "compensation" is the real object of the exercise no more may be ever heard of the "traditional laws and customs". They may sleep beside the hunting rights of the Yalanji.

Native title, then, is fast evolving as a unique system of licensing conducted at public expense, over Crown lands, for the benefit of claimants or their organisers. Even before ILUAs arrived, the quasi-religious attachment to land that gives *Mabo* its emotive appeal was being exchanged for mundane and more negotiable assets. In 1997, after many alarms and excursions, Queensland's Century Zinc mine made peace with native title claimants by paying $24 million (including $500,000 for a "women's business" centre), and assigning normal titles to two grazing properties. A development-minded State pledged another $30 million.[28] Perhaps it is no coincidence that the project is now up for sale.

Other "payoffs" in 1997 were $1.3 million by a gold mine at Tenterfield,[29] and an undisclosed amount from Striker Resources to clients of the Kimberley Land Council to "license" a diamond mine.[30] The NSW government paid $738,000 to dispose of a claim at Crescent Head.[31] Shrewd "negotiators" have been heard to say that "there are a lot more Crescent Heads around". Australian Gas Light Ltd bought a "licence" for a pipeline to proceed.[32] But claimants priced themselves out of the market when a "negotiating company" owned by the late Charles Perkins demanded $120 million from the Ernest Henry mine in Queensland. It refused to pay and a native title claim was filed forthwith.[33]

In July, 1998, when almost 2,500 mining projects in Western Australia were held up by "rights to negotiate", observers noted an "increasing trend towards negotiated agreements".[34] Miners were becoming openly resigned to "go away money". A representative told *The Australian*:

> "Practically every mining and mineral exploration in this country has been delayed or seriously inconvenienced by the demands of native title claimants. In a large number of cases the expedient solution is to pay the claimants to facilitate progress".[35]
>
> He was supported by a leading resources lawyer:
>
> "A project proponent wishing to develop in any commercially acceptable time frame will have to negotiate agreements with native title claimants".[36]

One need not be a claimant or an anthropologist to turn native title into a serious commercial proposition. In 1998 Queensland electricity authorities were paying "cultural monitors" $31 per hour to steer landlines around "culturally significant" sites. Some "monitors" received as much as $2,000 per week, while exasperated public servants railed at "*de facto* compensation rackets".[37] Seventy Aborigines demanded "sitting fees" of $350-$800 per day to "advise" on "cultural heritage" along a power line from Mt Isa to the already well-mulcted Century Zinc mine. Some were reported to be earning $100,000 for "consultancy services" to the beleaguered mine, with generous accommodation and travel allowances. By January, 1999 the North Queensland Electricity Corporation had spent nearly $1 million on "consultants" in one year, and was "unable to afford any further meetings with Aborigines at typically $70,000 [a time]".[38] In March, 1999 it cost the Beveridge uranium mine in South Australia $850,000 per annum to be free from claims. Four months later the federal government promised $6 million for a "comprehensive package of social and welfare benefits" to Aborigines opposing the Jabiluka uranium mine. The company offered another $9 million.[39]

In May this year Queensland surrendered title to seven islands in Torres Strait.[40] In June, Black CJ of the Federal Court was off to Murray Island with staff and preening politicians, at public expense, to make a consent order he could have rubber-stamped in Melbourne. There was a similar performance by his brother Carr in Western Australia a week ago, and no doubt there will be more. In this self-promotional age even courts have an eye to "PR".

Comalco's bauxite mine at Weipa hopes to enjoy trouble-free expansion by spending $500,000 per year on "Aboriginal education and training".[41] Presumably it expects to pass on the cost. A casino on the Gold Coast has just paid a large amount (as much as $600,000) to induce "traditional owners" of that urban area to go away.[42] Two months ago Aborigines on Stradbroke Island near Brisbane were promised $500,000 down, and about $740,000 per annum in royalties by the State government to drop objections to existing sand mines and to "license" a new one. The proceeds are supposed to be distributed equitably among 600 people, who will also be given jobs and normal titles to land.[43] Just eight years ago Labor Premier Wayne Goss condemned the Stradbroke claim as a "political stunt and a try-on", driven by "*Mabo* madness" and lawyers "out to make a fast buck".[44] Four years later, with no settlement yet in sight, the Stradbroke Land Council declared that the mines threatened their most sacred site.[45] The same Council is now prepared to let mining continue indefinitely. "We want as much as we can get for our people".[46]

So far only a few defended cases have been completed. Three were outright failures, and – subject to High Court judgments pending – the results in two others fell far short of expectations. "Stolen child" cases have been particularly unrewarding. It is unlikely that many titles to land will be established in court cases that are fully contested. Probably most of the titles that are eventually established will be gained by default or by consent, either through lack of political will to examine claims unromantically, or to avoid long and prodigiously expensive litigation. Governments so disposed can "run dead", as did the Commonwealth in *Mabo* itself. The trial judge in *Yorta* remarked that Victoria was "actively engaged at all stages". Would that still be the case today?

Primary producers and miners are becoming resigned to it. Politicians can win points for "political correctness", and pretend that native title is working well while they consent to encumbrances on Crown land which (they hope) will not need to be redeemed in their lifetimes. And yet, if our population rises as fast as Malcolm Fraser desires, there just might have to be some buy-backs (double compensation) in the not-too-distant future.

Native title is as Delphic as ever, a *Mabo* licensing system prospers, and those who are slow to offer "go away money" risk facing a court or tribunal where the disciples of *Delgamuukw*[47] hold sway.

Endnotes:

1. *The Australian,* 1 December, 1993.

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3. *The Australian*, 4 October, 1994.

4. *The Australian,* 11 September, 2000.

5. *The Australian,* 18 August, 1999.

6. On anthropologists and native title evidence see *Upholding the Australian Constitutuion*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 46 ff; Volume 7 (1996), 112 ff.

7. *Mabo and the Miners*, in *Mabo: a Judicial Revolution,* University of Queensland Press, 1993, pp.206, 211.

8. *A Black Arm-Band for Australia's 20th Century?,* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 12 (2000), p.241.

9. G Neate, *Three Lessons for Australians from* Delgamuukw v. British Columbia, in *Native Title in Perspective,* Aboriginal Studies Press, p.228.

10. Watkin Tench, *A Narrative of the Expedition to Botany Bay and a Complete Account of the Settlement at Port Jackson,* ed. T Flannery, Text Publishing Company, Melbourne, 1996, p.264.

11. *The Australian,* 14-15 April, 2001; 24 April, 2001 (Peter Sutton); *The Sydney Morning Herald,* 16-17 June, 2001; and *The Sydney Morning Herald*, 20 June, 2001.

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13. *Courier Mail,* 10 May, 2000, *Black Mark in Australia's Heart.*

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16. *The Australian,* 21 August, 2000 (letter David Green).

17. *Courier Mail,* 16 December, 2000.

18. *Courier Mail,* 18 December, 2000.

19. *Courier Mail,* 19 December, 2000.

20. *The Sydney Morning Herald,* 12 May, 2001.

21. *Sydney Morning Herald,* 11 July, 2001.

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25. *Establishing the Factual Basis for Native Title,* in *Native Title in Perspective,* Aboriginal Studies Press, Canberra, 2000, at p.94, emphases added.

26. *Courier Mail,* 22 August, 2001.

27. *The Sydney Morning Herald,* 4-5 August, 2001.

28. *Courier Mail,* 21 August, 1997.

29. *The Sydney Morning Herald,* 26 July, 1997.

30. *The Sydney Morning Herald,* 21 August, 1997.

31. *The Sydney Morning Herald,* 4-5 August, 2001.

32. *The Sydney Morning Herald,* 15 December, 1997.

33. *The Australian,* 3 December, 1997.

34. (1998) 17, *Australian Mining and Petroleum Journal,* p.23.

35. *The Australian,* 19 January, 1998, p.8 (W J Ryan).

36. Michael Hunt, *'Workability' of the Native Title Act*, (1998) 17, *Australian Mining and Petroleum Journal*, p.339.

37. *Courier Mail,* 23 November, 1998.

38. *Courier Mail,* 4 January, 1999.

39. *The Australian,* 22 March, 1999; 14 July, 1999.

40. *Courier Mail,* 23 May, 2001.

41. *The Sydney Morning Herald,* 16 July, 2001.

42. *Courier Mail,* 28 August, 2001.

43. *The Australian,* 19 July, 2001.

44. *Sunday Mail* (Brisbane), 20 June, 1993.

45. *Courier Mail,* 28 April, 1997.

46. *The Australian,* 19 July, 2001.

47. "Rogue judges", as Peter Walsh might say.

Chapter Five:
Fiscal Balance in the Australian Federation

Professor Jonathan Pincus[1]

Since 1901, there has been a considerable, useful, but not determinative economic literature on federal financial arrangements in democratic systems. In this paper I will apply these economic ideas to the Australian case, using some ideas from public economics.

Economics is a normative discipline. My concern here is with utilitarian notions of economic efficiency, to the neglect of considerations of fairness or natural liberty. The economics thought-experiment is to design the efficient set of federal fiscal rules, against which to judge the record of federal fiscal balance.[2] These theoretical, economistic "constitutional provisions" are: the rules for the allocation of tax powers between the central government and the States; those for the allocation of expenditure responsibilities between the central government and the States; and rules for federal grants. A list of specified powers and responsibilities of the kind found in s.51 of the Constitution and elsewhere can be tested, as it were, against some general principles of the optimal assignment of fiscal powers and responsibilities.

To allay fears, I should state that I am not here canvassing changes to the Constitution, let alone a wholesale revision. Rather, my purpose is to discuss some economic standards against which the operation of the actual Constitution can be judged. As my subsequent argument makes clear, I will be defending the Constitution, not burying it.

I have a modest goal: using the economic theory of federalism to establish the case for grants from the Commonwealth to the State and local governments. I do not seek to rationalise the exact level of the grants in Australia, but merely to argue that federal grants are a component of a well-designed federal fiscal system.

In devising arrangements concerning the economic powers of government, there is a tension to be resolved between the exercise of the coercive (or monopoly) power of government, and the operation of competition between governments. Federal constitutions offer a range of resolutions of that tension, with the Australian Constitution providing a specific combination of elements of inter-governmental tax cartel, with elements of inter-governmental competition.[3]

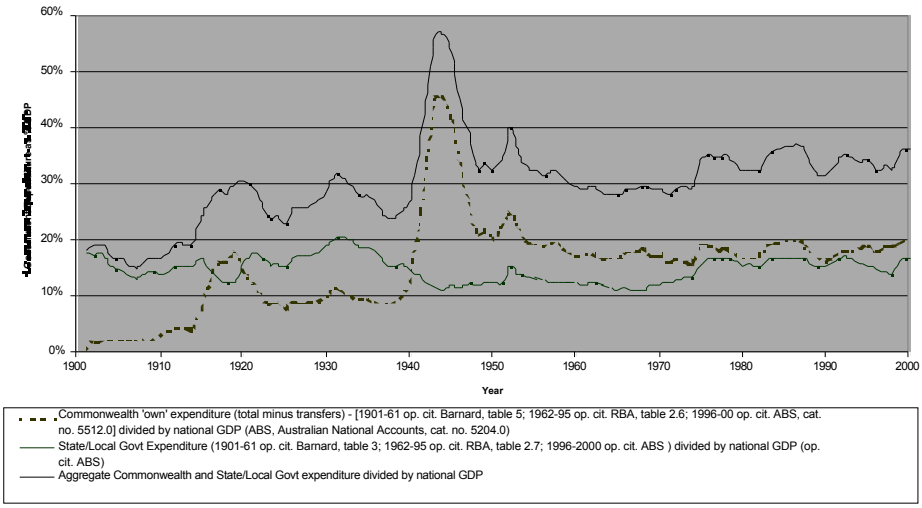
By "voting with their feet", taxpayers can constrain the fiscally exploitative tendencies of government. That is, a state or jurisdiction can lose some of its tax base through inter-jurisdictional mobility, unless it provides mobile taxpayers with sufficiently valuable services. Federation increases taxpayer mobility when it lowers the costs of migration between the federated States. However, a federation also can, and the Australian federation did, institutionalise forms of inter-state tax agreements or cartels, limiting tax competition.

Although it made some transitional arrangements, the Constitution of 1901 left unresolved the ultimate fiscal shape of the Australian federation. The issue was determined by the working of everyday politics, by High Court interpretation and by constitutional referenda. The major political factors have been the adherence of voters to their States of residence, and their expectation that State and local government (rather than the Commonwealth) will continue to be responsible for a wide range of public services; and the increasing political demand for social security payments and spending (opened to the Commonwealth by the passage in 1946 of the "social welfare" referendum, s.51 (xxiiiA)). On the tax side, the major constitutional influences since 1901 have been the persistent invalidating by the High Court of indirect taxation imposed by the States; the assumption in 1928 by the Commonwealth of responsibility for all the debts of the States (s.105A); and the uniform income tax cases in the 1940s. Also, the Court has interpreted, liberally to the Commonwealth, the power of the federal Parliament to make grants to the States on such terms and conditions as the Parliament thinks fit (s.96) and allied powers.

First, a sketch of the data is in order. Over the 20th Century, there were substantial rises in taxation and in public spending of the Commonwealth and of the State and local governments, as proportions of national income (Chart 1). To what extent did the Commonwealth invade or displace the States in taxing and spending, in course of the century? In taxation, at the end of the 20th Century the Commonwealth's share of the total of the taxes (and fines) of all Australian governments was about the same as it was shortly after federation. In contrast, the Commonwealth's share in public spending rose markedly over the hundred years' span. However, it is notable that the last fifty years of the 20th Century saw falls in the Commonwealth's shares of both taxation and public spending.

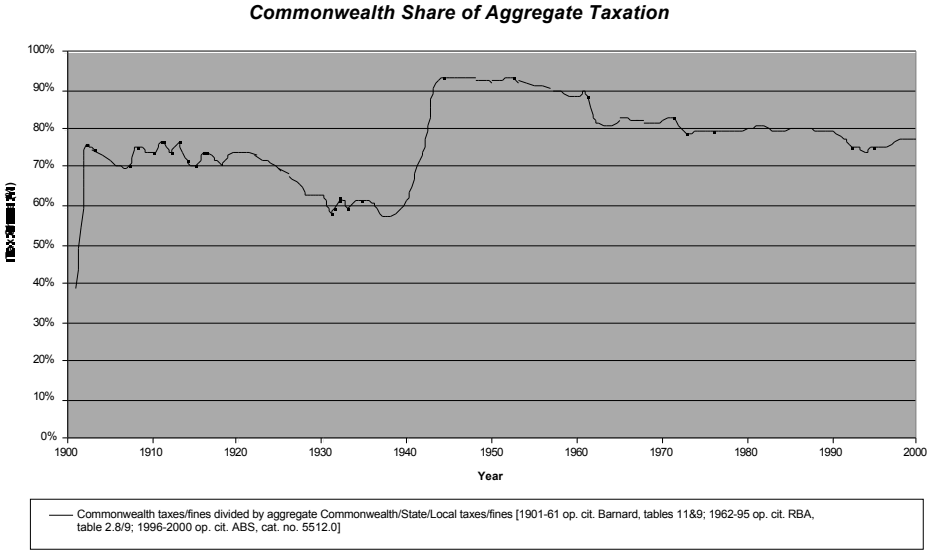
Chart 1

Expenditure as a Proportion of GDP by Level of Government



More detail of what happened over the whole century is shown in the charts. In 1902-03, when the transfer of customs and excise powers had been accomplished, the central government was responsible for a little over 75 per cent of total collections of taxes and fines, Commonwealth, State and local (Chart 2). The Commonwealth government's tax share fluctuated above 70 per cent until the onset of the 1930s depression, when it fell.

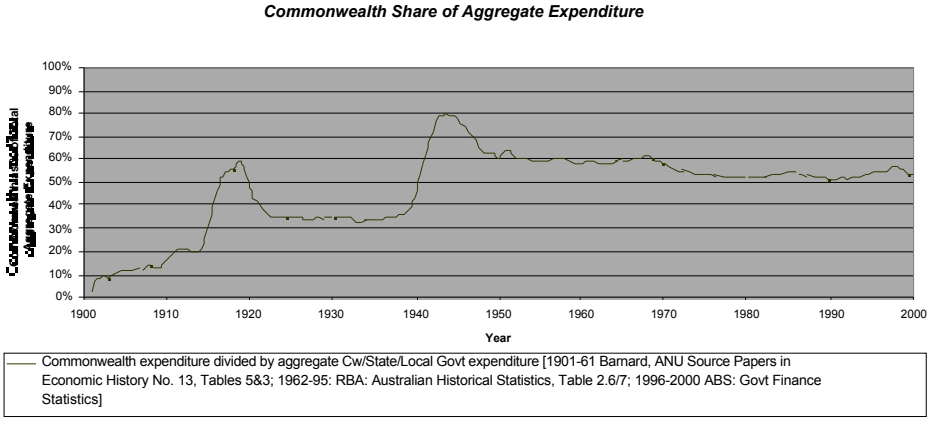
Chart 2



Assumption by the Commonwealth of exclusive income tax powers in 1942, and the rises in income tax rates for purposes originally related to war, led to the historical peak of Commonwealth tax dominance around 1950. Then followed fifty years of an inconstant, downward tendency, such that the tax share of the Commonwealth government returned by 2000 to its level of 1902-03, around three-quarters.

The third Chart shows the Commonwealth government's share of aggregate public spending. This remained low until 1910, around 10 per cent. Thereafter are two marked peaks, associated with the two World Wars. Since 1950, the central government's expenditure share has fluctuated, but overall has fallen a little,

Chart 3

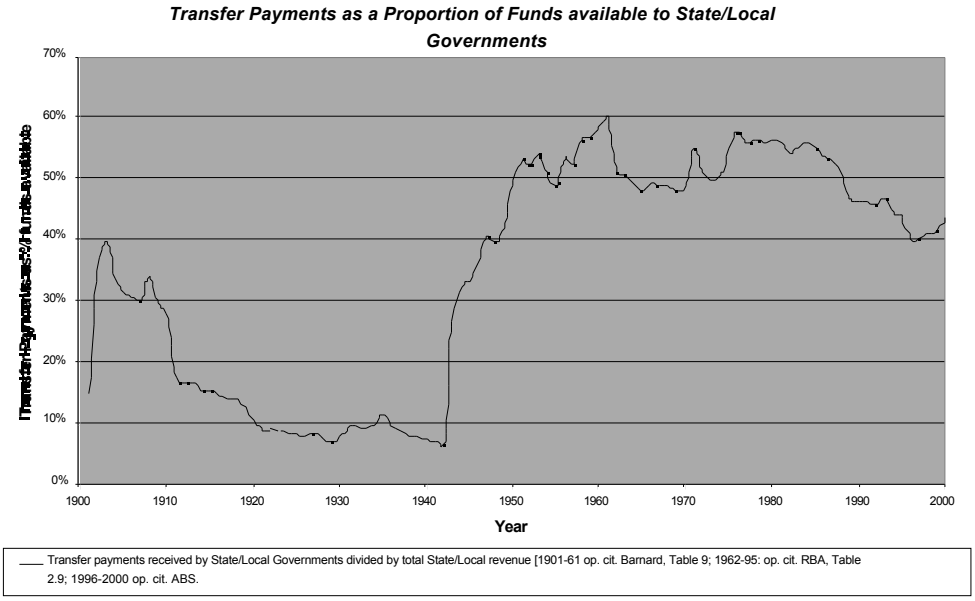


from over 60 per cent to about 55 per cent of all public expenditure. The rise of the Commonwealth's share of public spending from say one-tenth to over one-half is much greater than can be explained by the increase in its social security payments.

The difference between taxing and spending shares of the Commonwealth is reflected in Commonwealth grants to State and local governments, shown in the fourth Chart as the proportion of State and local expenditure financed by payments or assistance from the Commonwealth. Its record is more complicated, and comprises four main eras.

The first and shortest of these eras shows the influence of the temporary fiscal arrangements in the Constitution, limiting Commonwealth spending and requiring the Commonwealth to return most of its tax collections to the States. Next, with the validation of the *Surplus Revenue Act* of 1908 (whereby the Commonwealth put monies aside for future

Chart 4



payments of old-age pensions), for 30 years the Commonwealth funded about 10 per cent of State and local spending, or less. During the third era, after World War II, the Commonwealth channelled surplus revenue into the States in increasing amounts, so that in the 1970s almost 70 of every 100 dollars spent by the subsidiary levels of government were funded by Commonwealth grants of various kinds. Putting it in different terms: in the early 1970s, the Commonwealth distributed to the States and local governments grants amounting to over one-tenth of national income. Finally, by the end of the century, those proportions had halved, so that about one-third of State and local spending was financed by Commonwealth grants, which amounted to less than 6 per cent of national income.

This record can be interpreted as a triumph of the operation of a flexible and adaptive Constitution, or as a disaster reflecting deficiencies in the Constitution (e.g., in the method of appointment of High Court judges), or something in between. Three kinds of complaints have been made about the recent state of the federal fiscal balance, especially grants. Firstly, some State governments have objected to the system of so-called Horizontal Fiscal Equalisation (HFE) grants. These are Commonwealth grants designed to equalise the fiscal capacities of the States, and are made on the recommendations of the Commonwealth Grants Commission. I will argue that the Australian federation has got these grants about right, from an economic point of view.

The second and third criticisms of Australian fiscal federalism both rely on the claim that the States are all too dependent on grants from the Commonwealth. This dependence of the States on grants is prejudicially called Vertical Fiscal Imbalance (VFI). In the extreme version, enunciated by Cliff Walsh as "No Representation without Taxation", the solution would be for the States to rely solely on their own revenues. Arithmetically, this could be achieved either by the Commonwealth vacating some tax fields in whole or in part, making more room for the States (the option approved by Walsh, for example); or by the Commonwealth displacing some State spending and increasing its own spending so as to exhaust its tax collections.[4]

Grants are said to have two kinds of bad effects. Firstly, they permit the Commonwealth to impose on the State (and local) governments, the recipients of federal grants, conditions designed to deprive them of choice over how to spend public financial resources nominally at their disposal. I will concentrate on the third and more central criticism, which is that Commonwealth grants are economically bad in that they induce fiscal irresponsibility in the States.

Should Horizontal Fiscal Equalisation be zero?

It is useful to deal first with the Commonwealth grants designed to equalise the fiscal capabilities of the several States of the federation. These grants could be made without any transfer of Commonwealth public funds to the States (and Territories) taken as a whole. HFE grants, that is, do not require a degree of VFI between the Commonwealth and the States and Territories as a whole.

Specifically, the fiscal capabilities of the various States and Territories could be equalised by requiring some States or Territories to make fiscal grants to other States and Territories in the federation. In practice, in Australia the Commonwealth has made the grants to achieve HFE from its "surplus" tax revenues, so as to achieve equalisation at a higher level of fiscal capability of the States and Territories, rather than at a lower level.

The origin of these HFE grants was in the 1920s and 1930s, and had to do with the concern about the disaffection of outlying States, and the desire for secession from the federation, especially in Western Australia, to escape the economic costs of federation.[5] Grants for the fiscal assistance of poorer States were consistent with the Australian ethos of equality. Rather than examine those arguments, I will use what economists later in the 20th Century wrote about the economic efficiency consequences of HFE, and examine the effects of grants on economic productivity, via their consequences for the incentives for inter-State migration.

Federation made it easier for citizens to migrate from one Australian State to another. Some forms of economic migration add to national productivity; others detract, in that the migrating individuals gain by their choices of location, but at an overall economic cost. Properly designed inter-State grants can remove the incentives for inefficient migration, caused by State fiscal systems. The genius of the Australian federation is that it arrived at close to the perfect HFE arrangement, when judged from the point of view of economic efficiency: economic efficiency was served by the pursuit of economic equity.

The HFE grants are made so as to equalise the fiscal capability of the States. Such an equalization is achieved if, after spending its HFE grant, any State could provide a standard or average level of State public services, like schools and law and order and roads, while levying the standard or average rates of State taxation and fees, and balance the State public budget.[6]

HFE grants depend on a State's relative advantages or disadvantages on either side of the fiscal ledger, in revenue raising capacity or in the costs of providing State services. A State with few taxable natural resources per head of population would, at standard rates of State resource taxation, raise less State revenue per head than would a State with abundant taxable natural resources. Under HFE, the State with a poor tax base would receive a grant to compensate for this fiscal disadvantage (and for any other measurable difference in the State tax base). Turning to the cost side, a State with a large retired population would have to make larger expenditures, per head of population, on services for old folk to provide them with the standard or average level of services that would be experienced in States with relatively fewer retired folk. Under HFE, this State would receive a grant to compensate for this and other cost disadvantages.

The economic argument for HFE grants is that they discourage or eliminate those interstate migration or settlement decisions which, although they are economically motivated, are in fact economically inefficient. Central to the argument is the idea that, by settling in a State, a resident obtains a right to his or her share of the State fiscal pie. The attraction of this unpriced fiscal 'share bonus' can induce inefficient interstate migration or settlement decisions.

The main economic argument now follows. First, notice that federation made interstate migration easier than before. With federation, nationality or citizenship became Australian. In addition, certain things were made or kept uniform across the States – communications services, currency and paper money, weights and measures, marriage, laws relating to some commercial matters like bankruptcy and copyright, and so on. By and large, this uniformity was conducive to greater productivity for a variety of reasons; here I will focus on the effects on interstate migration, or the choice by immigrants of a State in which to settle. (The argument made here applies equally to immigrants attracted to Australia from other countries, a matter of great importance in Australian economic history).[7]

The second leg of the argument is that national production would be greatest if workers located where they were most productive (i.e., where they added most to national output).[8] The removal of some artificial barriers to interstate migration would assist in that regard. However, interstate economic migration can occur for unproductive fiscal reasons, as is explained below, to the detriment of national productivity. These reasons are removed by the Australian federal system of HFE grants.

The central task, therefore, is to show how some kinds of settlement decisions can benefit the individual but harm national productivity; and how HFE grants deter those inefficient decisions. I will attempt to do this by illustrating some cases that, in the fashion typical of economists, will be shorn of all but the essential ingredients. Two of these were signalled earlier, when I discussed how the HFE grants compensate for differences in taxable resources and costs of provision of State services. I will concentrate, for simplicity, on individuals who move for a better standard of living. I will also make a number of other simplifying assumptions, including that the individual's standard of living depends only on his or her wage rate and on State government taxing and spending; and that the only sources of State tax revenue are natural resource taxes and pay-roll taxes.[9]

As was mentioned, at the core of the argument is the idea that membership of a State polity allows an individual to share in the fiscal pool of the State, as well as be employed in a job in that State. The formation of a federation, to the extent that it lowers some barriers to interstate migration, makes it easier for tax-paying entities (or tax-consuming entities) to shift to another State if it offers a better fiscal deal (i.e., a larger excess of value of tax-funded benefits over taxes paid, or a smaller deficiency). States with relatively more taxable natural resources would, to that extent, be more attractive locations than would those with relatively less. The richer States could afford better State services or lower pay-roll taxes or both. An immigrant worker to the richer State would enjoy a higher standard of living, inclusive of taxes and State services, even if he or she would be more productive and earn a higher wage in the poorer State.[10] That is, without an HFE grant to offset the poorer State's disadvantage in tax base, economically inefficient settlement will be encouraged – some workers will be attracted away from more productive jobs by the opportunity to share (via the State fisc) in the benefits of natural resources that they do not own.[11]

A parallel case can be made for HFE grants to offset State government cost disadvantages. Assume one State has more retired folk per capita than another, the same level of taxable resources per capita – zero in both cases – but that a worker's productivity is higher in the State with more retirees.[12] If each State provides old folk with about the same level of services, then the State with relatively more retirees will be forced to levy higher pay-roll taxes. This tax difference distorts the pattern of settlement of mobile workers, and reduces national output. The distortion can be reduced or eliminated by an HFE grant to offset the differential State costs of providing old-aged services.[13]

So far, I have discussed the economic efficiency benefits of the Australian system. There are efficiency costs to be accounted. These include the excess burden of the taxation necessary to finance the grants, and the possibility that the HFE grants give States incentives to be poorer and more costly, in order to receive more grants. On balance, the evidence points to these being smaller than the advantages.[14]

Should Vertical Fiscal Imbalance be zero?[15]

The economic theory of federalism focuses attention on the spatial properties of public goods and taxes, to provide a theoretical grounding for the allocation of particular expenditure and taxing activities across a pre-determined set of geographical boundaries (which I take the States to have).[16] For example, in the illustration just given, I could have assumed that the State with relatively more retirees levied the same rate of pay-roll tax as in the other State, and afforded a lower level of services to the aged than in the other State. There would then be an incentive for the aged to move to the State offering better old-age services, driving up pay-roll tax rates there and inducing taxpayers to move to the States with lower tax rates. In the extreme, this kind of fiscal migration can lead to severe losses of mobile tax bases, and intense downward pressure on the level of welfare services provided from State funding.[17] It provides an argument for having the central government, rather than the States, primarily responsible for the funding of welfare. The underlying principle is that better economic decisions are made if the consequences of the decisions are sheeted home to the decision makers.

The economic argument about the appropriate locus of decisions on public spending is fairly well known, and now goes under the name of "the principle of subsidiarity".[18] It is that where the benefits are (mostly) confined to a particular State (or "locality", more generally), then decisions over the level and nature of the service supply should be made in that State (or "locality").

Consider a service which, once provided, costs nothing or very little to provide to more people rather than to fewer. A case in point could be weather prediction, in which the heavy cost is to arrive at a useful prediction, which can then be disseminated cheaply. Now say that the particular form of public spending provides benefits (mostly) to those residing in a "locality", and none (or few) to those residing outside the "locality" – i.e., a *local* weather prediction. The appropriate political decisions about how much to spend on local weather predictions are those made "locally", because they are more responsive to demand. In contrast, best decided by a national political mechanism are decisions about how much information to provide for the making of better weather predictions over the whole nation. Historically, this kind of argument was made for the inclusion of defence in the list of activities over which the Commonwealth would have exclusive responsibility.

There are similar if less familiar spatial considerations in deciding on the allocation of various tax instruments within a federal polity. Virtually all taxes fall on economic transactions. Therefore, there will be a spatial dimension to the incidence of taxation that corresponds to the spatial dimension of the transaction being taxed.

In particular, consider a tax levied on the importation of a product from one State into another. The economic burden imposed by the import tax, its incidence, could fall partly on the out-of-State producers, and partly on the in-State consumer-voters. The producers vote in one jurisdiction, the consumers in another and they alone decide on the level of the import tax. Similarly, a tax on the production of a good produced in one State may be borne predominantly by consumers who reside in other States – which is an argument for having political decisions about the level of such taxation made in the inclusive jurisdiction of all those (significantly) bearing the tax burden.

There is another more pragmatic consideration in taxation, which is that small jurisdictions will find it more difficult, than do larger jurisdictions, to impose taxes on highly mobile factors of production. If capital taxes are assigned to local governments, for example, we can confidently predict that the rate of tax will be lower than if it were assigned to the national level – tax competition will tend to drive the tax rate down. The classic tax base for small jurisdictions, then, is unimproved land values.[19]

An interpretation

In this short paper, I can do no more than to indicate in general terms the kind of arguments made in public economics about the optimal assignment of taxing powers and spending responsibilities to the various layers of government in a federation. What I want to infer from the foregoing discussion is that there is no reason why the tax-side considerations will generate a distribution of tax revenues, what we may call the *intergovernmental tax mix*, that corresponds exactly to the demands of citizens for public expenditures across those levels.

On the tax side, efficiency requires that the economic cost of an extra dollar of public revenue be the same for all taxes, independently of the level of government to which the tax applies.[20] Achieving the tax-side ideal will give rise to a distribution of tax revenues that is independent of the expenditure responsibilities. Federal grants, of the VFI type, permit the reconciliation of the claims of tax efficiency in the jurisdictional dimension with the claims of efficiency in the allocation of expenditure responsibilities across jurisdictions. In the absence of vertical transfers of tax revenues in the federation, one would have to re-allocate expenditure responsibilities according to the dictates of the efficient jurisdictional tax allocation; or to re-allocate tax powers according to expenditure responsibilities, rather than on the dictates of tax efficiency.

