Upholding the Australian Constitution Volume Fourteen

Proceedings of the Fourteenth Conference of The Samuel Griffith Society

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Foreword

John Stone

The fourteenth Conference of The Samuel Griffith Society, which was held in Sydney in June, 2002, was more than usually notable, for several reasons. This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains the papers, and Dinner Addresses, delivered to that Conference, together with the usual brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

It is one thing to conclude with those remarks by a former, and greatly respected, Chief Justice of the High Court of Australia. It is another thing to begin, as this Conference did, with an address to its opening dinner by the present, and also greatly respected, Chief Justice, the Hon Murray Gleeson, AC. As noted in my introductory remarks to the Conference on the following morning (see below), it is a measure of how far, in its own small way, the Society has come in the brief ten years of its existence that such a signal honour should be paid to it.

In his scholarly address, *The Birth, Life and Death of Section 74*, His Honour surveyed the history of that section of our Constitution, dealing with access by Australians to a court of appeal beyond our own High Court – namely, the Judicial Committee of the Privy Council. Such access, which was limited from the outset, was successively further diminished over the years until, in 1986, it was finally terminated by the *Australia Acts* of that year.

In the course of his remarks, Mr Justice Gleeson rightly observed that:

> "… it is hard to imagine that the Australian people would now accept any tribunal other than a completely Australian court as the final interpreter of their Constitution".

The same, he said, "may be said of judicial review of administrative action". Thus:

> "Some Australian legislators and administrators may not be enamoured of judicial review, but it may be doubted that they would be enthusiastic about judicial review by a tribunal outside Australia".

It is, I think, undoubted that almost all Australians, and not merely some of our legislators and administrators, would share that sentiment.

If that be so, how then can we explain the federal Government's recent decision that Australia should ratify the *Statute of the International Criminal Court*? For, despite all the untruths, half-truths and evasions to the contrary which were voiced by various Ministers, departmental officers, and others during the months and years leading up to that decision, there is no doubt that Article 17(1)(b) of the *Statute* gives that "tribunal outside Australia" the power to decide whether, in its view (and *its* view alone), Australia has "genuinely" carried out the investigation or prosecution of any of its citizens against whom allegations within the ICC's jurisdiction may have been made.

In concluding his address, the Chief Justice remarked that:

> "It was not until 1986 that the judicial power by which Australian citizens are governed was vested completely in Australian institutions".

It is ironic that, within a week or so of those words being spoken, our Government in Canberra should have chosen to turn back the clock of our national sovereignty in this manner. (I say nothing of whether it be constitutionally possible for it to do so in terms of Chapter III – The Judicature – of our Constitution.)

As it happens, the Conference program had already provided for some further examination of this matter of national sovereignty, including encroachment upon it from the international legal activists. ("Further", because the topic was also examined in some detail at our twelfth

Conference in 2000.) Dr Janet Albrechtsen's paper on *The International Criminal Court* spelled out at length the criticisms of that new international political institution, while Dr Stephen Hall's paper *September 11 and International Law* succinctly summarized the dangers not merely to Australia, but to all Western liberal democracies, from the rise of the new "top down" international legal authoritarians. From this viewpoint, the onslaught on the United States on 11 September last year, tragic though it was, has at least provided us with a douche of cold reality. It has brought home to us, in particular, the contrast between real democratic nations, on the one hand, and unreal international institutions ("unreal" because, among other things, of possessing no democratic legitimisation), from the United Nations downwards, on the other.

Under the segment of the Conference program entitled "Immigration and Judicial Activism", three speakers, including the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, MHR presented papers addressing that general topic from varying standpoints. Professor John McMillan pointed to the failings of certain judges of the Federal Court, in particular, who have persistently sought to impose their personal ideologies upon the administrative decision-making of the Department of Immigration by, in effect, reviewing the "merits" of departmental decisions rather than simply their legality. Mr Ruddock, who, in the face of inexplicable obstruction from the Labor Opposition in the Senate, has sought to deal with the problems thereby created, spelled out the pass to which such judicial activism has brought us. Finally, Piers Akerman, with chapter and verse, arraigned many of his own colleagues in the media on the charge of manifest bias in the reporting of these and other immigration matters.

These Proceedings are notable also for containing both the longest paper to have been published by the Society, and the shortest. The latter, by Mr Justice Kenneth Handley of the NSW Court of Appeal, deals with the interpretation to be placed upon the words "a majority of the electors voting" in s.128 of the Constitution, governing the approval of constitutional referendums. According to Mr Justice Handley, "electors voting" must comprehend all votes cast, including those cast informally; whereas the practice of the Australian Electoral Commission has been to ignore informal votes in ascertaining whether the relevant referendum majorities have been achieved. As Sir Harry Gibbs said in his Conference concluding remarks, "How this question would be decided is unpredictable, but Mr Justice Handley's argument is a strong one".

The longest paper, by Professor Geoffrey de Q Walker, deals with the *Engineers' Case* (1920), the High Court case which, more than any other (with the possible exception of *Tasmanian Dams* in 1983), has robbed the Australian people of the *federal* Constitution which they believed they had enacted – and which any detached observer would concede that they *had* enacted – in the 1890s. (The accompanying paper by Dr Nicholas Aroney, *The Ghost in the Machine: Exorcising Engineers*, wholly corroborates that judgment.) But gross as the 1920 judgment was in *Engineers'*, and worse than gross as clearly were the motives of its main author, Mr Justice Isaacs, it has to be said that it was not merely that High Court, but the High Court considered institutionally as a whole, which over the subsequent 75 years or so has persistently betrayed the trust reposed in it by the Australian people.

Carefully, logically, and in the end overwhelmingly, Professor Walker's paper, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* sets out the course, and the causes, of this betrayal, whose nature can be best summarized in his own words:

> "*Engineers* inaugurated a method of one-sided interpretation that reversed the polarity of the Commonwealth Constitution in a way that contradicted the document's plain intention and ignored the first principles of legal interpretation. It has violated the wishes of the Australian people as consistently expressed in constitutional referendums, and mocked the sovereign power recognized in them by s.128 … It has denied the people the advantages of competitive federalism and increased the burden, cost and remoteness of government. Since the 1970s especially [and particularly during the tenure of what Professor Walker calls the Murphy-Mason Court], it has pushed the constitutional order to the brink of breakdown".

It may not be too much to say that Australians reading Professor Walker's account would be moved to anger, mixed with despair, in the face of this betrayal by the very institution (the High Court of Australia) charged with the duty to avoid it. How, in the face of Professor Walker's account, can the Australia people continue to respect, and hence trust, our highest legal institution? I am again reminded of the words of our President in concluding our 13th Conference, when, speaking then of the Federal Court, he said:

> "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 … 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 … judges whose reputations are beyond reproach".

Like all its companions in this Volume, Professor Walker's paper deserves to be widely read, and widely debated. Like its thirteen predecessors, it is to stimulating such debate that this Volume is dedicated.

Dinner Address
The Birth, Life and Death of Section 74

Hon Chief Justice Murray Gleeson, AC*

It is a curious aspect of the history of the Australian Constitution that the provision that was the last significant obstacle on the road to Federation no longer matters.

The procedures that were adopted to prepare, and give legal effect to, the Constitution involved an obvious risk. While the United Kingdom government encouraged Federation, and, from time to time, made known its views on aspects of the proposed federal agreement, the framing of a draft Constitution was left to the colonists themselves. And it was considered necessary to obtain the approval of the people and Parliaments of the Colonies. In modern terms, that approval was necessary for Federation to have political legitimacy. There was never any possibility that the Imperial government would force Federation upon unwilling Colonies. But what if the terms on which the Colonies agreed to federate were unacceptable in London?

Unlike the *British North America Act* of 1867, the Australian Constitution was written locally, and resulted from two Conventions, one in 1891, and one in 1897-1898. The draft that finally emerged from the second Convention ultimately secured the approval of the colonial Parliaments, and was endorsed by a process of popular referendum. Everyone understood, however, that in order to take legal effect, the new Constitution had to be enacted as legislation of the United Kingdom Parliament. That was essential for constitutional legitimacy. Since the United Kingdom Government played no direct role in drafting the Constitution, there was at least a possibility that it might not approve all the terms upon which the people and Parliaments of the Colonies agreed to Federation. What was to happen in that event? Clearly, this was a delicate matter.

Looking back on it, it is the relative detachment of the Imperial authorities from the negotiations for the federal agreement, rather than any interference in them, that is striking. The issues that excited most attention, and division, among the colonists, such as the problem of reconciling federalism with responsible government, and the respective powers of the two Houses of the new Parliament, do not seem to have attracted a great deal of interest in London.

The officials in London who examined the final draft of the Constitution, as agreed and approved in Australia, including the Attorney-General of the United Kingdom and the Solicitor-General, had some objections to it. However, they were conscious of the importance of not raising unnecessary difficulties that might disturb the carefully negotiated agreement that had been reached, and approved formally, in the Australian Colonies. That agreement, in many respects, reflected hard-won compromise. If some of the terms of the agreement were to be rejected in London, there was no process for re-submitting any amended agreement for further approval in the Colonies. Would the Imperial Parliament force on the Colonies a federal agreement different from that which they had negotiated and approved?

There was one important respect in which the draft Constitution was unacceptable to Her Majesty's Government. The problem was especially acute because it concerned a matter about which there were strong and divided opinions in Australia. The matter was the continuation of appeals to the Judicial Committee of the Privy Council following the establishment of the High Court of Australia.[1]

At the time of Federation, there was a right of appeal, by leave, to the Privy Council, from the Supreme Courts of the Colonies. The draft Constitution required the establishment of a Federal Supreme Court, to be called the High Court of Australia. It was contemplated that appeals

to the new Court would lie from State Supreme Courts, and from other federal courts, in civil and criminal cases. It was also intended that the High Court would have the primary responsibility of interpreting and applying the Constitution. This aspect of the work of the new High Court was emphasised by Alfred Deakin in his speech in support of the Judiciary Bill in 1902.[2] It had also been stressed during the Convention Debates. Edmund Barton, for example, referred to the High Court as the body which would decide "those questions of dispute which arise, and which must arise, under the Federal Constitution".[3] What was to be the continuing role of the Privy Council in the Australian judicial system?

The draft Constitution produced by the 1891 Convention, in which Sir Samuel Griffith, then Premier of Queensland, played a prominent role, provided that the new High Court was to have a general jurisdiction in appeals from the Supreme Courts of the States, and that its decision in those cases was to be final and conclusive. There remained the possibility of direct appeals to the Privy Council from State Supreme Courts, but the Parliament of the Commonwealth was to have legislative power to end appeals to the Privy Council by directing that all appeals from State Supreme Courts should go to the High Court, and that there should be no further appeal from the High Court to the Privy Council. This was subject to the qualification that the Privy Council would retain its capacity to grant leave to appeal from a decision in any case which concerned the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions.

The same subject was dealt with, to different effect, in clause 74 of the draft Constitution that resulted from the second Convention. That was the draft ultimately approved by the colonial Parliaments and the people. Clause 74 provided that there should be no appeal to the Privy Council in any matter involving the interpretation of the Constitution, or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions other than the Commonwealth or a State were involved. Subject to that qualification, there was to be a right in the Privy Council to grant special leave to appeal from the High Court to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the cases in which such leave might be asked.[4] Nothing was said about appeals direct to the Privy Council from State Supreme Courts.

The Secretary of State for the Colonies, Joseph Chamberlain, was strongly opposed to this proposal. So also were some in Australia, including the Chief Justice and Lieutenant Governor of South Australia, Sir Samuel Way, and Sir Samuel Griffith, who was by then Chief Justice and Lieutenant Governor of Queensland, and who had not participated in the second Convention. The significance of the fact that these two were Lieutenant Governors of their respective States was that, in that capacity, they were in a position to communicate directly with the United Kingdom government; a position of which they took advantage.

In October, 1899, after Queensland had voted, by referendum, to join the Federation, Griffith wrote to the Secretary of State for the Colonies stating that he had "reason to believe that the people of these Colonies would gratefully welcome any suggestions that may be made by Her Majesty's advisors with the view of perfecting this most important instrument of government".[5] The confidential solicitation of suggestions to "perfect" a Constitution that had been drafted in Australia, approved by the colonial Parliaments, and then agreed to by popular referendum, by someone who had been a leading figure in the federal movement, and who was now outside politics, is worth reflecting upon. According to Griffith's biographer, he suggested a number of alterations to the Australian draft, including clause 74.[6]

The influence of Griffith with the United Kingdom Government can be measured by the fact that, when a question arose as to how any difficulties about the draft Constitution might be resolved, inquiries were made from London, confidentially through Griffith, in his capacity as Lieutenant Governor of Queensland, as to whether the Colonies might appoint delegates to assist in the consideration of the Bill, and, if so, whether those delegates would be authorised to assent to

any alterations. The fact that such an inquiry had to be made demonstrates the absence of any clearly defined process.

Griffith must have given a positive response, because Chamberlain then officially contacted the colonial governments and arrangements were made for delegates to be sent from the Colonies to London.[7] The delegates included Barton, Deakin and Kingston. But they were instructed not to agree to any changes. They were aware of, and indignant about, the activities in Australia of opponents of clause 74. Kingston sent a message back to South Australia making the colourful and defamatory assertion that Sir Samuel Way was motivated by a desire to sit on the Privy Council, and be remunerated accordingly, and by the prospect of a life peerage.[8]

The story of the passage of the Constitution Bill through the United Kingdom Parliament, the lobbying that went on in Australia and London in relation to clause 74, and the final compromise resulting in the present s.74, a compromise in which Griffith himself evidently took a significant part, has been retold so frequently as part of our recent Centenary celebrations that it is unnecessary to repeat it. The outcome, in summary, was as follows.

Appeals from State Supreme Courts, by leave to the Privy Council, remained unaffected. Nothing was said about them. But it was contemplated that most appeals from State Supreme Courts would go to the High Court, as they did. As to the possibility of appeals from the High Court to the Privy Council, the most sensitive question concerned appeals in cases involving the interpretation of the Constitution itself. There were to be no appeals from the High Court to the Privy Council on any question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, or as to the limits *inter se* of the constitutional powers of the States, unless the High Court should certify that the question was one that ought to be determined by the Privy Council. Subject to that exception, there was to be a right of appeal by special leave from the High Court to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the matters in which such leave might be sought.