I am not making the claim that the level of Commonwealth revenue grants to the States is about right. I am making the claim that zero is the wrong level. More sophisticated arguments have to be mounted to arrive at the approximately correct level than merely to claim that any, positive, Commonwealth grant to the States distorts State decisions about how much to spend and on what.

An interpretative story can be told about the general course of the Australian fiscal balance. As State populations grew in numbers and in wealth, the political demands grew for more State spending in total.[21] In a well-balanced fiscal federation, a relatively efficient mix of taxes financed the increase in State spending, involving some additional State tax revenues, and some additional federal tax revenues, paid by way of additional grants. Federal revenue grants to the States responded to State voters' demands for State spending. The alternatives to federal grants, to repeat the earlier discussion, were the complete reliance on relatively costly State taxes; or the transfer of more State spending responsibilities to the Commonwealth.[22]

The "flypaper effect": grants stick where they hit?

"The only good tax is a Commonwealth tax", said a former Premier of Queensland. What he probably did *not* mean is that all Queensland taxes were hopelessly economically inefficient when compared with all Commonwealth taxes. Rather, I suspect he believed that it was politically easier for him to finance Queensland public spending from grants than from Queensland taxation itself. Federal grants seem to come at no or low political costs within the State; State taxes are resisted at State elections.

Does this point to the conclusion that States are less frugal in their spending of federal grants than they are in their spending of State tax revenues? For this is a crucial question: if federal grants give States an incentive to overspend, or to spend unwisely, then it speaks against such grants. I will argue that the case is hard to make.

Confine attention to general revenue grants ("FAGs without tags"). Upon the receipt of a federal grant, the Premier could choose either to spend the grant on State services, or to cut State taxes. At that time, as now, Queensland tax rates were not all zero, so if State taxation were then very expensive politically, the Premier had the opportunity to gain some political advantage by using the federal grant to finance a cut in State taxes. If the marginal, swinging voters valued a tax cut more than they valued State spending, on the margin of taxing and spending, then successful politicians would provide State tax cuts out of federal grants, rather than spend them.

What keeps politicians "honest", then, is political competition. A federal arrangement sharpens some forms of political competition, by increasing interstate mobility. But it weakens other forms, as the States pass over to the central government power to levy certain kinds of taxation. At the time of the drafting of the Constitution, all knew that the States were passing over the then major taxes, customs and excise. It later proved that they also, in effect, had transferred the income tax in circumstances when inter-State tax competition was detrimental to the national purpose of raising more income tax revenue. In the period of reconstruction after World War II, voters also passed over to the Commonwealth the power to make all kinds of social security payments to individuals. For reasons sketched earlier, these are the kind of payments that are susceptible to fiscal migration: it is to be expected that there will be a higher level of redistributional payments of this kind, if they are made by a more inclusive polity, than if by a less inclusive one (in terms of spatial spread).

Conclusion

The data provided stops before the implementation of the GST arrangements, which are not discussed in this paper (except by inference, in the section about the spatial characteristics of tax incidence).

The paper has argued the cases in favour of two kinds of Commonwealth grants to the States: those to equalise the fiscal capacities of the States (Horizontal Fiscal Equalization), and those to supplement the tax revenues of the States ("Vertical" grants). I argued that the Australian federal arrangements for HFE grants are beneficial to economic efficiency. As to so-called Vertical Fiscal Imbalance, with the Commonwealth taxing more than it spends and sending the surplus to the States to supplement their tax resources, my claim is less definite. It is merely that, in a well-functioning federation, revenue grants from the central government to the States are, in principle, consistent with economic efficiency in taxing and spending. What I did not attempt was a *quantitative* assessment of the degree of imbalance in the Australian fiscal federation, if any; the paper is concerned with qualitative judgments for the most part.

Endnotes:

1. This paper draws freely on joint work with Geoffrey Brennan. Thanks to Phil Killicoat for assistance.

2. There is a general proposition in economics that lists the circumstances in which competition produces the best of all possible outcomes. In this paper, the focus is on constitutional political economy, on the design of the rules, rather than the more usual focus of the economics profession on tinkering with policy. See JM Buchanan, *What Should Economists Do?* (Indianapolis, 1979).

3. There are two types of political competition in democratic systems: electoral competition to become the Government; and inter-governmental competition, which has two sub-types: "inter-national" or "inter-state" fiscal competition between nations or states; and federal fiscal competition between the States and the central government, within a nation.

4. Cliff Walsh, *Refocusing Commonwealth-State Financial Relations: Tax powers, microeconomic reforms and intergovernmental relations*, in *Business Council Bulletin* 126 (1995), pp.30-37.

5. In the 1930s, another inquiry was set up in response to complaints that federation had harmed the economic condition of smaller states, especially Western Australia. The economist Giblin and others argued that it was impossible, by the late date, to assess the costs of federal arrangements. The counterfactual, to use modern terminology, was too hard to construct and estimate. Instead, it was suggested, it would be better for the federation to make grants so as to affiliate citizens of those States more closely with the federation.

6. Purists may object to the idea that the grants permit the balancing of the standard budget. However, the argument applies to any standard budget deficit or surplus, and zero makes exposition easier.

7. See JJ Pincus, *Liberalism and Australian Economic and Industrial Development*, Chapter 16 in JR Nethercote (ed.), *Liberalism and the Australian Federation*, Annandale, NSW, 2001.

8. The basis of this argument is that if a worker adds more to output in one location than at another, then there is a loss in output if he or she settles into the latter job. For simplicity, I have assumed that workers are paid the value of their addition to production.

9. An additional factor in standard of living is environment, broadly conceived. The argument made here can be extended to include this factor, but at the cost of considerable complexity. Additional tax sources can easily be added to the argument.

10. The SA Centre for Economic Studies discusses these arguments in more detail in the paper entitled *Financing the Federation: A Centenary of Federation project carried out for the South Australian Department of Treasury and Finance* (June, 2001), Chapter 4 and its Appendices (by J. Hancock).

11. The argument does not change in substance if natural resources are owned publicly or privately.

12. My argument does not depend on there being a persistent difference in average productivity (due, for example, to climate), but does depend on differences that would vanish with sufficient relocation of workers.

13. A similar argument arises when there are fixed costs of State services that do not vary at all or proportionately with the number of State citizens being served. Hancock, in the work cited in Endnote 10 above (p.67) gives the example of State weather forecasting services, which are what economists call a public good.

14. There is a literature on these issues in Australia, which I do not intend to survey; references are in the SA Centre for Economic Studies paper referred to in Endnote 10 above.

15. This section draws freely on an unpublished paper with Geoffrey Brennan entitled *The Myth of Vertical Fiscal Imbalance?*.

16. It can also be used to design the optimal boundaries of jurisdictions.

17. More generally, there is a phenomenon, documented by George Borjas in the United States, of "welfare magnets".

18. The classic reference is WE Oates, *Fiscal Federalism* (New York, 1972); see also DC Mueller, *Public Choice II* (Cambridge, 1996).

19. In the literature of efficient taxation, the rule is that if it stands still, then tax it relatively highly; if it moves easily, then tax it lightly. In applying the rule, the notion of "movement" includes any method of avoiding the tax (e.g., "movement" from highly into more lightly-taxed activities). The rule is named Ramsay taxation, after an English mathematical economist of the 1920s. It is important to realise that the cost of a tax varies positively, and more than proportionately, with the tax rate. The Public Choice literature, especially Brennan and Buchanan in *The Power to Tax* (Cambridge, 1980), points out that there is a trade-off: if taxes are efficient, then the government can get away with imposing more of them than if taxes are inefficient. Some decades ago in Australia, this kind of Public Choice argument was used by the Australian Treasury to oppose what others called tax reform.

20. In terms of the previous footnote, the marginal "Ramsay price" of each tax is equal to one plus the marginal excess burden, which depends on the inverse of the elasticity of supply of the taxable activity. Efficiency requires equality of the marginal excess burdens.

21. Here I am not relying on Wagner's Law, which is that the demand for State public spending increases faster than income. Rather, I rely on the assumption that the effect of the rise in the number of heads of population was sufficient to ensure that the total demand increases (not demand per head): any loss of demand due to income-inferiority is small in relationship to the rise in population.

22. This argument is made at length in HG Brennan and JJ Pincus, *A minimalist model of federal grants and flypaper effects*, in *Journal of Public Economics,* 61 (1996), pp.229-246. The phenomena are of grants apparently "sticking" to the Treasury (i.e., being spent, not used for tax relief) and "sticking" to individual spending categories (e.g., school grants being spent on schools).

Chapter Six:
Judicial Intervention: The Old Province for Law and Order

Des Moore[1]

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.[2]

Introduction

One cannot help thinking that Justice Higgins must have taken seriously the dictum in *Iolanthe* that "the law is the true embodiment of everything that's excellent, it has no kind of fault or flaw". He certainly echoed Gilbert's Lord High Chancellor's claim to be the embodiment of the law when he made his romantic assertion in *A New Province for Law and Order*[3] that "there should be no more necessity for strikes and stoppages" because:

> "… the process of conciliation with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public".

Of course, this perceived rationale for compulsory conciliation and arbitration has also been promulgated by many others since Higgins, such as former long serving industrial relations Deputy President and economics Professor, Joe Isaac. In 1987 he wrote that:

> "The Great Strikes [of the 1890s] … and the perception and perseverance of a handful of men – liberal-minded and labour-minded – [were] the main active joint agents in the establishment of arbitration ... The Great Strikes changed the climate of opinion. Although the strikes were confined to a small number of industries, they were in economically strategic industries and the strikes lasted a long time. This was unprecedented".[4]

The inclusion in the Constitution of a dispute settling power was certainly very much a response to a period of extended industrial conflict in the 1890s, and the recession that effectively continued through most of that decade. But for those circumstances s.51 (xxxv) might not have scraped the majority of three votes (including two surprise "conservative" supporters) it received at the Melbourne session of the Convention in 1898.[5]

It is pertinent that when, in 1903, liberal Alfred Deakin was debating the establishment of the Conciliation and Arbitration Court, he affirmed that the "object of this measure is to prevent strikes", and even he rejected any idea that legislation should attempt to regulate industrial affairs generally, because Parliament:

> "…. would be incompetent to do so, because of the impossibility of drafting provisions, however well devised, so that they would meet all the contingencies, changes, and difficulties of different industries, which are subject in themselves to continuous alteration".[6]

Indeed, one would be hard put to explain to a visitor from Mars how it has come about that the Commonwealth developed a quasi-judicial system that has intervened comprehensively in employer-employee relations solely on the basis of a specific constitutional power limited to the prevention and settlement of interstate industrial disputes. It is also hard to reconcile the palpable failure of the regulatory institutional arrangements with their continued existence. *The Old Province for Law and Order* must surely cease to be part of the legal system before its centenary in three years time.

My proposition is that various participants in the legal system effectively created the industrial arrangements because of their perception that social interventionism was needed to offset the alleged failure of the labour market to produce "fair" outcomes, and because they saw a role for themselves. Mr Justice Higgins' denigration of bargaining between employers and employees, what he scornfully described as the "higgling of the market place", provided the superficial rationale for wide-ranging judicial and quasi-judicial action. This kind of thinking encouraged self-elected legal politicians to devise a comprehensive, general Commonwealth power to regulate employer-employee relations even though the constitutional base was clearly not intended to provide that power. Moreover, such power-hungry gentlemen persisted with their interventionism despite the fact that Australia continued until fairly recently to have a high rate of industrial disputation under the system, including during the period to 1930 when strikes and lockouts were proscribed, and then during the 1930s recession itself.

The "real" courts approved the interventionism when they allowed a case-hungry Court to accept the unions' clever technique of "creating" an interstate dispute and then submitting it for settlement. The dubious legitimacy of this so-called paper disputes mechanism was not settled by the High Court until the 1914 *Builders Labourers Case,*[7] and when as recently as 1997 it came before that Court,[8] Justice Kirby's separate judgment endorsed such a strategy on the theory that it is "now so deeply entrenched in the long-standing authority of this Court and in Australia's industrial practice that (it) should not be disturbed"!

The Industrial Relations Commission (IRC) (as it now is) has also been allowed to interpret widely the power for preventing and settling industrial disputes. This has extended to the imposition of a broad range of employment conditions, including the fixing of wage levels, on the ground that it would help settle disputes. Even today the Commission presides over twenty "allowable matters" in wage awards. And, according to one experienced authority, the IRC even has a strategy designed to avoid legal challenge through the making of "recommendations" rather than "orders", which are subject to challenge. Unsurprisingly, unions often (mis)use these recommendations to give the impression to members and the media that they are enforceable decisions.

Overall, it is difficult not to characterise the emergence and continuation of the Commonwealth industrial relations system as a prime example of what economists call "capture", that is, an effective takeover by those who perceived social interventionism as a source of power and employment for themselves.

Justice Higgins was a prime captor through his promulgation of the unemployment-producing basic wage in the 1907 *Harvester Case* and provides a classic example of the misguided social interventionism pursued by the legal politicians. Although his superficially compassionate concept of a "living wage" did not have immediate application, it was gradually taken up by State wages authorities and had become widespread by around 1920. Analysis by economic historian Dr Colin Forster suggests that the resultant increase of about 20 per cent in the mandated wage rate at the bottom end of the labour market was a primary cause of the substantial increase in unemployment in the 1920s, particularly amongst the unskilled.[9] It is one of the quirks of history that a decision that helped worsen the situation of the poorest classes continues to be hailed widely as a virtuous one.

My analysis of the history of interventionism in industrial relations matters suggests that the record of the IRC is an extremely poor one when viewed from a broad economic and social perspective.[10] It not only fulfilled the prediction of Sir George Reid at the 1898 Convention[11] that s.51 (xxxv) would encourage the spread of disputes, but its decisions have almost certainly also had an adverse influence on employment and unemployment; and, given the widening in the distribution of earnings within the labour market, they have failed even to deliver the much-touted comparative wage justice. Yet, with its half-sister at the Federal Court, the IRC continues to interpret legislation governing employer-employee relations in a way that makes it much more difficult and more costly for employers to enter into employer-employee relationships, a situation which reduces employment opportunities, particularly at the bottom rung of the employment ladder.

Policies devised within legal institutions influence more than the economic outcome of market place higgling and, in Australia's case, the policies reflected in decisions on employer-employee relations have had a wide-ranging adverse impact on social structures and attitudes. Those familiar with the papers presented to HR Nicholls Society[12] conferences will be aware of the corporatism, anti-individualism and misconceived attempts at egalitarianism that have been inherent in those decisions, reflected in particular in the favourable treatment of unions and the infamous "industrial relations club" label. The gross inequity of many IRC decisions in preventing people from accepting jobs on non-union terms is also readily apparent but has received little attention.

It may be argued that, if the industrial relations system has had such adverse economic and social effects, it was up to the political arm to correct the situation, and that no blame for the poor outcomes should rest on the shoulders of the legal arm. It is certainly relevant that the promulgation by the likes of Justice Higgins of the case for social interventionism by the legal system did permeate deeply into the thinking of the political and other arms of society.

However, in the last twenty years the greater exposure to international competitive forces has led to increasing recognition and not inconsiderable steps, on both sides of the political fence, to limit the potential for adverse economic effects from regulatory decisions on employer-employee relations and to create a more flexible labour market. The need to move away from the centralized award system and allow enterprise bargaining was recognized by Labor in the *Industrial Relations Acts* of 1988 and 1992, albeit in a limited form and offset to some extent by the introduction in 1993 of federal unfair dismissal laws. The setting in 1996 by the Coalition of a low inflation target under a largely independent Reserve Bank has been a major and important shift in the balance of institutional power that now means, in effect, that monetary rather than centralized wages decisions are the prime determinant of inflation. The present Government, led in this area by former Workplace Relations Minister Peter Reith, has also made valiant attempts and some progress in continuing the reduction in the scope for interventionism.

Such action has not been confined to Australia and, for some time now, international economic institutions, notably the IMF and the OECD, have not only endorsed our changes but have recommended they be taken further. The latest OECD survey, for example, politely notes that Australia has moved "towards a largely decentralized and more flexible industrial relations system", but suggests there is a "need for further improvement in the areas of wage-bargaining and employment conditions".[13]

But, while the system that Australia's current generation has inherited still leaves much for the political arm to do to move us from having probably the most regulated set of employer-employee relations amongst developed countries, it would be difficult to detect any significant response from the legal arm to the obvious change in direction. Quite apart therefore from whether, from a legal perspective, the extent of interventionism was justified originally and for the first 80 odd years, there is the more important question of why the legal arm has not responded to the change of direction and the development of a more competitive economic environment (but where social security has been increased to help those unable to obtain employment). This is not to deny that parliamentary authority has existed for the regulation of employer-employee relations, and continues to exist: the question is whether the interpretation of the legislation by the relevant legal authorities has been appropriate, and why the legal arm has apparently continued as though, both economically and socially, unchanged interventionism has been needed.

A legal perspective on interventionism

Of course, the making of law by judges has been continuing for so long that AP Herbert was even prompted to quip (in 1935) that "the Common Law of England has been laboriously built about a mythical figure – the figure of *The Reasonable Man*".[14] But statute law was much more limited then, and we now have reams of statutes and an Acts Interpretation Act requiring that interpretations should promote the purpose or object underlying statutes. So, in changed modern circumstances, what guidance can be obtained from the present Chief Justice of the High Court, Justice Murray Gleeson?

In an article entitled *Individualised Justice – The Holy Grail,*[15] which he wrote in 1995 when Chief Justice of NSW, His Honour noted the growing trend for judicial decisions to be based on individualised or subjective assessments of a case rather than the straight application of general rules. Accompanying this has been a greatly increased attention to detail and additional pressure on the court system to the point where:

> "One cannot help feeling, on occasion, that the kind of truth for which the courts sometimes search is nonexistent, or at least undiscoverable".

The Chief Justice instanced many departures from general rules, and attributed the increased subjectivisation largely to a mysterious beast called "the consequences of what society has come to demand" of the legal system, so that it reflects "the spirit of the times" that sees justice as "much less likely to be met by formal and inflexible rules".

Thus, nowadays a killer who (successfully) uses a defence of diminished responsibility or provocation can escape with a conviction for manslaughter rather than murder. Those who imagine they have a contract may have their actions judged to be unconscionable or unfair or inequitable, thereby preventing the enforcement of an agreement. Indeed, Justice Gleeson even stated that:

> "… we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract".

In tort, there is now a situation where:

> "… the concept of reasonableness is of key importance and the duty owed by one person to another depends so much on the facts of the case…"

and judges and legal commentators have even "noted the tendency of the law of tort to supplant contract". Further, the idea that hearsay is not admissible in evidence is apparently old fashioned if it can be regarded as reliable or even needed.

Notwithstanding these departures from general rules, His Honour was clearly concerned that:

> "There is a balance to be maintained and it is important to note the consequences, for the law and the justice system, of this seemingly irreversible move towards subjectivisation of issues and, also, some constraints to which the process remains subject".

He emphasised the need for consistency so that:

> "… the outcome of cases (should) depend as little as humanly possible upon the identity of the judges who decide them".

Encouragingly, he also saw an "abiding need for predictability and certainty", because it particularly affects the "willingness of people to engage in commercial transactions". And, although not ruling out judicial lawmaking (it must be incremental and involve the development of established principle), he saw a need to avoid judges acting "as *ad hoc* legislators who, by decree, determine an appropriate outcome on a case-by-case basis".

Finally, he suggested a need to recognize that:

> "… there is no general principle of fairness which will always yield a result if only the judge can manage to get close enough to the facts of the individual case…..The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law".

It may not be going too far to suggest that AIRC President, Mr Justice Guidice, has effectively acknowledged that the courts and tribunals dealing with the employment relationship are doing exactly what the Chief Justice said they should not be doing! Justice Guidice recently complained about the potential for unfairness that arises because:

> "The uncertainty generated by the mixture of laws which impact on employment relationships in this country constitutes an erosion of freedom and impacts on the quality of our society".

While he disclaimed any criticism of "the basis or continuing need for the various laws" applying to that relationship, he observed that "the very significant increase in the number of judicial, quasi-judicial and administrative bodies to which resort may be had in relation to the various statutory rights and rights of action" meant that "the outcome of particular cases is of very little predictive value in similar cases". And, echoing the Chief Justice's warnings:

> "What is of real concern… is the potential, some may say the fact, for discretionary decisions to be made by individual judges or arbitrators which have no consistent theoretical basis either because they are made in different statutory contexts or because the discretion afforded by the law is too wide".[16]

Since his appointment as Chief Justice of the High Court, Justice Gleeson has had more to say on judicial activism. In an important speech on 2 July, 2000[17] he recognized that many laws gave discretion and that judges have "the capacity, and sometimes the obligation, to exercise qualities of judgment, compassion, human understanding and fairness". At the same time:

> "… in the administration of any law there comes a point beyond which discretion cannot travel. At this point, 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".

It would be idle speculation to suggest that these remarks by the Chief Justice may have been prompted by the fact that the High Court had previously taken Federal Court judges to task on several occasions for their interventionist decisions. In a paper to the eleventh conference of this Society in 1999, Dr John Forbes suggested that the over-ruling by the High Court of Federal Court decisions in immigration cases was basically on the ground that those decisions were an unjustifiable usurpation of the functions of other branches of government.[18] To an outsider, the handling by all the courts of immigration claims seems an extraordinary example of excessive interventionism.

In his 2000 Boyer Lectures the Chief Justice also noted "important practical limitations on the capacity of judges to make law", and he acknowledged that:

> "If the Constitution is silent on human rights and freedoms, then it is up to Parliament from time to time to deal with that subject – or not to deal with it – as it thinks fit".

At the same time, he asserted that, once a human rights issue comes before the courts, the protection of the rights and freedoms of individuals and minority groups is "an essential part of the role of the courts". This led to the rather puzzling statement that:

> "One of the most important and difficult issues of current debate … [is the] … working out [of] the principles according to which the will of an elected Parliament that is responsive to popular opinion must bend to the law, as enforced by unelected and independent judges".[19]

Unfortunately, the Chief Justice did not elaborate on why the High Court has made significant subjective judgments in, for example, human rights and other areas. Yet, as Justice Meagher pointed out in January, 1998,[20] although:

> "… there are to be found in the Constitution very few express, or necessarily implied, civil rights…..the High Court has begun reading into the Constitution civil rights which are certainly not overtly mentioned there, nor which are necessarily implied there on any ordinary rules of construction, but which are 'implied' because the current judges of the High Court regard them as indispensable democratic rights".

Justice Meagher noted in particular the High Court's "discoveries" of a right to freedom of communication on matters relevant to political discussion,[21] a new right to equality of legislative and executive treatment, an implied right to a fair trial and a right in certain circumstances to be free of the laws of defamation. In a 1997 lecture Professor Greg Craven was similarly (and more extensively) as critical as Meagher J.[22]

Justice Meagher did not discuss the Court's highly controversial decisions in relation to Aboriginal issues, presumably because they do not read rights into the Constitution *per se*. These decisions clearly reflect emotional interventionism of the highest order. For example, in an article in July, 1993 responding to criticisms that the High Court had been trying to usurp the role of Parliament, a former Chief Justice of the High Court, Sir Anthony Mason, defended the *Mabo* decision on the simple basis that:

> "In some circumstances governments and legislatures prefer to leave the determination of a controversial question to the courts rather than leave the question to be decided by the political process".[23]

Again, in a further article in November, 1993 the Chief Justice even patronized critics of judicial activism as believers in "fairy tales", who are "entirely ignorant of the history of the common law".[24]

In a paper to the fourth conference of this Society in July, 1994, Dr John Forbes has some further analysis of the Lord-High-Chancellor-like behaviour of then Chief Justice Mason. In basing their decisions largely on their assessment of *past* injustice experienced by Aborigines, and their perception of what they judged to be morally appropriate for the nation, the majority judges in *Mabo* effectively adopted the role of an elected government.[25]

All this suggests that, while some judges have significant reservations and concerns about the process and implications of subjectivisation, it appears to have become quite widely accepted that a large section of the judiciary will, when given the opportunity and/or occasion to do so, adjust the balance of decision making to accord with what it perceives to be society's demands. While Chief Justice Gleeson's recent remarks provide some encouragement that there may be a move under way for the legal system to stop looking beyond statutes and their expressed objects, these remarks seem to have had limited effect – and in any case they paid no specific attention to the industrial relations area.

One assumes that Mr Justice Gleeson would feel bound by the 1914 *Builders Labourers Case* and, based on Justice Kirby's recent highly inaccurate description to the Australian Labour Law Association of the "successes" of the conciliation and arbitration arrangements (and his mistaken suggestion that resort to ordinary courts under the common law cannot take the place of the national tribunal system), the High Court already has two strong supporters of interventionism in this area.[26] On this basis, while one might agree with the High Court judge who is supposed to have quipped that the industrial judiciary has been providing "milk bar justice", that justice might nevertheless be said to be consistent with legal theory. It might also be seen as appropriately democratic and reasonable: after all, the judiciary should not be allowed to fall into disrepute by preserving out of date social standards!

But there is another side to the question of the serious underlying problems with judicial intervention in the contractual relationship between employers and employees. If jurisprudence says society's demands should be recognized, why hasn't the legal arm responded to the changing "spirit of the times" regarding reduced labour market regulation?

The legal arm should at least start looking behind the old beliefs and myths in industrial relations and ask itself whether they really require intervention in modern society. It should also acknowledge that interventionism by un-elected officials requires that account be taken of adverse implications, particularly the uncertainty and the adverse effects on employment, which have hitherto gone largely unrecognized.

The solution is surely not simply to rationalize industrial laws and the tribunals exercising jurisdiction, as suggested by Justice Guidice. Judges and commissioners need educating in the social and economic problems arising from industrial interventionism and, until they catch up with modern society, their capacity for exercising discretion needs to be reduced. In the US, the Law and Economics Center at George Mason University, Virginia has been running an economics education program for judges for about twenty years. We need something comparable.

The inequality of bargaining power argument

Such an education process would need to point out that the whole regulatory system is based on completely mistaken perceptions about the employment relationship. It is assumed that there is a major imbalance of bargaining power between employers and employees that would, if allowed free rein, operate against employees, and reduce the rewards they would otherwise obtain from their working relationship with employers. It is unsurprising perhaps that, while this misperception exists, the judiciary takes the view that subjective assessments are needed, in the interests of fairness, to correct the perceived imbalance.

At first glance, it does seem obvious that employers have an intrinsically much stronger position deriving from their greater wealth and their power to hire and fire, albeit much reduced. Yet this notion has been too facilely accepted, and little analysis appears to have been undertaken into whether it corresponds with reality. HR Nicholls Society members are well aware, for example, that sub-contractors who work on building sites, and who actively compete against other "subbies", earn an average annual wage of over $40,000 without any "protection" other than their own bargaining power and trade skills. They work, moreover, in an industry that is one of the most efficient in the world, that is virtually free of disputes between builders and sub-contractors, and that provides no evidence that its trades-people feel "exploited" by what is effectively a free market system.

What the judiciary do not appear to understand is that modern labour markets actually operate within a competitive environment. The demand for and supply of labour is determined in a context where over 1,000,000 businesses compete for the labour services of over 9,000,000 workers, a situation that can scarcely allow the exercise of monopsony power by employers except in certain limited situations. Of course, competition in the labour market is heavily constrained by regulation, but employers do compete between themselves within that context, and they compete for a labour supply that offers only a limited quantity of each of the various different kinds of labour. Indeed, there effectively exists not one single labour market but a whole series.

During a debate I had with former Deputy President of the AIRC, Professor Keith Hancock, at a meeting of the South Australian Economic Society on 30 May, 2000, Hancock conceded that not enough account had been taken of the competition constraint that employers face, but argued that "there remain instances where employers can exert significant bargaining power". He referred specifically to companies such as CRA (which had by then gone out of existence), BHP, Telstra, Patrick Stevedores and Qantas; i.e., he put forward the absurd proposition that these companies are not subject to competitive constraints in the labour market. Hancock also made the equally absurd assertion that "the notion of negotiation at the point of hiring is, in most instances, nonsense".

It is relevant that, in circumstances where the labour market operated in the 1990s under more competitive conditions, the share of national income going to labour remained stable and average real wages increased strongly. This outcome occurred, moreover, despite predictions that labour would experience adverse effects on both employment and real wages from the more competitive environment which businesses had to face from tariff reductions, competition policy and the like.

By contrast, while the considerably higher interventionism in employer-employee relations by government and arbitral and judicial authorities in the 1970s and 1980s led to an initial short, sharp increase in labour's share of national income in the mid 1970s, that was followed by a long, steady decline in that share in an environment where there was only a tiny annual growth in real wages and a relatively small growth in the rate of profit, not to mention higher unemployment. Further analysis of these comparative trends is contained in the Productivity Commission's excellent paper on *Distribution of the Economic Gains of the 1990s*.[27]

This marked contrast in the outcomes under widely different extents of interventionism clearly suggests that more intervention, allegedly on behalf of workers, does not increase the returns on their labour, and certainly does not improve business output and profits. It is not to say, of course, that the labour market operated satisfactorily in the 1990s. Judicial intervention continued apace and, as I have pointed out elsewhere,[28] the reduction in unemployment was due more to the large increase (from 15 to 22 per cent) in the proportion of the working age population on income support payments than to a more competitive labour market. The limited nature of the improvement in the rates of underlying unemployment and employment is being revealed in the current slow-down in economic activity.

Even so, the improvement in labour market performance under more competitive arrangements does provide an additional basis for challenging the inequality of bargaining power argument. And the likely increase in the unemployment rate in the short term can be used to reinforce arguments for reform. It is relevant that the "imbalance of power" arguments now used to legitimize arbitral or judicial intrusion into labour market arrangements have no constitutional or statutory authority. Nor for that matter does H B Higgins' view that labour disputes arose because of the market's incapacity to determine the "just" price for labour services, a mediaeval notion that has no rational basis. Higgins' belief that the "just" price had to be determined judicially, and that any deviation from such a price was an infraction of the natural order, raises a real question as to whether he should have been allowed to continue to hold judicial office.

Interpretation of employment contracts

The second main problem with judicial interventionism in the employment relationship relates to the incapacity of the judiciary to interpret employment contracts. An invaluable draft paper by economist Geoff Hogbin[29] summarising recent thinking by labour economists[30] on employment relationships, and its relevance in the Australian context, highlights the virtual impossibility for third parties to make informed and meaningful judgments on employment contracts, let alone rewrite them *ex post* to the betterment of the contracting parties.

The little recognized reality is that many elements of employment contracts take the form of expectations and understandings that are impossible (or at least prohibitively difficult and costly) to specify in explicit terms. These implied or *relational* terms are, moreover, as important to the satisfactory performance of a contract as the explicit or *formal* terms that are normally the subject of judicial attention. For example, an outside party cannot really observe and accurately assess performance in relation to the amount of physical and mental effort to be devoted to tasks, the required degree of alertness on the job, and the amount of on-the-job training to be provided and undertaken.

In fact, whether an employment contract operates satisfactorily for both employer and employee depends importantly on whether the self-enforcing and in-built incentives work out in practice. These incentives take the form of both "carrots" and "sticks". For example, an employee may be induced to make an extra effort by the promise of a career path (a carrot), or a stick involving a threat of incurring the costs of finding a new job in the event of being fired. Most employers are constrained from making excessive demands on employees by the risk of losing their investments in hiring and training if employees quit. Also, getting a reputation as a "bad employer" makes hiring competent workers more difficult and costly in the future. As performance in relation to such implied terms cannot be independently verified, employment contracts simply cannot be enforced *effectively* by a court. The already-quoted remarks by Alfred Deakin when debating the bill to establish the Conciliation and Arbitration Court are relevant.

The impossibility of fairly enforcing such implicit contractual terms was almost certainly recognized by courts when they allowed employment contracts under common law to evolve into at-will contracts. There is an analogy here with unfair dismissal cases, where courts concentrate on the more readily verifiable issue of fairness of procedures, rather than on the substance of alleged malfeasances. But this indicates an inability to address overall fairness in the employment relationship, as well as creating a situation that is inherently biased against the employer because of the procedural focus. The "at-will" contract in which the employee's right "to quit", at a moment's notice, was balanced by the employer's right "to fire" equally spontaneously, has been subverted through unfair dismissal provisions which, while on the face of them a burden on employers, in reality work against employees, and particularly on people who want to become employees. The costs of complying with these provisions are, in the end, born by employees, consumers, and especially the unemployed.

Earlier this year Rio Tinto Iron Ore Vice President, Sam Walsh, illustrated the difficulties a third party would have in interpreting the trade-offs involved when employers treat employees as individuals in order to maximise their potential to contribute not only to a company's performance but to their own well-being. It is particularly interesting, given that Rio has been a prime target for attack by the union movement for "exploitation" of employees, that Walsh emphasised that:

> "At the core of what we are talking about here is the alignment of employee goals, expectations and behaviours with the goals of the company and the expectations of management …"

and that he also noted, "We are proud of the fact that since 1993 we have not lost any time to industrial disputation".[31]

The inability of courts to effectively enforce employment contracts does not, unfortunately, deter third party adjudication under statutory laws and regulations. But that adjudication tends systematically to undermine the self-enforcing properties of employment contracts, thereby eroding incentives to contribute productive effort to jobs. For example, as adjudicators are simply unable to verify performance with respect to relational terms, and as institutional tradition leads them to favour employees, the existence of unfair dismissal laws has the effect of reducing the penalties employees would normally expect to experience for "shirking". (Shirking is used here as a general term to cover slackness and negligence in all dimensions of effort.) This can be expected to raise the general level of shirking in the workforce, partly because those predisposed to shirk expect to "get away" with more of it, and partly because the morale of more diligent workers tends to be sapped. This loss of morale can be catastrophic in situations such as nursing homes, where the nature of the job is morale-sapping to begin with.

But higher levels of shirking have implications for fairness as well as efficiency. Thus, although *prima facie* it may appear that the cost of a decision to reinstate or compensate a fired shirker falls on the employer, in practice it may well be borne by workers generally. Since in the longer term wages must reflect the net value of workers' contribution to production, employers as a group respond to reductions in productivity and/or to required additional supervision costs by providing lower wages than otherwise for staff generally. The result is that the costs of increased shirking resulting from unfair dismissal laws tend to be borne ultimately by more diligent employees.[32]

Another fairness problem with unfair dismissal laws is their potential adverse effects on matching between employees and jobs. Such effects will occur when workers capable of performing more satisfactorily are excluded because of regulatory impediments to firing. This will likely have negative effects on the welfare of workers capable of forming superior job matches. However, as it is impossible to identify those affected, those dispensing "justice" simply cannot take these negative effects into account.

Equally, the judiciary cannot take adequate account of the likely adverse effect of employment protection regulations on marginal workers. When tribunals are biased against them, employers are much less likely to employ such workers because they fear that firing will be costly if the job-match proves to be unsatisfactory. The Institute of Chartered Accountants spokesman for small business claimed on 20 March, for example, that those he represents are "seething" over the unfair dismissals legislation and that "everyone of them has a horror story".[33] Although such comments may have partly reflected the federal Government's then announced intention to have another try in the Senate to reduce unfair dismissals protection, it was undoubtedly also inspired by the deterrent effects that protection has on employment. Those deterrent effects have recently become so extensive that the statistics on unfair dismissal cases provide no indication of them, because employers frequently make out-of-court settlements even where there is no substantive case rather than incur the cost of allowing the matter to go before a tribunal.

It is ironic that the virtually costless access to tribunals for unfair dismissal claimants, and the consequent encouragement to such claims, became built into legislation after Clyde Cameron's attempt in the mid 1970s to make access easier for claimants against union misbehaviour. Amendments to unfair dismissal laws passed earlier this month attempt to reduce the encouragement in various ways, such as by allowing expanded cost orders to be made against parties who act unreasonably in pursuing, managing or defending claims and by providing penalties against lawyers and advisers who encourage claims where there is no reasonable prospect of success.[34]

It is a consequence of human nature that some employers are heartless and unscrupulous and make unreasonable demands on employees. However, as University of Chicago Law and Economics Professor, Richard Epstein, has pointed out, regulations aimed at achieving perfect justice are frequently counterproductive because they create unintended injustices that outweigh any benefits they might confer. The best protection against exploitation for workers is a freely functioning labour market that allows employees to change jobs if they believe their current employer is treating them unfairly. It is also the most effective way of disciplining employers.

I return to Chief Justice Gleeson's comment that:

> "The justice system is rarely equipped to undertake an exhaustive investigation of the merits of a particular dispute, and only by a fairly strict limitation of issues can courts hope to achieve even an approximate knowledge of the facts of a case".

Although this admission was made in considering the law generally, it is clearly very relevant to cases involving the employment relationship. A tribunal that cannot be apprised of all the facts, and cannot comprehend the significance of important aspects of a relationship, is necessarily unable to make a meaningful assessment of that relationship.

It is particularly worrying that the overwhelming focus of tribunals is on the perceived interests of the great majority of workers with secure jobs (insiders), to the neglect of the adverse effects on the minority of marginal workers and the unemployed. While growing numbers of students of labour markets are now prepared to concede such adverse effects, the judiciary seems yet to reach even the student stage. In short, the intrinsically complex nature of the employment contract provides a powerful argument against judicial intervention.

Recent improvements

The growing concern about excessive interventionism that developed in 1998-99 became a matter of public discussion last year and was followed by some improvement within the legal arm.

Some public criticism

The main public commentary has been:

(i) An editorial in *The Australian Financial Review* of 7 February, 2000 featured worrying aspects of Justice Gray's extraordinary injunction, which prevented BHP Iron Ore pursuing individual agreements because they could involve discrimination against union members. The editorial highlighted:
- The growing tendency for the Federal Court to interpret the *Workplace Relations Act* in ways that help unions pursue their agendas;
- The difficulty this created for even large employers to effect changes needed to improve efficiency, and the likely adverse employment effects;
- The establishment of a panel of specialist Melbourne-based industrial relations judges, nearly all former union barristers, and the need to change arrangements that appeared to continue the industrial relations club.

(ii) Two days later *The Age* published an article by its State political reporter entitled *IR Chaos*, drawing attention to the outbreak of major disputes in the construction, airlines, automotive and manufacturing industries. The article saw this as clearly the start of a determined attempt by unions to undermine the trend to enterprise and individual bargaining and to force a return to industry-wide bargaining.[35]

(iii) That was followed by a paper presented to the Leo Cussen Institute on 29 March, 2000 by Richard Dalton of Freehills arguing that there had developed "aggressive industrial action by unions and a lack of rigour by the Federal Court (and to a lesser extent the AIRC) in applying the relevant compliance provisions under the [*Workplace Relations*] *Act*". Dalton pointed out that certain provisions in the Act designed to limit industrial action had been rendered ineffective because:

- "At times" the AIRC was reluctant to issue orders under Section 127 to stop industrial action, often preferring to grant union applications for adjournments and long conciliation sessions, with employers thus coming under pressure to compromise to obtain a return to work;
- Even when Section 127 orders were issued, the Federal Court showed "a distinct reluctance" to issue an injunction to enforce them, adopting instead an approach that was overly technical and would drag out proceedings. The Court was also "giving primary attention to the unions' and employees' bargaining positions";
- Attempts by employers to obtain protection against industrial action by having recourse to the Victorian Supreme Court were effectively prevented by the Federal Court, which appeared determined to establish a monopoly position as the judicial decision maker in industrial matters.

(iv) The next stage in highlighting concerns about judicial intervention was the paper presented by Melbourne barrister Stuart Wood to the HR Nicholls Society's May, 2000 conference.[36] Wood gave many examples of tribunal decisions on industrial issues and highlighted the fact that many unions simply treated Section 127 orders as having no effect. He pointed out, indeed, that one prominent union official, Craig Johnston, had boasted publicly that: "I've got hundreds of them and I just throw them in the bin".

This paper also noted that, as a consequence of the Federal Court's attitude to Section 127 orders, employers had turned to common law remedies in the Supreme Court. The thrust of Wood's paper was that the Federal Court had attempted to prevent this from happening by granting anti-suit injunctions against the Supreme Court and, for the first time ever, was hearing appeals from the Supreme Court in industrial matters.

Wood also noted that ten of the Federal Court judges, who had been appointed by the previous Labor government and who had been part of the previous Industrial Relations Court, were continuing to operate a *de facto* Industrial Relations Court through the administrative mechanism of the Federal Court industrial docket system. Although he also observed that four "commercial" judges had started to sit on industrial cases "in the last few months", his presentation clearly indicated that unions were continuing to receive preference over employers and the Federal Court was attempting to set itself up as an intermediate appeal court between the Supreme and High Courts in industrial matters.

(v) Another significant development indicating concerns about the Federal Court was an important article on 12 June, 2000 by *The Age*'s industrial correspondent, Paul Robinson.[37] While this article contained some typical *Age*-type misrepresentations and one-sidedness, it made several important revelations, *viz*:

- At the judges' biannual conference in April "some interstate judges expressed concern about the damaging publicity judges in Melbourne were receiving, which they said reflected on the Court as a whole".
- The Chief Justice of the Federal Court had allocated five extra judges – Merkel, Goldberg, Kenny, Finkelstein and Weinberg to the industrial panel. While these extra judges were said to be "assisting" Justices North, Marshall and Ryan to cope with a "rapidly increasing industrial workload", the reality appears to be that those three judges, along with Justice Gray, are largely undertaking other duties. Justice North, for example, appears mainly to be sitting on immigration cases. (There has been no change, however, in the system by which Federal Court cases are assigned to a judge's docket and that judge stays with the case. By contrast, in the Supreme Court a case is assigned to a subject-based list rather than a judge's list.)

- The leading union lawyer, Josh Bornstein, was quoted as accusing certain identities of conducting a campaign against the Federal Court, which is simply "applying the law as it stands". According to Bornstein, this campaign came from:

  > "… a very small but vocal group associated with the HR Nicholls Society. A lot of federal government policy in industrial relations is driven by the HR Nicholls Society and the Institute for Private Enterprise, which is the same as a Labor government taking advice on IR policy from Spartacists!".

- The article attempted to portray as responsible the fining in May by Justice Merkel of union officials Mighell and Johnston for contempt of court in relation to the holding of statewide stop work meetings late in 1999.[38] However, the fine of $40,000 was not only minuscule in relation to the deterrent effects on employment and other damage to business that would have been wrought by these two officials, but was made payable by the garnisheeing of their wages; i.e., the penalty could be met by payment over a period. Importantly, the costs order against the employer considerably outweighed the penalty imposed upon the union.

(v) On 27 July, 2001 Stuart Wood pointed out in an article in *The Australian Financial Review*[39] that, in strongly supporting the existing system in a speech before the Labour Law Association, Justice Kirby had so clearly entered the political arena "that it's hard to differentiate Kirby's speech from Labor policy".

It is doubtless possible to argue that the action taken by the tribunals, as described by Mr Dalton, was consistent with one interpretation of the *Workplace Relations Act* 1996. For their part, Federal Court judges would presumably say that the Act has impelled them to be more interventionist because it made provision for injunctions to be issued under Section 127 and for breaches of the freedom of association requirements. However, the question at issue is how the courts and tribunals use their legislative discretion. For example, it was clearly the intent of the Act to prevent arbitration on bargaining issues during bargaining periods, and to strengthen the compliance provisions to deal with unlawful industrial action. Indeed, in his Second Reading Speech on 23 May, 1996, Minister Reith stated that the intent of the compliance provisions was to give "parties suffering from illegal industrial action….access to effective legal redress, including injunctions and/or damages. Industrial action that continues in breach of such directions from the court will be in contempt of court". It was clear that many judges of the Federal Court interpreted Section 127 in accordance with personal whim rather than give effect to parliamentary intent.

Also, the Federal Court granted anti-suit injunctions, and heard appeals from the Supreme Court on industrial issues, in circumstances in which Parliament had made it clear that the traditional Supreme Court common law remedies were available, and the traditional appeal routes had not changed. This can be seen as part of the Court's strategy not only to favour unions directly but also to establish itself as a major player in industrial issues, and thus favour unions on appeals instead of leaving it to the Supreme Court to hear appeals. To the extent it succeeds, the composition of the Court makes it almost inevitable that it will be interventionist. It would also by-pass the new Courts of Appeal established for Supreme Courts in Victoria and NSW.

How much has interventionism reduced?

The public commentary and the (not unconnected) decision to change the composition of the Federal Court have led to some reduction over the past year or so in judicial intervention, and some attempt to deal more effectively with aggressive union behaviour:

- Unions have reduced their previous attempts to have cases held in the IR capital of Australia. This implies a sidelining of the coterie of former union barristers within the Federal Court that was grossly sympathetic to union positions.

- As the Federal Court has stopped granting injunctions against Supreme Court actions, this suggests that unions have accepted that they have reduced chances of getting anti-suit injunctions. However, this came about only after the public complaints led the Federal Court to introduce a requirement that three judges have to grant a stay of a Supreme Court decision. Moreover, the Supreme Court's bad experience with anti-suit injunctions issued by the Federal Court has made it reluctant to issue orders against strikes and has therefore made it less worth employers' while pursuing strike-restraining applications in that Court. At the same time, by focusing on applications to stop unlawful and violent picketing, employers have reduced the chance of unions being successful with an anti-suit injunction.
- There has also been a significant drop in Section 127 actions asking the Commission to issue an order to stop or prevent threatened industrial action. It is not clear why this has occurred. The reduction in such action may reflect greater union concern that a follow-up Federal Court injunction may be issued requiring observance of a penalty provision. It may also reflect a strategy of presenting a "softer" union image in the lead up to the federal election in the hope that a Labor government will implement re-regulatory measures.
- Despite its timidity, Justice Merkel's $40,000 fine of Mighell and Johnston can at least be seen as an attempt by the Federal Court to discipline militant unions by giving effect to a Section 127 order. (Note, however, that although the dispute was in Victoria and involved Victorian manufacturing unions, the Australian Industry Group demonstrated its confidence in Victorian judges by deciding to seek the Section 127 order in Sydney, where it was granted by Justice Whitlam.)
- The Federal Court now appears somewhat less sympathetic to union applications to prevent the introduction of workplace changes by management. In December it gave the Employment Advocate favourable decisions in two separate cases commenced in March, 1999 and involving threats of industrial action by Queensland unions with the object of preventing the employment of a non-unionist. However, no decision was made on penalties and the CFMEU has appealed against the decision.
- In December the Burnie Port Corporation succeeded in an appeal to the full bench of the Federal Court against a decision by Justice Ryan that the Corporation had contravened the freedom of association provisions by refusing to employ a prospective employee because he would not accept employment under the individual agreements policy that the corporation was pursuing. The Court took the view that the *Workplace Relations Act* 1996 did not prevent an employer from offering one form of employment rather than another.
- In an address to the Industrial Relations Society of New South Wales on 20 March, 2001, the Employment Advocate, Jonathan Hamberger, indicated that, of the nine cases that have gone to the Federal Court (four against employers, four against unions and one against both), only one has been lost by the Advocate, and that is currently the subject of appeal. This part of the legal arm has dealt with over 1,000 freedom of association complaints, with complaints in relation to the right *not* to be in a union outnumbering those in relation to the right to be in a union by about three to one. The great majority of such complaints have been satisfactorily resolved without taking legal action. However, as recently as 24 August, the Federal Court was still intervening in these matters by excluding evidence showing CFMEU intimidation and thuggery.[40]

While the foregoing suggests some improvement in the legal arm's handling of the situation, there remains substantial evidence of excessive interventionism, an inadequate response to aggressive union action and an unsympathetic attitude towards structural reform by business. Thus:

(i) Unions and unionists have continued to be allowed to get away with illegal behaviour and obstruction of needed productivity improvements:

- In Queensland, for example, coal-mining unions successfully flouted court orders earlier this year when strong action was taken against BHP's attempts to improve the efficiency of its coal operations in that State. Such union action may have reflected a fear that BHP would attempt to move to individual agreements in coal as well as iron ore rather than the enterprise agreement being debated. A Supreme Court order for unions to maintain order on picket lines and on coal trains was openly defied by individuals whose reckless behaviour prevented trains from running to the port. An application by BHP to have the protected bargaining period terminated was rejected by the AIRC on the basis that the protected strike action had not been sufficient to threaten the national interest. Finally, after four months of mediation and negotiation under the Commission's direction, it would appear that an agreement will be concluded this month. While reforms have improved productivity by up to 20 per cent, with much of this resulting from reductions in employees (BHP's Queensland workforce has reduced from 4,700 to 2,600 over four years), and while this latest agreement will introduce further reforms, the process has incurred considerable unnecessary costs, including much management time.
- Although in March the Federal Court fined the CFMEU $200,000 for contempt, one can only doubt the effectiveness of fines of this size for such a powerful union, whose officials are prepared to engage in what Justice Kiefel described as "calculated, devious, dishonest and cynical" actions. The fine culminated from an illegal stoppage at five of BHP's Illawarra coal mines in February, 2000 as part of a national strike against BHP's price settlement with Japanese steel mills. When the CFMEU in NSW then extended the strike at the Illawarra mines to 48 hours, BHP obtained a return to work order from the AIRC but employees failed to return, pleading they had not received adequate notice. This was disproved in court and led to the subsequent Federal Court fine. The CFMEU action also needs to be seen in the light of its earlier national coal strike against BHP's alleged failure to achieve coal price increases, which led to the CFMEU's infamous charge of Parliament House, Canberra.
- In industrial action last December, the AMWU led a violent attack against *The Age* that included breaking the paper on the printing presses, pressing emergency buttons to stop the presses, and completely disregarding an injunction issued by Justice Marshall at 12.30 am (it might be noted that *The Age* was dissuaded by the Federal Court from going to the Supreme Court). In the ensuing case,[41] the unions made no attempt to dispute the facts and Justice Finkelstein imposed penalties of $8,000 on one union and $6,000 on another. However, he refused to grant an injunction that would provide the basis for a future contempt action, on the ground that "there is no evidence [of]… a real risk of unlawful industrial action" – but he gave no reasons for that view. Moreover, although he acknowledged the "considerable loss for many people" resulting from the action, his penalties were less than the pathetic maximum of $10,000 (which has apparently never been "awarded"!).
- Last August the CFMEU trashed the National Gallery site in a bout of deliberate destructiveness which was vividly described by Justice Goldberg in the case against the union by Abel Constructions. A Supreme Court injunction has been issued restricting union entry, but the Federal Court trial is still to be held.
- The State Secretary of the Workers First group, Craig Johnston, appears recently to have led a similar trashing expedition against Skilled Engineering in regard to a dispute over contract employment. However, on this occasion police at least responded, with the result that he and some other AMWU officials have been charged with aggravated burglary, riot and affray.

- The blatant repudiation by the CFMEU of agreements made in the Victorian 36 hour construction industry dispute contrasts with the subsequent readiness of the AIRC to approve increased demolition allowances. The industrial and legal tactics during the Victorian Construction Industry 36 hour dispute of early 2000 were a huge success for the union, and its pattern agreements have since been extended outside metropolitan Melbourne. Indeed, according to the Master Builders Association, after the "agreement" the unions continued to conduct aggressive industrial action within the Victorian building industry, and also engaged in pay-backs against companies that (almost uniquely for the industry) joined together to oppose the Campaign 2000 push. Having effectively wasted over $1 million on that opposition, there has naturally been great reluctance by employers to take legal action to curb union militancy. Action by an individual employer would be almost unthinkable. Anecdotal evidence suggests a deterioration in productivity in the Victorian construction industry.
- The best that can be said about the tribunals' treatment of militant action is that employers' access to the Supreme Court to prevent violent picketing, and a somewhat less sympathetic approach to union actions by the Federal Court, appear to have stopped unions achieving all their objectives. But unionists such as Craig Johnston have retained significant media credibility as a spokesman for "the workers" and, when it is used, Section 127 remains relatively ineffective in dealing with militant union action. Some of the "quietness" may reflect a short-term political strategy by unions. Overall, the Federal Court can scarcely be said to have encouraged attempts by business to improve efficiency.

(ii) Considering the last five years as a whole, attempts by "aggressive" unions such as the CFMEU, the AMWU and the CEPU to prevent freedom of association and enforce union restrictive practices, by coercion and intimidation of both employers and employees, have probably become more successful. Importantly, the Employment Advocate's recent report on the building industry[42] indicates that much of the intimidatory kind of union behaviour is "outside the jurisdiction of the Employment Advocate", and that his actions are limited because of "complainants' fear of repercussion". It also asserts that referring to other authorities is ineffective because "they will not be actioned with any priority". This is clearly a reference to the well-known reluctance of police to prosecute as a result of complaints about intimidation, coercion and even violence in the industrial area. For example, in the case of a West Australian CFMEU official who failed to observe the conditions of his right of entry to a particular building project, the Advocate had to take him to court, where he was fined and ordered to pay costs.

The successful flouting by some unions of court orders (which recalls the infamous description of unions in the Hancock Committee report of 1985 as "centres of power" that should not necessarily be treated as subject to the law on the same basis as other "subjects"),[43] presumably reflects an unwillingness by the legal arm to create a "crisis" by confronting the situation and sending union officials to jail and/or making unions insolvent (except in extreme cases, such as the action taken against the Builders Labourers Federation by the Victorian and federal Labor governments in the 1980s, which led to the deregistration of the union but its effective merging with and partial take-over of the CFMEU).

The decision last month by the political arm to establish a(nother) Royal Commission to investigate the building industry[44] confirms that, where unions continue to operate aggressively, there is an acquiescence by the legal arm in an imbalance of bargaining power that actually accords favorable treatment to unions. Such pro-union judicial interventionism also, of course, has adverse effects on law-abiding employers and employees. But what seems to be needed is not another inquiry but action to ensure the law is actually implemented.[45]

(iii) Although Justice Kenny rejected union claims that BHP Iron Ore's[46] individual agreements policy constituted discrimination, it took over a year before Justice Gray's injunction stopping BHP from making further individual agreements was removed. After being assigned the case, Justice Kenny required senior executives to spend considerable time giving evidence about the company's intentions. In effect, she tried to put herself in the position of company executives in order to test whether those executives were genuinely seeking the conclusion of individual agreements for efficiency reasons – "BHP industrial relations management's reasons for introducing the Workplace Agreements (are) a central issue in this case".

The fact that Justice Kenny's judgment ran to 76 pages tells a story: if BHP had to incur what must have been large costs in terms of management time alone, how would smaller companies fare if they have to go through similar procedures in trying to introduce individual agreements? It also indicates the economic burdens that the award regime imposes on companies and workers alike: while companies such as BHP are able to offer substantial increases in remuneration to workers who accept individual contracts, that simply indicates that the award regime is imposing a huge economic burden on all involved in the enterprise. Clearly, the rewards that follow from escape from this régime can be shared between the shareholders and the workers.

The importance of this case is illustrated by the decision of the ACTU to become actively involved, and to make a major effort to persuade those who had not signed individual agreements to hold off decisions pending amendments by the newly elected Western Australian Labor government to that State's industrial legislation. However, in June the AIRC revoked the entry permit to the Pilbara site of an ACTU organizer because, while trying to persuade employees not to sign individual agreements, he failed to observe the entry conditions. Moreover, with Premier Gallop claiming to have brokered a compromise, the State's legislation is now expected to allow individual agreements (to be known as employer-employee agreements or EEAs), albeit presumably involving deterrent-like procedures. In the meantime, although the ACTU's major effort to hold the fort has kept BHP Iron Ore's individual agreements to about 55 per cent of the workforce, the company claims the changes already made should increase productivity by 15-20 per cent.

(iv) Rio Tinto has had a similar experience to BHP Iron Ore in its long running attempts to improve productivity at the key Hunter Valley No. 1 Coal Mine.[47] While the latest AIRC verdict accepted that Hunter Valley No. 1 had established the need to improve productivity and hence to reduce the number of employees, before reaching her decision Deputy President Leary effectively tried to sit in the managers' chairs for 57 days, to hear 51 witnesses and examine 85 witness statements (which were even acknowledged by Ms Leary to have involved "a great deal of time … pursuing evidence which was of little or no relevance"). In what some might see as having an element of pay-back for some of Rio's earlier actions in the Commission, she eventually decided that the method used to lay off 288 employees, which included detailed assessments of performance of individual workers as opposed to the seniority approach demanded by unions, contravened Section 170 CE of the *Workplace Relations Act* 1996 that forbids terminations to be "harsh, unjust or unreasonable".

In effect, the Deputy President reached the absurd conclusion that the company shouldn't use previous performance to determine who should remain at Hunter Valley No. 1, and should re-instate those made redundant over the previous two years (70 of whom have, however, already accepted voluntary redundancy). While it is scarcely surprising that the company has appealed to the full bench (and succeeded in staying re-instatements), the serious aspect of this case is the deterrent and cost effects for businesses that want to improve their productivity.

(v) While the Federal Court's interventionist enthusiasm may have been curbed by the over-turning by the High Court last November of its decision in the St George Bank case, a very fine line of interpretation was involved in deciding whether there had been a "transmission of business" when the bank had created an agency at a chemist. The Federal Court had concluded that the bank had assigned part of its business to the chemist, and that the agent was therefore bound by the relevant banking award, but the High Court said that "it is not correct that it is carrying on banking business. It is carrying on the business of a bank agent".[48] It is not difficult to imagine that businesses would be hesitant in making substantive investment and employment decisions dependent on such judgments.

The scope provided for judicial intervention in the employment relationship, whether by the AIRC or the Federal Court, remains very large. The *Workplace Relations Act* 1996 comprised 536 main sections plus numerous supplementary sections, most requiring judicial interpretation, not the least being the 20 allowable award matters under Section 89 of the Act to which industrial disputes are notionally confined. (While the Government was successful in having the Senate pass legislation on 7 March, 2001 removing "tallies" from the list, the AIRC had already deleted them from the main meat industry award and replaced them with a payment by results system. The Democrats refused, though, to delete union picnic days from 750 awards on the ground that workers would continue to have a day off because such days already have public holidays gazetted by the States!) The question for the legal arm, and the community more generally, is the basis on which it should exercise its interpretation.

Conclusions

It can be argued that the prime responsibility for the extent of third party intervention in Australia in employment relationships lies with the failure of successive governments to address the issue at the political level, and the associated failure of others (particularly the business and academic communities) to actively support the rights of people to manage their own relationships. However, the legal arm must also share a substantial part of the blame, if only because it has promulgated an increasing role for judge-made law in interpreting "what society demands". It has surely failed to recognize the extent of competition in the labour market, the virtual impossibility of making meaningful judgments on employment contracts and the considerable security now provided to those in social need. It has equally failed to pay heed to the objects of statutes as required by the *Acts Interpretation Act*.

The adverse social and economic effects from interventionism in the employment relationship demonstrate the serious problems with the subjectivisation approach. The Chief Justice of the High Court has identified many of the general problems with this approach, but he has not addressed the important industrial relations area and has left open the question of what should be done about the issue. As there seems little prospect that the legal arm will itself take action to reduce interventionism, there is a strong case for reducing by legislative means the discretion that tribunals and courts can exercise in this field. I have published some proposals on this aspect.[49]

There is also the question of the marked contrast between interventionism in the corporate and industrial relations areas. Those thought to have infringed corporate law are pursued and, if caught and convicted, are fined or jailed and the companies they have operated are made insolvent. Some are even barred from operating a business. But, while this is appropriate, there appears to be very limited comparable action in relation to behaviour by unionists/ employees that is either unlawful or deliberately obstructive, and there are few higher penalties for repeat offenders.

The apparently "soft" approach adopted in dealing with such unlawful/obstructive behaviour seems to reflect a fear that, say, jailing a unionist or sending a union insolvent is socially unacceptable while providing the same treatment to a "greedy capitalist" is not. The reluctance of the police side of the legal arm to pursue complaints against intimidation and coercion by unionists is part of this syndrome, and helps explain why Royal Commissions into the construction industry are needed from time to time to bring a temporary halt or easing in criminal behaviour in that industry. There is also a natural reluctance by employers to pursue penalties to the maximum degree.

One way of dealing with this problem might be to create a body to ensure competition in the labour market and to prosecute those who behave unlawfully, just as the Australian Competition and Consumer Commission prosecutes, some would say too readily, anti-competitive behaviour by business in the production and trading fields. The NSW Building Industry Task Force operated successfully for three years in the construction industry and it could provide a model for a body with wider authority.

The recent moderation in the extent of judicial intervention in industrial cases does suggest that expressions of concern from various quarters have produced some response from the legal arm, most notably reflected in the Federal Court's compositional change and the slightly more amenable attitude to employers' attempts to restructure employment arrangements. But even there the picture is mixed, and it seems absurd that compositional changes in a court should be a determining influence. There is certainly a need to reduce the role of the Federal Court.

It remains particularly worrying that an examination of the plethora of industrial cases dealing with the *Workplace Relations Act* 1996 reveals no precedent that would enable one to advise an employer that he could confidently pursue this or that course of action; or, as Justice Guidice put it, "the outcome of particular cases is of very little predictive value in similar cases". To the outsider at least, it seems that ad hocery prevails. Chief Justice Gleeson's "abiding need for predictability and certainty" is nowhere to be found: it has been overwhelmed by the "irreversible move towards subjectivisation of issues".

Finally, particularly if Labor were to attain government in Canberra, there is a further worry that even the recent slightly more moderate Federal Court approach will not last. Labor has already largely adopted the ACTU's industrial relations interventionist agenda and was responsible for many of the aberrant Federal Court appointees. Those who believe that minimal intervention in employment relationships is in the best interests of the community clearly need to explain and proselytize better their arguments that society is not demanding judicial intervention, and that we would all be much better off without it. It seems unbelievable that grown men and women should behave as the participants in this interventionist system have been behaving, and continue to do so. As Dr Johnson said of an acquaintance, "such an excess of stupidity, Sir, is not in nature".

Endnotes:

1. I acknowledge the generous assistance provided for this paper by Dr John Forbes, Mr Ray Evans, Mr Barrie Purvis, Mr Geoff Hogbin and others who prefer to remain anonymous. They are not responsible, however, for my comments and interpretations of judicial intervention.

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26. Kirby, Michael, *Industrial Relations Law – Call Off The Funeral*, at *www.hcourt.gov.au*, 18 July, 2001. Mr Kirby was a member of the AIRC before being appointed to the High Court, as was Justice Mary Gaudron.

27. Productivity Commission Staff Research Paper, *Distribution of the Economic Gains of the 1990s*, Commonwealth of Australia, November, 2000.

28. Moore, Des, *Reform's big problem is political,* in *The Australian Financial Review*, 15 December, 2000.

29. Hogbin, Geoff, *Employment Relationships, Employment Contracts and Earnings*, unpublished mimeo, 2000.

30. Malcomson, James M, *Contracts, Hold-ups and Labor Markets,* Journal of Economic Literature (1997), 35(4) pp.1916-57, especially p. 1917; and Baker, George, Gibbons, Robert and Murphy, Kevin, *Relational Contracts and the Theory of the Firm,* mimeo (1999),Harvard Business School.

31. *Future Success Depends on People*, Sam Walsh, AMMA Conference, Perth, 8-9 March, 2001.

32. While this statement is broadly correct, at least two substantial caveats should be noted. First, where a firm has the capacity to earn economic rents (i.e., returns to special advantages not enjoyed by competitors, such as an unusually rich mineral deposit), union power may be used to capture part of the rent through shirking at the expense of the owners. Second, in non-traded goods industries some of the costs of shirking may be passed on to consumers in the form of higher product prices. Also, the statement does not mean that employers need not be concerned about shirking – an employer who fails to control it at least as well as his competitors will not survive. Rather, in the longer run there tends to be an equal amount of shirking, the level of which reflects the prevailing labour market institutions. Moreover, each employer separately has a financial incentive to gain a competitive advantage by devising employment contracts that reduce the costs associated with shirking.

33. Rendall, Curt, *Unfair Dismissal Laws 'Worse Than Recession'*, in *The Australian Financial Review*, 20 March, 2001.

34. *Workplace Relations Amendment (Termination of Employment) Act* 2000.

35. See also Wood, Alan, *Menaced by Union Muscle*, in *The Australian*, 14 March, 2000.

36. Wood, Stuart, *The Death of Dollar Sweets*, at *www.hrnicholls.com.au*, May, 2000.

37. Robinson, P, *Contempt of Court*, in *The Age*, 12 June, 2000.

38. *Australian Industry Group v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] FCA 708.