In considering the effect of the Constitution on appeals to the Privy Council from the High Court, it is necessary to make two distinctions. The first is between civil and criminal appeals generally, and constitutional cases. The second, and less clear, is between constitutional cases involving the limits *inter se* of the powers of the units of the Federation, and other constitutional cases.

As to civil and criminal appeals generally, the importance of the Privy Council, at the time of Federation, and well into the 20th Century, was closely related to the power and influence of the British Empire, of which Australians saw themselves as part, and to the desirability of maintaining a reasonable degree of uniformity of the common law in those parts of the Empire that had common law systems. Quick and Garran, writing in 1901, quoted with approval a statement made about the work of the Privy Council in 1871:

> "[T]he controlling power of the Highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any Judge in the Empire, because [the Judge] knows that [the] proceedings may be the subject of appeal to it".[9]

The expense associated with appeals to the Privy Council, whether direct from State Supreme Courts, or from the High Court, was always a limiting factor in their numbers; but the possibility of such appeals was a powerful influence on Australian jurisprudence. Writing in 1981, Mr Justice Hutley of the Court of Appeal of New South Wales said:

> "The evaluation of the effect of the Privy Council upon Australian law has yet to be done. The existence of a superior court has a constricting effect upon a lower court, and this type of constriction by a foreign court offends nationalistic sentiments. On the other hand, the forcible hitching of the legal systems of a small State to one of the great legal systems of the world has provided stimulus to us. The development of the law of torts and contracts in so far as it has been effected by the judiciary has been largely guided by English leadership.

> That leadership would have operated anyway without the existence of the Privy Council, but its existence guaranteed its success. The casuistical methods employed by the courts to adjust and modify the law work most effectively if there are competing doctrines confronting them. In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change". [10]

When Australian appeals went to the Privy Council, the influence of senior English judges in Australian law was exercised not only through a capacity to overrule decisions of Australian courts, including the High Court; it was exercised at a more personal level. Justices of the High Court used to sit on the Privy Council, whose members were mainly English and Scottish Law Lords. The last two High Court Justices to do that were Sir Ninian Stephen and Sir Harry Gibbs. And Australian counsel regularly appeared before the Privy Council, and argued cases against leading English counsel. The advantages for Australian law of such personal contact were significant.

An examination of the effect of the Privy Council upon the work of Australian courts might usefully include, not only a consideration of principles of substantive law, but also of styles and techniques of judgment writing. In the years when there were appeals to the Privy Council, judgments in the High Court were written in a manner that closely reflected the methods of English judges, including the Law Lords. It might be an interesting exercise for a scholar to make a similar comparison today, provided, of course, the comparison was with the current Law Lords.

There was always a cost, apart from a financial cost, associated with the availability of these appeals. The capacity of litigants to appeal direct to the Privy Council from State Supreme Courts gave rise to the possibility of inconsistent decisions of the High Court and the Privy Council. An example occurred in a case in 1985 in which I appeared for the respondent.

My client had succeeded at first instance in the Supreme Court of New South Wales, in a claim for financial loss arising out of a collision between two ships. We relied on the authority of the High Court in *Caltex Oil (Aust) v. The Dredge "Willelmstad"*.[11] The defendant took the case direct from a single judge to the Privy Council.[12] It did so for the clear purpose of avoiding the High Court. It wanted to argue that the *Caltex* decision was wrong. (The fact that it was possible to appeal direct from a single judge to the Privy Council without going through any intermediate court of appeal was itself anomalous. It resulted from a legislative provision which made the judgment of a single judge the judgment of the Court. This enabled the appellant to by-pass the New South Wales Court of Appeal, which would have been bound to follow the decision of the High Court.) The Privy Council disagreed with *Caltex*, allowed the appeal, and overruled the decision of the New South Wales judge.

The last appeal that ever went from the High Court to the Privy Council was one in which I appeared for the appellant. It also concerned a question of shipping law. The case, *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust) Pty Ltd,*[13] was decided in July, 1980. The majority of the High Court, with Barwick CJ dissenting, had declined to follow an earlier decision of the Privy Council, *New Zealand Shipping Co Ltd v. A M Satterthwaite & Co Ltd*,[14] concerning the effect of a standard limitation of liability clause in a shipping document. The appeal was heard some years after the passing of federal legislation blocking such appeals, but there was a grandfather provision in the legislation.

The most difficult part of the case was persuading the Privy Council to grant special leave to appeal. We had three things in our favour. First, the issue involved an important point of shipping law which affected international trade, and there was a strong dissent in the High Court by Sir Garfield Barwick. Secondly, the High Court had declined to follow an earlier decision of the Privy Council. Thirdly, the High Court had stopped argument on the point in question, and had not heard from counsel who had appeared in that court for my client. Even so, the special leave

application was difficult. Their Lordships obviously had serious reservations about taking an appeal from the High Court years after the Australian Parliament had legislated to stop such appeals. And the case had already been through two levels of appeal following the hearing at first instance. Once special leave had been granted, however, the Privy Council had little hesitation in applying its own earlier decision, and upholding the dissenting opinion of Barwick CJ.

The existence of appeals from State Supreme Courts to the Privy Council, or, less frequently, from the High Court, in matters of civil and criminal law meant that, for much of the 20th Century, the High Court was not the ultimate court of appeal in our legal system. This operated as a constraint upon the decision making of all Australian courts, including the High Court. But, as time went on, the Privy Council itself began to allow for the possibility that it might be appropriate for the common law to develop in Australia in a manner different from its development in the United Kingdom.

Two examples, one civil and one criminal, illustrate what occurred. In the area of defamation law, the common law of Australia took a line in relation to awards of punitive or exemplary damages that differed from the English approach. This departure was accepted by the Privy Council.[15] In a matter relating to the law of homicide, a departure also occurred and was accepted.[16] These differences were sometimes explained by a polite fiction that variations in the common law were justified by differing conditions and circumstances. In truth, however, they reflected a willingness to allow scope for local autonomy in legal development, and a more flexible approach to the need for uniformity of common law.

Beginning in 1968, the Australian Parliament legislated, in stages, to put an end to appeals, in general civil and criminal cases, to the Privy Council. (Appeals from Canada had been abolished by legislation in 1949).

The *Privy Council (Limitation of Appeals) Act* 1968 blocked appeals in which a Commonwealth law was, or might have been, involved. Once again there was a grandfather clause, and the last appeal to the Privy Council involving the application of a law of the Commonwealth was decided in November, 1970. The case was *McClelland v. Federal Commissioner of* Taxation,[17] an income tax case. It is of interest to note that in this case the Privy Council, (itself divided), also overturned the decision of the High Court, and upheld a dissenting judgment of Barwick CJ.

Parliament next enacted the *Privy Council (Appeals from the High Court) Act* 1975. That legislation effectively blocked all other appeals from the High Court in civil and criminal cases, although, as was noted, it took some years for that to take complete effect. And, for a time thereafter, it was still possible to appeal directly from a State Supreme Court the Privy Council. The case of *Candlewood Navigation* was one such appeal.

In the late 1970s and early 1980s there was a regular flow of appeals from State Supreme Courts to the Privy Council. One reason was that, with inflation, increasing costs of litigation, and a relative decline in the cost of international travel, the expense of taking a case to London was not necessarily disproportionate to the costs that had already been incurred in Australia. Some well-resourced litigants could choose between appealing to the High Court or the Privy Council, according to where they thought they were more likely to succeed. This gave appellants a tactical advantage over respondents. If a case was certain to go on appeal, it could be an advantage to lose at first instance, and so have the choice of the appeal path to follow. The effect on Australian jurisprudence was complex. It became necessary for Australian courts to develop principles as to how they would deal with conflicts of authority between the High Court and the Privy Council. And it impeded the development of an Australian common law.

Finally, appeals from State Supreme Courts to the Privy Council were abolished by the *Australia Acts* of 1986 (Cth and UK).

Occasionally, suggestions are made to the effect that what is seen as an increase in Australian judicial activism is in part the result of the abolition of appeals to the Privy Council.

Such comments assume that modern English judges are like those when we last had substantial contact with them. This is a questionable assumption. It overlooks an important aspect of developments in British jurisprudence in the last 20 years; developments now occurring at an increasingly rapid pace.

English judges are now strongly influenced by human rights jurisprudence. The *Human Rights Act* 1998 (UK) came into force in England in October, 2000. But for many years before that, litigants in the United Kingdom had the capacity to resort to the European Court of Human Rights in Strasbourg. The human rights jurisprudence of the European Union, based on the *European Convention on Human Rights*, has had a major impact on English law. Some commentators in the United Kingdom have remarked upon what they call the "judicialisation of British politics".[18] People who complain that Australian judges are no longer subject to what they assume would be the restraining influence of British judges may be unfamiliar with the work of modern British judges.

In a lecture at Oxford University in March, 2002, a senior Law Lord, Lord Steyn, said:

> "The causes of the change in legal culture can only be touched on briefly. Public law has been transformed over the last thirty years. The claim that the courts stand between the executive and the citizen, and control all abuse of executive power, has been reinvigorated and become a foundation of our modern democracy. The European dimension has played a large role. Subject to the principle of parliamentary supremacy, our courts must set aside Acts of Parliament if they are inconsistent with directly effective European Community law. Since the creation of the right of petition to the European Court of Human Rights in 1966 the influence of the *European Convention on Human Rights* has increased year by year. … [T]he Convention is effectively our constitutional Bill of Rights. The principles of judicial independence under article 6 of the Convention now apply to all courts of law including the highest court. … The incorporation of the Convention into our law has generally accelerated the constitutionalisation of our public law. A culture of justification now prevails. The renaissance in constitutionalism in democracies such as Australia, Canada, India, New Zealand and South Africa has not by-passed the United Kingdom". [19]

It should also be acknowledged that the House of Lords, and the Privy Council, have shown themselves responsive to developments in the common law in other Commonwealth countries, including Australia. For example, the House of Lords, in December, 2001,[20] altered its long-held approach to the question of the proper test for reasonable apprehension of bias, and has adopted the test that had been previously applied in Australia and other Commonwealth countries.[21]

More controversial from the beginning of Federation, was the subject of appeals from the High Court to the Privy Council on questions concerning the interpretation of the Australian Constitution. The compromise that ultimately appeared in s.74 narrowed the area of constitutional interpretation that was, subject to one qualification, committed exclusively to the High Court. Disputes about the constitutional limits, as between themselves, of the political units of the Federation, were not to be subject to an appeal from the High Court to the Privy Council, unless the High Court gave a certificate permitting such an appeal.

This limitation on the powers of the Privy Council gave rise to an early conflict with the High Court. In 1907, *Webb v. Outrim,*[22] an appeal to the Privy Council directly from the Supreme Court of Victoria, raised a question concerning the capacity of the Commonwealth and State Governments respectively to legislate in such a way as to impose a burden on other government instrumentalities. In the earlier case of *Deakin v. Webb*[23] the High Court had applied a principle, from which the Privy Council departed in *Webb v. Outrim*. In *Baxter v. Commissioner of Taxation (NSW)*[24] the High Court took the view that this was an *inter se* question and that the High Court could ignore the decision of the Privy Council.

Only one certificate was granted by the High Court in an *inter se* case; that was in 1914 in *Attorney-General v. Colonial Sugar Refinery Co Ltd*.[25] But it was not until 1985, in *Kirmani v.*

Captain Cook Cruises Pty Ltd[26] that the High Court formally announced that it would never again grant a certificate under s.74. The combined effect of the legislation earlier mentioned, and that announcement, has been that s.74 has become a dead letter, and what remains of s.74 after the legislation limiting appeals to the Privy Council will have no further effect.

An interesting feature of the 1907 decision in *Baxter* is this. The majority judgment, of Griffith CJ, Barton and O'Connor JJ, was read by Sir Samuel Griffith. These three men were among the principal framers of the Constitution. The judgment deals at length with the history and purpose of s.74, including the negotiations in London for its amendment. In explaining the compromise that was finally reached, the judgment asserts that there had been considerable dissatisfaction with the manner in which the Privy Council had interpreted the Canadian Constitution. It also asserts that the framers of the Australian Constitution had greater familiarity with the constitutional work of the Supreme Court of the United States than had the English Law Lords. The judgment may well have been regarded in England as a somewhat aggressive assertion of colonial independence. And it provides a fascinating glimpse of part of the history of Federation. I strongly commend a reading of *Baxter* to anyone interested in the history of s.74, or in the personality of Sir Samuel Griffith.

During the first 60 years of federation the Privy Council became involved in some important constitutional issues. For example, a number of cases went to the Privy Council concerning s.92 of the Constitution.

Writing in 1968, Sir Douglas Menzies, who himself, as counsel, had been involved in some major s.92 cases, said:

> "[T]he Privy Council has on five occasions decided appeals relating to s.92. It has reversed the High Court three times and affirmed the High Court twice. On each occasion upon which it reversed the High Court its actual decision has been substantially in accord with prevailing professional opinion in Australia. The High Court, when reversed, and so freed from the burden of its own error, has proceeded without eager interference from the Privy Council, to develop the law in its traditional style, that is to consider each case and decide it upon its own facts.
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> "It is, I think it, a fair statement that the essential difficulty about s.92 arises from the section itself, not from the lawyers, and that the Privy Council has been of assistance in clearing away bold but unjustified generalisations made by the High Court from time to time to avoid the inescapable difficulty of the section itself, and, that in doing what it has, the Privy Council has left it to the High Court to work out a doctrine that recognises both the great importance of the section and its necessary limitations". [27]

It was only after appeals to the Privy Council came to an end that the High Court was able, by a unanimous decision, to set aside much of the previous case law, and to lay down a new approach to s.92.[28] It may be doubted that this would have been possible if appeals to the Privy Council had still been open. When Sir Garfield Barwick, in retirement, was asked by an interviewer from the New South Wales Bar Association to comment on the decision in *Cole v. Whitfield*, he said that he would have had great fun arguing an appeal from that decision before the Privy Council. No doubt he would. A lot of barristers had great fun arguing appeals about s.92 over the first 88 years of Federation. But it is worth remarking that, since *Cole v. Whitfield*, there has been very little s.92 litigation. The only s.92 case to come before the High Court in my four years there concerned, not trade and commerce, but freedom of movement of citizens between parts of Australia.

In an interesting turn of the wheel, years after it ceased to play any part in the interpretation of the Australian Constitution, the Privy Council has now found itself dealing with consequences arising from Scottish devolution, and the introduction into the United Kingdom of something not unlike federalism.

In Deakin's speech on the *Judiciary Bill*, in 1902, he pointed out that the constitutional place and role of the High Court of Australia was intended to be more like that of the Supreme Court of the United States than that of the Supreme Court of Canada. This is a theme to which Sir Samuel Griffith returned in *Baxter*. The scheme of the Australian Federation was more like that of the United States, especially in the constitution of the Parliament, and the relationship between Parliament and the judiciary. Deakin observed that under the *British North America Act*, the central government in Canada had a power of veto over provincial legislation; senior provincial officials, including judges, were appointed by the central government; and the Upper House of the legislature was quite differently constituted. Unlike the Supreme Court of Canada, but like the Supreme Court of the United States, the High Court of Australia has never given advisory opinions to the other branches of government. The Canadian arrangements no doubt reflected the history of the Canadian Federation and, in particular, the position of Quebec. It was not until the end of appeals to the Privy Council in constitutional cases that the High Court found itself completely in the position envisaged by Deakin.

From time to time, as it became obvious that the ties between Australia, and other former parts of the British Empire, and the Privy Council, were being loosened or broken, suggestions were made for the creation of some new supra-national tribunal that could act as a court of last resort at least among some parts of the British Commonwealth. Nothing has ever come of these proposals, and it is difficult to imagine that they could be revived. The developments and changes in relations between Australia and the United Kingdom, and in relations between the United Kingdom and Europe, which recently led the High Court to decide that, within the meaning of our Constitution, the United Kingdom is now a foreign power, [29] seem impossible to reconcile with such a proposal. In particular, it is hard to imagine that the Australian people would now accept any tribunal other than a completely Australian court as the final interpreter of their Constitution.

The same may be said of judicial review of administrative action. This is an area in which, in recent years, United Kingdom law has been revolutionised. The consequence of human rights legislation and jurisprudence has been to alter the focus of English judicial review from the responsibilities of administrators to the rights of citizens. Questions as to the relationship between the courts, the executive, and Parliament are at least as sensitive in the United Kingdom as they are in Australia. Some Australian legislators and administrators may not be enamoured of judicial review, but it may be doubted that they would be enthusiastic about judicial review by a tribunal outside Australia. Even in the area of ordinary civil and criminal law, there is now a much greater involvement of State and federal Parliaments in changing the law than there was a century ago. Tort law reform, sentencing, consumer protection, product liability, and many other areas of the law as it affects the daily lives of citizens involve an inter-action between the courts and the legislature.

The history of s.74 mirrors the history of the Australian Federation over the course of the 20th Century. Appeals to the Privy Council were never merely a symbol of our ties to the United Kingdom. While they lasted, they were a practical manifestation of the existence of a form of Australian governmental power external to Australia. It was not until 1986 that the judicial power by which Australian citizens are governed was vested completely in Australian institutions.

Endnotes:

* I am grateful for the assistance of my Associate, Anthea Roberts, in the preparation of material for this paper.

1. An account of Australian experience and opinion as to Privy Council appeals is contained in Howell, *Joseph Chamberlain and the amendment of the Australian Constitution Bill*, (2001) 7 *The New Federalist* at 16.

2. Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 18 March, 1902.

3. *Official Record of the Debates of the Australian Federal Convention* (Adelaide), 23 March, 1897 at 25.

4. See La Nauze, *The Making of the Australian Constitution*, 1972, at 303.

5. *Ibid.*, at 248. See also Joyce, *Samuel Walker Griffith*, 1984, at 208-209.

6. Joyce, *op. cit.*, at 208-209.

7. *Ibid.*, at 208-209.

8. La Nauze, *op. cit.*, at 262.

9. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, at 736.

10. *The Legal Traditions of Australia Contrasted with Those of the United States*, (1981) 55 ALJ 63 at 69.

11. (1976) 136 CLR 529.

12. *Candlewood Navigation Corp v. Mitsui OSK Lines* [1986] AC 1.

13. (1980) 54 ALJR 552.

14. [1975] AC 154.

15. *Australian Consolidated Press Ltd v. Uren* [1969] 1 AC 590.

16. *Viro v. The Queen* (1978) 141 CLR 88.

17. (1970) 120 CLR 487.

18. See, for example, Nicol, *E C Membership and the Judicialisation of British Politics*, Oxford University Press, 2002.

19. Steyn, *The Case for a Supreme Court*, the Neill Lecture, delivered at All Souls College, Oxford, 1 March, 2002 at 6-7.

20. *Magill v. Weeks* [2001] UKHL 67.

21. For example, *Webb v. The Queen* (1994) 181 CLR 41.

22. [1907] AC 81.

23. (1904) 1 CLR 585.

24. *Commissioner of Taxation* (*NSW) v. Baxter* (1907) 4 CLR 1087.

25. [1914] AC 237.

26. (1985) 159 CLR 351.

27. (1968) 42 ALJ 79 at 83.

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

29. *Sue v. Hill* (1999) 199 CLR 462.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the fourteenth Conference of The Samuel Griffith Society.

As most of you know, the Society was founded just over ten years ago, in January, 1992, and its Inaugural Conference was held almost ten years ago, in July, 1992. It is fair to say, I think, that its foundation was not well received by our media. One senior journalist, writing at that time in Melbourne's "quality" broadsheet, *The Age*, described us as "another right wing think tank", and sundry other such bouquets were handed to us by our journalistic mentors. The writings of that journalist, which now grace the columns of *The Australian Financial Review*, have not varied in quality over the decade, any more than have those of his fellow scribblers.

More serious than those journalistic animadversions, however, were certain canards put about at the time by some who not only should have known better (one does not, after all, expect that from most of our journalists), but whose own reputations have to do with the integrity of their discourse. A Justice of the High Court, no less, was alleged to have sought most assiduously to blacken our reputation in judicial circles – particularly after one of our members, Mr S E K Hulme, QC produced, in 1993, his devastating dissection of both the reasoning powers and the judicial propriety of (six Justices of) *The High Court in Mabo* (as his lapidary paper to this Society was entitled).

Another Justice of that Court was even reported to have alleged that the Society had been established by Western Mining Corporation as a means of denigrating the High Court's whole "native title" judicial legislative enterprise. Apart from the fact that the Chief Executive Officer of that company, Mr Hugh Morgan, AO was initially a member of our Board of Management, there was not otherwise a scintilla of truth in that allegation. It could only have been made by one who paid as little regard to the need for evidence in that matter as, indeed, the Justice in question had done in his *Mabo* judgment.

It is against that background that I mark the signal honour paid to the Society at our opening dinner last night by the present Chief Justice of the High Court, the Honourable Justice Murray Gleeson, AC. His Honour's address, for those of you here this morning who may not have been privileged to hear it, provided a scholarly description of – to use its title – *The Birth, Life and Death of Section 74* – the section of our Constitution, now defunct, which dealt with appeals from Australian courts, both the State Supreme Courts and the High Court, to the Judicial Committee of the Privy Council (generally known simply as the Privy Council).

It is now sixteen years since the passage of the *Australia Acts* 1986 (by the federal and all State Parliaments, and by the British Parliament also) finally abolished what were by that time merely the vestigial remnants of the power for Australian citizens to have their cases tried in a foreign court. In passing, I note that, next week, the Coalition Government parties in Canberra are said to be deciding whether Australia should now surrender a great deal more judicial sovereignty than was involved in 1986, to an international court (the so-called International Criminal Court) which is likely to be a great deal less judicially respectable than the Privy Council ever was. Listening to the Chief Justice last night, I could not but reflect upon the folly (not to mention the constitutional questionability in terms of Chapter III of our Constitution) of any such proposal.

Having referred earlier to the Inaugural Conference of the Society nearly ten years ago, let me now quote something which I said in my introductory remarks on that occasion:

"Alexis de Tocqueville, in his famous work *Democracy in America*, has a chapter on Public Associations in which he had this to say:

> 'Americans of all ages, all conditions, and all dispositions, constantly form associations, ….. If it be proposed to advance some truth, or to foster some feeling by the encouragement of a great example, *they form a society*'." (Emphasis added).

I went on to say that "The Samuel Griffith Society is now launched 'to advance some truth', and 'to foster some feeling' in defence of our Constitution". Today we can say that, for ten years, in its own small way, it has done so.

Our program this weekend, copies of which you all have, touches as usual upon a number of separate topics. As things have turned out, two of these topics in particular seem most aptly timed. I refer, firstly, to our session this afternoon, when we shall hear three papers under the general rubric of *Immigration and Judicial Activism* – a subject which could hardly be more topical. Secondly, our session tomorrow morning on *National Sovereignty versus International Law*, which I know will address, among other things, the proposed International Criminal Court, will also be extremely timely for the reasons already stated.

Important as these matters (and indeed, all the other topics listed in our Agenda) are, however, there is probably no topic more central to the interests of this Society than that with which we shall now begin – namely, the malign influence which, more than 80 years ago, the *Engineers' Case* cast over the whole subsequent development of our constitutional history, transforming what was originally our fundamentally federal Constitution into a basically centralist one. Having had the benefit of a prior reading of our first paper, by Professor Geoffrey Walker, on that general issue, I can assure you that you are to begin today with a veritable *tour de force* upon it. Presiding over it will be our Session Chairman, Mr Ray Evans (himself, appropriately, an engineer), and I now ask him to take the Chair and introduce our first speaker.

Chapter One
The Seven Pillars of Centralism: Federalism and the *Engineers' Case*

Professor Geoffrey de Q Walker

Holding the balance: 1903 to 1920

The High Court of Australia's 1920 decision in the *Engineers' Case*[1] remains an event of capital importance in Australian history. It is crucial not so much for what it actually decided as for the way in which it switched the entire enterprise of Australian federalism onto a diverging track, that carried it to destinations far removed from those intended by the generation that had brought the Federation into being.

Holistic beginnings. How constitutional doctrine developed through the Court's decisions from 1903 to 1920 has been fully described elsewhere, including in a paper presented at the 1995 conference of this society by John Nethercote.[2] Briefly, the original Court comprised Chief Justice Griffith and Justices Barton and O'Connor, who had been leaders in the federation movement and authors of the Commonwealth of Australia Constitution. The starting-point of their adjudicative philosophy was the nature of the Constitution as an enduring instrument of government, not merely a British statute:

> "The *Constitution Act* is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian colonies which formed the Commonwealth. This is recited in the Preamble to the Act itself".[3]

Noting that before Federation the Colonies had almost unlimited powers,[4] the Court declared that:

> "In considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State".[5]

The founders had considered Canada's constitutional structure too centralist,[6] and had deliberately chosen the more decentralized distribution of powers used in the Constitution of the United States.[7]

Experience had shown that under federal Constitutions, differences had continually arisen about the respective powers of State and central governments. A body to decide such controversies was needed, and in Australia's case that body was the High Court.[8]

As a constitutional court, it was the Court's duty to interpret the Constitution as a whole:

> "In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections and to ascertain from its whole purview whether the power [in question] was intended to be withdrawn from the States, and conferred upon the Commonwealth".[9]

What we might today call a "holistic" approach was needed, one that reconciled as well as drawing distinctions:

> "The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred".[10]

When using that approach, a Court had to keep steadily in mind:

> "… a fundamental principle applicable to the construction of instruments which purport to call into existence a new State with independent powers .... Such instruments are not, and never have been, drawn on the same lines as, for instance, the *Merchant Shipping Acts*,

which describe in every detail the powers and authorities to be exercised by every person dealt with by the Statutes".

The Constitution unavoidably deals in general language, as it would be impracticable, in an instrument intended to endure for a long time, to declare the means whereby those powers would be carried into execution.[11] Further, certain things are taken for granted, such as the Constitutions and history of other federations and of the Commonwealth of Australia itself:

> "If it is to be suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if relevant, is negatived by the Preamble to the Act itself, [which declares that] the Constitution has been framed and agreed to by the people of the Colonies mentioned who ... had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to be present to the minds of the parties be left out of consideration?".[12]

The whole instrument had to be construed in accordance with the recognized rules of construction for statutes and other written instruments, including those directed to ascertaining the intention of the legislature.[13]

What the people had agreed to when they adopted the Constitution, the Court said, was essentially the following:

> "(1) They rejected the Canadian [centralist] scheme: …..
>
> (2) They agreed to adopt, so far as regards the distribution of functions and powers, the scheme of the American Constitution, and in particular:
>
> (a)To confer upon the Commonwealth Parliament plenary power to make laws for the peace, order, and good government of the Commonwealth with respect to the matters enumerated in sec. 51 of the Constitution, thus adopting the analogy of sec. 8 of Article 1 of the United States Constitution ....
>
> (b)To allow the States to retain their original authority except so far as it was taken from them. This was expressed in sec. 107 of the Constitution, which is as follows:
>
> 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be'.
>
> For the purposes of comparison we again quote at length the 10th Amendment of the United States Constitution:
>
> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.
>
> In the case of *D'Emden v. Pedder* , this Court referred to these respective provisions as 'indistinguishable in substance, though varied in form', and in *Deakin v. Webb* as 'language not verbally identical, but synonymous'. To any one familiar with the subject the aptness of both expressions will be apparent.
>
> Finally:
>
> (c)The 'people' agreed (sec. 71) that the judicial power of the Commonwealth should be vested in a Federal Supreme Court to be called the High Court of Australia, …".[14]

This contextual approach to constitutional interpretation fits perfectly with modern views on purposive construction and, if it had survived, would in time have generated a balanced and stable body of federal constitutional doctrine.