39. Wood, Stuart, *For impartiality's sake, do curb Kirby*, in *The Australian Financial Review*, 27 July, 2001.

40. *Employment Advocate v. Williamson* [2001]FCA 1164 (24 August, 2001).

41. *The Age Company Limited v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000], FCA 1757.

42. Hamberger, Jonathan, *Employment Advocate Report on The Building Industry*, at *www.dewrsb.gov.au*, 11 May, 2001.

43. *Report of the Committee of Review of Australian Industrial Relations Law and Systems*, Commonwealth of Australia, 1985.

44. Abbott, Tony, *Royal Commission to investigate building industry*, Media Release, 26 July, 2001.

45. See also, *Inquiry won't fix construction*, editorial in *The Australian Financial Review*, 20 July, 2001.

46. *AWU v. BHP Iron Ore Pty Ltd* [2001] FCA 3; *AWU v. John Holland Pty Ltd* [2001] FCA 93; and *NUW v. Qenos Pty Ltd* [2001] FCA 178.

47. Davies, Allan, *Coal Reform – the Hunter Valley No 1 story*, at *www.hrnicholls.com.au*, March, 2001.

48. *PP Consultants Pty Limited v. Finance Sector Union* [2000] HCA 59.

49. See Moore, Des, *op.cit.*.

Chapter Seven:
The Senate Today

Harry Evans

A paper presented to the eighth conference of this Society in 1997 advanced an exposition of the intention of the framers of the Constitution in establishing the Senate.[1] That intention was expressed in quoted statements by leading framers to the effect that, by representing the people of each of the States equally, the Senate would require a double majority in the legislature to pass any laws: a law would be passed only with the support of a majority of the people and a majority of the people of a majority of the States, both speaking through their elected representatives. This applied to ordinary laws the same formula as is applied to changes to the Constitution by referendum under s.128. In short, the Senate was to ensure that the legislative majority would be geographically distributed, and that it would be impossible to form a majority in the legislature from only one or two regions. Without that safeguard, it would be possible for the legislative majority to rest on the votes of Sydney and Melbourne, to the detriment of other parts of the country.

This theory of the geographically distributed majority was contrasted with the current common and facile treatment of the Senate, which is along the following lines: the framers of the Constitution intended that Senators vote by States and according to the interests of their States, and as this has never happened, the intention of the framers has never been realised. This erroneous but commonplace pseudo-analysis is refuted by even the most casual reference to what the framers actually said.

On that basis, it was suggested in the 1997 paper that the Senate has fulfilled the framers' intention, in that it has been impossible to form a legislative majority from only one or two States, or from Sydney or Melbourne, and the formation of geographically distributed majorities has avoided the extreme alienation of the outlying parts of the country such as has been evident in Canada.

The emergence of the two-party system, with highly cohesive parties divided by class and ideology, did not altogether overthrow this effect of equal representation in the Senate, but, combined with first-past-the-post and later simple preferential voting, produced lopsided party results in the Senate, greatly at variance with the actual pattern of party voting by the electors.

The cure for this situation was proportional representation, introduced in 1948, which has now been in effect for more than half the life of the Constitution. It was suggested in the earlier paper that proportional representation enhanced the formation of a geographically distributed majority in the Senate by providing an ideologically distributed majority. Given that the electors vote for parties, proportional representation ensures that parties achieve representation nearly in proportion to their share of the electors' votes. In that sense, Senate elections produce a more representative result than elections for the House of Representatives. In that House, single-member constituencies result in the elimination of minority parties that may attract up to 20 percent of electors' votes, and in parties winning majorities, and thereby winning government, with less than 50 per cent of the electors' votes, and often with fewer votes than their major rivals, before and after the distribution of preferences.[2]

There is an historical difficulty with this thesis that proportional representation complements the geographically distributed majority. No one raised this difficulty in 1997. It could have been raised by the simple question: why did Richard Baker oppose proportional representation?

Richard Baker was a leading framer of the Constitution, who participated in the Conventions of 1891 and 1897-8, and who later served a six-year term as a Senator and as President of the Senate. He was the leading exponent of equal representation of the people of the States in the Senate, of the equality of power between the Senate and the House of Representatives, and of the theory of the geographically distributed majority. When the then government attempted, in 1902, to introduce proportional representation for Senate elections, however, Baker vigorously opposed this measure, taking the unusual step of speaking against it from the Chair in the Senate.[3] He opposed proportional representation because it would produce "cranks or faddists", what we would call single-issue candidates, rather than representatives of a broader range of public concerns. He defended the then existing electoral system on the basis that it was better to have a two-party result, with representatives dividing basically between liberals and conservatives.

This defence of a two-party system by a leading exponent of equal representation of the States in the Senate surprises us. How could the Senate perform the role he envisaged for it with a two-party system? Was not the two-party system the very problem which led to the ultimate introduction of proportional representation? The answer to this conundrum is that the parties envisaged by Baker were not the parties of ten years later and for most of the Commonwealth's subsequent history. His parties were perfectly consistent with the constitutional role of the Senate. There was no inconsistency between Senators dividing into two parties and their representing the people of their States by ensuring that the legislative majority was geographically distributed.

This draws attention to the greatest change which overcame the Commonwealth after its founding, which would have disturbed the men of 1901, and did disturb those of them who survived to see it. The situation whereby electors vote for nationally-organised parties and for national leaders, often with little knowledge of local candidates, and the parties vote as blocs in Parliament, bound to the party line on every question, radically changes the system of government.

In the House of Representatives, this development put an end to "responsible government" as it was understood by the founders, in that governments and Prime Ministers came to control the House through their assurance of a controlled party majority. Governments became accustomed to using their control of the House to suppress all legislative activity in that forum.

We have come to regard this situation as normal, and no longer think it remarkable. Government legislation is pushed through without amendment, debate is curtailed, no serious inquiry into government activity is permitted if it would be even remotely politically embarrassing. Responsible government as it was understood in the 1890s survived only in the Senate, and only to the extent that the Senate, free of a government party majority, was able to hold the government accountable, however fitfully. (In other places a distinction has been drawn between governments being responsible (liable to be dismissed) and accountable (required to give account of their activities),[4] but here the two closely-related concepts are merged.)

Proportional representation somewhat restored responsible government by making it more likely that governments would lack a Senate majority and therefore would be held accountable in the legislature. On the other hand, proportional representation greatly strengthened national party machines because it is essentially a system based on voting by party through party tickets. Thus, the statement that the Senate more accurately represents the voting pattern of the electors by States should be reformulated: the Senate represents more accurately the *party choices* of the people of the States.

In this connection it is necessary to make two observations about the nature of parliamentary scrutiny and control in the Australian parliamentary system as it now operates. Governments are accustomed to the total support of their party members, at least in public (and perhaps not only in public: it appears that government party meetings have in recent decades become somewhat like meetings of the House of Representatives so far as the government party is concerned, in that dissent tends not to be openly expressed in that forum, but is relegated to "private discussions".) Scrutiny of legislation, amendment or rejection of legislation, and vigorous inquiry into government activities usually comes only from other parties, and in the other House on which the government does not depend for its tenure of office. It is therefore easy for governments to fall into the habit of regarding all parliamentary scrutiny as simply the machinations of their political enemies.

In conducting themselves in this fashion, governments are their own worst enemies. The absence of parliamentary responsibility and the attribution of scrutiny to political opponents means that governments' mistakes go uncorrected and accumulate until their responsibility to the electorate finally hits them.

It should be emphasised that the manifestations of legislative scrutiny and control may be useful to the public, and also to the government itself, even where they are the work of the government's political opponents and rivals. Indeed, it is possible to make out a strong case that legislative scrutiny and control is all the more effective and desirable because it is the work of political opponents and rivals, and that governments benefit by these activities coming from that source, but it would be even more beneficial if government backbenchers would participate.

Secondly, in this situation the public relies on oppositions and minor parties always being champions of accountability. At least at the federal level and in the Senate, this is usually the case. There is, however, a sort of institutionalised hypocrisy involved. Major parties which aspire to gain majorities and form governments are champions of accountability when in Opposition, but resist accountability to the death when in government. Minor parties and independents are able to enjoy consistency by favouring accountability all the time. The public can only hope that this state of affairs continues. If an Opposition, intent on protecting itself in office in the future, combines with a government to suppress accountability, the public is in danger. If the major parties regularly coalesce in this way, bad government results.

Another point, foreshadowed at this stage, is in the form of a question: by conducting themselves in this way, are the major parties encouraging electors to vote for minor parties and independents, particularly in Upper Houses?

In another paper on the effects of proportional representation on the parliamentary system, a list was provided of accountability mechanisms established by the Senate over many years.[5] The list ranged from the establishment of a committee to scrutinise delegated legislation in 1932 to ensuring that taxation legislation is not made retrospective to a date earlier than a public announcement of the government's legislative intention. It was pointed out that any reasonable assessment of these measures would lead to the conclusion that they are valuable adjuncts to the parliamentary system from the point of view of the public. It was also pointed out that most of these measures had been opposed by the government of the day on their introduction, and had been introduced only because of the absence of a government party majority in the Senate. The list continues to expand: for example, last June the Senate agreed to an Order requiring government departments and agencies to publish details of their contracts, including statements of reasons for any provisions regarded as confidential. This list underlines the point that a measure of parliamentary accountability of government exists only because of proportional representation in the Senate.

It must be said that the lack of a government party majority in the Senate has another consequence. The majority of the Senate may amend or reject legislation, not to improve it, but simply to substitute its own policy preferences for those of the government. It is often difficult to separate quality control over legislation from pure differences on policy, and certainly there is no way of avoiding the latter without removing the former and the desirable effects of parliamentary scrutiny and control. The earlier paper also exposed the fallacy of those who think that the Senate should be able to scrutinise without rejecting or delaying government legislation: the point was made that a scrutinising body without legislative power would simply be ignored and its scrutiny would be ineffective.

The major consequence of proportional representation has therefore been to disguise the death of responsible government. By depriving governments of their controlled party majorities in the Senate, it has made the Senate the sole legislative House, where legislation is the subject of something approaching real deliberation. It has also partially restored the responsibility of the executive government to the legislature. In the absence of the Senate, the central executive government could legislate by decree, with results which have been only too well demonstrated in other jurisdictions.

The full effects of proportional representation, however, are still not fully appreciated. It has produced another unintended consequence, also contrary to the intention of the framers of the Constitution. It has resulted in a reversal of the intended representational roles of the two Houses of the Parliament.

The House of Representatives was intended to represent most directly the voice of the electors as most recently expressed. Changes in the opinions and choices of the electors would be swiftly and directly conveyed through the House of Representatives. The Senate would reflect the opinions and choices of the electors with a built-in delay because of the six-year term of Senators and their election by rotation, with half the Senate turning over at the end of each parliamentary term. By representing whole States, the Senators would also give expression to the more considered opinions and choices of the people of the whole Commonwealth. This view of the respective roles of the Houses was in accordance with the classic expositions of the rationale of bicameralism and Upper Houses.

As a result of proportional representation, however, shifts in opinion in the electorate are reflected more quickly and more accurately in the Senate than in the House. The Senate has become the House representing the passion and turbulence in the electorate, while the House filters out that passion and turbulence. This has been demonstrated also in State Legislative Councils elected by proportional representation. Surprisingly, this effect is largely ignored by the commentators and pundits.

Some of those very commentators and pundits tell us that there has been a long-term loss of voter loyalty to the major parties and a drift to minor parties and independents. They concentrate largely on the effect this will have on the formation of governments in the House of Representatives. The point that this trend, if it is a trend, will be most starkly reflected in the Senate largely escapes notice, although the presence in the Senate of a One Nation Senator should draw attention to this phenomenon.

The imminent general election may provide an illustration of both the phenomenon and the neglect of it. Whether or not there is an abandonment by the electors of the major parties in favour of a spectrum of minor parties and independents, it is entirely predictable that the concentration of comment on election night will be on who has won government in the House of Representatives. It is also predictable that the winners will be winners in name only, in the sense that the winning party, if there is one, will achieve significantly less than 50 per cent of electors' votes, and quite possibly fewer votes than their major rivals, before and after the distribution of preferences.

The turbulence in the electorate, if it occurs, will be reflected more directly and urgently in the composition of the Senate. It is possible that no party will win a majority in the House, but it is far more likely that the electoral system for the House will continue to do what it has done for the past ninety years or so: produce a winner, even with a minority of votes. Some weeks after the election, attention will turn to the Senate, and the real position of the winners, in the Parliament and in the electorate, will be appreciated.

This kind of result, if it occurs, is certain to make legislative life much more difficult for the "winners" in the House of Representatives. We are accustomed to the situation of a government not being guaranteed the passage of its legislation, having to compromise with other parties, and having its activities more rigorously examined than would otherwise be the case. It is not generally appreciated that this occurs because proportional representation lends legitimacy to these activities in the Senate. They are legitimised by the composition of the Senate more accurately reflecting the votes of the electors. It is also not generally appreciated that this effect is in proportion to the disparity between the representativeness of the two Houses. If a government's majority in the House is clearly unrepresentative of the electors' votes, the more representative majority in the Senate is less likely to defer to that government's authority. Recent governments have been weakened by "winning" elections without even a plurality of votes.

If there is a desertion of the major parties in the forthcoming election, as some predict, a non-government majority in the Senate may be emboldened to make even greater use of its legislative powers. We could have a situation in which the loss of votes by the major parties is such that a government formed by either side is quite delegitimised, its authority reduced to nought. The deadlock-resolving provisions in section 57 of the Constitution are of little comfort to a government in this condition.

It is possible to take a Panglossian view of this evolved arrangement, and conclude that perhaps it works in the end. The House of Representatives may be seen simply as an electoral college, which produces a government in much the same rough and ready way as the American electoral college. The Senate produces a representative legislature and provides some measure of accountability of the executive government.[6]

There is much to be said for this interpretation. We are troubled, however, by the voice of President Baker speaking to us from our past. Is it healthy for political parties to become closed sects, even if there are many to choose from? Would it not be sounder for parties to represent the real diversity of people and opinions within their ranks? Should they not also allow their members to perform their representational role and speak for their constituents more freely? Would people prefer to be represented by parties of that kind? Baker's implied questions are still pertinent.

This leads to the question foreshadowed above: is the currently accepted *modus operandi* of major parties actually undermining their electoral support? By maintaining their show of monolithic unity, pretending that they have the only true answers to all questions, while those of their opponents are uniformly wrong, resisting or suppressing parliamentary accountability measures, and controlling their members so rigidly, the parties may be contributing to a drift of votes to minor parties and independents, and encouraging voters to "split" their votes between the two Houses.

The 1997 paper concluded with the view that there is nothing basically wrong with the institutions of government, and that what is required is reform of the political parties. There is a stubborn refusal to think this thought. If the kind of election result which has been described eventuates, it is also predictable that the result in the Senate will be seen as anomalous, and as demonstrating the need for change in the structure of the Parliament, rather than as an accurate reflection of the electors' opinions and choices and as a reflection on the party system. Some people, however, may draw the lesson that it is time for the parties to reform themselves, so that they can reflect the diversity of the country and the considered and stable underlying views of the people, as Baker thought that they ought to be able to do in 1902.

A first step towards that reform would be for governments to abandon the pretence of infallibility and total unanimity on all points great and small, and to allow their own members to examine and deliberate on legislation, to make amendments, and to inquire into government administration. Both Houses could then fulfil their intended role of making good laws, scrutinising government and holding ministers accountable. This could make governments more effective and the electors less likely to vent their frustrations at the ballot box.

Endnotes:

1. *Federalism and the Role of the Senate*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp.125-137.

2. Figures for percentages of votes and percentages of seats won by parties in elections since 1949 are in *Odgers' Australian Senate Practice,* 9th ed., 1999, pp.23-26. The winning party in the House of Representatives received fewer first preference votes than the other major party in 3 elections since 1949, in 1954, 1987 and 1998, and in 5 elections the winner had fewer votes than the losers after the distribution of preferences, in 1954, 1961, 1969, 1990 and 1998.

3. *Senate Debates,* 19 March, 1902, pp.11007-11010.

4. In the item cited in note 5.

5. *Accountability Versus Government Control: the Effect of Proportional Representation*, in *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate,* ed. M Sawer & S Miskin, Papers on Parliament No. 34, December, 1999, pp.71-78.

6. Such an interpretation is offered by D Hamer, *Can Responsible Government Survive in Australia?,* 1994.

Chapter Eight:
Mr Beazley and his Plebiscites

Professor David Flint, AM

The constitutional safeguards are there "…not to prevent or indefinitely resist change…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". (Founding Fathers, Sir John Quick and Robert Garran)

Introduction

When it comes to its amendment, our federal Constitution prescribes one method – and one method only – for change. This is the Australian referendum. (Or rather, the Australian adaptation of the Swiss referendum.)

Our Founding Fathers were well aware of the difference between a constitutional plebiscite and a Swiss-style referendum. While a plebiscite is an acceptable method of finding out the peoples' views on some aspect of legislative policy, it should *not* be used in Australia to achieve constitutional change. Why?

Because the Founders knew how easily a constitutional plebiscite could be an instrument of abuse and duplicity. Napoleon Bonaparte, and his nephew Napoleon III, had demonstrated precisely this. The Swiss were well aware of this because Bonaparte himself had tried out the constitutional plebiscite on them – after he had invaded them. So the Swiss devised a way of ensuring that the people could *never* be duped. This requires the politicians seeking change to put all their cards on the table before the people vote. This is the Swiss referendum. It is this the Founders wrote into the Constitution.

Now we have a plan to circumvent, indeed to subvert, our Constitution. According to this plan, before any referendum on a republic, we are to have the French dictator's favourite device, the constitutional plebiscite. And not one, two! That alone is bad enough. But there is worse. Remember that this plan comes from the same people who failed, over the decade of the '90s, to come up with an alternative republican constitutional model which would work. They failed in 1993, and they failed again in 1999. Knowing this, they are now asking, they are inviting and indeed beseeching a vote of no confidence in the existing Constitution. If successful, this will next lead, of course, to a vote of no confidence in the flag.

If they can get a vote of no confidence in the Constitution, they actually intend this be followed by a constitutional vacuum to last over the decade. This is breathtaking in its irresponsibility.

So we are to have a "public education" campaign, then a second plebiscite, then some sort of a drafting exercise in which they will whip up yet another republican model (their third), and finally a referendum the result of which they cannot guarantee. Given the quality of their work over the last decade – at a direct cost of more than $150 million of taxpayers' money – it is more likely than not that their next, and third, attempt will also fail.

This is not the way the Founders prescribed for constitutional change. It goes against the spirit of the Constitution, which clearly and expressly prescribes only one way for constitutional change. This is the constitutional equivalent of going the wrong way in a one-way street.

How did we ever get to this point?

First let me remind you of the events that led up to the making of this plan. Then let me try to assess what is being proposed against what was so clearly intended by the Founders of our Constitution. And then I would like to say a few words on repeat referenda.

The 1999 referendum

The '90s were a decade of constitutional introspection, even instability. This was brought about by that small group who want constitutional and other change, against the general indifference of the Australian people. In 1998, Prime Minister John Howard, seeking a final resolution of the question, honoured an election promise made to the Australian people. He set up a Convention to choose a republican model to put to the people. Half elected, the other half was made up of State and federal government representatives, along with a few notables. Such is the fairness of our Prime Minister that a majority of the latter turned out to be … republicans!

At that Convention, the Australian Republican Movement turned its back on the obviously flawed 1993 model which its best minds had developed. In the very last few days they suddenly revealed yet another model. Although it did not win the approval of the Convention, it was overwhelmingly the preferred choice of the republican delegates. It was put to the people in a referendum in 1999.

There, against overwhelming odds – almost all of the mainline press, which actively campaigned for the model, about two-thirds of the politicians, a cast of celebrities, the Labor Party organisation, a good part of the Liberal Party organisation, the Australian Council of Trade Unions, and with great wealth – the "No" vote won about 55 per cent of the electorate against 43 per cent. About 2 per cent voted informal or abstained.

Even where the Australian Republican Movement was most active, in New South Wales, 70 per cent of electorates voted "No". In the other States the number of electorates voting "No" ranged from 51 per cent in Victoria to 75 per cent in South Australia, 80 per cent in Tasmania, and 93 per cent in Queensland and Western Australia. No matter how apologists explain this landslide, the people clearly preferred the existing Constitution to what was on offer.

Australians could be forgiven for believing that the defeat of the 1999 proposal should have settled the issue – at least for a decent interval.

In the aftermath of this devastating result the penny has dropped. The small but noisy group behind this have finally realised what is obvious. They are unable to produce a republican model which, when grafted onto the 1901 Constitution, will maintain its integrity. Their ultimate weapon was that with the New Year of 1 January, 2000, with the Olympics, and with the Centenary of Federation, we would be demeaned, disgraced and ridiculed by the whole world because of our Constitution and our flag. This has now been shown to be lacking completely in either merit or truth.

A new proposal

So the Australian Republican Movement, which incidentally promised it would no longer exist on 7 November, 1999, come what may, now demands that the taxpayers waste more money and the legislators spend more time on a cascading series of plebiscites which is designed to ensure a decade of constitutional instability.

So what precisely is being proposed? Notwithstanding the clear message from so many Labor supporters, who like their flag and their Constitution, ALP Leader Kim Beazley announced this to the 2000 ALP National Conference:

> "We need a process which gives all Australians a greater sense of ownership and genuine involvement in any proposal for a Republic. As I have said publicly, this could be achieved with the three-step consultative process which would begin with a plebiscite on the threshold question: do we want an Australian as our Head of State? If a majority of people agree, a second plebiscite would follow to determine the preferred mode of selecting the Head of State. Finally, a constitutional referendum would be held based on the outcome of the two plebiscites".

No doubt to the surprise of his audience, Mr Beazley disowned the model for which he had so vigorously campaigned in 1999. The fault, he said, was all Mr Howard's. The process Mr Howard "set up failed to deliver Australians a model they could accept"!

Mr Beazley indicated in a speech in Perth on 7 October, 2000 that the first plebiscite will be held in conjunction with the federal election *after* the next election. This could be in about 2004. This would be preceded by a programme of "community education", no doubt taxpayer funded. The first plebiscite would cascade into the second plebiscite, which will presumably coincide with the following election, perhaps in 2007. After some sort of drafting exercise involving conventions and forums, a referendum would be sometime later. (If it is to be like the campaign after the 1993 model was unveiled, it will be a republican propaganda campaign.) There is no indication that the States – and Territories – are to be simultaneously involved. Most State Constitutions require a referendum to change to a republic; it is inconceivable that any would be changed without one. It therefore seems we are to face up to eleven plebiscites and referenda. To date this process has cost $150 million. It is difficult to be precise on how much more is to be spent before a republic can be achieved – if it can.

The first plebiscite will be intended by its wording to achieve the result of a vote of no confidence in the 1901 Constitution. This process will no doubt be later replicated with the flag. (It should not be forgotten that it was intended that there be a change of our flag in time for the Centenary of Federation. This was thwarted by an amendment in 1998 to the *Flag Act*, introduced by John Howard. The National Flag can now only be changed after a majority of electors, voting at a plebiscite in which the Australian National Flag is included, choose a new flag. This is a good provision. Under this there can be no vacuum, for the plebiscite cannot invite a vote of no confidence in the present flag without immediately substituting another.) After the flag, what then? The names of our States, our cities, our streets? The States themselves? What limits will there be to eradicate our heritage and our history?

The Honourable Richard McGarvie argues that the first plebiscite would be:

> "….a process of drift, leaving the country without leadership and postponing resolution for a long time. What use would it be if we learnt in the first vote that, despite overwhelming support for an Australian Head of State, only a bit over half were prepared to vote in the dark in favour of an unidentified republic which they could not be satisfied would actually preserve our democracy? Unless a vote is on a model described in sufficient details for people to decide whether they are satisfied it would safely preserve their democracy in a republic and be otherwise satisfactory, it does little to advance resolution of the issue. Different republic groups would use the debate on the first plebiscite to promote the models they support. There would be great pressure on political parties to give some form and substance to the debate and seek political advantage by stating their preferred models. Once they did that they would in practice regard themselves as committed to promote their model. The debate would revert to adversary politics which would in practice place the issue beyond referendum resolution".

As with the flag, it is incumbent on those who want change to come up first with an acceptable constitutional model. If they want change they ought to be able to say what they want. To say you are republican is a useless observation. On many a respectable definition Australia is a republic. The question is, what sort of republic, and precisely which changes to the Constitution are proposed? This should be such that it can be either immediately substituted for the existing Constitution or be rejected. But the new strategy is to destroy confidence in the Constitution and the flag so that the task will be easier. The plan is that, eventually, the Australian people will give in and accept a second rate Constitution.

This process is designed to turn Australia into some as yet undefined form of republic, notwithstanding the clear evidence that Australians are just not interested in the question. As Mr Turnbull writes in his book, *Fighting for the Republic* (p.111), nobody is interested. This was confirmed beyond doubt by the Morgan Gallup poll taken immediately after the referendum.

Apart from the waste of taxpayers' money, as well as legislators', governments' and the people's time, this exercise should be condemned. Not only does it propose to subvert the Constitution. Worse, the clear intent is to create a loss of confidence in the present Australian Constitution without any guarantee that, after the resulting decade of instability, a new constitutional model will be produced which will be acceptable to the people. In fact, after Mr Beazley's speech, republicans began fighting over the best model to put to the people. In other words, while the proponents of change cannot agree on what is the best republican model, they also cannot agree on which model the Australian public will accept. In fact, they are so desperate that any republic will do, as long as it will pass a referendum.

The constitutional intention

To understand the danger of what is being proposed, let us go back to the work of our Founding Fathers. Our Founders carefully and exhaustively considered the question of how the Constitution should be amended. The Constitution they had drafted was to be a "binding and indissoluble social compact" between the people of the Australian Colonies (now States). That the people of each Colony had to be involved at all stages, and finally approve the Constitution, was in fact the centrepiece of the process initiated by Sir John Quick at Corowa in 1893. Under this, neither the drafting of the Constitution, nor its final approval were to be exclusively in the hands of the politicians. This is not to denigrate the role of the politician in the Commonwealth. But the politician's role is to be limited in constitutional matters, a point confirmed in the 1999 referendum.

How then to involve the people in any amendment to the Constitution? The Founders well understood the use, and indeed the misuse, of the constitutional plebiscite. From the time of the French Revolution to the drafting of our Constitution, there had been a total of about 40 national plebiscites and referendums in the world.

Of these, 24 would be recognisable to Australians as a referendum. That is, the full texts of the amendments (or of the Constitutions) were already on the table, not hidden. There was an opportunity for a proper debate, and above all the country was a democracy. Surprisingly *all* 24 were in one country, Switzerland.

The remaining 15 were not what Australians would call referenda. They were all constitutional plebiscites. The first was actually held in Switzerland in 1802. But it was a Switzerland under French occupation. There, the Swiss were asked to approve of a Constitution drafted by the French. And although the "No" vote exceeded the "Yes" vote substantially, Napoleon decided the "Yes" case had won. This was done by treating all abstentions as affirmative votes. An early example of electoral fraud!

Then there were three plebiscites to approve of the installation of a monarch. These were in Greece in 1862, in Mexico in 1863 and in Romania in 1866. The Mexican plebiscite was held under the auspices of an invading French army. The Emperor, Maximilian, was the nominee of the French Emperor, Napoleon III. He was approved by 99 per cent of the people. This vote was not reflected among those who then fought for an independent Mexico. The unfortunate Maxmilian, abandoned by Napoleon, was executed by a firing squad.

Then there was an aborted constitutional plebiscite in Mexico in 1867, but the votes were never counted. The Romanians also approved a constitutional change in 1864.

The remaining ten constitutional plebiscites, that is the bulk of them, were held in France. Almost all were held under authoritarian, if not dictatorial, regimes, with the probable exception of those in 1851 and 1852 which I will come to in a moment.

The French Revolution, from the Reign of Terror to the rise of Napoleon Bonaparte's dictatorship, produced seven plebiscites. These were to approve:

- In 1793 – The Constitution of the Year I (so called because the revolutionaries hated the past so much they threw out the Gregorian calendar);
- In 1795 – The Constitution of the Year III to introduce the *Directoire*;
- In 1799 – The Constitution of the Year VII to introduce the *Consulate*;
- In 1800 – The confirmation of Napoleon Bonaparte as Consul;
- In 1802 – The appointment of Napoleon as Consul for Life;
- In 1804 – The making of Napoleon Emperor of the French; and
- In 1815 – The restoration of Napoleon's Imperial Constitution.

Two more constitutional plebiscites were used to install Napoleon III (Napoleon Bonaparte's nephew) as Emperor. The first was in 1851 to extend his term as President of the Second Republic to ten years. The second was in 1852 to make him Emperor. A last minute and unsuccessful reprieve to the Empire, by liberalising it, was approved in 1870 before France's defeat in the war with Prussia.

Incidentally, the collapse of the Empire and the installation of the Third Republic were never submitted to the people for their approval.

If we exclude those plebiscites to approve the name of a Sovereign in Greece and Romania, all but one of the constitutional plebiscites about which the Australian Founding Fathers would have been aware were held in France, or in a country under French occupation. And all of these were used either to confirm or to install some form of authoritarian or dictatorial rule.

It is not therefore surprising that the Founding Fathers, democrats to a man, would have found nothing at all attractive in the constitutional plebiscite! Even in a democracy, as France was in 1851 and 1852, a constitutional plebiscite could be so easily misused as it so clearly was. They were determined to prevent change made by stealth, something which is now being proposed in Australia to take up the first decade of the 21st Century.

So what did the Founders do? In 1891 the draft Constitution provided that amendments be first proposed by the federal Parliament and then submitted for approval by a majority of elected State Conventions. But at the Corowa Conference, a peoples' conference, it was decided that the process for constitutional approval, and by implication constitutional change, was to lie with the people. It was only when the politicians accepted this principle that the federation of Australia could proceed.

During the referendum campaign in 1999, Kerry Jones and I were called to appear before the Joint Parliamentary Select Committee on the Republic Referendum at a hearing on 5 July, 1999 in Sydney. One member asked me about cases concerning the removal of a Governor-General. I referred to various precedents in other Commonwealth countries which proved, in my view conclusively so, that unlike the President of the proposed republic, the Governor-General could not be removed instantaneously. The member replied that she was not interested in other countries.

I thought, but did not say, that it was indeed fortunate that our Founders, wise men that they were, were neither provincial nor myopic. In drafting the Constitution, they looked at the experience of the world's great democracies, and they learned from them. They knew that constitutional plebiscites can be so easily abused. They knew that the Swiss Constitution guarded against this. (That it also gives the people the right to initiate changes to the Constitution and to propose legislation is another issue.) In brief, our Founders knew how democratic the Swiss referendum was and how undesirable a constitutional plebiscite is.

It was on the same day, the 5th of July, that Mr Turnbull proposed to this same committee that the words "president" and "republic" be removed from the question on the referendum. Illustrating, if there need be such an illustration, the dangers of the constitutional plebiscite where any sort of question can be put to the people without any details.

So that is why our Constitution provides for a Swiss style referendum as the only way for change. Under s.128, a proposed law to change the Constitution has to be passed by an absolute majority in each House of Parliament, and then put to the people. (Where the Houses do not agree it is still possible for the Governor-General to submit the referendum to the people.)

Not only is a national majority of electors voting required, there must also be a majority of those voting in a majority of States – that is, four States out of the six.

If so approved, the bill is then presented to the Governor-General for royal assent.

(A majority of electors voting in a State is necessary to approve any alteration:

- Diminishing the proportionate representation of that State in either House;
- Diminishing the minimum number of representatives of that State in the House of Representatives (the most relevant being the minimum for Tasmania of five);
- Increasing, diminishing or otherwise altering the limits of that State; or
- In any manner affecting the provisions of the Constitution in relation to that State.)

The experience of countries since federation confirms the misuse, and the potential for misuse, of constitutional plebiscites, even to this day.

For example, when the Quebec government decided in 1995 that it was time to secede from Canada, they knew they would need the support of the people in what was called a referendum but in reality was a plebiscite.

The honest approach – the approach to ensure an informed vote – would have been to put all the facts before the Quebecois. In particular, that there was no guarantee that even if Quebec were able to secede, the new state could retain the advantages it had enjoyed as part of Canada. Could Quebec continue to use the Canadian dollar? What would happen to the national debt? Would Quebec continue to be a party to each of Canada's treaties, for example, the free trade treaty with the US and Mexico? Would Quebec's boundaries remain the same? And what of the indigenous people, who preferred to stay in Canada? Could they secede from Quebec?

All of these unresolved issues were swept under the carpet by the secessionists. Instead, the question was devised, and deliberately devised, to attract a maximum uninformed vote. In brief, the question was designed to deceive the people. The question should have been, "Do you approve of Quebec leaving Canada and becoming a separate nation?", or words to that effect.

This was the actual question that the Quebecois voted on:

> "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and the agreement signed on 12 June, 1995?"

To say the referendum question was misleading is an understatement. Exit polls demonstrated that many people who voted "Yes" actually thought they were voting to stay in Canada! To the credit of the Quebecois, they voted "No". But only by a hairsbreadth, because they were *not* properly informed.

In other countries there have been a handful of plebiscites and one referendum, in all about 13, to change to a republic. Most were of doubtful validity and several taken under dictatorships. Only the Australian referendum in 1999 allowed the people to see in advance what precisely was being offered.

Now some will say that this is all very well, but the Australian referendum makes it too difficult to change the Constitution. That is not so. As two of our Founders, Sir James Quick and Robert Garran wrote (The *Annotated Constitution of the Australian Commonwealth*, 1901, reprinted in 1995, at 988), the safeguard in s.128 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".

It is even said that we still live under a "horse and buggy" Constitution. In other words, because it is old and successful it must be changed. The American Constitution is twice as old, yet I cannot recall it described as a "horse and buggy" Constitution!

We have approved eight changes to ours, the Americans twenty-five. But ten of these – the Bill of Rights – were made in 1791 and were necessary to secure its ratification. So since 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 propose a constitutional change by way of an initiative. Nor can the States. Only the Houses of the Federal Parliament can propose constitutional change.

Repeat referenda

And what of repeat referenda?

Having rejected a proposal the Australian people have, at least until now, also rejected any subsequent similar proposal.

In fact, they have been asked to give these following additional powers to Canberra more than once, and they have repeatedly said "No":

- Monopolies (5 times).
- Corporations not already the subject of federal power (5 times).
- Industrial matters within the State (5 times).
- Intra-state trade and commerce (3 times).
- Marketing schemes (twice).
- Price control (twice).

(It could be said that some or most of these would be superfluous today because of the judicial interpretation of the Constitution.)

Attempts to impose simultaneous elections of the House and Senate have been rejected on three occasions. (While these proposals might at first glance seem sensible, they would have reduced the Senate's powers, and thus the influence of the smaller States.) The people have also twice rejected a proposal to include a guarantee of freedom of religion (once in a package, and once by itself), probably because they suspected a subterfuge. And in any event this freedom was already well and truly guaranteed.

So precedents suggest that when the people say "No" they well and truly mean "No". The small group who clamour for change just will not accept this.

Conclusion

This is a plan to circumvent the Constitution by the use of cascading constitutional plebiscites, which are designed to soften the people up before a final referendum. This is constitutional change by stealth and by fatigue. It irresponsibly invites a vote of no confidence in our Constitution so as to create a vacuum during at least a decade. This might be the sort of tactics that political parties might adopt over some minor issue. It is not the way to deal with something so fundamentally important as the Constitution.

Apart from the sheer irresponsibility of this approach, there is nothing in it for any of the political parties. It is a folly of monumental proportions beside which the Millennium Dome will appear as a minor glitch. There is nothing in it for the Labor Party – that was clear from the way in which so many safe Labor seats voted. The issue is even less attractive to the Liberal Party, where it has already embittered a significant portion of the membership and supporters. And both the members and supporters of the National Party are overwhelmingly anti-republican.

There is one way, and only one way to undertake responsible constitutional change here. That is by the referendum. And this is not there to prevent or indefinitely resist change. It is there, as Quick and Garran said, 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.

Chapter Nine:
The Role of the Sovereign: The United Kingdom and Australia Distinguished

John Paul

The paper I delivered to this Society's inaugural conference was entitled *The Head of State in Australia*.[1] Therein I outlined how the authority and prerogatives of the Crown had been discharged by its representatives. One recurring theme in our constitutional history has been the interaction of political forces in such a way as to require the Crown's representatives to invoke prerogative powers, which are still extant in Britain but which for various reasons have not been invoked to anything like the same degree as in Australia.

In 1932 Air Vice-Marshal Sir Philip Game, as Governor of New South Wales, dismissed the Premier, J T Lang. An Australian Prime Minister, Edward Gough Whitlam, was dismissed from office as recently as 1975, and the prerogative, which in Australia's case was a statutory power, was exercised by, and indeed was exercisable only by, the Governor-General, in this case Sir John Kerr.

By contrast, the last time a British monarch invoked that prerogative was in 1783 – five years before the foundation of Australia – when King George III treated the House of Lords' rejection of the *East India Bill* as a pretext for dismissing the Fox-North coalition. The King then appointed William Pitt the Younger who, but for a break between 1801 and 1804, held office from 1783 until his death in 1806. Each case that I have given – 1932, 1975 and 1783 – was a dismissal in the full technical sense.

The last time a vice-regal office-holder in Australia requested a chief minister to resign – as distinct from dismissing him – was in 1952, when the Governor of Victoria, General Sir Dallas Brooks, required this of Tom Hollway. The last time a British monarch did this was in 1834, when King William IV made that request of Lord Melbourne.

Vice-regal office-holders in Australia have exercised the prerogative in refusing requests for a dissolution of Parliament too frequently for me to enumerate. Such a request has been refused by a Governor-General of Australia on three occasions: by Lord Northcote in 1904 and again in 1905, and by Lord Dudley in 1909. These incidents stand in stark contrast with the situation in Britain, where there is some uncertainty as to whether there is even a precedent for that prerogative being exercised. One authority, Professor Peter Hennessy, has claimed, "no dissolution request from a Prime Minister has been refused by a monarch since before the *Great Reform Act* of 1832".[2]

The Australian electors rejected a particular model for a republic when put to referendum in 1999. This event had featured the use of the campaign catchcry, "An Australian for Australia's Head of State!", or words to that effect. What this implied was that a republic was essential to there being an Australian Head of State.

To counter this it was pointed out that the expression "Head of State" was often employed loosely and had no precise constitutional connotation. This was attested by its absence from the texts of *The Commonwealth of Australia Constitution Act* and of the Constitutions of the Australian States. In fact the expression itself originated in the requirements of diplomatic protocol, such as orders of precedence and which luminary should be fêted with a twenty-one gun salute.

Such an office had to be identified, however, by its functions and by distinguishing it, where possible, from the effective head of government.[3] Those distinguishing functions have been vested in the office of Governor-General of the Commonwealth of Australia – as distinct from the Prime Minister – and only Australians have been appointed to that office since 1965. Accordingly, Sir David Smith, Professor David Flint and others were able to demonstrate that we did not need to adopt a republican Constitution to have an Australian as Head of State.

It was noted further that while The Queen is Australia's Monarch or Sovereign, she is not Australia's Head of State, nor can she be for as long as our Constitutions vest the prerogatives of the Crown exclusively in her representatives. The Queen, however, does act as a Head of State in her role as Queen of Great Britain and Northern Ireland within the sovereignty of the United Kingdom. To illustrate this point, this paper will outline some historical incidents which derive from the requirement that the Sovereign alone can formally appoint a British Prime Minister.

It was well into the 20th Century that the selection of leaders of the principal British parties, when in office, seemed so inseparable from the exercise of this prerogative that it came to be reconciled with it. The Liberals, like their antecedents the Whigs, had no ordained method of electing their leader while they remained credible contenders for office. The Labour Party, on the other hand, had adopted some such method before its displacement of the Liberals as a contender for office in 1922. With the Conservatives, it was not until 1965 that a specific method of election was adopted for determining their leadership.

I have already mentioned the *contretemps* between King William IV and Lord Melbourne. I now wish to emphasize that these events of 1834-35 effected a significant and gradual change in the nature of British government. In 1835 the Prime Minister, Sir Robert Peel, fully supported by the King, faced the electors, and his government established itself as the first since 1715 not to be re-elected in spite of the King's support. This meant that the patronage of the Crown was no longer essential to the winning of elections. Of course, governments before 1835 had lost office, but this had occurred because an administration had lost its ability to control the Parliament. And parliamentary control still remained essential to the maintenance of a government in office. After 1835, however, an administration did not have to give any kind of priority to keeping the Monarch on side. This change, as Lord Blake put it, amounted to an almost imperceptible transition "from the concept of government as the King's government to that of government as party government".[4]

Before relating this disjunction to more recent events I should mention two notable British party splits in the course of the 19th Century. The Conservatives, led by Sir Robert Peel, were effectively split into two parties by the repeal of the Corn Laws in 1846. Although only one party survived in the long term, it comprised not the followers of Sir Robert Peel but the Protectionist followers of Lord Derby, Lord George Bentinck and Benjamin Disraeli. The Liberal Party was also split in 1886 over William Ewart Gladstone's first Bill for the Home Rule of Ireland, and this led to the creation of a separate party, the Liberal Unionists, whose prominent identities were the Marquess of Hartington, later the 8th Duke of Devonshire, and Joseph Chamberlain, father of Austen and Neville to whom I shall be referring later.

My next point is that, from 1832 until 1911 no party leader could be said to have been driven from that position by his followers. In 1894 Gladstone, aged 84, finally and reluctantly resigned the office of Prime Minister. While he found himself at odds with his Cabinet on two vital matters of policy, his unwillingness to do battle with them stemmed from one over-riding consideration – his age and health; and his parting from them was amicable enough. In 1911 Arthur Balfour, a former Prime Minister who had been Leader of the Opposition since 1905, resigned from the leadership of the Conservative Party, also pleading ill health – a condition which was not apparent to anyone else. Like Lord Rosebery, who as Opposition Leader had resigned from the Liberal leadership in October, 1896, Balfour was troubled by dissension within his own party. In Balfour's case also there was the sense that his continuance as leader for very much longer would encourage some sort of challenge. Andrew Bonar Law was then elected unopposed by the Conservative MPs to lead them in the Commons when the two front-running contenders, Austen Chamberlain and Walter Long, considered it politic to withdraw.

Party leaders as a rule either resigned of their own accord or died in harness. When it came to a party leader vacating the office of Prime Minister, the Monarch would choose a successor. Sometimes such a successor stood out so plainly as to predetermine the Monarch's choice; at other times the Monarch was left with a discretion.

When however a party was in Opposition and the party leader, a former Prime Minister, vacated the office either through death (as with Lord Beaconsfield in 1881) or voluntary resignation (as with Lord Rosebery in 1896 and Arthur Balfour in 1911), the party leadership went into commission and was in effect shared by the respective party leaders of the Lords and Commons. It would thus remain in commission until the party regained office, when the party leadership would be vested in whichever leader was appointed by the Monarch as Prime Minister.

In 1885, when Gladstone's Liberal administration was defeated in the House of Commons and he resigned on behalf of his government, Queen Victoria had to find a Conservative Prime Minister; but there was no leader of the whole party whom she could appoint. Exercising her own discretion, she appointed the Conservative leader in the House of Lords, the 3rd Marquess of Salisbury, rather than his counterpart in the Commons, Sir Stafford Northcote, and *ipso facto* Lord Salisbury was acclaimed by the party as its leader.

In 1894, when Gladstone resigned for the last time but only on his own behalf, the Queen again exercised her discretion in selecting his successor as Prime Minister. She appointed the Foreign Secretary and Leader of the Government in the House of Lords, the 5th Earl of Rosebery, rather than the ranking Cabinet Minister in the House of Commons, the Chancellor of the Exchequer, Sir William Harcourt. Lord Rosebery thereupon became the leader of the Liberal Party as a whole.

From 1830, almost without exception party leaders in the Commons were nominated by the peer who happened to be the party leader in the Lords. In 1846 Lord George Bentinck was elected unopposed to lead the Protectionists in the Commons – who, after Sir Robert Peel's death in 1850, effectively inherited the mantle of the Conservatives. Bentinck's successors until 1911 were all chosen by the Conservative peer leading the party as a whole – Lord Stanley (later the 14th Earl of Derby), the Earl of Beaconsfield (as Benjamin Disraeli had become in 1876), and Lord Salisbury.

This was also the case even with the Whigs. With the Liberals, who emerged in the 1860s from the Whig party of old, the same tended to apply, except in 1875 and 1899, when in each case the new leader of the Commons was elected unopposed by the Liberal MPs. When the party leadership as a whole was in commission, Leaders of the House of Lords were or had been elected by peers taking the party whip – unopposed in most cases I can think of – and this applied to Conservatives and Liberals alike.

All this might seem very élitist, but such leaders, whether nominated or elected unopposed, were expected to vindicate the confidence reposed in them. Even so, these arrangements stand markedly in contrast with the hard-fought contests which have come to characterize the scramble for party leadership in more recent times.[5]

In 1902 Lord Salisbury, a Prime Minister of three terms, finally resigned. He was succeeded by his nephew Arthur Balfour, the Conservative Leader of the House of Commons since 1891. For reasons which need not concern us here Balfour submitted his Government's resignation in 1905, and King Edward VII, finding that there was no Liberal peer whom he could consider eligible, commissioned as Prime Minister the Liberal Leader of the House of Commons since 1899, Sir Henry Campbell-Bannerman. The new Prime Minister, having been granted a dissolution, was confirmed in office in a landslide (the extent of the Conservative defeat being comparable with the elections of 1832, 1997 and 2001).

In April, 1908 Campbell-Bannerman, who was gravely ill, resigned. Fully expecting this, the King, whose own health was very precarious, had already been ordered by his own doctors to recuperate at Biarritz. On receiving Sir Henry's letter of resignation while there, the King wrote to the Chancellor of the Exchequer, Herbert Henry Asquith, inviting him to form a government and to present himself at Biarritz to be commissioned. Asquith was quite happy with this arrangement and the Opposition raised no objection.[6]

Benjamin Disraeli has often been quoted as saying, "England does not love coalitions". Like so many of his *apercus* which have been treated as truths universally to be acknowledged, this one was founded in the political exigencies of the moment. Disraeli made that observation in the House of Commons on 16 December, 1852 as the Chancellor of the Exchequer in a minority Conservative government led by Lord Derby. As Lord Blake remarked: "What he meant was that he did not love the coalition which was about to turn out the Tory Cabinet of which he was a member".[7]

It has to be said, however, that coalitions were to be a common enough feature of British politics in the ensuing one hundred years. Indeed, one such was formed on a single issue. The Conservatives and the Liberal Unionists joined forces from 1895 to 1905 with the specific purpose of excluding from office the Liberals, who were committed to Home Rule for Ireland. And as Lord Blake again has observed, "There were the war and post-war coalitions of 1915 to 1922; and we were governed by a coalition from 1931 to 1945".[8] The point here is that the formation of all these coalitions involved the Monarch to a greater or less degree.

Asquith's administration formed in 1908 had survived two elections in 1910 called, respectively, in connection with the House of Lords' rejection of his Government's Budget in 1909, and the *Parliament Bill* which, when ultimately enacted, significantly reduced the powers of the Upper House. In both those elections the Conservatives had so regained ground lost in 1906 as to draw almost level with the Liberals who, although denied an outright majority of their own, could still govern with the support of the Labour Party and the Irish Nationalists. Asquith's dependence on the Irish reopened the whole issue of Irish Home Rule, which brought the country close to civil war. This was the government which led Britain into war with Germany in August, 1914.

In May, 1915 Asquith formed an all-party coalition. Robert Blake outlined a number of factors which Professor Richard Shannon had listed as causes for Asquith's decision. Rather than determining which of these proved the most potent, Blake identified another which he regarded as more pressing:

> "… Under the *Parliament Act* a general election was due to be held at latest in January, 1916. In the existing House Asquith was unlikely to be defeated even if deserted by Irish and Labour MPs, because more Conservative than Liberal members were on active service, but if he had to go to the polls the prospect was very different. His chances of victory were remote, and in the new circumstances only a coalition could avert a general election".[9]

The *Parliament Act* of 1911 limited a parliamentary term to five years. The Parliament itself could legislate to lengthen its term by suspending that particular provision, but that same *Parliament Act* also ruled that such specific legislation would provide one of the rare instances still permitted since 1911 where the House of Lords' veto remained absolute as distinct from being merely suspensory. As Conservative peers overwhelmingly outnumbered Liberal peers, only a coalition with the Conservatives would ensure the enactment of that legislation.

Sir Charles Hobhouse, one of the Liberal ministers whom Asquith replaced in forming his coalition, noted in his diary on 23 May, 1915, "Lloyd George and his Tory friends will soon get rid of Asquith".[10] And they did get rid of him, but not until December, 1916.

The Cabinet had to be reconstructed in June, 1916 when the Secretary of State for War, Field Marshal Lord Kitchener, was lost at sea. David Lloyd George, who had been Chancellor of the Exchequer from 1908 until May, 1915 and then Minister of Munitions, was supported by the Conservative leader, Andrew Bonar Law, in pressing his own claim to be Kitchener's successor on a less than enthusiastic Asquith. Exactly five months later Lloyd George succeeded Asquith as Prime Minister.

Growing dissatisfaction with the quality of Asquith's leadership, especially among prominent Conservatives within the unwieldy coalition Cabinet of twenty, led to this *dénouement*. The key figures were Lloyd George, Bonar Law and Sir Edward Carson. Lord Blake has summarized the terms of their ultimatum:

> "… The proposal they decided to put to Asquith was a change in the 'decision-making process' – the creation of a War Council, small in number (the final version was three), sitting from day to day with real powers to act and with Lloyd George as Chairman. The Prime Minister was not to be a member, the excuse being that he would be too busy with other things (no one said what), but he would be entitled to call in any decision to which he objected and refer it to the Cabinet as a whole …
>
> "… It was a transparent device to sidestep the Prime Minister and vest the only area of government business that mattered in a triumvirate consisting of Lloyd George, who was his chief Liberal rival, Bonar Law, for whom he had little respect, and Carson, who was one of his sharpest critics. Asquith saw what was intended quickly enough and, when Lloyd George put it to him on 1 December, he gave a polite but firm refusal. He had no objection to some measure of reorganization, but he insisted on the Prime Minister being chairman of the War Council. If personalities could be ignored, Asquith was right. The arrangement was a constitutional absurdity. Personalities, however, were what the crisis was all about. If Asquith insisted that the Prime Minister must be chairman of the War Council, Lloyd George and Bonar Law were going to insist that the Prime Minister must not be Asquith …".[11]

The King, having received Asquith's resignation on 6 December, followed constitutional custom by sending for the leader of the next largest party in the Commons, Andrew Bonar Law, and asking him to form a government. Of Bonar Law's approach to this request Kenneth Rose has given the following account:

"His [Bonar Law's] hope of success hinged on whether he could persuade the fallen Prime Minister to join his administration in a subordinate office. But when he called at Downing Street after his audience with the King, he was rebuffed. Asquith did, however, agree to attend a conference at the Palace summoned by the King for the following day. It was attended by Asquith, Lloyd George, Law, Balfour and Arthur Henderson, who represented the Labour Party. Each participant in turn pleaded with Asquith to serve under Law on patriotic grounds and so maintain an appearance of national unity. Asquith refused. In a long apologia tinged with bitterness, he observed that throughout his alleged mismanagement of the war he could not recall any issue on which a decision had been reached without the concurrence of Lloyd George; that he had been subjected to vindictive and merciless attacks by the press; that he was grateful to His Majesty for the trust placed in him; but that he had awoken that morning thankful to feel he was now a free man. At this point the King, with his habitual common sense, reminded the politicians that they had discussed the matter fully but had not yet come to a decision. The meeting thereupon agreed that Asquith should further consider whether or not he was prepared to serve under Law; and that if he still felt unable to do so, Lloyd George rather than Bonar Law should try to form a Government.

"The conference broke up at 4.30. Asquith immediately consulted his Liberal colleagues. Then, fortified by their almost unanimous approval, he delivered his final answer to Law. Rather than join any administration of which he was not the head, he would lead 'a sober and responsible Opposition, steadily supporting the Government in the conduct of the War'. Lloyd George now remained the sole contender for the premiership. At 7.30 he was entrusted by the King with the formation of a new Ministry. Twenty-four hours later, his Cabinet complete, he kissed hands as Prime Minister".[12]

Leo Amery, a prominent Conservative politician in the first half of the 20th Century, made this observation on one of the essential differences between the two war coalitions:

"… Mr. Asquith's Coalition Cabinet of 1915 resulted immediately from Lord Fisher's resignation as First Sea Lord and from consequent negotiations with the Conservative leaders. It may, however, be said to have conformed to a general desire on the part of the House of Commons that he should strengthen his Government by including the leaders of the Opposition. But the Lloyd George War Coalition at the end of 1916 was not one that could have emerged from any method of ascertaining the wishes of Parliament beforehand. Few Liberals and still fewer Conservatives would have actually chosen Mr Lloyd George as Prime Minister. Nor was there any demand, outside a very small circle, for a drastic change in the structure and the working of the Cabinet as such. The whole affair was, in effect, a Palace Revolution brought about by a handful of men in the inner circle of the Asquith Government who were convinced that the war could not be won under the existing leadership and by the existing methods".[13]

Lloyd George operated through a five-member War Cabinet which included only one departmental Minister, Bonar Law, the Chancellor of the Exchequer. He continued this system after the election in December, 1918 which was called after the Armistice was announced in November. Not until late October, 1919 did he revert to a more conventional type of Cabinet government; and this continued until 1922. By then Lloyd George's anomalous position had become blindingly obvious. He was still in a formal sense a Liberal; but his 133 Liberal followers were outnumbered by 335 Conservatives on whom his position as Prime Minister depended. Yet Asquith, with 28 Liberal followers on the Opposition benches, was still the acknowledged leader of the Liberal Party.

Bonar Law, pleading ill health, withdrew from the Cabinet in March, 1921, but he remained a Member of Parliament. Austen Chamberlain, for long the *prince héritier*, was elected unopposed by the Conservative MPs to succeed him as their leader in the Commons. By September, 1922, however, Chamberlain and most prominent Conservatives in the Cabinet had drifted apart from most Conservative MPs, and also from the party organization, in wishing to fight the next election as a coalition.

A meeting of Conservative MPs which Chamberlain felt obliged to call at the Carlton Club on 16 October, 1922 attained some notoriety in voting overwhelmingly (187-87) to withdraw from Lloyd George's coalition. When this vote was announced, Lloyd George and Chamberlain resigned respectively as Prime Minister and as Conservative leader. Bonar Law, who had emerged from retirement to attend the Carlton Club meeting, succeeded Lloyd George as Prime Minister. Five of the senior Conservatives from Lloyd George's coalition, including Chamberlain and Lord Balfour, refused to accept office under him.[14]

Bonar Law's resignation in May, 1923 after being diagnosed with cancer, posed a number of problems for the King. It was recognized that the King had a discretion in the naming of the new Prime Minister, but Bonar Law himself had asked, in view of his enfeebled state, to be relieved of the responsibility of submitting his resignation in person and of giving any advice as to his successor. Because Chamberlain and his fellow loyalists to Lloyd George were still sulking in the Cave of Adullam,[15] the field was reduced to the Secretary of State for Foreign Affairs, George Nathaniel, Marquess Curzon of Kedieston, and the Chancellor of the Exchequer, Stanley Baldwin.[16]

In terms of experience Lord Curzon's claim to the succession was unchallengeable. He had been Viceroy of India from 1898 until 1905 and a Cabinet Minister since 1915. From December, 1916 until October, 1919 he had been a member of Lloyd George's War Cabinet and had been Foreign Secretary since then. Baldwin, by contrast, had attained Cabinet rank as recently as March, 1921, when he was appointed President of the Board of Trade to fill the vacancy in the Conservative Party's Cabinet allotment caused by Bonar Law's retirement. Unlike Lord Curzon, however, Baldwin enjoyed the advantage at that stage in his country's fortunes of sitting in the House of Commons.

Much ink has been used up in assessing the attempts by various Conservative politicians to influence the King's decision. There was conflicting advice given by two prominent Conservatives whom the King had to locate during that long Whitsun weekend: Lord Salisbury, son of the legendary Prime Minister, advised the King to appoint Lord Curzon, while Lord Balfour, the only former Conservative Prime Minister apart from Bonar Law himself, phrased his advice in such a manner as to favour Baldwin. As Lord Blake observed:

> "… It is now clear that there was a pro-Baldwin conspiracy, probably unknown to Baldwin himself, and that the plotters, who included both [John] Davidson [Law's Parliamentary Private Secretary] and Colonel Waterhouse, Law's private secretary, contrived to mislead the King about the opinion of the retiring Prime Minister. One cannot say that the deception was decisive though it was certainly discreditable …".[17] (parentheses added)

The King, it seems, decided to appoint Baldwin rather than Curzon before receiving that advice, which seemed so vital to that decision. The King's Private Secretary, Lord Stamfordham, who had advised the King to appoint Curzon, confided the following to Geoffrey Dawson, the Editor of *The Times*:

> "I told Dawson frankly that the King was so far convinced that his responsibility to the country made it almost imperative that he should appoint a Prime Minister from the House of Commons. For were he not to do so, and the experiment failed, the country would blame the King for an act which was entirely his own and which proved that the King was ignorant of, and out of touch with the public".[18]

So in the final analysis the King's common sense triumphed over all other considerations, including the merits of the two contenders, and he settled on a course which he was satisfied would protect his own flanks.

After merely sixth months as Prime Minister, Baldwin called an election out of a misbegotten sense of obligation: he felt bound by a promise made by Bonar Law not to introduce protective tariffs without first going to the people. The Labour Party led by Ramsay MacDonald emerged from that election as the second largest party in the Commons, with 191 seats to the Conservatives' 258 seats: it assumed office for the first time as a minority government, relying for its working majority on 159 Liberals still led by Asquith. It lasted from January until October, 1924, when the Liberals withdrew their support and another election returned the Conservatives to office. Baldwin then began his second and longest term as Prime Minister.

Baldwin was able to act as that emollient which the rush of events had prevented Bonar Law from doing. Austen Chamberlain and almost all his fellow Adullamites were restored to office. Chamberlain was given the Foreign Office, displacing Curzon who went to the Privy Council Office as Lord President.[19] The election in May, 1929 made Labour the largest party in the Commons with 288 members: still led by MacDonald, it returned to office, supported once again as a minority government by the Liberals. But the Conservatives with 260 members were not a negligible force.

Any government in office at the onset of the Great Depression found itself imperilled by its impotence in dealing with unemployment on such a prodigious scale. The second Labour government was doubly cursed in not only having to reconcile differences within its own ranks but also in having to retain the support of 59 Liberals. It was in May, 1931 that Austria's biggest bank, the Kreditanstalt, failed, "setting in motion a domino effect which first shattered Germany's tottering credit, then destroyed the Labour government and finally drove Britain off the gold standard".[20]

Lord Blake has given us the following serviceable summary:

> "The nature of the crisis is often misunderstood. It was not a matter of budget deficits or adverse trade balances, except in so far as the latter caused the Bank of England to seek short-term loans at high interest rates in order to prevent loss of gold. The basic trouble was that for many years London had been lending 'long' and borrowing 'short'. The lending had been largely for the laudable (and profitable) purpose of financing post-war reconstruction in central Europe. The collapse in Austria made these loans impossible to recover and obliged the German banks to declare a moratorium on their international debts. London bankers with their foreign loans frozen were at the mercy of 'hot' money depositors who had no reason to keep their money in Britain if they had any doubts about sterling. In theory Britain could have done what Germany did – block foreign funds and introduce exchange control. But this would have been financial heresy in the City and would have wrecked London as a world financial centre. The only remedy, though in reality it was irrelevant, seemed to be a balanced budget which, it was believed, would restore confidence in the pound".[21]

The necessity of obtaining large credits from New York and Paris to bolster and restore confidence in the pound was accepted on all sides, as was the necessity of balancing the budget; but it was the MacDonald Cabinet's haggling over the necessary cuts in expenditure to achieve this objective that ultimately broke up the second Labour government. The principal actors in this crisis were: King George V; MacDonald; Philip Snowden, the Chancellor of the Exchequer, a legendary pillar of fiscal orthodoxy; Arthur Henderson, the Foreign Secretary, who led the dissentients within the Cabinet; the Conservative leaders, Stanley Baldwin and Neville Chamberlain, Austen's younger half-brother; and Sir Herbert Samuel for the Liberals.[22]

Without outlining all the developments leading to this melancholy outcome, I can make one thing clear: MacDonald did all that was humanly possible, in the midst of a sweltering heat wave, to keep his Government in office and to persuade his Cabinet to agree on the steps necessary to balancing the budget. It was also the case that "the King and the Opposition leaders regarded acceptance of the cuts by the existing Government as the most desirable solution – any other as second best".[23]

On 23 August, a Sunday, the Cabinet bowed to MacDonald's persuasion to accept the necessary cuts; but did so by a very slender margin – eleven to nine. With some of the nine intending to resign, it was acknowledged that the Government had run its course. As Lord Blake has summarized:

> "… MacDonald announced that he would at once see the King, and the ministers put their resignations in his hands. He would advise the King to consult next day with Baldwin, Samuel and himself. He left for Buckingham Palace at 10.10. The King strongly urged him not to resign and agreed to the conference next day. MacDonald returned at 10.40 to Downing Street, said that he had told the King they could not go on as a united Cabinet and that the conference would take place on Monday. After the ministers had gone he talked to Baldwin, Chamberlain and Samuel. The two latter urged him not to resign. Baldwin said nothing. The impression gained by the Opposition leaders was that MacDonald had finally decided to throw in his hand.
>
> "MacDonald's diary, however, suggests that he had not in fact closed the door. Just what went on in his mind that night no one can say, but he took, or half took, a far-reaching decision. When the King next morning pressed him to remain, and when Baldwin and Samuel offered to serve under him, he agreed to remain in office as head of a National Government to last for a few weeks and tide over the crisis. It would be a government of individuals and it would implement the cuts agreed upon by the majority of the Labour ministers. There would then be an election fought not by the government but by the parties which would revert to their ordinary roles. MacDonald returned to Downing Street and announced the decision to the Cabinet, who agreed that their resignations should now be submitted formally to the King. A few polite remarks were uttered and the Cabinet recorded its appreciation of MacDonald's 'great kindness, consideration and courtesy when presiding over its meetings' ".[24]

The Opposition leaders' willingness to serve under MacDonald was essential to the formation of the National Government. But Kenneth Rose made the following unarguable observation, at least as it applied to the King:

> "Without the King's initiative there would have been no National Government. Three times in twenty-four hours MacDonald tried to resign and three times the King dissuaded him. Then he gave way and agreed to remain Prime Minister … The motives of public men are rarely as base or as quixotic as their enemies would have us believe; and no portrait of MacDonald is complete which depicts him as the ambitious, fawning courtier of Labour mythology or the martyred patriot of his own invention. He did not become less willing to relinquish office during those forty-eight hours of crisis; but he did become less willing to relinquish office at the behest of Arthur Henderson …
>
> "There is nothing like hatred and contempt of one man's conduct for driving another along a contrary course; to that extent Henderson provoked MacDonald into forming the National Government. It was the King, however, who appealed to the Prime Minister's patriotism and sense of duty, who flattered him on the influence of his statesmanship at home and abroad, who stiffened him to break with half a century of his radical past …".[25]

Leo Amery, a Conservative Cabinet Minister under Bonar Law and Baldwin in the 1920s, felt obliged to support the National Government throughout the 1930s in spite of his resentment at being denied office. In the Chichele Lectures he delivered at All Souls College, Oxford shortly after the war, he made it quite clear that this government was formed by a compact of party leaders. As far as the Conservatives were concerned, Baldwin had assured his followers that it was an emergency arrangement which would be terminated the moment the balanced budget had been passed.[26]

On 29 September, 1931 MacDonald, along with the Labour members who still served under him, was expelled from the Labour Party against the advice of Henderson. In Labour Party folklore he was to be travestied as a betrayer of his party. The fact is that the Labour politicians who deserted him put party before country and paid dearly for their preference; MacDonald thereafter was to be pilloried for doing the opposite and being vindicated by the electorate.[27]

The National Government survived until May, 1940. MacDonald remained Prime Minister and Stanley Baldwin Lord President of the Council until the completion of the celebration of King George V's Silver Jubilee in 1935, when they both changed places.[28] The election later that year still left the National Government in a commanding position, but with its majority over all other parties reduced from 425 to 243. MacDonald and Baldwin both retired in 1937 after King George VI's Coronation. Neville Chamberlain, the obvious successor to Baldwin as Conservative leader since 1930, then served as Prime Minister until Winston Churchill succeeded him in 1940 as Prime Minister in an all-party war coalition.