Emerging concepts. By 1920 two guiding concepts had already emerged from the Court's perspective on the Constitution as a whole. One was the reciprocal immunity of instrumentalities doctrine, under which the Commonwealth could not subject the States to Commonwealth law, nor could the States subject the Commonwealth to State law. In developing this doctrine the Court relied on a number of United States cases, notably *McCulloch v. Maryland*[15] and *Texas v. White*, with its ringing declaration that "The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States".[16]

The other was the doctrine of implied prohibitions, or State "reserved powers". This principle first emerged in *Peterswald*, from which is taken the passage quoted earlier in which the Court explains that regard must be had to the Constitution's general provisions as well as its particular sections. In *R. v. Barger* the Court took the idea further, declaring that the Constitution's scheme was to confer definite powers on the Commonwealth "and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth".[17] Specific reliance was placed on s.107, and on the effect of the almost identical U.S. Tenth Amendment (both provisions are set out in full above).

Similarly, in the *Union Label Case*, the Court held that, while s.51(i) gives the Commonwealth legislative power over interstate trade, control over intrastate trade was reserved to the States by s.107, as no clear words to the contrary appeared.[18] The same result was reached in *Huddart Parker & Co v. Moorehead*, again with specific reference to s.107.[19] The result of this doctrine was that Commonwealth powers were in general construed relatively narrowly (at least by subsequent standards), so as not to cover "the private or internal affairs of the States"[20] unless clear language to the contrary appeared.

At this point one should note an odd, but common and important, misconception about reserved powers. The two doctrines mentioned are usually described as being based on implications from the Constitution rather than on express provisions, following *McCulloch v. Maryland*.[21] That is true enough of the immunity of instrumentalities, but much less so of reserved powers, which was mainly based on s.107. Reserved powers were discussed in *McCulloch* but, there again, the concept was seen as flowing from the Tenth Amendment.[22] The reserved powers approach was not primarily an exercise in finding implications, but a normal piece of judicial construction based on the standard principle that written instruments (not least Constitutions) are to be construed as a whole, the general provisions along with the specific.

The doctrine as far as it had developed was not entirely satisfactory, because it presupposed an attempt to create a list of powers that were meant to remain with the States, on the basis of clues in s.51 and elsewhere. But by 1920 the reserved powers doctrine had not yet been comprehensively enunciated.[23] With suitable modifications it could have been developed into an even-handed contextualist approach, guided by the roles for the Commonwealth and the States that the Constitution plainly contemplated.[24] In that approach, s.107 would properly have played a key part as expressing an intention that the seven partners in the Federation would be in a relationship of approximate sovereign equality within their own spheres.

The reserved powers approach has been called unsupportable because s.107 does not, unlike the Tenth Amendment, use the word "reserved".[25] That is just an insubstantial matter of labelling. As s.107 says State powers "shall ... continue", the Court could just as easily have called it the "continuing powers" approach. If anything, s.107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth, words of emphasis that do not appear in the American model. Chief Justice Marshall in *McCulloch v. Maryland* pointed out that the word "*expressly* [delegated to the central government]" used in the 1781 Articles of Confederation was dropped from the Constitution, probably deliberately.[26]

Griffith remarked on this in *D'Emden v. Pedder*, pointing out that s.107 was more definite than the Tenth Amendment.[27]

The *Engineers* Decision

Sources and impact

The eclipse of s.107. The actual decision in *Engineers*, delivered by a High Court that by then had different membership, was that federal industrial law could bind State government enterprises. In a joint statement of reasons authored by Justice Isaacs, the Court overturned the implied immunity of instrumentalities doctrine, though it could have reached the same result by simply holding that a business operated by the State was not a function of government, and that the doctrine therefore did not apply to it. But in a brief passage that was unnecessary for the decision and therefore not strictly authoritative, the majority went further and sidelined the reserved powers doctrine, and s.107 with it. They simply asserted that s.107 did not support a general reserved powers implication. Despite their failure to elaborate on the point, their proposition about s.107, which was mainly bluff and bluster, became instant orthodoxy that has never been questioned.

The short passage in question consists mainly of a paraphrase of s.107 which, though literally correct, gives it quite a different, indeed the opposite, ring from that which it has in the original. It seems to suggest that the section is mainly about continuing State powers that are exclusive or are protected by express reservations, when it is actually about powers that are not exclusively granted to the Commonwealth. And the overheated rhetoric about "fundamental and fatal error" is pretty obviously meant to discourage critical analysis of the Court's reasons on this point – no lawyer likes to risk looking a fool:

> "Sec 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec 51, as that grant is reasonably construed, unless that reservation is as explicitly stated".[28]

"This last sentence", writes Dr Colin Howard, "is the crux of the *Engineers' Case* and summarizes its whole importance. After nearly twenty years' experience the ruling criterion for the construction of the Constitution was rejected and a new one put in its place". Although the reserved powers approach has never been formally overruled, "[T]he formulation in the *Engineers' Case* remains the guiding principle to the present time".[29] In fact, the *obiter dicta* about reserved powers has proved more durable than the holding against immunity of instrumentalities, for that doctrine was later revived and still survives, in a lop-sidedly pro-Commonwealth form.[30]

Engineers' inordinate impact. The impact of the case was of course far greater than might appear from the decision, or even from the quite heavily qualified *dicta* about s.107 (" ... falls *fairly* within the *explicit* terms of an *express* grant, as that grant is *reasonably* construed ..."). It lay in the radically changed approach to interpretation that came to be known as "literalism", which involved construing the Constitution as if it were nothing more than a British statute, to be interpreted by reference to its explicit terms and without reference to history, to implications from federalism, or even those terms' own context in the Constitution itself. As RTE Latham later wrote:

> "It cut off Australian law from American precedents, a copious source of thoroughly relevant learning, in favour of the crabbed English rules of statutory interpretation, which are one of the sorriest features of English law, and are ... particularly unsuited to interpretation of a rigid Constitution".[31]
>
> Even that understates the case's effect, because the "crabbed English rules" did not require

courts to ignore context, structure or history. The 1875 edition of Maxwell's standard work *On the Interpretation of Statutes*[32] opened by stating that language is rarely free from ambiguity, and that the words had to be considered in their context in the statute, their history, and general principles.

Further, while the Privy Council had held that Canada's *Constitution Act* 1867 (then called the *British North America Act*) was to be interpreted like any other statute,[33] that did not prevent the Supreme Court or (until 1949) the Privy Council from construing the Act to provide for a balanced, decentralized, co-operative federal system rather than the quasi-colonial structure the High Court has imposed on Australia. That was despite the fact that Canada's Constitution was on its face of a centralist design,[34] while Australia's was plainly intended to be truly federal. Indeed, for the first 20 years of the Commonwealth, all the High Court Justices claimed to be applying the ordinary rules of interpretation, as Professor Leslie Zines has pointed out, and Griffith had repeatedly enunciated all the interpretative principles mentioned in *Engineers*.[35]

The rules of statutory interpretation do not, moreover, give a legal basis for introducing methods borrowed from probate law as a way of centralizing political power, as when Chief Justice Barwick wrote that Commonwealth power:

> "…will be determined by construing the words of the Constitution by which legislative power is given to the Commonwealth irrespective of what effect the construction may have upon the residue of power which the States may enjoy".[36]

This formulation originated with Justice Higgins (who was with the majority in *Engineers*):

> "We must find what the Commonwealth powers are before we can say what the State powers are. The Federal Parliament has certain specific gifts; the States have the residue".[37]

The specific-grant-then-residue approach belongs in the interpretation of wills, not Constitutions. A similarly unhelpful borrowing was Justice Victor Windeyer's analogy from the law of merger in leases and mortgages. The Constitution sprang from an agreement or compact, he said, "[B]ut agreement became merged in law".[38]

Professor Geoffrey Sawer showed how misleading it was to compare the States to residuary legatees. To find that there is nothing left for a residuary legatee after specific bequests have been distributed is by no means absurd, he argued, so far as a testator's intention is concerned. In any case, it is impossible, in light of a residuary clause, to read down a gift of "my house" or "my piano". It is, however, unbelievable, having regard to the attention given to the States in the Constitution, that they were (with their Parliaments, Governors and the express limitations of their powers), to be left as impotent governmental ornaments with plenty of glory and no power.[39]

Nor do crabbed English rules explain how literalism came to stand for a permanent pro-Commonwealth bias. For in interpreting Commonwealth powers, their words were not only to be given their literal meaning, but also the *widest* literal meaning that the words could possibly bear.[40] *Engineers* signalled the start of a long-term trend of High Court decisions centralizing political power in Canberra (sometimes more than the federal government itself wished),[41] and which continues at the present day.

Literalism as such cannot account for most of this trend, for an objective reading of the Commonwealth's legislative powers shows that they are expressed in cautious words, inconsistent with any intention to create an all-powerful national authority – and, after all, seeking the intention of the legislature in the words used is the principle behind literalist technique.[42] The powers are strictly defined, and wherever the Founders thought the Commonwealth's powers might infringe those of the States, they inserted express limits, as for example in the powers related to banking, insurance, corporations, fisheries and industrial relations.[43]

Stephen Gageler SC has pointed out that strict literalist rules of construction would be more likely to dictate a narrow reading of Commonwealth powers than a wide one. Those rules do not, he adds, explain the rejection of the reserved powers approach at all, as s.51 is expressed to be

"subject to this Constitution", while s.107 is not so qualified.[44] So consistent and far-reaching is the post-*Engineers* centralizing trend that it can only be explained as reflecting a conscious centralist agenda on the part of a majority (often a bare majority) of the Justices.

Varieties of centralist ideology. This centralist orientation seems to come from several sources. The first could be broadly described as Marxian, incorporating Marx's hostility to rigid Constitutions and his belief in large-scale central government control of the economy, together with Lenin's commitment to élite rule, his disdain for the "false consciousness" of the benighted masses, and his maxim that truth is anything that advances the cause. The anti-federalist writings of the Communist academic Harold Laski also proved influential with readers in Britain and the then Empire.

While only a minute proportion of Australians were ever certifiably Marxist, and none of those sat on the High Court, the Marxist world-view (incorporating also Engels's hostility to family and property) had great influence in Australian intellectual circles.[45] Together with a mishmash of Darwin, Freud, Rousseau and Foucault, it still forms the basic architecture of Australian academic thinking in the humanities and social sciences field. All lawyers are exposed to it via the education system and the official media, and one can see its influence on judges such as Evatt and Murphy. Chief Justice Mason's unsupported assumptions about the allegedly greater efficiency of centralized government also reflect this cast of mind.[46]

More important than Marx, however, is the work of AV Dicey, Vinerian Professor of Law at Oxford in the late 19th and early 20th Centuries, who taught that the legislative power of the British Parliament was absolute, unlimited by any concepts of human rights, freedom or democracy. At the same time, Dicey was obsessively opposed to Irish home rule, and this made him a violent opponent of federalism, which had been advocated in the United Kingdom as a solution to Irish and Scottish nationalism. His book *The Law of the Constitution*,[47] which made constitutional law seem simple and easy to teach, was seized upon by academics and was a standard text until the 1960s. His anti-federalist message was taught to generations of Australian law students with no pro-federalist material to balance it. Aided by the general falling back onto British institutions caused by World War I Empire propaganda, it led to Britain's unitary, omnipotent, effectively unicameral Parliament, with no checks or balances, being presented as the ideal form of government.

While Dicey's doctrine of parliamentary omnipotence could have no application to a legislature of limited and enumerated powers[48] such as the federal Parliament, it undoubtedly provided impetus for the principle that Commonwealth powers were to be read as broadly as possible. Its corresponding antipathy towards any limits on Parliament's powers resulted in the reading down of constitutionally protected rights such as those in ss 41, 80, 116 and 117.[49] Chief Justice Barwick was in some ways typical of the Diceyan centralist school, though later in life he was shocked into repentance by the *Tasmanian Dams Case*.[50]

The third source of centralist ideology is cosmopolitanism or globalism, which has been the major intellectual force behind the High Court's extremist interpretation of the external affairs power. Obviously, greater international co-operation in appropriate situations must be in the public interest. But even the best of principles can be loved too much. Sir Harry Gibbs has observed with characteristic wisdom that:

> "Unfortunately, it is a characteristic of many special interest groups, in Australia and elsewhere, that they tend to exaggerate a case which is not without some merit, and make claims which are distinguished neither by fairness nor moderation".[51]

So it is with globalism, which has crossed the line separating ideas from ideologies. "Internationalism, or what I have elsewhere called 'Olympianism' ", writes Professor Kenneth Minogue, "is one of the most powerful salvationist movements of our time. Internationality is for many of the educated the last best hope of a better world".[52] With Marxism and Diceyism in

decline, cosmopolitanism has proved a lifesaver for centralists, providing an opportunity not only for further concentration of domestic political power, but also for a higher level of centralization of power in international bodies such as the United Nations. Writes the former federal Cabinet Minister Peter Walsh:

> "Later generations of centralists would go much further than Whitlam. *He* advocated national centralism, using UN Conventions to transfer power from the States to the Commonwealth. *They* want global centralism, using UN Conventions to transfer power from national governments to international bureaucracies elected by no-one and responsible to no-one".[53]

Sir Anthony Mason, with some misgivings, concurs. Now that the States have lost much of their role, he warns, Canberra in turn may have to yield power to international bodies.[54]

Having helped the High Court to strip away one level of self-government, the cosmopolitans are now using the Court to transfer power to global institutions which can never, by any conceivable means, be made democratic. Even assuming one vote per adult and no ballot fraud, Australians in a system of global government would be permanently outvoted by billions of people who care nothing for our democracy, our culture or our national survival.

The techniques for this surreptitious and incremental power transfer are starkly demonstrated by the European Union. "Here broad general principles can be agreed by officials on their abstract merits, and then imposed on member states, who often find that the small print of implementation contains unexpected implications", writes Professor Minogue. "Governments are then able to say, quite correctly, that their hands are tied. In many cases, rulers and their civil servants are happily conspiring in a process which removes power from the people",[55] transferring it to international committees that are "remote from the discipline of low-level democratic repudiation".[56]

In this way the globalist project portends the centralization of power in the hands of smaller and smaller groups of people who are less and less democratically accountable. It is an élite-driven process. There is no mass support anywhere in the world for the loss of self-government, and in fact it is leading to growing alienation and feelings of powerlessness.[57] In order to move it forward, national governments have to claim there is no alternative to it, both when giving up national sovereignty and when centralizing power at the national level.[58] Cosmopolitanism is the strongest ideological force behind centralism in Australia today.

Contemporary and later criticism

The *Engineers' Case* decision provoked widespread public opposition at the time, like the *Tasmanian Dams Case* 63 years later, and for the same reason – because it expanded the powers of the Commonwealth at the expense of the States.[59] World War I had led to a significant increase in the exercise of Commonwealth power, and the post-War period had seen popular resentment about its continued intrusion.[60]

Owen Dixon disliked *Engineers*,[61] and from the 1930s to the 1950s did much to wind back the approach that it stood for, especially in relation to immunity of instrumentalities, not because he was himself a federalist (he was not), but because he believed the Constitution should be read logically as a federalist document.[62] To the extent that *Engineers* was taken to have curtailed the use of implications – especially implications from the Constitution's federalist structure and language – he scorned it:

> "Since the *Engineers' Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied".[63]

Geoffrey Sawer called *Engineers* "one of the worst written and organized [judgments] in Australian judicial history",[64] and other scholars have criticized its *non sequiturs*, irrelevancies and vitriolic, *ad hominem* tone.[65]

In a paper presented at the 1997 conference of this Society, Professor Greg Craven restated the main problems with the *Engineers* approach. Its greatest deficiency, he began, is lack of any articulated theoretical justification. No reason is given for why it should be seen as so intellectually compelling. Next, it has been used for the purpose of defeating precisely that intent to which the words are supposedly the safest guide, especially through the practice of selecting, from a range of possible meanings of a grant of Commonwealth power, the widest one that the words are capable of bearing. Its ahistorical outlook, which has been used to reverse the Constitution's intended operation, is at odds with the modern purposive approach to legal interpretation. As a practical matter, it is unable to deal with provisions that are ambiguous, or that can only be understood in light of the circumstances surrounding their inception, such as "duties of customs and of excise" in s.90. It cannot manage the concept of implications, which are increasingly understood as central to eliciting the meaning of potentially indeterminate language. Its claims to apolitical objectivity have lost whatever credibility they once had and, finally, literalism runs athwart the contemporary practice of admitting into the process of legal interpretation perspectives from disciplines other than law, such as economics, history and political science.[66]

The Seven Pillars of *Engineers* Literalism

All those criticisms, and more, are well deserved. But the bankruptcy of the *Engineers* approach stands out most starkly if one considers how it has been applied in practice. The result is a tableau of what might be called tactical myopia – "myopia" because of the systematic avoidance of any insights into intention, context or history; "tactical" because it is plainly serving ends other than the rendering of impartial justice according to law, and because different legal tests are used according to which one will best serve those ends.

> In the constitutional understatement of the 20th Century, Chief Justice Mason wrote that: "[T]he operation of a Constitution may vary according to the technique of interpretation that a court adopts".[67]

As Professor Zines observes, the interpretative approach of the Court's members varies depending on the issue involved.[68] From the key cases on federalism issues (that is, those dealing with the division of powers between Commonwealth and States) since 1920, and more especially since the 1970s, there emerges a pattern of judicial techniques and practices constituting a set of instructions for phasing out Australia's federal structure. It can be summarized as seven principal canons or tenets. There are exceptions to the application of all these canons, but they are of minor importance. The key cases that have substantially altered the structure of Australian government are the ones that matter, and in all of those these tenets appear, though most have been abandoned in other areas of constitutional interpretation such as implied, or newly revived, human rights guarantees. They are:

1. Focus on "ordinary meaning" (if it is the broadest), disregard substance. The starting-point for the post-1920 literalist approach was the passage in *Engineers* stating that the basic rule for interpreting the Constitution was the "Golden Rule" that its express words should be given their "natural" or "ordinary" meaning.[69] Unfortunately, the Court could not even get that much right, for the "Golden Rule" is about *altering* the natural meaning of legislation where it is apparent that an error has been made and an absurdity would otherwise result.[70] Still, read in context, and without tactical myopia, the passage intends to invoke the "literal" or "plain meaning" rule.[71]

Yet this commitment to literalism is often contingent on the production of the desired result, namely, the expansion of the powers of the Commonwealth.[72] The ordinary sense of a

word will be adopted if it will have that result, as with the phrase "industrial disputes" in s.51 (xxxv).[73] But an interpretation at odds with the ordinary meaning was adopted to make the power over individual intercommunication given by s.51 (v) ("telegraphic, telephonic, and other like services") cover not only mass radio and television broadcasting, but also the antecedent preparation of radio and TV programs and a wide range of conditions imposed on broadcast licensees.[74] Sometimes the Court will prefer to consider the "high object" of a power,[75] or the results of empirical study,[76] or alleged practical or functional considerations where they favour the Commonwealth.[77] Thus, a literal, ordinary, arcane, technical or otherwise convenient meaning can be used as desired but, as we have seen, it must be the widest (i.e., most centralist) meaning that the words can possibly bear.[78]

This broad meaning will be supplemented by the expansionary effects of the incidental power – not only the express power in s.51 (xxxix), but also an implied incidental power applying "from the necessity of the case".[79] While no doubt legitimate, that additional power sits uneasily with the rejection of federalist implications, and specifically those founded on "necessity", in *Engineers*.

Just as literalism has been used to legitimate one-sided interpretations of constitutional language, it has also underpinned a tendentious process of characterizing a challenged federal Act. Where the Act has a number of different purposes or subject matters, only one of them need be supported by a grant of central power for the whole Act to be upheld.[80] Indeed, even if all the different elements add up to "an obvious or even primary characterisation" that is beyond Commonwealth power, it will still be upheld.[81]

The High Court's mechanistic style contrasts sharply with that of Canada's Supreme Court (and, before 1949, the Privy Council) when interpreting Canada's federal Constitution. The Supreme Court's method is to uncover the "pith and substance" of a challenged law. If the law's legal operation, viewed in light of its practical effects, reveals a predominant purpose outside Parliament's powers, it will be characterized as unconstitutional, whatever the verbal garb in which it has been clothed. The Court's process is finding out, "What does the law do, and why?".[82]

2. Disregard Constitutional Context. There is no more basic rule of legal interpretation than the one requiring that a document be read as a whole.[83] It is the legal version of the axiom common to all rational discourse that one must not take statements out of context. Professor Dennis Pearce puts it this way:

> "The starting point to the understanding of any document is that it must be read in its entirety. A writer will not expect his audience to read only selected passages and he will therefore *make different passages dependent upon one another*. The courts have frequently said that the same approach is applicable to the interpretation of an Act: ' ... every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument' ".[84] (emphasis added).

Ironically, the words quoted by Professor Pearce were authored by Justice Isaacs, which shows that Isaacs knew exactly what he was doing in *Engineers* when he discouraged the use of context in construing the Constitution.

But, incredibly, the effect of the Case was to discourage reference to context, even though the Court's reasons themselves did countenance reference to context, at least in cases of ambiguity. Nevertheless, the Case was taken to mean that the only limits on Commonwealth power were those that were explicit. So each power in a series of Commonwealth powers is read independently of all the others.[85] Restrictions in one power can be avoided by invoking a power on a different subject, which when given its widest possible meaning, as the Court requires, can be made to cover the subject matter of the other power. "Each power, then, pushes to its full parameters", Professor Patrick Lane explains, "whatever a deliberate listing of powers implies, or an overall context suggests".[86]

In this way the power over certain corporations (s.51 (xx)) has been used to escape the limitation on the power over trade and commerce to interstate trade only,[87] and the industrial relations power's restriction to interstate disputes.[88] The restrictions in the matrimonial causes power have been evaded by relying on the marriage power in s.51 (xxi),[89] and so on. It is only when the limitation is expressed as an extraction, as in "(xiii) Banking, other than State banking", rather than as a qualification, as in "(i) Trade and commerce ... among the States", that it will be considered relevant to the scope of other powers.[90]

Again, the Court takes no account of the fact that a broad reading of a power will make another enumerated power redundant or meaningless,[91] even though doing so must clearly defeat the intention of the framers. Justice Dawson observed that the way in which the marriage power has swallowed up the matrimonial causes power conflicts with the accepted norms of statutory interpretation.[92] The starkest example is, of course, the Court's interpretation of the external affairs power in *Tasmanian Dams* and later cases. That power is now subject to no significant limits, leading Sir Harry Gibbs to observe that it was as if s.51 (xxix) had been amended to delete the words "external affairs" and substitute "anything".[93]

In his *Tasmanian Dams* dissent, Justice Dawson pointed out that giving the words granting Commonwealth powers:

> "… the widest interpretation which the language bestowing them will bear, without regard to the whole of the document in which they appear and the nature of the compact which it contains, is a doctrine which finds no support in [*Engineers*] and is unprecedented as a legitimate method of construction of any instrument, let alone a Constitution".[94]

To a similar effect is the Chief Justice Latham's warning in the *Bank Case* that:

> "… no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution".[95]

Yet that is not what is now done. Each power is interpreted as broadly as possible, as if it stood alone, and the enumeration of powers has indeed been rendered absurd.

3. Disregard the Constitution's federalist implications. *Engineers'* stress on the express words of the Constitution, which discouraged the reference to context and had the effect of downplaying the significance of other possible meanings,[96] also deterred the drawing of implications from the federal nature of the Constitution, as being "formed on a vague, individual conception of the spirit of the compact".[97]

This legacy of the case is if anything stronger than ever. Submissions based on federal balance were dismissed in *Tasmanian Dams* as mere "ritual invocations" or political rhetoric,[98] and were again rejected in the *Incorporation Case*.[99] Any argument based on federalism confronts *Engineers*, and the language used by the majority in *Tasmanian Dams* shows how it lends itself to a tactic of howling down the concept of balance rather than rationally debating it. Even some *Engineers* supporters believe it is so one-sided on this point as to be vulnerable to a more comprehensive approach.[100] The literalist approach has travelled so far in its anti-federalist enterprise that, according to Justice Dawson, it has stood the actual reasoning in *Engineers* on its head: instead of the pre-1920 preconceptions favouring federalism, there is now a fixed preconception favouring the widest possible reading of Commonwealth powers, regardless of context.[101]

A plainly federal polity. The federal orientation of the Constitution could hardly be clearer. Indeed, Professor Campbell Sharman argues that there is no need to find an implied theory of federalism when there is one expressed in the Constitution.[102] A hard point to dispute when, as

Professor Lane points out, a federal polity appears at the very outset of the Constitution in the Preamble, and in clause III's introduction of "an indissoluble and Federal Commonwealth". From there, "[t]he federal concept appears at least 28 times throughout the document, for example ss 1, 15, 26, 51 (xiii), (xiv), (xxxiii), (xxxiv), (xxxvii), 62-64, 71, 74, 77, 79, 94, 106-109, 123, 124, 128".[103] The text insists on "federal" in key sections, such as s.1 on the "Federal" Parliament, s.62 on the "Federal" Executive Council and s.71 on the "Federal Supreme Court", the High Court. The Senate is meant to be the States' House (s.7), and the House of Representatives is elected on a State-by-State basis, with members apportioned on that basis: ss 24, 29.[104] Justice Victor Windeyer thought the idea went beyond mere implication, saying that:

> "… the nature of federalism is made express for us ... It is on the combined effect of ss 107, 108 and 109 [also s.106] that ... the nature of Australian federalism firmly rests".[105]

Construing the Constitution in light of its establishment of a federal nation is not the same as reviving the doctrine of reserved powers. The problem with that doctrine, as we have seen, is that it looks to a defined content of State legislative powers preserved by s.107. A modern balanced approach, as Professor Darrell Lumb explained, would not attempt to define a list of exclusive State powers. It would simply mean that grants of Commonwealth power would be read in conjunction with all other power-recognizing or power-conferring sections such as 106 and 107.[106]

In the early 1980s the Gibbs High Court was starting to move in that direction in *Gazzo* and *Coldham*,[107] but its progress was abruptly stopped by the rise of the Murphy-Mason school of thought, which became the majority in *Tasmanian Dams*. The *Dams* minority maintained, despite Justice Murphy's insistence to the contrary, that they were not seeking to invoke reserved powers. They were right, according to Professor Zines:

> "Surely you cannot say that the Commonwealth has power over everything and still say that it is a federal state".[108]

Implications without effect. Yet even though *Engineers* itself drew upon implications from the system of responsible government and the then supposed indivisibility of the Crown, there is, as Professor Cheryl Saunders points out:

> "… a curious reluctance to accept the use of implications from federalism, even though that is at least as obvious a fundamental feature of the Constitution as responsible government. The existence of certain implications based on federalism is accepted, although they are seldom applied with any effect .... Any suggestion that they might be expanded or developed to meet the circumstances of the current case seems to be considered rather unsavoury".[109]

On the other hand, where there is no constitutional power to support a particular law, the Court may be prepared to imply one in the Commonwealth's favour, as in the case of the implied "nationhood" power.[110]

The observation that federalist implications are actually accepted, but are seldom applied with any effect, is a telling one. For the Court does recognize certain implied limits to the expansion of Commonwealth power at the expense of the federal division of power, but they are either easily evaded or so extreme as to be useless.[111] These exceptions to *Engineers* literalism are:[112]

1. The Commonwealth cannot legislate so as to place special burdens or disabilities on State governments.[113]
2. The States are immune from Commonwealth legislation, even if non-discriminatory, that would destroy or curtail the continued existence of the States or their capacity to function as governments.[114]

The first exception has not proved to be adequate protection against discriminatory federal laws. The Court upheld legislation aimed specifically at Tasmania in the *Lemonthyme Forest*

Case.[115] It likewise approved the *Native Title Act* in *NTA* despite its disproportionate impact on Western Australia.[116]

The second exception is equally ineffective, as no individual Commonwealth Act that is politically imaginable is likely to satisfy the apocalyptic test on which the exception depends. Thus the Court has allowed the Commonwealth to regulate the wages and conditions of almost all State public servants, to revolutionize State land law and to hijack the natural resources industry.[117] It is hardly an exception at all, as it countenances a step-by-step concentration of power, a kind of "salami centralism".