The parliamentary drama which precipitated the formation of Churchill's war coalition requires no elaboration here. The choice of a successor to Neville Chamberlain had reduced itself to one between Winston Churchill and Lord Halifax. Churchill had been Chancellor of the Exchequer in Baldwin's second administration, and after a long period in the political wilderness he had been appointed First Lord of the Admiralty by Chamberlain when war broke out in September, 1939. Lord Halifax, like Lord Curzon, had been Viceroy of India and had been Foreign Secretary in succession to Anthony Eden from February, 1938. The reason why the King was *not* required to exercise some sort of discretion in this matter should be obvious from Lord Blake's forceful dissent from an assessment by Lord Beaverbrook:

> "Churchill's appointment was by no means popular. He would probably not have commanded a majority among any of the political parties. He rose by default. Halifax could have had the job for the asking. Beaverbrook summed up the events pithily but erroneously: 'Chamberlain wanted Halifax. Labour wanted Halifax. Sinclair wanted Halifax. The Lords wanted Halifax. The King wanted Halifax. And Halifax wanted Halifax'. But the last of these brief sentences is simply wrong. Had it been true, Churchill would not have become Prime Minister – anyway, not in May, 1940".[29]

Whatever the King's misgivings about Churchill in May, 1940, they were dissipated as soon as the two settled in together into a trusting working relationship which persisted throughout the war.[30]

When the war coalition ended in May, 1945 Churchill formed a caretaker administration comprising Conservatives and Liberal Nationals pending the election, which resulted on 26 July in a decisive victory for the Labour Party. Sir Robert Rhodes James observed:

> "… The Register of Electors was both inaccurate and out of date. It was, democratically speaking, a shambles. This was reflected in the result. With just under 12 million votes Labour won 392 seats; the Conservatives, with nearly 10 million votes, 189, although their Commons strength was greater than this with the Liberal Nationals and the Ulster Unionists; the Liberals, with 2.5 million votes, only returned 12 Members of Parliament. The total votes cast put Labour into a significant minority; the distribution of seats gave them a huge majority. Attlee was as astonished as anyone in politics".[31]

Churchill's immediate reaction was to delay his resignation and face the newly elected Parliament. The King was alarmed at this as, indeed, were Anthony Eden and the former Chief Whip, David Margesson. Pressure from the three changed Churchill's mind and he resigned at 7.00 on the evening of 26 July.[32]

The first initiative the King took in the formation of the new administration was to advise Clement Attlee, the incoming Prime Minister, to appoint Ernest Bevin as Foreign Secretary, when Attlee had indicated to him that he was intending to appoint Dr Hugh Dalton to that position. In the event Attlee did appoint Bevin to the Foreign Office and appointed Dalton to the position he had originally intended for Bevin, Chancellor of the Exchequer. Dalton's biographer, Professor Ben Pimlott, discussed this initiative at great length.[33] He concluded that "it is reasonable to suppose that the King's advice was an important factor".[34] But he was inclined to believe that it was inspired solely by a deep personal dislike of Dalton. Without denying the King's personal feelings, Rhodes James placed them in a wider context:

> "… He was very well-informed about the horror of the Foreign Office at the prospect [of Dalton being Foreign Secretary] and Eden's dismay at the possibility; indeed Eden had made it plain that he favoured Bevin as his successor. And, as the King's diary makes clear, Attlee's suggestion of Dalton was only a tentative one. He had, after all, not expected to be appointed Prime Minister so soon, and he had little time either to consult many colleagues or to clarify his own thoughts after his unexpected victory and speedy summons to the Palace. (parentheses added)
>
> "Attlee later denied that the King's influence had been crucial in his decision to switch Bevin and Dalton. 'I naturally took into account the King's view, which was very sound', he wrote in 1959, 'but it was not a decisive factor in my arrival at my decision', and this has been accepted by his biographer, Kenneth Harris. Attlee even told him that he could not recall the King's intervention, an amnesia almost certainly deliberately manufactured to protect the King's constitutional probity and reputation, and probably also to impart to his own actions on 26-27 July a decisiveness and confidence that were not apparent to others.
>
> "By this point the King's political antennae were very acute, and his sources of information formidable. His respect and affection for Bevin had increased steadily during the war, but the key element was that, with his intense interest in foreign affairs, he had got used to working closely with two Foreign Secretaries, Halifax and Eden, whom he liked, trusted and respected. The prospect of working with Dalton was deeply unappealing, and this was made very clear to Attlee. If the King's views were not 'decisive' – although they probably were – they were highly important. When he met Dalton, now Chancellor of the Exchequer, and Bevin, now Foreign Secretary, on 27 July he expressed himself very pleased with these appointments. He was more pleased with the latter that the former…
>
> "Dalton's biographer Ben Pimlott has expressed surprise that the King, the 'least political of British monarchs and seldom given to advising Prime Ministers on any matter, should have held such passionate views on this one', which is a serious underestimation of the King's political interests and the impact of his advice and influence. If he had attempted to veto Dalton's appointment to the Cabinet this would have been stretching matters rather too far for comfort; by urging Attlee to think again about the Foreign Secretaryship he was quite properly expressing an opinion that he was not only entirely entitled to have, but which was shared by many others. And it was, as Attlee conceded, 'very sound' advice. Indeed, given Dalton's temperament and booming impetuosity, it is difficult to envisage him lasting very long at the Foreign Office, with hostile officials and a King who struggled with much difficulty to remain civil with him. He did not last all that long at the Treasury, either.
>
> "It was also a good example of the King's personal judgements on men. He was not, of course, infallible, but his assessments tended to be remarkably shrewd".[35]

And so they proved to be in this case! Bevin established himself as the greatest Foreign Secretary since Lord Salisbury, and his claim to this status has not been challenged by any successor.

In his own discussion of the reserve powers of the Monarch, Professor Peter Hennessy has given the following summary:

> "Since 1949 the use of those powers has arisen in at least six real or threatened contingencies:
>
> 1. in the spring of 1950, following the general election of February that year, when the majority of the Attlee government fell from 146 to six;
> 2. in July, 1953 when, with Churchill afflicted by a stroke and Eden under the surgeon's knife in the United States, the Palace was worried that the newly crowned Queen might have to send for Lord Salisbury [grandson of the legendary Prime Minister and Foreign Secretary] as a caretaker Premier if Churchill perished;
> 3. in January, 1957 when, on Eden's resignation after the Suez crisis, The Queen had to choose between the claims of Harold Macmillan and R. A. Butler for the succession;
> 4. in October, 1963 when, on Macmillan's resignation, she had to do the same between the hapless Rab and the Earl of Home;
> 5. in October, 1964 when, as the election results came in overnight, No. 10 hastily prepared a 'Deadlock' file in case the result left neither main party with an overall majority;
> 6. in March, 1974 when Edward Heath, his majority gone after the first of that year's two elections, hung on over a weekend while attempting to do a deal with the Liberals.
>
> "In addition to those occasions, most of which are relatively well known, the Palace, the Cabinet Office and No. 10 engaged in intense contingency planning in case the reserve powers should come into play in the late winter and early spring of 1974 (lest Wilson lost an early vote and sought a dissolution); in the winter and spring of 1978-9, as the Callaghan government staggered to its close; and in the run-up to the … three elections – 1983, 1987 and 1992 – either because Britain seemed about to revert to a 1920s-style three-party system or, in the spring of 1992, because the opinion polls suggested the strong possibility of a 'hung' Parliament".[36]

The two occasions when The Queen had to appoint a Conservative Prime Minister in succession to Sir Anthony Eden in 1957 and then to Harold Maemillan in 1963, have been discussed by me at greater length in a document on the Tory leadership.[37] On both occasions The Queen sought advice, and made the appointment after she had been satisfied that the state of opinion within the Conservative Party had been faithfully reported to her. Lord Blake observed:

> "It is a matter of controversy how correct that advice was in each case. My own guess is that it was as sound as such advice ever can be …".[38]

In spite of the controversy surrounding the appointment of Lord Home in 1963, I am confident that R A Butler then, as in 1957, had support everywhere but where it really mattered. However much he was esteemed by many of the Lobby correspondents and in the professional classes and the non-party establishment, this esteem was not reflected to anything like the same degree within the Conservative Party itself.

The adoption of a method of election for the Conservative leadership in 1965 has undergone more than one revision. Lord Blake claimed that the changes proposed in December, 1974 and subsequently adopted:

> "… make the process potentially even slower and there could be a delay of nearly three weeks. It is clearly desirable that the implications should be considered by the Conservative leadership, and there is reason to believe that they soon will be".[39]

Not in the manner Lord Blake contemplated, however! Under the system adopted when William Hague became leader, which has thrown the final decision to the Conservative Party branch membership, we have witnessed a delay of months. William Hague resigned the Conservative Party leadership as soon as the results of the election of 7 June this year were in. The result of the final ballot is not expected to be announced until 12 September. This delay is surely serious enough for a party in opposition. But for a party in government!

While Lord Blake was prepared to concede in 1974 that the Conservative Party's adoption of a method of election "seems to rule out royal choice altogether …", he added:

> "Yet can one even now, despite these changes, argue that the role of the monarch is purely mechanical, and that no element of discretion survives at all? I am not quite convinced that this is the case even today …
>
> "… There have been three clear cases this [twentieth] century where Prime Ministers have been appointed, although they were not, and in two of the cases had no prospect of being, elected leaders of their respective parties; Lloyd George in 1916, Ramsay MacDonald in 1931, Winston Churchill in 1940. I do not think one can wholly exclude the possibility of a crisis in which royal discretion might have to be invoked in order that government can be carried on at all – a situation in which the mechanical application of automatic rules simply could not work".[40] (parentheses added)

Professor Peter Hennessy has also remarked that the adoption by the Conservatives of an election process in 1965 for determining its leadership "did not put paid to the personal prerogatives of the monarch. It is always a profound mistake to write off Britain's ancient Constitution because of some seemingly modern refinement".[41]

In relation to Australia, these personal prerogatives are vested not in The Queen's person but in her representatives, who are called upon to interact with our local politicians in a way The Queen simply cannot. As Queen she can inform herself from any number of sources, and not least from the regular reports to her by the Governor-General and by the State Governors, about the political state-of-play in this country; but her capacity to intervene in person is strictly limited. That she is more than a purely decorative presence in the United Kingdom itself should be obvious from the details given in this paper.

Endnotes:

1. John Paul, *The Head of State in Australia*, in *Upholding The Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), pp.177-207.

2. Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, Indigo (1996), p.53.

3. Such a distinction cannot be made in the United States of America and the French Fifth Republic, where the President in each case is both Head of State and head of government.

4. Lord Blake, *The Office of Prime Minister*, published for the British Academy by Oxford University Press (1975), pp.31-4 at 34.

5. A consequence of the gradual democratization of the party system has been its conversion from being the plaything of gentlemen amateurs, who in most cases were gifted to a remarkable degree, to a spoils system dominated by professionals of both sexes who, it might be said, have not been as consistently gifted.

6. Simon Heffer, *Power and Place: The Political Consequences of King Edward VII*, Phoenix Giant (1999), p.251. This was the only time a Prime Minister was to kiss hands on his appointment in *partibus infidelium*. Asquith was also the last Liberal leader to be Prime Minister of an all-Liberal government.

7. Lord Blake, *op. cit.,* p.65.

8. *Ibid*.

9. Robert (Lord) Blake, *Decline of Power 1915-1964*, Paladin (1986), pp.1-2. This is the succeeding volume to Professor Shannon's in the Paladin History of England series.

10. *Ibid*., p.1. Blake cited David Edwards (ed.), *Inside Asquith's Cabinet, From the Diaries of Charles Hobhouse* (1977), p.247.

11. Blake, *op. cit*., pp.42-3.

12. Kenneth Rose, *King George V*, Weidenfeld and Nicolson (1983), p.198.

13. L. S. Amery, *Thoughts on the Constitution*, Oxford University Press (1964), pp.25-6.

14. Bonar Law's expectation was that after a suitable interval he could restore the Conservative recusants to office so that Chamberlain could succeed him. Not even that inveterate pessimist could have foreseen how completely his hopes would be blighted. Seven months into his premiership he was forced to resign when diagnosed with cancer of the throat.

15. The biblical reference to the cave Adullam, a place of refuge for David, is to be found in 1 Samuel 22 i. During the heated debates in the British Parliament in 1866 over a proposed Reform Bill to extend the parliamentary franchise, a former politician from the Colony of New South Wales who was then a leader-writer for *The Times* and MP for Calne, Robert Lowe, later the 1st Viscount Sherbrooke, led a vigorous campaign against any advance towards democracy, and achieved lasting fame courtesy of the radical MP John Bright, who branded him the leader of the "Adullamites" or cave-men.

16. It was a situation broadly similar to the choice between Lord Rosebery and Sir William Harcourt in 1894, except that the latter had been the more experienced political gladiator.

17. Blake, *op. cit*., p.108.

18. Rose, *op. cit*., pp.268-9. Also quoted in Cameron Hazlehurst: *The Baldwinite Conspiracy*, in *Historical Studies* (University of Melbourne), vol. 16, no. 63, October 1974, pp.167-91 at 190. Hazlehurst's quotation is identical with Rose's except for the last expression, which is "public opinion" rather than "the public".

19. The last to be restored was Lord Balfour, one of the strongest opponents of the revolt in 1922. On Lord Curzon's death in March, 1925, he accepted Baldwin's offer to fill his vacancy as Lord President. As Balfour was wont to say, "I never forgive but I always forget".

20. Blake, *op. cit*., p.149.

21. *Ibid*., p.150.

22. Samuel was standing in for Lloyd George, who had led the Liberal Party since 1926 when Asquith had retired, and who at this time was recovering from a very grave operation.

23. Blake, *op. cit.*, p.158.

24. *Ibid*., p.159.

25. Rose, *op. cit*., p.377.

26. Amery, *op. cit*., pp.26-7. The relevant quotation is as follows:

> "… It is doubtful whether a Gallup poll taken in advance of that particular solution would have secured even 10 per cent support from either the Socialists or Conservatives in Parliament. The bulk of the Socialist party, indeed, broke away as soon as it was formed, and the Conservatives only acquiesced on the most explicit assurances given by Mr Baldwin to a party meeting that the emergency arrangement would be terminated the moment the balanced budget had been passed. By then, however, Ministers had begun to feel at home in their offices and to persuade themselves that the economic emergency still called for a 'National Government'. Unable to agree upon any policy to meet the emergency, they appealed to the country for a 'doctor's mandate'. The public, impressed by the vigour of the effort to balance the budget, and persuaded by a vast consensus of political and non-political 'expert' authority of the imminent danger of inflation and soaring prices, gave, by its vote, a majority in Parliament of ten to one, not so much for the Coalition, as against the unhappy and bewildered rump of the Socialist party. The subsequent necessity of having some sort of positive economic policy was met, for several months, by the fantastic expedient of certain Ministers dissociating themselves from the collective responsibility of the Cabinet and voting against its measures, and by their resignation after the Ottawa agreements".

The Ministers who resigned in 1932, including Sir Herbert Samuel, were numbered among 33 Liberals from whom the modern Liberal Party derived its descent. The 35 members of Sir John Simon's Liberal National Party continued as supporters of the National Government and effectively merged with the Conservatives. Samuelites and Simonites were bitterly antagonistic, while the sour hostility both those groups directed towards Lloyd George's family group of four was fully reciprocated. It was, as Lord Blake remarked, "a sad and petulant ending to a great tradition" (*op. cit*., p.166). The only significant change in this cast occurred when Samuel lost his seat in the 1935 election and was succeeded as leader by Sir Archibald Sinclair.

27. Reginald Bassett published an authoritative account of this crisis in 1958. Professor W. N. Medlicott, writing in 1967, described this book, *Nineteen Thirty-One, Political Crisis,* as "the fullest account of the negotiations", and observed that Bassett's "extreme accuracy had baffled but apparently not convinced MacDonald's surviving critics". (W N Medlicott, *Contemporary England 1914-1964 with epilogue 1964-1974*, Longman (1976), p. 257, fn. 1). David Marquand's biography of MacDonald published in 1977 authoritatively completed his vindication.

28. MacDonald's failing powers, both physical and political, had become obvious from early 1933 – tragically, he was conscious of his condition – and only a deputy as kind-hearted as Stanley Baldwin would have recoiled from displacing him a lot sooner. He lingered on in a state reminiscent of Lord Randolph Churchill in his prolonged decline – described by his contemporary and friend Lord Rosebery as the chief mourner at his own protracted obsequies.

29. Robert Blake, *How Churchill Became Prime Minister*, in Robert Blake and Wm. Roger Louis (eds): *Churchill: A Major New Assessment of his Life in Peace and War*, Oxford University Press (1993), p.270.

30. The best account of this relationship in my judgment was given in the late Sir Robert Rhodes James's book published in 1998, *A Spirit Undaunted: the Political Role of George VI*, Little Brown. This covers in detail the political role of George VI throughout his reign. Simon Heffer has performed a service for King Edward VII similar to Rhodes James's for King George VI.

31. *Ibid*., p.271.

32. *Ibid*., pp.271-5.

33. Ben Pimlott, *Hugh Dalton*, Papermac (1986), pp.410-22.

34. *Ibid*., p.415.

35. Rhodes James, *op. cit*., pp.276-7.

36. Hennessy, *op. cit*., pp.51-2. This summary touched off a most stimulating discussion of the implications of all this but this is not the place to deal with it.

37. *Retrospect on the Tory Leadership*, August, 2001.

38. Blake, *The Office of Prime Minister*, *loc. cit.*, p.57.

39. *Ibid*., fn. 1.

40. *Ibid*., pp.57-8.

41. Hennessy, *op. cit*., p.52.

Chapter Ten:
What shall we do with ex-Governors-General?

Sir David Smith, KCVO, AO

"As for further appointments after retirement, I take a narrow view that for an Australian the Governor-Generalship is the apex. There is no office higher than it and one should not go below it. An apex is the wrong shape to be a stepping stone".[1]

Once upon a time our Governors-General came from Britain and returned home at the end of their tours of duty, never to be heard of again, at least not in the context of Australian public life. Today those who are appointed to that high office are distinguished Australians who continue to live among us, either immediately upon stepping down or after a brief sojourn overseas. Hitherto they have returned to their home States, but our latest former Governor-General has retired to live in Canberra, just down the road from Yarralumla. The question of what, if anything, we should do with them after they leave Government House has never been considered in public policy terms, so far as I am aware, and such precedents as we have are *ad hoc*, contradictory and unsatisfactory.

Our present Governor-General is the twenty-third to hold the office, and the tenth Australian. Dr Peter Hollingworth's Australian predecessors were Sir Isaac Isaacs, Sir William McKell, Lord Casey, Sir Paul Hasluck, Sir John Kerr, Sir Zelman Cowen, Sir Ninian Stephen, Mr Bill Hayden, and Sir William Deane.

Sir Isaac Isaacs was a Crown Law Officer, barrister, Queen's Counsel, member of the Legislative Assembly of Victoria, Solicitor-General and later Attorney-General for Victoria, occasionally acting Premier, member of the House of Representatives in the Federal Parliament, federal Attorney-General under Prime Minister Alfred Deakin, Justice of the High Court under Chief Justice Sir Samuel Griffith, Chief Justice, and finally, in 1931, at the age of 75, the first native-born Australian Governor-General.

His appointment was opposed by the King, by the Federal Opposition, and by some, not all, sections of the media. His appointment was of significance to the Empire, for it was the first appointment of a Governor-General to be recommended to the Monarch by a Dominion Prime Minister and not by a British Minister.

Isaacs was called upon several times to exercise constitutional functions in potentially troublesome circumstances, but he handled each situation impeccably. He also had to cope with the coming to office of an Opposition which had opposed his appointment. He handled that successfully and set a pattern for future incumbents who would be so placed. His term as the first Australian in the post has been described as one of the most important in the history of the office.

Isaacs retired to Melbourne in 1936, at 80 years of age, and remained vigorous and active. He was a regular reader at the Melbourne Public Library and discussed books and their work with students, made speeches and broadcasts, wrote pamphlets and articles, presided at functions, and carried on an extensive correspondence.[2] He campaigned consistently for reform of the Australian Constitution and for wider Commonwealth powers, yet he was also an ardent Empire and King's man,[3] and an opponent of any attempt to insert guarantees of personal freedoms in the Constitution, believing them to be matters for Parliament and not judges.[4] In the last year of his life he was active in defence of the Victorian State Constitution against attempts by the Legislative Council to coerce the State Government. He died in 1948 at the age of 92.

Eleven years were to elapse after Isaacs's retirement before Australia was to have its second native-born Governor-General in the person of William John McKell, boilermaker, union official, barrister, member of the New South Wales Legislative Assembly, minister of state, Leader of the Opposition, Premier of New South Wales, and in 1947, at the age of 55, Governor-General. He came to that office straight from politics. The Federal Opposition was outraged by his appointment and said that he would be removed when they returned to government. Oddly enough, even members of the Labor Government objected to his appointment, and twice as many Labor members absented themselves from his swearing-in as did Opposition members.[5] But McKell acted impeccably as Governor-General, and instead of having him removed, the Menzies Government extended his term of office and offered him the knighthood which he accepted.

McKell retired to his farm near Goulburn in 1953, at 61 years of age, to enjoy life as a practical farmer, to race his trotters, and to resume his enjoyment of boxing, a sport which he had not thought appropriate for a Governor-General to patronise.[6] In due course he and Lady McKell moved to Sydney, leaving their son to manage the farm. McKell was now free to accept some business offers and he took up a number of company directorships, including positions of chairman of directors.

In 1956, at the age of 64 and in good health, the ex-Governor-General was given an unexpected opportunity to use his diplomatic abilities and political experience. In a generous gesture by Prime Minister Robert Menzies and his Minister for External Affairs, Richard Casey, that McKell greatly appreciated, he was nominated as Australian member of the British-led commission to draft a new federal Constitution for Malaya. Headed by Lord Reid and including representatives from Britain, Pakistan and India, the commission travelled widely through Malaya and released its report in February, 1957. Although McKell signed a minority report opposing the principle of nominated members to the proposed Upper House, he helped the process by which Malaysia (as it now is) became a democratic member of the Commonwealth, and in September, 1957 he returned to that country to participate in the independence celebrations.[7] He died in 1985 at the age of 93.

Our third Australian-born Governor-General was Richard Gardiner, Baron Casey, engineer, company director, diplomat, member of the House of Representatives, minister of state, life peer, and in 1965, at the age of 75, Governor-General. But these were only his Australian accomplishments. During World War II Winston Churchill offered Casey two positions which he filled with distinction – in October, 1941 he became United Kingdom minister of state in the Middle East, based in Cairo, much to the chagrin of Prime Minister John Curtin in Australia and the Foreign Office in Whitehall; to be followed in January, 1944 by the Governorship of Bengal, India.

Casey had been appointed a life peer (on the recommendation of the British Prime Minister, Harold Macmillan), in January, 1960 and had resigned as Minister for External Affairs and from Parliament in the following month. The peerage made him an institution, and Australian governments felt able to call on him to represent Australia, the East African independence celebrations in 1963 being one example. He refused seats on company boards in Australia, Britain and the United States, and kept his commitments almost exclusively to the public domain and without remuneration. Unable to speak as a local in the Upper House of the United Kingdom Parliament, or as an Australian in a non-Australian Parliament, Casey used his appearances in the House of Lords to speak for the wider Commonwealth, and in 1963 published his book *The Future of the Commonwealth*. The book was received in the corridors of power with polite indifference, which left him angry and ready to abandon the British connection. Nevertheless, both he and his wife, Maie, continued to travel and to throw themselves into their respective writing.[8]

When the offer of the Governor-Generalship was made in 1965, Casey's first reaction was to refuse, not least because of the non-Labor reaction to the appointment of McKell on account of his political background. With the appointment eventually accepted and announced, Casey remained apprehensive until a reassuring telegram arrived from Arthur Calwell, Leader of the Opposition, welcoming the news personally, for his Party and for Australia.[9] Nevertheless, Casey had asked for a two year appointment, with extensions if he wished, rather than the more normal five-year term. He was to serve in the office for three and a half years.

Casey retired as Governor-General in 1969, at the age of 78, to a farm at Berwick, outside Melbourne, and to an East Melbourne townhouse. He was still in demand as a public speaker; politicians, businessmen and scientists still called on him; our diplomats still called on him, wrote to him, sent him papers; and in 1972, with editorial assistance from TB Millar, he published a volume of extracts from his diaries for the 1950s under the title *Australian Foreign Minister*.

In 1970 he and Maie went to Katmandu as the Governor-General's representative at the wedding of the Crown Prince of Nepal. But by 1973 Casey's health began to fail, and he found himself with nothing in particular to do. He had always been a doer, and he lacked the temperamental resources to cope with solitude and inactivity. A car accident in September, 1974 put him in hospital for nine months, and his wife Maie joined him there in April, 1975 after her car accident. They left hospital together in July, 1975 and returned home. Casey tried to put some work into a book of his speeches, but his heart was not in it and it was never completed. As someone who was never really happy unless he was working, he was overtaken by feelings of loneliness and uselessness, and he lived out his retirement in an enforced quiet which he did not enjoy.[10] He died in 1976 at the age of 86.

Three Governors-General from Britain had come between McKell and Casey, who was the first Australian to be recommended for the office by a non-Labor government. His appointment ensured that there would be no further appointees from Britain.

Casey was followed by Sir Paul Meernaa Caedwalla Hasluck, journalist, university lecturer, public servant, diplomat, member of the House of Representatives, minister of state, poet, author, historian, and in 1969, at the age of 64, Governor-General. He had represented Australia at unique occasions in the nation's history: for example, he was the first person to present credentials to the first Secretary-General of the United Nations. He wrote and published on a wide range of topics – poetry, autobiography, Aboriginal affairs, foreign affairs, Australia's administration of Papua New Guinea, two volumes of the Australian official war history, and on the office of Governor-General.

Hasluck was an astute observer of politics and politicians, and a meticulous keeper of written records, not only about his parliamentary contemporaries, but also on such diverse matters as poetry and personalities, social habits and marriage, modern literature and music. His profiles of those about him in Parliament were published after his death by his son Nicholas.[11] A senior political journalist, in reviewing the book, had this to say about its author:

> "Paul Hasluck's career has been remarkable, probably unique, by Australian standards. Hasluck was not only a journalist, historian, public servant, politician and Governor-General but also a man who left a distinct contribution in each of these capacities".[12]

His belief in a level of dignity in politics, and his refusal to canvass openly his own attributes and achievements, were to cost him the Prime Ministership. As Governor-General he wrote about and defined the role and powers of the office.[13]

Sir Paul Hasluck retired as Governor-General in 1974, at the age of 69, and he and Lady (later Dame Alexandra) Hasluck returned home to Perth. He continued writing in retirement, producing amongst other things his autobiography, *Mucking About*, in 1977; *The Office of Governor-General* in 1979; and *Diplomatic Witness – Australian Foreign Affairs* in 1980. He died in 1993, at the age of 87.

A glance through the Hasluck collection of press clippings shows that the most frequent descriptions of him, whether as Cabinet minister or Governor-General, were as a perfectionist, an idealist, a person of integrity. In 1946 he resigned from the Department of External Affairs over a matter of principle after disagreement with the way the minister, Dr H.V. Evatt, was running the department. In 1967, following the death of Harold Holt, the three party-room votes that would have made him Prime Minister instead of John Gorton eluded him because he would not go out and campaign or offer deals in order to secure them. W McMahon Ball, then Emeritus Professor of Political Science at Melbourne University, had this to say in 1977 in reviewing Hasluck's autobiography:

> "It is a good thing, with whatever mistakes or failures, to have had a man at the centre of Australia's political life as indifferent to personal gain or glory, as incapable of sly or devious tactics, as Sir Paul".[14]

Hasluck's successor was Sir John Robert Kerr, lawyer, barrister, Judge of the Commonwealth Industrial Court, Judge of the Supreme Courts of the Australian Capital Territory and the Northern Territory, Chief Justice and Lieutenant-Governor of New South Wales, and in 1974, at the age of 59, Governor-General. Kerr's dismissal of the Whitlam Government in 1975 has overshadowed his many accomplishments in the law as student, practitioner and judge. He was a brilliant student, winning an exhibition that took him to Sydney University, where he won or shared every possible prize or scholarship on his way through Law School.

After war service with the Second AIF, described by some as cloak and dagger stuff, Kerr became the first Principal of the Australian School of Pacific Administration. He acted briefly as organising secretary and Secretary-General to the South Pacific Commission before returning to the Bar, where he became an outstanding advocate. The first of several federal judicial appointments came in 1966, and in 1972 he became Chief Justice of New South Wales, where he set about modernising the administration of the New South Wales Supreme Court. His appointment as Governor-General was widely hailed, particularly by the media, as a magnificent and inspired choice. *The Age*'s editorial said that "it is gratifying that the new Governor-General will be a man with an outstanding breadth of community and international interests as well as of military and legal experience".

Kerr's retirement as Governor-General on 8 December, 1977, at the age of 63, was marked with bitterness and acrimony. The Prime Minister's press statement announcing the impending retirement, after three and a half years in office, stated that the Governor-General had asked leave of The Queen to retire early in the belief that any remaining partisan feelings in the Australian community might be resolved more quickly if he were now to make way for a successor.[15]

Two months later the Fraser Government announced that it had appointed Kerr as Ambassador to UNESCO, the United Nations Educational, Scientific and Cultural Organisation. The Labor Opposition and the media were quick to denounce the appointment. Some were outraged at the prospect of Kerr receiving any sort of personal benefit whatsoever, while others raised the principle of a former Governor-General receiving what might be seen as a reward from the Government that had served under him. The thought of him receiving a salary on top of his vice-regal pension drove his critics into a frenzy: political journalist Michelle Grattan described the appointment as an example of breath-taking cynicism. Three weeks later Kerr put an end to the storm by announcing that he would not be taking up the appointment.

In his letter of resignation to Prime Minister Malcolm Fraser, Kerr said that:

> "I have become aware, since arriving in Paris, of the attacks that have been made upon me and upon the Government as a result of my appointment as Australian Ambassador to UNESCO. These attacks have been made in the Parliament … and … in various branches of the media … There is no doubt that, in these circumstances, my ability successfully to undertake the work of Ambassador to UNESCO would be severely impaired".[16]

For the next five years Sir John and Lady Kerr lived in England, making frequent visits to Europe. During this time Sir John wrote his autobiography, *Matters for Judgement*, published in 1978. He and Lady Kerr returned to Australia at the end of 1982, to their home in Sydney. He died in 1991, at the age of 76.

Kerr was succeeded by Sir Zelman Cowen, lawyer, barrister, Queen's Counsel, naval officer during World War II, Rhodes Scholar, university lecturer, Professor of Law, Vice-Chancellor of two Universities, and, in 1977, at the age of 58, Governor-General. As a scholar Cowen had written and published on the law, including international law; on the Commonwealth of Nations; on the liberty of the individual; a biography of our first Australian-born Governor-General, Sir Isaac Isaacs; and an Introduction to the second edition of HV Evatt's *The King and his Dominion Governors*. He thus came to the vice-regal office, not only with a determination to apply a touch of healing to the nation's constitutional wounds, but also with some background knowledge of the office. Over the next four and a half years he was to bring to the task a passion and a vigour such as the office had not seen before and has not needed since.

On his retirement in 1982, at the age of 62, Cowen took up the appointment of Provost of Oriel College, his former Oxford College. He and Lady Cowen lived in England for the next eight years. During this period he served for five years as Chairman of the British Press Council; maintained significant academic links with universities in a number of countries; and served on the boards of many academic and community organisations, in Britain and in Australia. The Cowens returned to Australia in 1990, where Sir Zelman became Chairman of such divers organisations, among many others, as John Fairfax Holdings Ltd and The Australian National Academy of Music; and President of the Australia-Britain Society and of the Order of Australia Association. He also served as Chairman of the Advisory Committee on Executive Government to the 1985-88 Constitutional Commission established by the Hawke Government. He has continued to write and speak on a wide range of topics, including the republic which he strongly supports, and is currently engaged in writing his autobiography.

Cowen's successor was Sir Ninian Martin Stephen, lawyer, barrister, Queen's Counsel, Judge of the Supreme Court of Victoria, Justice of the High Court of Australia, and in 1982, at the age of 59, Governor-General. His term of office coincided with Australia's bicentenary celebrations in 1988, and was extended on that account, with the result that he and Lady Stephen were hosts to more visiting Heads of State than at any other time in the nation's history. They also made more state visits to other countries than any other Governor-General.

Stephen retired in 1989, after more than six years in office, at the age of 65, and immediately embarked on another career of government and non-government appointments. Within two months of leaving Yarralumla he was off to Barcelona as leader of a delegation to lobby for Melbourne's right to host the 1996 Olympic Games. Three months later Prime Minister Bob Hawke announced Stephen's appointment as Australia's first Ambassador for the Environment, an appointment in which, so the Prime Minister told us, the new Ambassador would report to the Prime Minister, the Foreign Minister, Senator Gareth Evans, and the Minister for the Environment, Senator Graham Richardson. This diplomatic appointment was to last for three years, and I shall have more to say about it later.

Stephen also took up many other appointments: Chairman of the National Library Council; Chairman of the Committee of Review into the Institute of Advanced Studies of the Australian National University; Director of IBM Australia Ltd; a UN observer at constitutional talks in South Africa; Chairman of Northern Ireland Peace Talks; first Chairman of the Constitutional Centenary Foundation; a Judge of the International Tribunals for former Yugoslavia and for Rwanda; Special Commonwealth Envoy to peace talks in Bangladesh (where his effigy was burnt by protesters in Dhaka); a Judge of the International Court of Justice in a case brought by Portugal against Australia over the Timor Gap agreement; and this is but a partial list of his wide-ranging appointments to national and international bodies. He has also made a number of speeches, and he launched former Prime Minister Bob Hawke's autobiography.

Sir Ninian retired as Ambassador for the Environment after three years. Prime Minister Paul Keating scrapped the post, combined its duties with those of an existing post based in Geneva, and appointed a career diplomat to it.

Stephen was succeeded by William George Hayden, public servant, police officer, Member of the House of Representatives, minister of state, Leader of the Opposition, minister of state again, and in 1989, at the age of 56, Governor-General. Hayden's appointment infuriated his critics on both sides of politics, but he was to carry out his duties and responsibilities impeccably, to the great delight of his many friends on both sides of politics, as well as of the staff who had the privilege and pleasure of serving him.

It was during Hayden's term that the push for the republic began in earnest, with many claiming that a President would be able to speak out on issues of concern to the community. Hayden responded to the call for an outspoken Head of State, and spoke about a number of matters then under discussion within the community. Responsible sections of the media welcomed these comments as useful contributions to informed public debate. But Hayden also expressed his reservations about socialism and republicanism, as well as his opposition to changing the Australian flag, and spoke about a number of social issues. For these "heresies" he was attacked by the media and by others for daring to express views with which they disagreed.

In order to punish him, even Hayden's ministers started leaking falsehoods about the extent of his official overseas travel and expenditure at Government House. They preferred to ignore the facts that the Governor-General may not undertake overseas travel without the specific approval of the Prime Minister, and that the annual appropriations for Government House are approved by the Prime Minister as the responsible portfolio minister and by the entire Cabinet during the Budget process. It would seem that vice-regal outspokenness is welcome only when politically correct views are expressed and the media approve of what is being said.

Hayden left a legacy at Government House that had eluded his and my predecessors, for he finally was able to secure from the Keating Government the necessary funds to provide the staff at Government House with decent working conditions. The kitchen and pantry areas, the gardening complex, and the main office area, long condemned as being below standard, were renovated or replaced to provide the Governor-General's staff with working conditions equal to those available to their fellow public servants elsewhere.[17] Present and future generations of Government House staff have every reason to be grateful for Hayden's so-called "extravagance".

Hayden retired in 1996, after seven years in office, at the age of 63, to his farm in Ipswich. He was appointed Adjunct Professor of Humanities at the Queensland University of Technology; and Queensland Premiers from both sides of politics invited him to undertake special tasks on behalf of their respective governments. He was appointed by Prime Minister John Howard to be a delegate to the 1998 Constitutional Convention, and he campaigned against the republic during the 1999 Referendum campaign. He is chairman of the editorial board of *Quadrant*. He continues to write and speak on current issues, including foreign affairs, immigration, multiculturalism and republicanism. He also endures regular attacks from members of the media who not only disagree with his views but challenge his right to hold them, and he has to write many letters to editors to correct misrepresentation of his views in the course of those attacks. It would seem that ex-vice-regal outspokenness is also welcome only when politically correct views are expressed and the media approve of what is being said.[18]

Our final ex-Governor-General is Sir William Patrick Deane, solicitor, barrister, Queen's Counsel, Judge of the Supreme Court of New South Wales, Judge of the Federal Court, Justice of the High Court of Australia and, in 1996, at the age of 65, Governor-General. His term of office will be best remembered for the way in which he involved himself in championing the cause of the disadvantaged (to an extent that led to him being described as "the shadow minister for social services"), and in representing the nation at many memorial services commemorating major accidents and disasters, including the Port Arthur massacre, the Swiss canyoning tragedy, and the Black Hawk helicopter crash.

Deane retired this year (2001) after almost five and a half years in office, at the age of 70. On his retirement, amidst all the eulogies to one whom so many editors and journalists described as a model of a modern Governor-General and an ideal President of an Australian republic, it fell to *The Australian*, oddly enough, to sound an editorial note of caution and to give some advice to his successor, Dr Peter Hollingworth:

> "To the extent that the office affords a Governor-General some moral authority, forays into politics or other areas of public controversy only serve to undermine it … Sir William tried to avoid the dangers by concerning himself with problems, not solutions. Yet a number of times he went very close to crossing the line into politics, and occasionally crossed it".[19]

What a pity *The Australian* withheld these words of wisdom until Deane's last day in office.

At the time of writing, Sir William has been appointed president of CARE Australia, and has announced his intention to work with disadvantaged children through the Youth Off The Streets programme.

For the major part of its first century as a federation, Australia treated its Governors-General badly, and its ex-Governors-General not at all. We enshrined the salary of the office in s.3 of the Constitution, fixed it at ten thousand pounds until the Parliament provided otherwise, and said that it could not be altered during the Governor-General's continuance in office. The ten thousand pounds became twenty thousand dollars in 1966, but Parliament was tardy in providing otherwise, and the Governor-General's salary, fixed in 1900, remained unchanged until Sir John Kerr's appointment in 1974. And we provided no pension whatsoever for an ex-Governor-General. We even added insult to injury by requiring all Governors-General, up to and including Sir Paul Hasluck in 1974, to make some financial contribution to the running of Government House, out of their 1900 salary.

Our first Governor-General, the Earl of Hopetoun, was the first victim of government and parliamentary parsimony. Apart from the constitutional provision for his salary, no appropriation was made for an allowance to meet the cost of maintaining the Governor-General's establishment. Hopetoun spent heavily from his own resources in the expectation that the Prime Minister, Edmund Barton, would soon remedy the situation. But Barton's handling of the Parliament on this issue was inept; the Parliament was unsympathetic; and on 5 May, 1902 Hopetoun cabled the Secretary of State at the Colonial Office to report that:

> "No allowance whatever will be given. On a salary of £10,000 per annum I am expected to pay a staff, visit various States, paying all travelling expenses except railway, occupy two great Government Houses, paying lights, fuel, stationery, telegrams, postage other than official, dispense hospitality, maintain dignity of the office".[20]

Hopetoun had already strained his private resources, and he saw difficulties ahead for his successors. He asked to be recalled, and his appointment came to an end after two years.

Our second Prime Minister, Alfred Deakin, handled things rather better, securing Parliament's agreement to an allowance for the next Governor-General for the operation of Government House. In addition, an Official Secretary to the Governor-General and the Executive Council would be appointed and paid by the Commonwealth. Nevertheless, our first twelve Governors-General were expected to meet staff salaries and some household expenses of Government House out of their salary of £10,000. The last to do both was McKell, who was ready to retire at the end of his extended term, particularly as he was heavily out of pocket, with half of his salary going on "staff sustenance".[21] He informed Menzies of this, and the Prime Minister acted to make this a charge against the Treasury, a change which was greatly appreciated by McKell's successor, Sir William Slim, and those who were to come after him.[22]

The matter of a vice-regal contribution to household expenses was not so easily settled, and our first seventeen Governors-General, up to and including Hasluck, were expected to make their contributions. Out of recognition that the passage of time was steadily eroding the real value of a salary fixed in 1900, the Commonwealth progressively reduced each Governor-General's contribution, but it did not disappear altogether until the appointment of Sir John Kerr in 1974. In that year the Whitlam Government asked Parliament to approve a Bill to fix Kerr's salary at $30,000 to replace the constitutional amount of $20,000, and ever since, the *Governor-General Act* has been amended to fix the salary of the incoming Governor-General for the duration of his term of office. Thus since 1974 the annual parliamentary appropriations for the Governor-General's Office have covered all expenses of running the Governor-General's establishments, without the need for a financial contribution from the Governor-General.

Just as our Governors-General were treated less than generously, so too were our ex-Governors-General, for prior to 1974 there was no pension entitlement payable them. In 1970 Prime Minister John Gorton had learned that one of our British former Governors-General was in necessitous circumstances, and he asked Cabinet to approve guidelines for the payment of *ex-gratia* pensions to certain former Governors-General and their widows. The purpose of the arrangement was to ensure that a former Governor-General, his wife or his widow, did not suffer hardship in their declining years, and that they would be able to meet social obligations which might be expected to devolve upon them as a result of occupancy of the office.[23]

Cabinet's approach was certainly not generous. Seven months were to elapse between the circulation of the submission and the reaching of the decision; each individual case was to be considered on its merits; payment would be made only on it becoming known that some financial assistance was needed; and the vice-regal pension was fixed at a figure below that of the pension of a first assistant secretary in the Commonwealth Public Service, and about half that of a High Court Justice. Departmental advice that the scheme, though welcome in itself, was undignified and not very generous, was ignored by Gorton, who also rejected suggestions that the pension figure should be at least 60 per cent higher, and that the pension should be available to all former Governors-General and their widows, leaving it to those who had no need of it to refuse it if they wished.[24]

In 1974, in introducing the Bill which was to provide for Parliament, and not the Constitution, to determine the Governor-General's salary, Prime Minister Gough Whitlam also asked Parliament to approve a vice-regal pension as of right for all future ex-Governors-General and their widows, at the amounts fixed from time to time for ex-Chief Justices of the High Court and their widows. The arrangement was not to be retrospective, and the *ex-gratia* amounts payable at the time were to continue, with the amounts to be adjusted from time to time. Whitlam's proposal had the support of the Opposition, and the Bill was presented and given its first, second and third readings in six minutes.[25] Hasluck thus became the first Governor-General to retire with a statutory vice-regal pension.

The view that former Governors-General should be able to meet social obligations which might be expected to devolve upon them as a result of occupancy of the office has meant that they are also provided with certain facilities and privileges in retirement. These consist of a fully-furnished office in their home city; the normal range of office facilities such as postage, telephone, office furniture and equipment; a full-time secretary; telephone and facsimile facilities at home; access to motor vehicle transport in Australia; domestic air and train travel for official purposes; and overseas travel subject to the Prime Minister's approval. As this arrangement is a matter of Prime Ministerial approval and has no statutory basis, its origins are somewhat shrouded in the mists of time, but it is understood that Lord Casey, who retired in 1969, was the first beneficiary of such an arrangement.[26]

There is thus today no longer any element of personal financial sacrifice to burden a former Governor-General willing and able to meet the expectations placed upon him by the Australian community, and this is as it should be. On the other hand, as ex-Governors-General continue to be supported by the Australian community by way of pension and facilities and privileges, and because the community will continue to have expectations of them because of the high office which they once occupied, the kinds of things which they do in retirement are important to the community and to the office itself.

My survey of our nine Australian ex-Governors-General shows them to have been men of great talent and with distinguished records of community and public service before coming to that office. They also retired with their intellect and their vigour intact, at least so far as their respective ages would allow, and each one proceeded to occupy himself in a range of community and public activities. All of this has also been as it should be.

So far as I have been able to establish, from public records which are not necessarily comprehensive or complete, only McKell, Cowen and Stephen seem to have accepted appointments to the boards of public companies. Fortunately, for the sake of their own personal reputations, and for the dignity of the vice-regal office which once they occupied, none seems to have found himself associated with a company or with a board that was involved with questionable or unlawful activities. Nevertheless, given the responsibilities, risks and potential liabilities attaching to company directors, one would have to question the wisdom of ex-Governors-General accepting such appointments. As all of them will have found, life after vice-regal office has no shortage of challenging and useful things, both remunerated and voluntary, for them to do, without having to put at risk all that they previously have done.

There is, however, one class of employment that should never be offered to, or accepted by, an ex-Governor-General. Fortunately we have had only two examples where this has happened. I refer, of course, to salaried employment as a public servant, and particularly as a public servant of the Government that had previously served under the Governor-General concerned.

As I have already mentioned, Sir John Kerr's acceptance of an Ambassadorship under the Fraser Government unleashed such a torrent of criticism that he declined to take up the appointment. *The Age* expressed its "disgust and concern", while its political correspondent, Michelle Grattan, reported that the cynicism of the appointment had taken her breath away. Much was made of the fact that Kerr would receive a salary in addition to the vice-regal pension. Three weeks later *The Sydney Morning Herald* reported that his decision not to take up the appointment was a matter of great relief and great pleasure.

Yet eleven years later, when the Hawke Government announced Sir Ninian Stephen's acceptance of an Ambassadorship, the media fell over itself to praise the appointment. There was no thundering denunciation from *The Age* – on the contrary, it saw the appointment as a "masterstroke". *The Sydney Morning Herald* absolutely lauded the appointment, while *The Australian* saw it as a coup for Prime Minister Bob Hawke. The fact that Stephen would receive a salary in addition to the vice-regal pension was mentioned in passing but was not otherwise commented upon.

So far as I have been able to discover, only two commentators were sufficiently honest and objective to be able to put media euphoria over the Stephen appointment into proper perspective. As they did so in language far more eloquent than any I might employ, I trust I shall be forgiven for quoting them somewhat extensively.

Gerard Henderson wrote that:

> "I cannot recall any recent government appointment that has met with such widespread acclaim as Bob Hawke's decision to make Sir Ninian Stephen Australia's first Ambassador for the Environment".[27]

Henderson conceded that he supported the Stephen appointment and had no doubt that Sir Ninian would do a good job. And then he wrote:

> "But forgive me for a moment if I raise an unfashionable point. The last Governor-General to accept a diplomatic appointment was universally condemned for doing the very thing for which Sir Ninian is now being widely acclaimed. … The essential charge against Sir John was straightforward – namely that a former Governor-General should not accept a job offer from any government".

Henderson then went on to remind his readers of what the media had said about Sir John Kerr's appointment as Australia's Ambassador to UNESCO eleven years earlier:

> "*The Age* [had] editorialised that a former Governor-General 'should not accept an office involving financial gain from the Government'. *The Sydney Morning Herald* [had] intoned that the Fraser Government 'should never have set a precedent under which a future Governor-General may have some future appointment to hope for from the party in power'. Leading journalists of the day (Michelle Grattan, Alan Reid, Laurie Oakes, Peter Samuel) [had] said much the same thing. Paul Kelly [had written]: 'That a Governor-General who exercises his discretion in a way favourable to the government in power is to be, or can be, rewarded after his term of office can create a dangerous political precedent' ".

And then to reinforce his reference to media double standards, Henderson compared Kerr's dismissal of Whitlam in 1975 and his grant to Fraser of an early election in 1977 with Stephen's grant to Hawke of early elections in 1984 and 1987. But Henderson's comparisons fell on deaf ears. The media's moralising on the possible exercise of vice-regal discretion in the hope of some future appointment, so virulent in 1978, was strangely absent in 1989.

While Henderson wrote of the dangers to ex-Governors-General of any subsequent appointments being seen as rewards, Peter Ryan, a former editor of Melbourne University Press, raised an even more important principle that goes right to the heart of the nature of the Governor-Generalship.[28] Ryan asked:

> "Why did Sir Ninian do it? After an impeccable record of public service, culminating in an extended term as Governor-General, where his genial dignity made him both loved and respected, why would he start an honourably earned retirement by pulling the trigger of the double-barrelled weapon that has just wounded him personally, and that has put another scar on the scarcely healed frame of the Governor-Generalship. … In one perhaps hasty decision, he let himself be kidnapped right into the murky middle of conservation politics … And he [has] called yet again into question the essential nature of the Governor-General's office, and how its incumbents should behave.
>
> "To take the second aspect first, Governors-General are not ordinary people. … Like the field marshals, they are on the active list until they die. That symbolises the high honour, and also represents its price. What Governor-General, however long he may live in retirement, does not retain about him something of the aura of his late great office? [Sir John Kerr's UNESCO appointment] had raised in pointed form the question whether retired Governors-General should look for further appointments under government. Did not Sir Ninian notice? … All the considerable weight of esteem that he enjoyed (and earned) as Head of State he has now cast in support of one side of politics … [He] will 'report' to [Prime Minister] Hawke, Senator Richardson and Senator Evans".

And then Peter Ryan posed the question which is the nub of this issue:

> "Is it dignified for a former Head of State to 'report' to politicians? … I feel sorry for Sir Ninian. …But I feel sorry for me, too. Somebody has let me down".

My final comment on this important matter of principle raised by Peter Ryan comes from Sir Paul Hasluck, of whom his biographer said that he:

> "… delineated what he believed were the appropriate standards of conduct and behaviour for a Governor-General. These ranged from relations with the public service, to the desirability of former Governors-General not holding public office after their retirement".[29]

Described by Peter Ryan as "the most intellectual and most scrupulous of all our Governors-General",[30] Hasluck followed the example of his predecessor Lord Casey. In retirement, they both virtually separated themselves from public life, declined to take public office of any kind, and limited their public speaking engagements so that the public stage was left clear for the next incumbent.

As for further appointments after retirement, it was Hasluck's view that:

"… as in the case of a person like a Chief Justice, a Governor-General would imperil the reputation for detachment and independence necessary for his office if it were to appear that he was under an obligation to anyone or was inclined by his own hopes to seek special consideration in the future. While I take this strict view about appointment to new offices after retirement, it would not seem to me to be either inappropriate or improper for a retired Governor-General to accept public engagements which do not place him under an obligation or make him subject to the direction of another authority".

For Hasluck, the thought that a former Governor-General should become a Commonwealth public servant and be subject to instructions given to him by ministers and departmental heads, and particularly by those who once had served under him, was anathema. For all Australians, the thought that we should allow our expectations in this matter to be determined for us by the media, with its flexible principles and moveable standards, should also be anathema. The office of Governor-General is far too important for us to allow any ex-Governor-General to become the paid servant of any Australian government.

Hasluck saw the office of Governor-General as the apex for an Australian, and he believed that, once having held the highest office, one should not go below it. As he put it so succinctly and pointedly: "An apex is the wrong shape to be a stepping stone".[31]

Endnotes:

1. Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979, p.46.

2. Sir Zelman Cowen, *Sir Isaac Alfred Isaacs (1855-1948)*, in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography*, Volume 9, 1891-1939, Melbourne University Press, Carlton, 1983, p.449.

3. Sir Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967, p.217.

4. *Ibid*., pp.253-4.

5. Christopher Cunneen, *William John McKell*, University of New South Wales Press Ltd, Sydney, 2000, p.200.

6. *Ibid*., p.212.

7. *Ibid*.

8. W J Hudson, *Casey*, Oxford University Press, Melbourne, 1986, pp.290-292.

9. *Ibid*., pp.300-301.

10. *Ibid*., pp.318-324. See also W J Hudson, *Casey, Richard Gavin Gardiner, Baron Casey of Berwick, Victoria, and the City of Westminster (1870-1976)*, in John Ritchie (ed.), *Australian Dictionary of Biography,* Volume 13, 1940-1980, Melbourne University Press, Carlton, 1993, p.385.

11. Sir Paul Hasluck, *The Chance of Politics*, edited and introduced by Nicholas Hasluck, Text Publishing, Melbourne, 1997.

12. Paul Kelly, *Insider Dealings*, in *The Australian's Review of Books*, April, 1997.

13. Hasluck, *The Office of Governor-General* (1979).

14. Quoted in *Hasluck – writer, diplomat, politician, enigma*, Obituary in *The Australian*, 11 January, 1993.

15. *Resignation of the Governor-General*, Prime Minister's Press Statement, 14 July, 1977.

16. Sir John Kerr, *Matters for Judgement*, The Macmillan Company of Australia Pty Ltd, South Melbourne, 1978, pp.421-2.

17. In my final Annual Report as Official Secretary to the Governor-General, submitted to the Prime Minister and the Parliament on 31 August, 1990, my last day in office after seventeen and a half years, the final paragraph read as follows:

> "My time at Government House has been punctuated by a series of plans and proposals, each designed to provide the Governor-General and his staff with the resources and spaces necessary to enable them to carry out their duties, and each consigned to the dust-bin of history, not for want of need or merit but simply for the want of funds. That Government House functions as well as it does is due to the dedication of the staff and to their infinite capacity for improvisation. I leave office with a profound sense of disappointment that I have failed to secure for my colleagues and my successor the working environments to which they clearly are entitled and which they rightfully deserve".

18. My research for this paper has involved me in reading vast quantities of press cuttings about ex-Governors-General. I have been struck by the dishonourable tactic of many of Mr Hayden's media critics in embroidering their attacks on him by reminding their readers of the publicly-funded facilities available to him, quite properly, as Governor-General and as an ex-Governor-General – a reminder which seems strangely absent from accounts of the activities of Sir Zelman Cowen and Sir Ninian Stephen, and which I am certain will be absent from any similar accounts about Sir William Deane.

19. *Some quiet advice for Hollingworth*, in *The Australian*, 29 June, 2001.

20. Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs*, George Allen & Unwin, Sydney, 1983, p.31.

21. Vince Kelly, *A Man of the People: From Boilermaker to Governor-General: The career of the Rt Hon Sir William McKell*, Alpha, Sydney, 1971, p.202; and Christopher Cunneen, *William John McKell: Boilermaker, Premier, Governor-General*, University of New South Wales Press Ltd, Sydney, 2000, p.211.

22. Cunneen, *ibid*.

23. Cabinet Submission Number 86 of 9 January, 1970, and Cabinet Decision Number 583 of 3 August, 1970.

24. Personal knowledge.

25. *Parliamentary Debates, House of Representatives*, 9 April, 1974, pp.1248-9.

26. Similar, if somewhat more generous, facilities and privileges are provided for former Prime Ministers after leaving Parliament, to enable them to meet community obligations which might be expected to devolve upon them as a result of their occupancy of that office. With some former Prime Ministers, and some former Governors-General, engaging in private commercial activities after their retirement from public office, the question of separating their publicly-funded facilities from those used in the course of their private business activities remains to be determined.

27. Gerard Henderson, *This tale of two knights speaks of double standards*, in *The Australian*, 31 July, 1989.

28. Peter Ryan, *Sir Ninian steps into the green minefield*, in *The Age*, 29 July, 1989.

29. Robert Porter, *Paul Hasluck: A Political Biography,* University of Western Australia Press, Nedlands, 1993, p.299.

30. Ryan, *loc. cit*..

31. Hasluck, *The Office of Governor-General*, pp.46-7.

Chapter Eleven:
The New Zealand Connection

Professor Bob Catley

A few weeks ago I sat ruminating with a very influential New Zealander. He mused that the Romans had controlled Britain for 400 years but that, when they left, within a short time little was left of them, other than ruins.

This may be a parable applicable to New Zealand.[1]

The British abandoned New Zealand to its fate and joined the European Union in 1973. It is now rapidly becoming a Pacific country. In itself, this may be no bad thing. But the accompanying characteristics include:

- Its per capita income is now slipping quickly out of the high income or First World category, and stood in May, 2001 at $US11,200, when the World Bank cut-off point is around $US10,000. It has dropped from $US13,700 in 1999;
- Its demographic structure is increasingly non-European and Third World in origin and, despite having recently been the most British of Her Majesty's Dominions, it may have a bare European majority within a generation; New Zealanders – mostly European – left at the rate of over two per cent a year (79,000) in May, 2000-01 and will not now naturally replace themselves;
- It has little control over its major institutions: its banking, other finance, media, energy and transportation systems are almost entirely run, and often are run badly, by foreigners; its universities, health system and housing stock decline to Second or Third World standards; and its crime, youth suicide and social dissonance rates rise to developed world record levels;
- Its remaining private corporations relocate headquarters and production to richer markets, particularly to Australia;
- It abandons higher productivity industries, from automobile production, through television to international airline ownership;
- It ceases to maintain the capacity to defend itself, in particular by closing down its Air Force and much of its blue water Navy;
- Its European males abandon the running of the country to women and the sporting teams to Pacific peoples;
- Its economy becomes, after some decades of attempted industrialisation, once again, increasingly dependent on low wage and/or primary production industries, ranging from agriculture, logging and fishing through to tourism, but in a world economy paying less for these products and with a larger population base to support;
- During 1981-1998 average real annual after tax family income declined by 10 per cent; and
- Since 1999, it has had a government with no discernible strategy for improving economic growth, but with a myriad of policies for redistributing the existing national income.

This all came as a rather unpleasant surprise to me.

On 1 July, 1999 I took up my present position as Chair of Political Studies at the University of Otago. In February, 2000 a publisher wrote asking if I would contribute to a volume on the virtues of New Zealand integrating politically with Australia. I declined to so contribute, but said I would rather produce such a book myself.

During much of the rest of 2000, among other things, I wrote that volume. In April, 2001 the book was published as *Waltzing with Matilda: Should New Zealand Join Australia?* by a small but honest Wellington publisher.

Since then, it has been noted or reviewed in every newspaper in New Zealand and by *The Australian*, *The Times of India* and *The Straits Times*. It has been the subject of two prime time television documentaries and several radio broadcasts, and I have been interviewed about a dozen times for the media about the issue. I testified before the Parliamentary Committee on the subject earlier this year. It has also generated three conferences – one for two and a half days organised by myself as the 36th Otago Foreign Policy School; a second by the New Zealand Institute of International Affairs all day in Wellington; and a third yet to be held over three days in October in Wellington. A number of other conferences have added this theme to their other issues. In July I addressed the New Zealand National Party annual conference in Wellington on the subject – and the Party later passed a conference motion to rejoin ANZUS.

Of course, I do not claim I alone generated this activity, and some of it would have no doubt occurred anyway. But I was in the right time at the right place. My book gave impetus to what is referred to routinely – and so, routinely, dismissed – by New Zealanders as "that hoary old chestnut of joining Australia".

That is now widely discussed, at least in the chattering classes, as a possibility – though not by the Prime Minster herself. Indeed, she dismissed my book in April on national TV as having unfortunately appeared at a time when the New Zealand economy was strong and the Australian weak. In the previous quarter the Australian economy did 1.1 per cent while New Zealand failed to grow.

Trans-Tasman union is only one reform measure on the agenda, however, at a time of some considerable uncertainty for New Zealand.

1. New Zealand constitutional arrangements

Earlier this year I was also asked to contribute to a discussion in the country's largest circulation newspaper, *The New Zealand Herald*, on the less radical issue of constitutional reform.

The impetus for most proposals for reforming the structure of New Zealand's political process comes from one of three sources: a sensible desire to stabilise the policy regime after two decades of radical and oscillating change; Left opposition to the continuing liberalisation of the New Zealand economy; or the objective of continuing the establishment of a radical, welfarist and now part Polynesian Utopia in the South Seas.

These are all understandable impulses.

The centralisation of power in the New Zealand Cabinet has enabled a succession of quite diverse governments, and their dominant personalities, to impose their will very quickly on New Zealand, from Robert Muldoon and National, through Lange/Douglas Labour, on to Nationals again under Bolger/Richardson and Shipley/Peters, to the present government, dubbed by its critics as "Helengrad". Many people would now like greater checks on executive power.

Mixed Member Proportional representation – that is, MMP – since 1996 has not provided this. Indeed, it has arguably increased Cabinet power by introducing to Parliament a greater number of politicians dependent not on their independent standing with the public, but on their support within their much more ideological and executive controlled political party.

On the left of the spectrum many also believe a less powerful Cabinet would not have been able for the last fifteen years to dismantle the New Zealand welfare state and public sector with the resulting national social calamity. Although their cries are now muted by support for the present government doing much the same in the opposite direction – that is, re-regulating – their thoughts are both valid and widespread.

Others again believe that the political system should continue to be used for the creation of a more egalitarian and new society. To that end, executive power should continue to be used forcefully to establish a Republic, design a Maori sovereignty, dramatically equalise wealth and income, advance the cause of the environment, peace, or feminism, and so on.

How might New Zealand create a more stable political environment, that enhances democratic procedures but which facilitates a better economic performance by producing greater policy regime predictability?

Unlike almost all other democracies, New Zealand has no deliberately structured system of checks and balances; little separation of powers; and very few review processes. These features produce, again nearly uniquely, the almost total domination of the country by the Cabinet of the day. And within that, at present, the almost total domination of the Cabinet by the Prime Minister, Helen Clark. Her views are a combination of high tax welfarism, selective environmentalism, 1970s anti-Americanism, 1980s middle class feminism, 1990s identity politics, and neutralism. This resonates with some of the New Zealand intelligentsia, and received support from the University set until the impact of this government's funding regime dawned on them.

Unlike in the US or Australia, whose founding fathers faced these issues in the 1780s and 1890s, the New Zealand Cabinet is not restrained by: a written Constitution; a powerful High Court; the need to get legislation through a Congress/Parliament that it doesn't control; a Bill of Rights (US); a House of review (Senate, and even the Lords); an entrenched and powerful committee system in the legislature (US); a back bench wholly independently elected by the population (Commons); other powerful tiers of government (US, Australia, Canada); or a serious mass political party membership (New Zealand once upon a time).

Because winner take all is so supreme in the New Zealand political system, it often appears the Government faces no Opposition. Since the Nationals can now do little to prevent executive power being exercised, they have for the last eighteen months quite rationally had a bit of a rest. Labor did the same ten years ago.

The result of this supreme, but temporary, power has been gyrations in public policy for twenty years. This has undoubtedly contributed to the poorest economic performance in the OECD and the impending exit from First World economic status. How might this problem be addressed?

New Zealand could do with a written Constitution, incorporating some decent checks and balances on state power. At present its constitutional procedure is an amalgam of the British annexation, the *Treaty of Waitangi*, various Acts of the British Parliament and Crown, many Acts of the New Zealand Parliament, and a lot of procedures generally followed. (Even the Privy Council has been in there.) Many people – almost all of them British and fans of Edmund Burke, and not necessarily including Tony Blair – think this is a good idea. New Zealanders should not.

The first draft of such a Constitution could be drawn up by experts – let us try the parliamentary draftsman – from existing practice as best it can be determined. Constitutions need not be long. Take out the archaic financial provisions and the Australian Constitution need be only ten pages, the American no longer. Parliamentary procedures are more complicated and, as in Australia, might run to a thousand pages and be printed separately, like the electoral law, commercial code, taxation regime and so on.

This could then form the basis for a serious High Court to which people might appeal if the government overstepped its power. In both Australia and the US, the highest courts have struck down government acts on a broad range of issues both to the left and the right – bank nationalisation, taxation, eligible members of Parliament, capital punishment, abortion and indigenous land rights – if not routinely, then frequently.

It could also enable, possibly later, the reforming of another parliamentary House of review, abolished in New Zealand in 1950, elected separately and under different constituencies. Usually these would be geographically based on, say, the regions of the country rather than its classes as in the Lords, or its States as in the US or Australia. This was always a better option than MMP and need produce no more politicians, if all existing List MPs had to shift to the new Chamber in the first instance.