A more recent suggested constraint on the growth of central power is the concept of proportionality, the idea that an enactment must be reasonably appropriate and adapted to implementing a head of Commonwealth power. Justice Deane developed a test of proportionality in *Lemonthyme*[118] for use in connexion with the three "purposive" powers – defence, external affairs and the s.51 (xxxix) incidental power. Two Justices have extended it to cover the implied incidental power.[119]

The concept of proportionality rests on considerations of individual freedom rather than on the division of powers. Even so, it departs from the *Engineers* injunction that the possibility that a power may be abused is no concern of the Courts.[120] It can therefore be regarded as a partial revival of the reserved powers idea. But the scope of Commonwealth powers under literalism is so broad and ambulatory, Professor Michael Crommelin observes:

> "… as to overwhelm any constraints upon choice of means or incidental reach. For example, the capacity of the Commonwealth to extend its powers in the wake of internationalisation is undiminished by any requirement of proportionality".[121]

Federalist principles have on occasion received at least tacit recognition in recent years, as in *Davis* and *Dingjan*.[122] But the point is that those were cases of little importance. It is as if these cases, and the other exceptions, are tokens calculated to create an illusion of even-handedness, while the cases that really matter, such as *Tasmanian Dams* and *NTA*, all go Canberra's way.

The fate of guarantees. As was said earlier, *Engineers* proved fatal for the express guarantees of human rights in the Constitution, which might otherwise have restrained the Commonwealth legislative machine to some degree.[123] As late as 1981, Justice Wilson held that while a grant of power will be construed broadly, a restriction on power (in this case s.116, the free exercise of religion) should not.[124] Since then, the *Free Speech Cases*,[125] the other implied rights cases, and the reinterpretation of s.117 in *Street*,[126] have reversed that trend to some extent, but they have been offset by major cutbacks in the scope of other, express restrictions on Commonwealth power. Thus, *Cole v. Whitfield*[127] reinterpreted s.92 in such a way as to enable the Commonwealth to burden, or indeed prohibit, interstate trade as much as it wishes, while a line of cases on s.51 (xxxi) (acquisitions of property to be on just terms) has enabled the Parliament to circumvent what was previously regarded as an important human rights protection.[128] The Court's libertarian sweep is also much less in evidence, Dr John Forbes notes, when common law liberties are in issue, such as the privilege against self-incrimination.[129] One could also add the right of self-defence, and property rights apart from s.51 (xxxi).[130]

At the very least, though, a federalist might argue, *Engineers* itself recognizes that effect must be given to the Constitution's express provisions safeguarding the States.[131] Alas, no. The High Court has used contrived and artifical reasoning to restrict the scope of s.114, which prohibits federal taxes "on property of any kind belonging to a State". A reader might think "property of any kind" to be as all-encompassing an expression in this context as one could devise, but the Court has nevertheless upheld a Commonwealth tax on the interest earned by a State's investments. In so doing it declined to follow Canadian authority that went the other way, and added that, while there were policy reasons to support a broader reading of s.114, "the course

of judicial decisions" in the Court favoured the narrow view, and would be followed despite the conceptual difficulties it presented.[132] The *First Fringe Benefits Case*[133] held valid a tax on cars and houses owned by a State because the impost was not imposed "by reason of" the State's ownership, but because it made the property available to its employees.

Again, Commonwealth legislation has been allowed to override the protection s.106 gives to the continued operation of State Constitutions.[134] And of course *Engineers* itself, without offering reasons, virtually emptied s.107 of all meaning.

Pincer movement: s.109. The High Court's disregard of the Constitution's overall federalist structure and content resembles diagrammatically a kind of judicial Schlieffen Plan. One arm of the thrust is the maximalist interpretation of Commonwealth powers without regard to their federalist context. The other is the use of s.109 to annihilate whole areas of State legislative power. Together they complete an impressive double-envelopment strategy.

The Griffith High Court's test for inconsistency under s.109 was that a federal Act made a State law inoperative to the extent that it was impossible for the citizen to obey both. That approach favoured the continued operation of State law and limited the Commonwealth's power to oust it.[135] Next, it held that s.109 applied when a federal Act conferred a right while a State Act took it away, or *vice-versa*. Both of these criteria reflected the usual legal meaning of "inconsistency".

After *Engineers*, however, Isaacs enunciated a sweeping new test of what has come to be called "indirect" inconsistency. If the Commonwealth law evinced a legislative intention to "cover the whole field" of the subject matter,[136] the State law would be inoperative. This new criterion, which depended solely on intention, opened the way for the broad-brush invalidation of State law even where the Commonwealth law is silent on the particular matters regulated by State law.[137] It enables the Commonwealth to do indirectly what it cannot do directly, namely, prevent the States from legislating.[138] It can also amount to a power simply to override a State law, a power the Canadian government nominally has (but which fell into disuse long ago), but which was deliberately withheld from the Commonwealth.

Most inconsistency cases use the "covering the field" test, Professor Zines notes, and the Court finds an intention to exclude State law more readily than is necessary. Further, the Court has not descended:

> "… from lofty metaphor to concrete particularity and [spelt] out the way the field of Commonwealth legislation is determined, when an intention to cover that field will be found to exist, and when the State legislation can be found to invade that field".[139]

All federations need some kind of supremacy clause like s.109. But the sweeping Australian approach is in stark contrast with the Canadian handling of the same problem. "The Canadian paramountcy rule has been shaped so as to save provincial laws wherever possible", writes Professor CD Gilbert:

> "Not only have the Canadians apparently rejected the 'covering the field' doctrine, their version of 'direct clash' inconsistency is far narrower than the Australian equivalent".[140]

Depending as it does on intention and vague metaphor, the High Court's s.109 case-law does not use the "literalist" approach at all. It is instead another example of the Court using the most effective weapon it can find for sabotaging the constitutional division of powers, in disregard of the federal polity that the document creates. In that sense, however, it is consistent with the centralist agenda of which *Engineers* is the lasting symbol.

4. Ignore ulterior motives and purposes

Disregarding devious devices. *Engineers* deprecated judicial vigilance against possible abuses of legislative power.[141] That, together with its stress on express limitations as the only reason for invalidity,[142] tended to make for a nonchalant attitude to parliamentary purpose. *Engineers* itself

said nothing about the relevance of legislative purpose in the construction of federal legislative powers. It was not until 1931 that the Court began to move towards the position that, if a law operates directly on a subject of power, it is irrelevant that it has little to do with that subject and really seems to be a law with respect to some other subject that is outside Commonwealth power.[143]

Nevertheless, it was *Engineers* that cleared the way for such principles to develop to the full.[144] As long as an Act's connection with a head of power was not "insubstantial, tenuous or distant" (a test that allows the Court a very wide discretion), it would be valid, even if the power had been exercised on extraneous grounds or to achieve non-Commonwealth ends.[145]

From the 1970s on, however, the attitude became one of total *laissez-faire*. In 1976 the Court allowed the trade and commerce power to be used to block exports and thereby prevent mining on Queensland territory.[146] In 1993 it went further, and approved two Acts using the taxation power to underpin an elaborate regulatory scheme for employee training which fell outside any of federal Parliament's other powers. It did so even though revenue-raising was plainly secondary to the attainment of another object and one of the two Acts did not mention the raising of revenue as a purpose at all. Yet the Court treated the scheme as a simple tax statute.[147]

Disregarding clear ulterior motives to that extent is at odds with general legal principle, especially today when substance rather than form is the overwhelming focus of legal analysis. In the field of administrative law, the High Court has held that using a subordinate legislative or administrative power for a purpose other than that for which it was conferred is a corrupt abuse of power and contrary to law.[148] That principle has never been applied so as to invalidate an Act of a fully-fledged legislature, but it must surely be relevant when a court is required to choose between a broader and a narrower construction of a grant of power when an ulterior motive is plainly operating.

The part is valid, the whole an illusion. A key aspect of the Court's practice of disregarding legislative purpose and motive is its treatment of legislative schemes used by the Commonwealth to by-pass the constitutional division of powers. A common expedient is for federal Parliament to pass two or more Acts which individually might be valid, but which together bring about an unconstitutional result. Consistently with the *Engineers* tradition, the High Court has adopted an atomistic method that splits up the scheme and analyses each part separately, disregarding the purpose of the whole. This process places a premium on form over substance and avoids a realistic assessment of the scheme's constitutional impact.

The atomistic approach has been used in the two most devastatingly anti-federal cases the Court has ever decided: *First Uniform Tax* and *Tasmanian Dams*.

First Uniform Tax[149] involved four Commonwealth statutes which together were designed to drive the States out of the income tax field by means of a combination of inducements, penalties and coercion. All four Acts were passed at the same time and were consecutively numbered, but did not expressly refer to one another. The Court found each individual Act valid, and declined to take account of the obviously unconstitutional substance and purpose of the total scheme. The only situation in which the Justices indicated they would depart from the atomistic approach was where the different statutes explicitly referred to or incorporated one another, or where one Act was dependent on another Act which was itself invalid.

This exercise in *Engineers*-style literalism has been a crushing blow to decentralized self-government in Australia. In an age in which the transaction costs of income tax have been falling,[150] the Commonwealth's effective monopoly of this vast source of money and power has enabled Canberra to bribe its way into all areas of State policy via tied grants under s.96. By removing one of the self-limiting features of the federal system, the Commonwealth's income tax

monopoly has undermined the ability of State political communities to express their wishes against the political priorities of central government.[151]

By the time of the *Tasmanian Dams* case, arguments based on the total effect of a legislative scheme had fallen so far out of fashion that the scheme of Commonwealth statutes and regulations in issue was held valid almost solely on the basis of the individual constitutionality of the separate parts, considered piecemeal. As in *Second Uniform Tax*,[152] a few token provisions were struck down in a vain attempt to create an appearance of impartiality, but with no significant effect on the overall success of the enterprise.

The selective working of the tactical myopia strategy stands in sharp relief when one considers the one significant instance in which the Court has been prepared to look to the total operation of a legislative scheme. At issue was the then national domestic monopoly of the Australian Wheat Board. In *Clark King* and *Uebergang*,[153] although the issues were not litigated to a conclusion, the Court was prepared to look at the whole legislative structure of the wheat industry stabilization scheme in determining validity. The crucial difference between these cases and the other schemes mentioned was that this dispute arose under s.92, which before *Cole v. Whitfield* was thought to prohibit the establishment of a national monopoly through the prohibition of interstate trade. The Court was prepared to look at the overall scheme because, in this situation, that would enable it to *uphold* the validity of the Commonwealth-backed scheme and to cut back the operation of a restriction on legislative power.

The "crabbed English rules of statutory interpretation" in no way compel the flight from reality in legislative scheme decisions such as *Uniform Tax* and *Tasmanian Dams*. In one such case in 1940, the Privy Council demurred at the High Court's refusal to consider related Acts as a scheme, emphasizing that "pith and substance" could not be ascertained without considering the statutes' overall interaction:

> "The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine".[154]

Once again, the Canadian cases show a better way. Canada's judicial tradition of seeking "pith and substance" in constitutional adjudication has generated a non-formalistic doctrine of "schematic effect" to be applied in cases involving legislative schemes. It is not confined by Australian-type rules on conditional dependency and incorporation by reference. This method has commonly been applied to single-legislature schemes, which are inherently more likely than co-operative schemes to represent a devious ploy by a particular legislature to extend its power at the expense of another non-consenting, non-participating jurisdiction.[155] It has proved to be an effective tool in maintaining the constitutional demarcation lines between federal and provincial powers. The atomistic weapon used with such destructive effect in Australia, however, is unsupported by the principles of legal interpretation, and has no place in any intellectually respectable system of constitutional adjudication. That is especially so when it is only applied in favour of the Commonwealth and never against it.

5. Disregard the federalist intentions of the founders and the voters.

The ban on the Convention debates. Until 1988, the High Court had rejected the use of the Convention Debates of the 1890s as an aid to the interpretation of the Constitution. The ban extended to the bills drafted by Inglis Clark and Charles Kingston for the 1891 Convention, but not to the historical facts surrounding Federation. Apart from excluding access to an important source of background material, this had some odd results, including the fact that in construing s.116 the Court could not refer to what the Convention delegates thought it meant, but could indirectly give weight to the opinion of Thomas Jefferson on the meaning of the similar words of the First Amendment.[156]

The usual reason given for this rule was that there were no means of knowing whether remarks of a particular speaker commanded the majority's assent. Chief Justice Mason rightly doubted the soundness of that objection:

> "The objection is not universally true and, even if it were true, it is a very slender reason .... 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".[157]

Justice Frank McGrath agrees, pointing out that every section of the Constitution was proposed, considered by special committees, subjected to a drafting committee, and then resubmitted to the whole Convention, where it was debated again and voted upon. Not every section was debated extensively, but many of those that have since given trouble were, sometimes on more than one occasion. The debates can give a clear idea of what members understood to be the meaning and purpose of the various sections, whether they agreed with them or not. The light they can throw on the meaning and purpose of particular provisions does not rely on the opinion of a particular person, nor does it seek some impossible unanimous subjective intention on the part of the framers.[158]

Though the ban on using the debates antedated *Engineers*, it was consistent with the blinkered literalist method and was not lifted until the Court began to retreat from literalism in *Cole v. Whitfield*. Most of the Justices in that case still declined to use the debates for the purpose of discovering the subjective intention of the founders, but references to the debates for that purpose have been made since. In the *Incorporation Case* the majority asserted the positive intention of the framers as regards the corporations power,[159] declining to hold that it gave the Commonwealth power to legislate for the actual incorporation of companies. In the *Hindmarsh Island Bridge Case*, Justice Gaudron referred to the meaning of the races power as understood at the constitutional Conventions, and concluded that the view of that power as being confined to the making of "beneficial laws", "cannot be maintained in the face of the constitutional debates".[160]

This development is a potentially important encroachment into *Engineers* - style literalism by the "intentionalist" approach to interpretation. Supporters of this method argue that, as the Constitution was democratically adopted, it should be applied in accordance with the intentions of the framers and delegates, especially as literalism itself formally rests on a search for intention.[161] The collapse of the ban on the debates has been seen as an important victory for the States,[162] given that the real agenda of the *Engineers* method has been to shift the Constitution as far away as possible from the founders' intended design.