At present, there is great confusion about what New Zealand is and where it is going: a welfare state returning to the fold; a liberal experiment temporally suspended by Helen Clark; a green, under-developing, feminist Utopia in the making by the same; all of the above and whatever else turns up?

A written Constitution would provide a legal bedrock which might help define these purposes more clearly, and set limits to them, for New Zealanders as well as others.

2. Joining Australia: costs and benefits for New Zealand

The more ambitious proposal is for New Zealand to join Australia, possibly as the seventh State as envisaged, or at least provided for, in the Australian Constitution.

The arguments for New Zealand to apply for such a status to the Australian Parliament are weighty and are dealt with in my book at great length. I may here summarise them under four general categories: economic, political, access and strategic.

The Australian economy has done much better than that of New Zealand over the last three decades and has opened up a 50 per cent per capita income gap in that time, standing now at $US17,000 against $US 11,200. Joining Australia might enable New Zealand to access the sources of that better performance – whether they be better management, a more productive culture, a larger economy or a more extensive resource base. It might also produce a further outflow of New Zealanders to Australia were the migration made thus easier. But at least existing New Zealanders would benefit from the process even if their islands' population were thereby reduced – which might be no bad thing.

The structure of New Zealand political life is seriously disturbed by the periodic and present domination by a Left bloc holding views that can only be described as archaic in an age of globalisation. It is the only developed country to have increased income taxes this century in the name of progressive results – and the worst performed economically, partly as a result. Such behaviour is remediable in the case of a State government – as recent experience in Victoria and South Australia has shown – but can prove fatal in a sovereign nation state.

For individual New Zealanders, union with Australia would ensure their rights to move themselves or their institutions to Australia and thus offset the dangers posed by the unilateralism of the Wellington regime. This is a considerable advantage for those seeking an upward social mobility which the political sociology of New Zealand seems determined to prevent.

Union with Australia would ensure the defence of the New Zealand realm and its interests by providing it with access to the most serious military force in its region – the Australian Defence Force (ADF). The geography of the Shaky Isles continually gives rise to the geo-strategic thought that no-one will attack us or our interests, and we can as a result design a military force only capable of interfering with others' interests – and that with impunity. This is a shallow and potentially damaging posture.

The arguments against New Zealand joining Australia include: identity issues; the differences over foreign policy, particularly but not only nuclear issues; and the treatment of indigenous peoples, particularly as defined under the *Treaty of Waitangi*.

The core of the New Zealand identity was established in 1901, and may now be largely described as *not being* an Australian. Recently, this has been augmented by over 20 per cent of the population being of Pacific origin, including Maori and other Pacific Islanders. Over five per cent of the population are now of Asian origin.

The related political culture is, however, now clearly different. Domestically this shows up as support for a larger state sector, which dates from the 1930s, but also in stronger support for utopian strands, like feminism, pacifism, environmentalism, indigenousness and formalistic egalitarianism. Because the state is more easily captured, the latest trend – usually a thought generation later, because of distance – makes a bigger impact. Today, it takes the forms previously described as embodied by the Prime Minister.

Due to the dominance of the Left in the governments of the 1980s, there are residual and anachronistic issues of anti-nuclear policy that remain popular in New Zealand. If they were exposed to a wider and more serious strategic debate – as is conducted in Australia – this might not be so important. But there are other more transient issues that also continually arise, including presently the US proposal for an Anti-Ballistic Missile defence system, the *Kyoto Protocol* on the environment, and relations with the Peoples Republic of China. The New Zealand Left will quickly adopt an anti-US posture if possible.

Some New Zealanders also worry that union with the Australian state would diminish their capacity to comply with the 1840 *Treaty of Waitangi* under which the British Crown gave assurances to Maori leaders before taking over the country. The Treaty has now spawned an industry not unlike the old Arbitration system in Australia which has a life – and interests – of its own. None the less, and despite the continuing re-definition of the meaning of the Treaty during the last half century of legislation on the matter, the New Zealand political classes take it very seriously.

Whether New Zealanders would want to join Australia is a difficult issue to measure. Opinion polls suggest perhaps a fifth to a quarter of the population think it is a good idea. In addition, over 460,000 New Zealanders have migrated to Australia already (although I doubt that all of them want their homeland to join them). Perhaps that number again are now living in third countries. There is also an intention among recent migrant communities to leave for Australia as soon as formal qualifications to do so are achieved. Finally, my polling suggests that there is stronger support for such union the further one ventures up the decision making process in almost any sphere of national life, save the Left and, maybe, rugby circles.

I concluded in my book that there is a window of opportunity for a determined and intelligent political leadership to take New Zealand into union with Australia. A sage reviewer – Steve Hoadley – pointed out that if New Zealand had such leadership it would not be necessary for it to join Australia!

3. Joining New Zealand: costs and benefits for Australia

The benefits for Australia are not so obvious, but are none the less tangible. These would include: a larger population; a bigger defence force; and more resources. None of these, however, are unqualified gains.

Union would add 3.8 million people, mostly English speaking and with a similar if lower productivity level to Australians. This could be a benefit for a country which has spent much of the last half century trying to increase its population stock, chiefly by controversial immigration intakes. They would also bring their own homes and chattels – reducing their attractiveness to the Housing Industry Association but relieving everyone else.

In the era of globalisation, however, this is not a self-evident boon. As Peter Costello pointed out last month, neither immigration nor union with New Zealand can make up the Australian population deficit of about 350 million to Europe or North America. Free trade would do the same job more quickly.

New Zealand would provide substantial augmentation for the ADF in two ways. There would be more people to pay for the same ambition to achieve regional air and sea superiority; and there would be some forces to add to the ADF.

Against this must be set, however, the fact that the ADF would then have more to defend to the south and east – regions which it may presently choose to defend or not. The military personnel added would also be heavily concentrated among the infantry, which will lack either transportation capability or air cover. The electorate that comes with them is also not inclined presently to defend itself, leave alone a larger, drier and more distant region altogether, and is more likely to add to the pacifist and anti-defence vote than reject it. And, in any case, by the time union were achieved, the NZDF would be so depleted as to provide a questionable military asset.

New Zealand would provide more physical resources, but almost none of them is of the kind that Australia both lacks and needs. It has few metals and energy sources that are not already abundant in Australia. It produces food, but not much that cannot be produced here. It has better ski fields and wonderful scenery – but these may be accessed by cheap tourist excursions without the inconvenience of adding a Haka to the Wallabies' opening scene or tattooing to our national culture.

There are also very real costs involved in adding New Zealand to our list of States.

New Zealanders are a poorer people and getting more so. They will likely slip out of the high income category in a year or two, and have elected and now support a government which has shown little inclination to resist this process. At present those New Zealanders who resent this process have some chance of migrating to Australia, which may be better off continuing to cherry pick in this manner.

New Zealand political culture permits a higher level of dependency on the state than does Australia. In part this accounts for the poorer economic performance of the country and the inferior level of management that accompanies it. Taking on a population like this with a size of one-fifth the Australian population in one hit may actually inhibit the performance of Australia – which is far from guaranteed success as it is.

New Zealanders are also significantly more isolationist, anti-defence expenditure, and anti-American than are Australians. Adding that number of voters to the often delicate Australian balance could well have, at some critical time in the future, the same catastrophic impact on Australian strategy that it had on New Zealand in the 1980s and again more recently.

Australians have been more benign towards political union than have New Zealanders. But in recent times a majority opinion in favour has *not* been recorded in opinion polling, which has run at just over a third in favour. As in New Zealand, that percentage increases among the decision-making élite.

But as the economic and social performance of New Zealand has declined, opinion favouring union there has increased, as has the number migrating to Australia. In Australia, for the same reason, recently opinion favouring union has declined, and the number of Australians migrating to New Zealand has also fallen.

It would now probably be harder to get a majority of Australians to vote for union in a referendum than it would be in New Zealand.

4. Seven States: constitutional arrangements and policy regimes

If we assume that in fact it proves possible to get a majority of New Zealanders to vote for application under the Australian Constitution to join the Commonwealth, and that Australians seem inclined to accede to this request subject to appropriate terms being negotiated, what terms would be appropriate?

My research makes it quite clear that politicians in both countries believe a referendum in both countries would need to be passed. Assuming that these terms dealt with the political difficulties I have previously mentioned – including the *Treaty of Waitangi*, the US alliance and the maintenance of national identity for New Zealand, and the other matters just listed for Australia, the formal, constitutional requirements would be less difficult.

Provision has been made in the Commonwealth Constitution for New Zealand to join as a seventh State, and that is the only status reasonably available to it. Clause 6 says:

> " "The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State"."

Clause 121 adds:

> "121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit".

A two-State model would over-represent New Zealand with Senators and/or divide New Zealand into basically two islands in a way not presently even hinted at in its political arrangements. It would thus get twelve Senators – under both proportional representation and a State's right – and about thirty members of the House.

As a State, it would acquire the same powers and responsibilities as the other six States. In such an arrangement, New Zealand as a State of the Commonwealth would lose power over currency, defence, external affairs, treaty making, migration and trade, all of which would all pass to the Commonwealth government.

It would, none the less, be able to retain control over the size of its own State relative to that State's economy, and the taxation required to finance it. To that end, it could have a substantially larger welfare system, as it now does, than the other jurisdictions, with the attendant risk of maintaining the poorer economic performance which it has also endured. It could also run independent environmental regimes and indigenous peoples policies where these did not conflict with its other obligations, including to the maintenance of free trade.

There might also be some variation in a number of other policy areas, including aspects of the criminal and legal code, occupational insurance, pay-roll tax, licensing, stamp duties, rates and local government, school education, welfare provisions and so on – as there is already among the existing States. But the final avenue of appeal in many of these and other matters would be the Commonwealth High Court.

5. Recent history

What then are the chances of these events occurring? After the UK joined the European Union in 1973 there was certainly considerable movement of the two countries to become more closely integrated. This was driven chiefly by economic considerations and reached its institutional apogee in the *Closer Economic Relations (CER) Agreement* of 1983. This has assisted a process during which New Zealand has moved from its dependence on Britain to a heavy reliance on Australia for its economic growth. As it dismantled its *dirigiste* state, this process accelerated.

For New Zealand, Australia is now its largest export market, source of imports, capital investor and provider of tourists. Australian institutions dominate the New Zealand economy and Australia is of intense interest to New Zealand.

For Australia, New Zealand is a major trading partner, serious investor and large source of migrants. New Zealand is of little interest to most Australians.

Under the National government 1990-93, New Zealand moved closer to Australia. During the term of that government the CER agreement, which the Nationals had after all concluded, was extended into modestly new areas, such as occupational qualifications and food standards. It also did its work in spheres of civil society which took integration to new heights in trade, investment and policy coordination.

The National government continued the process of the liberalization of the New Zealand economy and extended it to reducing the size of the state sector, the level of taxation and the privatization of more state assets. Liberal agitators argue, however, that this process gradually slowed in the late 1990s, especially after the coalition with New Zealand First was forced on the Nationals after the 1996 election. None the less, it did continue.

In the defence sphere, despite continuing disagreement about the US alliance, the two states got generally closer together during the 1990s. By 1998 the accepted verbal usage concerning the ANZAC alliance revolved around the expression "single strategic entity" or similar, as was used by defence ministers MacLachlan and Bradford as late as 1998. In 1999 the US was offering a favourable lease/purchase deal on 28 F-16 airplanes to New Zealand. President Clinton during his 1999 visit to New Zealand was openly canvassing more joint exercises between the two military forces – perhaps in response to the New Zealand contribution to the Gulf multilateral forces in that year. Most importantly, however, New Zealand quickly responded positively to the Australian request to deploy alongside the ADF in Timor as part of the International Force in East Timor (INTERFET).

Since the November, 1999 elections, under the New Zealand Labour/Alliance government the two countries have been moving apart in several policy areas. These have included defence, migration, law, role of the state, trade and national culture.

During the last eighteen months a range of strategic decisions have been made in New Zealand. The defence review of mid 2000 believed that the Australian relationship was difficult for New Zealand because of differences over:

- The Australian commitment to the US alliance;
- Different strategic assessments, wherein Australia is more pessimistic;
- Australia's aspirations to middle power status; and
- The refusal of Australia to go along with New Zealand's (anti-) nuclear policy.

These were irritants and signposts of Left re-thinking of this issue and accompanied the rejection of the F-16 deal.

The announcements of May, 2001 were more serious altogether – particularly those concerning the Air Force – and will seriously impact on Australian defence policies. According to one estimate:

- The capacity of the New Zealand Air Force will be quickly almost eliminated;
- The capacity of the Navy will be degraded by 40 per cent;
- Armoured reconnaissance capability and that of the Special Services will be reduced by between 20 and 100 per cent;
- Maritime transport capability will be abandoned as the *Charles Upham* is sold;
- And while there will be an improvement in infantry capability of perhaps 25 per cent, it will have great difficulty getting anywhere under New Zealand steam.

Some improvement may be made in New Zealand's capacity to contribute to low level (sometimes called First generation) peacekeeping missions; but where these are contested, New Zealand will find itself unable to participate except when substantial forces are provided by other countries.

The cumulative changes to New Zealand defence policy by the coalition government now comprise:

- abandoning the doctrine of a "single strategic entity" by announcement by the Prime Minister in January, 2000;
- declaration that New Zealand would not take up any version of the US offer to lease/purchase F-16 aircraft;
- description of New Zealand as the real "lucky country" living in "an incredibly benign strategic environment";

- restructuring the New Zealand defence forces to participate in peacekeeping operations with other countries' forces, which would provide the equipment which New Zealand would not now have;
- ending the combat strike force role for the New Zealand Air Force by phasing out the Skyhawks; and
- degrading the anti-submarine capabilities of the Orions.

These recent decisions have been dealt with by an Australian Liberal government, but defence policy is largely bi-partisan and Labor reaction would be similar.

Australia will now have to plan on the basis of New Zealand being, at best, an unreliable partner in strategic policy. This is particularly so given the structure of government there and the ease with which the New Zealand state may be turned by one election. In any case, even if New Zealand decided to contribute to the defence of Australia, it is not clear with what equipment and in what manner its forces would arrive.

The Australian reactions to these decisions have included heavy media criticism. On 12 May, *The Australian's* foreign editor wrote:

> "Clark seems less like a modern Prime Minister and more like a greenie activist caught in a South Pacific Groundhog Day in which it is forever 1972 … for Clark, raising taxes and abolishing her nation's defences, Joan Baez has never stopped singing. … Senior Australian ministers are in a kind of muted despair about New Zealand … they think New Zealand has become literally hopeless".

The Australian government has been muted, save for two notable exceptions. The White Paper of late 2000 makes some quite barbed remarks for an official document about an ally. And after the ditching of the New Zealand Air Force the Australian Prime Minister pointedly referred to the fact that, while this was a decision for a sovereign state to make, it would have both international and domestic "consequences".

It now appears that the New Zealand political system as a whole has a quite different view of its strategic location and position from that of Australia. In essence, the difference between the two countries which has re-emerged during the last eighteen months is that:

- The New Zealand government believes there is no credibly imaginable threat to its interests and will not plan to defend itself, but will plan to contribute to uncontested peacekeeping operations with other powers;
- Australia believes the strategic environment is potentially dangerous and will plan to defend itself, alone if necessary.

Both these positions have considerable public support in the respective countries, though how much in New Zealand may be contested. Although National in power got closer to the US and Australia, it was never able to undo the nuclear vessels legislation, as both Canberra and Washington will note.

In 1999-2000 there was another surge of New Zealand migration to Australia. In September, 2000 Prime Minister Helen Clark assured Prime Minister John Howard that the "overstayer" amnesty would not produce a further surge. Those who would qualify, estimated between 5,700 and 7,700 people, were only those "well settled" for five years or more, and not inclined to move. Immigration Minister Ruddock advised Howard otherwise, and urged New Zealand to adopt higher immigration standards to match those of Australia. New Zealand Ministry of Foreign Affairs and Trade officials, too, warned the Government of the consequences of the amnesty. *The New Zealand Herald* reported on 18 April, 2001:

> "The amnesty could have a significant impact on the bilateral relationship with Australia, and was likely to undermine support for the Trans-Tasman Travel Arrangement (TTTA)…. The proposal would send the wrong signal to would-be illegal immigrants, who would eventually acquire New Zealand citizenship and gain backdoor entry into Australia under TTTA. The Australian Government regarded the TTTA as a gap in its otherwise carefully controlled immigration procedures, but was prepared to maintain the agreement as long as New Zealand's immigration programme did not significantly differ".

The amnesty was nevertheless granted. Cabinet papers leaked in early December, 2000 said Australia was claiming that welfare costs attributable to New Zealand immigrants could exceed one billion Australian dollars over the next ten years. New Zealand had either to pay up or agree to more restrictive guidelines if it wished to salvage the essence of the TTTA.

New Zealand subsequently decided to keep up all benefits for Australians, to attract and retain them. Australia declined to reciprocate. The new arrangement came into force on 26 February, 2001. All New Zealanders then resident in Australia would enjoy the previous benefits; new arrivals would not.

Australia, with New Zealand acquiescence, in fact had changed a fundamental feature of the TTTA. Previously, New Zealanders qualified for Australian residency after a two-year waiting period, after which they gained full social security eligibility and all other privileges. And they gained the option of applying for citizenship, subject only to a clean health and character record. After 26 March, 2001 New Zealand arrivals could still live and work in Australia indefinitely (albeit without social security eligibility), so still enjoyed a unique status. But if they wished to gain residency, they had to apply (and pay a A$1,000 fee). And they now had to achieve the same standards of skills-based points, entrepreneurship, or family sponsorship as migrants from any other source. An applicant over 45 years of age had almost no hope of success under the points system, for example.

Australian immigration specialists estimated that less than half of the 40,000 New Zealanders who crossed the Tasman during the prior year would qualify for Australian residency. Other consequences are possible as a result of the new policy.

While New Zealand will get relief from the $169 million or so remitted under the previous equalisation agreement, and avoid higher future bills from Australia, it risks getting back Kiwis who fail in Australia and who return home to go on the dole. In addition, a number of Kiwis on the dole or benefits here (i.e., in New Zealand) who might have tried their luck in Australia will now be deterred, and remain home …still on the dole. The New Zealand government may not save in the long run as much as it hopes.

Also, the new policy will not stop the brain drain. Since 1997, Australia has gained 10,810 New Zealand professionals, 5,476 trades people, and 1,022 senior clerical and service workers. These people, typically young, energetic, and ambitious, will continue to be attracted by economic opportunity. They will not need social security benefits, and if they need residency, they can easily qualify. As Birrell and Rapson argued in *People and Place* this year, Australia will be a main beneficiary from the changes, cherry picking New Zealand's skills. Migration issues will spill over into other sectors, putting further strain on the trans-Tasman relationship.

The number of New Zealanders in Australia who have applied for Australian citizenship rose from 4,000 in the first part of 2000 to over 10,000 in the first part of 2001 – largely from fear of losing the opportunity if the Australian government closed the door further. The number of student indebtees in Australia is rising at about 4,000 a year, and their defaulted debt by $60 million a year.

The former Canadian Prime Minister, Brian Mulroney, in June advocated the pipedream of New Zealand joining NAFTA. This would be as good an idea as New Zealand joining the European Union. The fact is that neither has expressed any interest in having New Zealand as a member. Australia is negotiating with the US to form a Free Trade Association. It is doing so without New Zealand, and with the huge advantage of being arguably the United States' most reliable ally across a wide range of other issues. Eighty major companies in Australia, many with US links, are lobbying for this in Washington. During the AUSMIN talks between the Australian government and the US Secretaries of Defense and State on 30 July in Canberra, the Americans gave Australia public assurance that such a FTA was being favourably considered in Washington.

During 1999-2000 there was considerable discussion about the possibility of the New Zealand and Australian stock exchanges merging. This was accompanied by and overlapped with other related considerations, including a proposal for a joint ANZAC currency and a common companies code. All of these have been shelved during the last year.

There has also been a modest expansion of the state as a proportion of the total economy. Using OECD figures, it would appear that in 2000 the New Zealand state sector comprises 40.8 per cent while that in Australia is 31.4 per cent. The New Zealand figure is not only substantially higher but has actually been rising under the present government, whereas it was falling under Nationals and was projected to continue to fall. Peter Costello, on the other hand, went to some lengths to defend his 2001 Budget on the grounds that it shrank the size of the state sector.

When first she was asked about integration with Australia shortly after coming to office, Prime Minister Clark said she believed the two countries were becoming more dissimilar under the impact of the rapid ethnic change in New Zealand. This is a fair observation about the development of biculturalism in New Zealand, compared with multicultural Australia. Under the *Treaty of Waitangi* the present government was committed to a policy of "Closing the Gaps", which it abandoned in late 2000 as a result of European backlash. Essentially, however, its policy remains the same, of attracting and maintaining a majority of Maori/Polynesian votes and thereby cementing its position as the long term government of New Zealand for the first time. To this end, it has pursued a number of policies, including enhancing Maori language television broadcasts, giving Maori preference in social service delivery (once part of "Closing the Gaps"), and increasing the number of Maori parliamentary seats, which have an average of about half the number of electors as general seats.

This all, of course, serves to dilute the basis for Australia-New Zealand partnership or even integration to the extent that it is in the final analysis based on the kith and kin argument of racial or cultural proximity. To regain office, one leading columnist, Colin James, argued in *The New Zealand Herald*:

> "National must learn biculturalism. Just settling Treaty grievances and setting up a few Maori health authorities misses the point. National's present attitude to Maori is in essence multicultural – acceptance that people of minority cultures might maintain their customs, ceremonies and language and that the state might even help them do that. Biculturalism, by contrast, acknowledges that two cultures stand side by side as equals and command mutual recognition and respect".

The Australian equivalent would be to grant Aboriginal culture equal status to that of all other Australians – a presently almost unimaginable outcome.

This apparently unilateral movement by New Zealand away from Australian policy has alienated Australians of all hues. It has also generated a larger than usual spate of anti-New Zealand and anti-New Zealanders resident in Australia stories in the Australian newspapers. What has made the tirade of the last year more serious is that it has spread to the serious newspapers, whose concerns have not just been the usual diet of "Kiwi dole bludgers", but have overlapped to the business, strategy and political columnists.

But after the initial outrage of reaction to perceived Kiwi stupidity has subsided, the country must seriously ask what to do with them. In a way, this consideration is hampered by the similarities between Anglo-Celts in New Zealand and Australia.

New Zealand is a foreign sovereign state driven by its own interests. At the moment the Clark government manifests them in a manner more distant from those of Australia than did the previous government. But that is their interest as determined by their elected government. Relations between the two states should not be confused with union between them, which may or may not happen some time in the future. In the meantime, they must live together as two sovereign states.

If New Zealanders want to become a semi-Polynesian outpost, this is fine. But Australia should then treat them as a sovereign state with such an ambition, not as an equal social and strategic partner.

Conclusion

It is extremely unlikely that any significant movement towards greater integration will occur under the present New Zealand government. This is not likely to resume until the Nationals are back in power leading the national government. On my reading of the situation, this is unlikely to occur until the 2005 elections.

If the New Zealand economic and therefore social, infrastructure and population problems have continued to worsen – as is now occurring under the Left coalition government – there might then be greater support for integration with Australia.

In other words, only as and if the New Zealand crisis worsens, is it likely to seek admission as the seventh State of the Commonwealth. In this event, its admission would become less likely as time goes on.

In my view it has been hard to maintain Australia as a First World, high income country in an era of globalisation. This has been partly achieved at the cost of substantial, disruptive and difficult political and economic reform during the last two decades.

Adding on the burden of New Zealand, where the results have been less successful and, arguably, not even positive would give a further substantial handicap to the Australian people. It would be one they would be unlikely to adopt at that time.

Endnote:

1. References may be found in Bob Catley, *Waltzing with Matilda: Should New Zealand Join Australia?,* Dark Horse, Wellington, 2001; and Bob Catley, ed., *New Zealand-Australia Relations: Moving Together or Drifting Apart?*, Dark Horse, Wellington, 2001.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I hope that we all agree that this has been another successful conference. It would be pointless for me to attempt a summary of the excellent papers which we have heard but there are a few remarks which I wish to make.

The papers by Mr Harry Evans on *The Senate Today* and by Professor Catley on *The New Zealand Connection* – each by a man with a special insight into his subject – show, by the contrast that they provide, how fortunate Australia is to have an Upper House of Parliament which does not necessarily reflect the composition of the Lower House. In other words, the checks and balances in our Constitution are effective and we have seen in New Zealand the consequences when a Constitution lacks those checks and balances. The picture of New Zealand which has been presented to us is a sad one and it convinced me, at least, of the difficulties of accepting New Zealand into our federation, assuming that New Zealand wished it.

Of course we have troubles of our own; they include the continuing claims for Aboriginal separatism and the state of the laws regarding industrial relations and the administration of those laws. It is disturbing that in both these contexts there is a perception that some federal Judges decide according to their ideological biases rather than according to law. It tends to destroy respect for the law in general, and the Federal Court in particular, that perceptions of this kind should exist, and it would indicate a most serious departure from judicial probity if the perceptions are well founded. This should be a matter of concern to those many Federal Court judges whose reputations are beyond reproach.

The unfortunate state of the law regarding native title has already cost Australia much in monetary terms, but what is worse is the divisive, indeed corrosive, effect of the Aboriginal issue on the unity of the nation. We have had some informative papers on this topic. If the nation survives, our successors in 100 years time will probably view with incredulity some of today's decisions on native title.

Dr McGrath's reference to the beneficial effect which some judges would give to the amendment of s.51(xxvi) of the Constitution, which deleted the reference to 'the aboriginal race', provides us with a clear warning of what judicial activism might do if we were unwise enough to enter into a treaty with the Aboriginal people.

Professor Pincus has told us of the economic benefits of the fiscal imbalance which is contributed to by the system of Commonwealth grants. That benefit has to be balanced against the diminution of governmental responsibility that results. We may differ on the question where the balance lies.

The controversy as to whether Australia should be a republic continues, and besides the papers on the position of the Crown and the Governor-General we have heard Professor Flint's convincing criticisms of the proposal that a plebiscite should be held as a device to advance a determination of the republican issue.

Once again we are deeply indebted to John and Nancy Stone, without whose efforts this conference would not have been held. I ask you to show your appreciation of their unfailing support.

Thank you for your attendance. I hope to see you all at the next conference.

Appendix I:
Contributors

1. Addresses

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (BScEcon, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociale, Paris (DSU, 1979). After admission as a Solicitor of the NSW Supreme Court in 1962, he practised as a solicitor (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. During the 1999 Referendum campaign on the Republic issue, he played a prominent part in the "No" Case Committee, and he remains today the National Convenor of the Australians for Constitutional Monarchy.

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, and 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.

2. Conference Contributors

Dr Bob BIRRELL was educated at Melbourne High School and at the Universities of Melbourne (BA(Econ), 1958); London (BA Hons (History), 1963); and Princeton (PhD (Sociology), 1970). He has held academic appointments at Indiana University (1967-1969) and the Australian National University (1986), but chiefly at Monash University (1970-85 and 1987 to date), where he has been a Reader in the Department of Sociology since 1991 and Director, since 1992, of the Centre for Population and Urban Research. He has held numerous government appointments and consultancies relating to immigration and population research, and published prolifically both in books and professional journals. He may be most widely known for his editorship, since 1993, of *People and Place*, and for his most recent book, *Federation: The Secret Story*.

Professor Bob CATLEY was educated at The Cooper's Company School, London, the London School of Economics (BScEcon, 1964), and the Australian National University (PhD, 1968). After a period teaching International Politics at Adelaide University (1968-1990), he became, in 1990, the Labor Member for Adelaide in the House of Representatives. After his defeat in 1993, he returned to academic life, first at the University of South Australia and then at Adelaide University (1994-98), before being appointed to the Chair of Political Studies at the University of Otago, New Zealand. He has recently been appointed to the new Chair of Governance in the School of Business at the University of the Northern Territory, Darwin. Among numerous other publications is his recently published book, *Waltzing with Matilda: Should New Zealand Join Australia?*

Harry EVANS was educated at Lithgow High School and the University of Sydney (BA Hons, 1967). After a brief period in the Parliamentary Library, he has served on the staff of the Senate since 1968. This has included serving as Secretary to a number of major Senate Committees, such as the Regulations and Ordinances Committee and the Select Committees on the Conduct of a Judge and Allegations Concerning a Judge. After periods as Clerk Assistant (1983-87) and Deputy Clerk (1987-88), he has been Clerk of the Senate since 1988. He is the author of numerous articles on parliamentary and constitutional matters, as well as editing the 7th edition of Odgers' *Australian Senate Practice*.

Dr John FORBES was educated at Waverley College, Sydney and the Universities of Sydney (BA, 1956; LLM, 1971) and Queensland (PhD, 1982). He was admitted to the New South Wales Bar in 1959 and subsequently in Queensland and, after serving as an Associate to Mr. Justice McTiernan of the High Court, practised in Queensland as a barrister-at-law. He is now Reader in Law at the University of Queensland Law School, and has published texts on the History and Structure of the Australian Legal Profession, Evidence, Administrative Law and Mining and Petroleum Law. In recent years he has become perhaps Australia's foremost expert on the law of native title.

The Hon Dr Frank MCGRATH, AM, OBE was educated at Canterbury Boys High School, Sydney and the University of Sydney (BA, 1944; MA, 1946; LLB, 1950). After practising as a solicitor (1950-51) and barrister at the Sydney Bar (1951-66), he was appointed to the NSW Workers' Compensation Commission in 1966, becoming its Chairman in 1982 prior to his appointment as Chief Judge of the Compensation Court of NSW (1984-93). Among many other interests he has served on the Arts Council of NSW (President 1975-84) and as Chairman of the Australian Playwrights' Theatre Company (1977-86). In 2001 he was awarded his PhD by the University of Sydney for his thesis on the Convention Debates.

Des MOORE was educated at Geelong Grammar School, the University of Melbourne (LLB, 1954) and the London School of Economics (BSc (Econ), 1958). He joined the Commonwealth Treasury in 1958, serving in various positions covering most of the main policy areas before becoming a Deputy Secretary in 1981. After his resignation from the Treasury in 1987 he became a Senior Fellow with the Institute of Public Affairs, Melbourne, in charge of its Economic Policy Unit. In that role he published numerous papers on a wide range of economic policy issues and became a prolific commentator on public affairs generally. Since leaving the IPA in 1996 to set up the Institute for Private Enterprise (of which he is the Executive Director) he has continued in those roles.

John PAUL was educated at Geelong Grammar School and the University of Melbourne (Trinity College) (BA, 1958; MA, 1960). After ten years in the Commonwealth Public Service (1961-71), including five years in The Treasury, he moved to academia in 1973, becoming Senior Lecturer in Political Science at the University of New South Wales, until his retirement from that post in 1996. He has written extensively on the reserve powers of the Governor-General, the role of the Monarchy within the Australian Constitution, and on Australian political history more generally.

Professor Jonathan PINCUS was educated at St Joseph's College, Brisbane, the University of Queensland (BEc Hons, 1964) and Stanford University (MA, 1970; PhD, 1972). He has since been a Fellow of the Institute of Advanced Studies, Australian National University (1974-85) and held chairs at Flinders University (Economic History, 1985-91) and the University of Adelaide (George Gollin Professor of Economics, 1991 to date), where he is now Convenor of the Academic Board. The author of several books and numerous articles in the professional journals, he was also joint editor (1988-95) of *The Australian Economic History Review*.

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, and in 1999 he was a member of the Victorian Committee for the No Republic Campaign. He now writes for *The Adelaide Review*.

Keith WINDSCHUTTLE was educated at Canterbury Boys High School, and, after seven years in journalism, Sydney University (BA Hons, 1969) and Macquarie University (MA, 1978), the intervening years having been spent partly in journalism and partly in teaching at the University of NSW (History Department, 1973-75) and the NSW Institute of Technology (now UTS) (History and journalism, 1977-1981). After briefly teaching sociology at the University of Wollongong in 1981, and history and social policy at the University of New South Wales (1983-1990), he has since become an author and publisher (Macleay Press), being a frequent contributor to *Quadrant* and to *The New Criterion*, New York. Among his several books is *The Killing of History: How Literary Critics and Social Theorists are Murdering our Past* (2000).