The ban lifted: possible results. Use of the debates as an aid to interpretation would not always favour the federal balance – the majority referred to them in *Ha* when striking down State taxes. But their use would point towards a narrower reading of Commonwealth powers in important areas.

The races power is one example. Professor Michael Coper has suggested that, but for *Engineers*, s.51 (xxvi) in its amended form would not have supported the *Native Title Act* 1993, with its radical impact on the title to land, a matter of State law.[163] The debates show that the paragraph was meant to deal with what were seen as problems flowing from the entry into Australia of certain ethnic groups that did not seem willing to conform with community laws and *mores*.[164] For example, among single Chinese men, some 90 per cent smoked opium and 80 per cent were addicted to gambling, raising concerns that such habits prevented them from saving their earnings, thereby making them unable to afford to return to their home country.[165]

From the debates it also appears that the framers envisaged the existence of the external affairs power in the context of the Commonwealth then having no treaty-making power. That being so, it could not be expanded merely by the *de facto* acquisition of treaty-making powers with

the consent of the British government. The interpretation of s.51 (xxix) by Quick and Garran, both of whom were intimately involved with the federal movement and Conventions, comes closest to reflecting the intentions of the founders. They considered that the power applied to:

> "(1) the external representation of the Commonwealth by accredited agents, (2) the conduct of the business and the promotion of the interests of the Commonwealth in outside countries, and (3) the extradition of fugitive offenders from outside countries".[166]

The *Incorporation Case* sparked consideration of how use of the debates might affect the interpretation of other powers, such as s.51 (xxxv), which was worded so as to cover only industrial disputes that could not be settled at the State level, but had been artificially stretched by the use of "paper disputes" and similar fictions. But when confronted in 1997 with a Queensland Government challenge to the shams of ambit claims, and the service of logs of claims on uninvolved employers in other States in order to circumvent the requirement of inter-Stateness, the Brennan Court remained locked in the *Engineers* tradition. In *Attorney-General (Qld) v. Riordan*[167] the Justices fell back on precedent to avoid disturbing the long-standing abuses that underlie federal industrial law.

Inverting "community values". It is mainly since the 1970s that the High Court has brought about the most sweeping transfers of law-making power from the States to the Commonwealth. During that period the Court has also begun to claim the support of public opinion for its program of constitutional change. Chief Justice Mason wrote that the Court must act on "accepted community values",[168] while Chief Justice Brennan in *Mabo* claimed to be carrying out "the contemporary values of the Australian people".[169]

Now the most accurate way of ascertaining community values must be by a referendum held after full and public debate, and after each voter has been sent a summary of the proposal and of the arguments for both sides – in other words, the procedure for deciding on a proposed alteration of the Constitution under s.128.

Yet that is not at all what their Honours had in mind. If it were, we would expect to see them giving great weight to the people's rejection of all but two of the Commonwealth's attempts to increase the powers of the federal legislature, executive or judiciary, almost all of which were defeated by an overall majority of the voters, not by s.128's special majority clause. They would, for example, be loth to read the industrial relations or corporations powers too widely, given that the people had rejected Commonwealth attempts to broaden them five times each.

We find, on the contrary, an élitist, paternalist attitude to the community and to its values as expressed in referendums.[170] Chief Justice Mason rejects the criticisms of the Court's propensity to alter the Constitution as it sees fit, lamenting that the critics overlook the fact that amendment is "so exceptional, so cumbersome and so inconvenient that governments cannot set it in motion regularly to ensure that the Constitution is regularly updated". Besides, "the electorate has been notoriously unsympathetic to the expansion of federal powers". ("Inconvenient" for whom? And why "notoriously", as if the people's "unsympathetic" preference for self-government bordered on criminality?). The Court will therefore tend, his Honour continues, apparently unaware of the contradiction, to read the Constitution in light of "the conditions, circumstances *and values* of our own time".[171] And the complexity of modern life and the like, he concludes without offering any evidence, require more centralized power.

Again, Mason CJ asks us to take his unsupported word for the alleged blessings of a radically expanded external affairs power. It may cause "a substantial disturbance of the balance of powers as distributed by the Constitution", but "it is a necessary disturbance, one essential to Australia's participation in world affairs".[172] Yet Canada, which participates in world affairs more prominently than Australia does, lacks any such power, as Justice Wilson said in his dissent in the same case.[173]

Chief Justice Mason's implicit belief that the voters' preferences reflect the conditions of a

past age is echoed by other critics of the people's constitutional "conservatism". That is hardly a criticism, though, if one believes in democracy. But in any case, a preference for decentralized self-government is not necessarily conservative. In Britain and France, where disintegrating unitary systems are being forced to decentralize and devolve, that preference is seen as the reverse of conservative. And in Australia, as John Gava has pointed out, "the republic referendum failed because it was not *radical* enough".[174] Nor would a stereotypically conservative electorate have defeated the referendum to ban the Communist Party at the height of the Cold War, or carried the 1967 referendum on Aborigines by one of the largest affirmative referendum votes ever recorded in a democracy. The Court's conviction that it is somehow entitled unilaterally to amend the nation's basic law is actually just the old aristocratic belief that the people are stupid. Its unconcealed mission of saving Australia from democracy may itself contribute to the public's reluctance to vote for constitutional alterations.

6. Phase out judicial review of Commonwealth legislation.

The Court's intended role. From the start it has always been understood that the High Court's chief role was to be upholding the Constitution. In so doing it might have to declare that the Commonwealth (or a State) had exceeded its constitutional power, and that what purported to be a federal (or State) Act was a nullity,[175] in accordance with the principle that Chief Justice Marshall first laid down in the United States in *Marbury v. Madison*. In the *Communist Party Case*, Justice Fullagar noted that:

> "… there are those, even today, who disapprove of the doctrine of *Marbury v. Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v. Madison* is accepted as axiomatic ...".[176]

Among the other products of *Engineers*, however, was the seed of an idea that remained dormant for decades but came to full flowering after the rise of the Murphy-Mason school of constitutional interpretation in the 1970s. This lay in the passage where the majority declared that:

> "… possible abuse of powers is no reason in British law for limiting the natural force of the language creating them .... [T]he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts .... No protection of this Court in such a case is necessary or proper".[177]

The Court did not deny that the Court could and should declare that an Act beyond power was void, but its emphasis on judicial restraint could be taken too far and lead the judiciary to abdicate its function of upholding the constitutional order. That, to a great extent, appears now to have happened. "[T]he High Court", writes Stephen Gageler SC, "has displayed an increasing tendency to leave the final determination of the 'federal balance' to the political and not the legal process".[178]

Leaving it to the Executive. One sees this tendency in *Koowarta*, where Justice Brennan, invoking *Engineers*, declined to identify any limits to the operation of the external affairs power, and left it to government to decide whether or not to legislate.[179] Similarly, Justice Mason in *Tasmanian Dams* said that whether the subject matter of a treaty is of international concern is a matter for the executive government and not the Court. Likewise relying on *Engineers*, he derided the possibility that the power should be construed by reference to "imaginary abuses of legislative power".[180]

Although both Justices refer to *Engineers*, they are taking the withdrawal from judicial review much further. *Engineers* only said that, in construing a granted power, no account should

be taken of "possible" (not "imaginary") abuses. But Justices Mason and Brennan are effectively leaving it to the government to say whether the power has been granted in the first place.

Tasmanian Dams has been described as the beginning of the end of judicial review.[181] Putting the other side of the coin, Professor George Williams describes how "the Court's focus and business is shifting from ... federalism to issues involving constitutional rights", now that many of the large federalism questions have been "resolved".[182] They have been "resolved" only because the States have little left to lose, and have concluded that a majority of the Court has no interest in federalism beyond phasing it out. This is made bitterly clear by the fact that, while it has virtually abdicated judicial review over Commonwealth legislation, the Court relentlessly pursues it against legislation by the States. In *Ha* it unnecessarily stripped away much of the States' remaining tax base, even though by so doing it could confer no benefit on the Commonwealth.[183]

Political constraints: a substitute? Professor Coper contends that we should now look to political, not legal, restraints on Commonwealth power.[184] Stephen Gageler similarly argues that under a system of responsible government, the political process is recognized in the Constitution itself as a mechanism of constitutional constraint capable of operating in relation to issues of federalism, and that judicial review should be confined to holding the political process to fair and proper procedures.[185]

There are problems with that. One is that the idea of a purely "political" rather than constitutional federalism contradicts every known political fact about the framing and adoption of the Constitution. The High Court's power of judicial review was meant to be the States' last line of defence, after the Senate and the conferral of only limited and enumerated powers on the federal Parliament.[186]

The other major objection is one that the Court itself has implicitly acknowledged. The growing body of case-law on judicially protected human rights recognizes that a human right that cannot be enforced in a court, that cannot if necessary prevail over an Act of Parliament, is a right that does not exist. The Court has correctly rejected as false the old British saw that the common law and a sovereign Parliament are the only protection human rights could possibly need. In a world of party lines, pressure groups devoid of any sense of proportion, and of media that can whip up instant moral melodramas, the Court has had to spell out constitutional limits to the power of government. This is part of a more general reconceptualizing of polity and people, a re-emergence of a species of natural law as a response to the problem of the limits of power.[187] Whether one agrees with all or any of the Court's human rights decisions is not the point. The crux is the Court's recognition that the old view of human rights as a purely political issue has been seen to be inadequate. It is therefore fair to argue that the current view of federalism as a purely political issue is inadequate too.

The idea of "political federalism" has been promoted by some United States academics, and was gaining ground until the Supreme Court's revival of federalism began a decade ago. But as a Canadian scholar explains:

> "The need for final judicial review of the federal distribution of legislative powers has roots in the necessities of a federal system. Neither the federal Parliament nor the provincial legislatures could be permitted to act as judges of the extent of their own respective grants of power .... If they were, soon we would have either ten separate countries or a unitary state".[188]

In our case, the latter.

Power abhors a vacuum. All power calls for its use, and absolute power calls absolutely.[189] Allowing Canberra to be judge in its own cause will not result in a negotiated pattern of political give and take, because the Commonwealth now holds all the cards. Instead it will lead to the

indefinite expansion of Commonwealth regulation. There is no limit to the hunger of lobby groups for more wealth transfers, of parliamentarians for new portfolios, or of bureaucrats for upgraded positions, larger departments and more overseas conference travel.

Public choice research shows that bureaucracies are an independent factor in the growth in the size of government, a factor that increases in power according to its own size. Thus government growth is partly a function of the absolute size of the bureaucracy, a correlation that helps to explain the ratchet effect whereby government growth appears irreversible.[190] And the size factor, of course, favours the Commonwealth.

The United States Supreme Court in effect abdicated its role of upholding constitutional federalism after the "1937 revolution" in which the Court, under pressure from the Roosevelt administration, held that the interstate commerce clause could support federal legislation of almost anything.[191] That state of affairs endured for six decades. Towards the end, Congress was enacting statutes without even considering whether it had the power to do so.

The Constitution becomes irrelevant. Some twenty years after the 1983 *coup d'état* in *Tasmanian Dams*, the Commonwealth is doing the same. A Government with an express commitment to federalism in its party platform introduces a media ownership Bill giving a government body a degree of control (limited at this stage, but readily extendable) over editorial processes in the print media *(Broadcasting Services Amendment (Media Ownership) Bill* 2002). Quite apart from the danger in any government agency having such unprecedented control, the Commonwealth has no power to make such a law – unless, perhaps, there is somewhere a treaty with Zimbabwe or North Korea on control of the news media.

The same Government puts through the *Renewable Energy (Electricity) (Charge) Act* 2000, using an Explanatory Memorandum that fails even to mention the question of constitutional power (likewise the Act itself). It offers no ground for federal legislation, other than the belief that it will be quicker and will avoid possible "inconsistencies" (as usual, the word is wrongly used to mean merely "differences") between States in implementing the *unratified Kyoto Protocol*. But delay and diversity in implementing treaties is not, as Colin Howard reminds us, necessarily a bad thing.[192] It may result in more creative and better-adapted solutions than the "one size fits all" approach.

Again, neither the *Privacy Amendment (Private Sector) Act* 2000, nor the Explanatory Memorandum prepared for it, makes any reference to the Act's constitutional basis or attempts to define its constitutional reach. Presumably we will be told that it rests on the same foundation as the *Privacy Act* 1988 – that is, the *International Convention on Civil and Political Rights*, which prohibits arbitrary or unlawful interference with a person's privacy, home or correspondence. The *Convention* is plainly directed at acts committed by, or on behalf of, governments, and does not require states to enact privacy laws. The *Privacy Act* also calls in aid an OECD recommendation that member states adopt privacy laws, but even the Brennan Court was not prepared to hold that a recommendation, by itself, gives the Commonwealth legislative power.[193]

Finally, with the Bills to implement the *Statute of the International Criminal Court*, the Commonwealth apparently feels confident enough to ignore the Constitution altogether. The *International Criminal Court Bill* will make it possible for Australians to be sent to The Hague for trial before a body which is prosecutor, judge and jury and has no separation of powers except at a bureaucratic level. There will be no jury, no right to a speedy trial, no independent appeal, and the defendant will be liable to be imprisoned in any participating country in the world. Besides delegating judicial power to a body other than a Chapter III court, the Bill also proposes to delegate domestic legislative power to the same body, which plainly it cannot do.[194] The High Court's abdication of its function has brought not only the end of federalism, but also apparently the end of constitutional government itself.

7. Refrain from developing a theory of constitutional interpretation.

The centralist's tale. Several commentators have drawn attention to the lack of judicial discussion of interpretative methods in Australian constitutional law, and to the High Court's failure to develop a serious theory of constitutional interpretation. In particular, it has never elaborated the role of the States in the legal structure of the federation.[195]

Engineers literalism relieves the Court of the need to develop a coherent vision of the Constitution and allows it simply to invoke the old formulae about the broadest possible meanings, grants and residues. This void at the heart of Australian constitutional discourse is a consequence of *Engineers*, but also something more. It also feeds back into literalist dogma in a way that reinforces the centralizing force of the *Engineers* tradition.

Adjudication under the common law embodies, more than that of most other legal systems, an element of storytelling. The free, flexible structure of appeal judgments lends itself to a narrative style that gives colour and life to the facts and issues. A favourite of law students is the Lord Denning judgment in *Hinz v. Berry* that begins, "It was bluebell time in Kent". All counsel know how to relate the facts of the case from their own client's viewpoint so as to capture the narrative's favour for their side. Screenwriters and directors understand the phenomenon too, and sometimes tell a story through the wrongdoer's eyes in order to make us identify guiltily with the villain, instead of the victim or the avenger.

Literalism harnesses this dramatic effect to the centralist ends of the *Engineers* tradition. The story that unfolds in the law reports is told through the Commonwealth's eyes, for under literalism it is only the Commonwealth's role and powers that are relevant. It is the tale of a unifying, nation-building, global-conscious Commonwealth fighting its way towards a goal of rational uniformity. The States are mentioned only as the negative opposing force, against which the Commonwealth must yet again unsheath its flashing sword. They are always unruly, always wanting to do things their own way and railing against their fate. *Engineers* literalism means that they need never be humanized, never considered as having worth in their own right, never taken seriously. But if they were allowed to tell their own story, they might sometimes be seen as sturdy, self-reliant *poleis* taking a stand for their citizens' right to control their own destinies.

Different ox, different test. Surveying the present state of constitutional interpretation, Professor Zines concludes that the recent cases are:

> "… a motley collection in which the Court and individual judges take varying approaches depending on the issue".[196]

To put it another way, the legal test applied in a given case depends on whose ox is being gored.

If that is so, what has happened to the universal iron rule of *Engineers* literalism? First, the good news. The judgments in the key *Free Speech Cases* and in *Street*, Professor George Williams flatly declares, "marked the end of the reign of the *Engineers' Case*". They dropped the literalist method of interpreting constitutional guarantees, identifying an implied right of free political discussion, and they discarded the undue deference to parliamentary sovereignty that had led to the Court's near-abdication of its role. They made it clear that the people can have recourse to the Court if their basic liberties are infringed by the legislature. "This turning point", he predicts, "may prove as significant a turning point as the *Engineers' Case* itself".[197] Justice McHugh in *McGinty* seemed to share that assessment, while fiercely disapproving of the trend.[198]

The separation of powers effected by Chapter III of the Constitution has also proved a rich source of implications, leading to entrenched protection against attainder-type laws and other violations of due process. In the *Hindmarsh Island Bridge Case*, Justices Gummow and Hayne hinted that the new trend might develop still further, through the elaboration of Dixon's statement that the rule of law is one of several assumptions underlying the express terms of the Constitution.[199]

The bad news, however, is that the new age of enlightenment shows no signs of illuminating the Court's federalism doctrine. Since *Nationwide News* and *ACTV*'s inauguration of free speech and contextual interpretation in 1992, all the important federalism cases have gone Canberra's way. *Northern Suburbs* (1993), *NTA* (1995), *Australian Education Union* (in part) (1995), *Industrial Relations* (1996) and *Riordan* (1997) give no indication that federalism has been detected among the constitutional implications to which real legal effect is to be given. If anything, the cases on the key financial provisions, *Ha* and *Northern Suburbs*, suggest that the Court has stepped up its attack on what remains of the federal system. Professor Williams rightly deduces that:

> "… it is unlikely that the place of the *Engineers' Case* will be affected in the short term in regards to its effect on the expansion of Commonwealth power".[200]

Nor are federalism issues being included in the other aspects of the move away from formalistic interpretation. The lifting of the ban on reference to the constitutional Convention debates has not led to their use in support of federal balance. They have only been invoked when they favour the Commonwealth or damage the States (*Ha, Cole v. Whitfield*), or where they give the States a purely token victory (*Incorporation*). In major cases such as those mentioned above, tactical myopia still rules. Again, reasoning based on functional or practical considerations is now employed in constitutional cases such as *Abebe* and *Eastman*,[201] but not where it might cast new light on the federal distribution of powers according to *Engineers*. Nor is the new concept of proportionality used to arrive at a more balanced interpretation of non-incidental Commonwealth powers.

The Brezhnev doctrine of constitutional interpretation. The High Court has never considered itself bound by its own previous decisions. On the other hand, it will not permit counsel to challenge an earlier decision without leave. It is also clear that case-law on the Constitution cannot replace the text. Judicial reasoning, declared Chief Justice Barwick, "may not be used as a substitute for the Constitution. Always the Constitution remains the text".[202] Beyond that, different Justices have expressed widely diverging views on the circumstances in which an earlier decision should be overruled.[203]

In fact, such overruling has not been infrequent. *Engineers* itself is an obvious example, and in recent years it appears to have become more common; for example, *Cole v. Whitfield* (which reconsidered 141 earlier cases and overruled 32 of them), *Street, Ha* and *Tasmanian Dams*. The protection for property rights in s.51 (xxxi) has been cut back as long-standing authorities have been circumscribed.[204]

It is striking, however, that with the only marginal exception of *Melbourne Corporation* in 1947,[205] there does not seem to be a single major case in which the Court has overturned an earlier decision in such a way as to return an area of legislative power to the States. On the contrary, the Court has, for example, fallen back on precedent so as not to disturb an admittedly untenable decision restricting the protection of State property under s.114, or a line of cases justifying the use of transparent shams to evade the limitations on the industrial relations power.

What seems to be at work is a judicial adaptation of the 1970s Brezhnev doctrine, whereby territory annexed by the Commonwealth, however wrongfully, will never be allowed to escape. The human rights cases of the 1990s do restrict Commonwealth power with a kind of reserved power mechanism, but they do not work in favour of the States, and several of the restrictions apply to the States as well. They strengthen human rights, but not the federal balance, though the federal division of powers can itself be an excellent safeguard for human rights. This asymmetry in the working of precedent shows the tenacity of literalism's hold over the Court in federalism cases.

Tokenism instead of theory. A final feature of literalist technique is the reliance on tokenism as a substitute for a coherent and balanced theory of constitutional interpretation. Some commentators have treated decisions such as *Davis, Dingjan* and *Incorporation* as showing a partial State recovery and note that they are accumulating.[206] *Residential Tenancies*[207] takes a small step towards balancing the currently one-sided immunity doctrine.

But none of those cases, nor all of them together, effects any significant retrieval of power from Canberra. And in practice *Residential Tenancies* does little more than spare the Commonwealth the unexciting task of devising its own landlord and tenant law. They belong in the same category as the practice mentioned earlier in major cases that bestow new powers on the Commonwealth – that of adding restrictions, conditions or qualifications which, on examination, prove to be trivial and easily evaded. They are mere sops calculated to give the impression that the Court is fulfilling its role of even-handedly upholding the Constitution. They are no substitute for a cogent doctrine of constitutional federalism.

The *Engineers* Legacy

Centralizing instability

Pole shift. All constitutional scholars agree that *Engineers* has led to a massive centralization of power in the Australian federation. It has succeeded in reversing the polarity of a Constitution that was designed specifically to allow maximum decentralized self-government at the State level. *Engineers* literalism has transformed it into a system of near-colonial rule, demolishing its self-correcting features and paring back the accountability of government to the people.

The impact of *Engineers* was felt quite quickly, and during the 1930s nourished the secession campaign in Western Australia. Apart from tariffs, the main grievance of the secessionists was the Commonwealth's arbitration system, the coverage of which *Engineers* had greatly extended. It reduced the ability of workers and employers to form agreements that reflected local conditions and the state of the local economy. This rigidity, coupled with regional inequity, was seen as a major factor in increasing the State's cost structure. The effect of the federal arbitration system on coastal shipping also caused dismay. The Commonwealth requirements for high wages and restrictive working conditions raised the cost of goods brought from the rest of the country. Eventually federal industrial law destroyed coastal shipping itself,[208] an industry on which the State depended heavily, and for which Australia as a whole is by nature ideally suited.[209] At a referendum held in 1933, 68 per cent of Western Australians voted for secession. Canberra simply ignored the result.

The decline of reflexivity. A major casualty of the *Engineers* centralizing process has been what Professor Brian Galligan calls "reflexivity", a core criterion for evaluating institutions, and which has to do "with the fact that self-conscious individuals operate institutions, and can learn from their mistakes, internalise norms, manage complexity and adapt to change". The Founders put much weight on the good sense of those who would operate the system. They trusted that:

> "… political actors in the Anglo-Australian tradition, like themselves, could be expected to reach a compromise rather than push the system into breakdown. Reflexivity is one of the key principles of Australian constitutional design, but probably the most neglected among Australian constitutional critics, perhaps because of the influence of a literalist legal mindset which would prefer to have everything spelt out".[210]

By crippling the balancing, stabilizing effect of reflexivity, the *Engineers* tradition has pushed the federation relentlessly towards breakdown, especially since the 1970s, when the attenuating effects of Dixon's contextual and more equitable "strict legalism" approach were swept away by the advent of the Murphy-Mason school. All the while, the mask of literalism has enabled the High Court to pose as a kind of helpless bystander with no power over its own

decisions. "The inability of the courts [i.e. the High Court] to protect the States from continuing federal encroachment has been graphically illustrated [by *Tasmanian Dams*]", wrote Chief Justice Mason. It is as if "the courts" happened to open a door marked "s.51 (xxix): external affairs", and found a raging, devouring monster which "the courts" were quite unable to restrain, despite their best efforts. That portrait of a passive, powerless High Court is hard to square with his Honour's vision, imparted a few pages further on, of a policy-oriented Court moving away from formalistic interpretation and boldly setting out its reasons for updating the Constitution by giving Canberra more power.[211]

Costs and consequences

The effects of *Engineers* have been felt in many ways throughout Australian society, but a few examples may be useful, starting with the industrial relations power that expanded enormously as a direct result of the case.

Industrial relations: abuses and rigidity. In *Riordan*, Justice Kirby said of the "paper disputes" sham used to avoid the constitutional limits of the power:

> "It has enhanced the position of unions and employer organisations. It has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national economy".

A further result has "undoubtedly been a tendency to encourage extravagant demands".[212] His Honour's assessment seems correct, except for the part about encouraging the growth of a national economy. The real effect has been to prevent the less populous States from competing with New South Wales and Victoria by applying industrial laws suited to their own conditions. This became clear early on and was, as we have seen, a major issue in Western Australia's secession campaign. To this day it is crippling the economies of South Australia, Tasmania and regional Australia.

The "national economy" itself has suffered from the extended reach of the Commonwealth arbitration power. "Australia's unique industrial relations system is an outdated relic from an era of inward-looking protectionism for selected industries", writes Professor Wolfgang Kasper:

> "Such industries have become rust-belt liabilities in all affluent countries. Success in the new age of globalisation and decentralised, agile service production is stifled by rigid, collective industrial relations. It requires the flexibility of certain and simple wage contracts, together with the firm and reliable common-law protection of workers against opportunistic employers".[213]

One of the misconceptions underlying Commonwealth industrial law is that interstate competition would inevitably lead to lower wages. In fact, wage levels are increased when there is more flexibility. The OECD, to whose opinions on other matters the Commonwealth, as we have seen, accords the force of constitutional law, consistently maintains that Australian labour law needs more flexibility. In his world-famous work *The Competitive Advantage of Nations*, the economist Michael Porter concludes that:

> "Policies to retard wage growth are often misguided. Wages should be allowed to rise with or slightly ahead of productivity growth. This creates beneficial pressures to seek more advanced sources of competitive advantage and compete in more sophisticated industries and segments".[214]

The Constitution provides a limited federal power to settle interstate disputes. In *Engineers* and the cases following it, the High Court decided instead to create a general power. The Court persisted with it despite the adverse economic and social consequences it produced,[215] including a high strike rate that enabled RJ Hawke, when ACTU President, to boast that, "We [the unions] will bring Australia to its knees". The Court's system is one that favours the employed over the unemployed, the union leader over the independent worker, city over country, Sydney over

Adelaide and Hobart. It denies the States the right to regulate the wages and conditions of their own public servants, surely the least interstate issue imaginable, in the name of a spurious "community of interest".[216] The labour economist Professor Helen Hughes has often said that the only thing that enables the system to work at all is massive non-compliance.

The tax monopoly. After industrial relations, the next major Commonwealth victory occurred when the *Uniform Tax Cases* gave Canberra a monopoly of income taxation. Since then, marginal tax rates on ordinary incomes have soared to previously unimaginable levels. Federal income tax legislation, which before the *First Uniform Tax Case* occupied 81 pages in the statute book, has grown to 8,500 pages, of such complexity that even the Tax Office's assessors can understand only a small part of it – hence the shift to self-assessment.[217] A flood of amendments, case-law and rulings make reliable predictions of tax liability almost impossible. This led to the introduction in 1992 of a system of binding public and private rulings[218] embodying dispensing powers of such scope as to make a James II sob with envy.

It is questionable whether federal taxation can still be regarded as "law" in any true sense at all, rather than as purely bureaucratic rule. This compromising of the separation of powers is particularly serious if one bears in mind the historically pivotal role taxation has played in the problem of government.

The Commonwealth monopoly of direct taxation (originally *de jure* and later *de facto*), coupled with the Court's campaign against State indirect taxes culminating in *Ha*, has forced the States to fall back on a motley collection of inefficient levies and on socially destructive gambling taxes.

The goods and services tax, the whole net proceeds of which go to the States, in practice alleviates matters significantly, assuming that some future Commonwealth government does not declare, or deliberately engineer, a "crisis" as a pretext for appropriating the revenue for itself. But legislative control remains with the Commonwealth, and this continues the distortions of interstate competition resulting from vertical fiscal imbalance.

Even under unitary systems, regions and cities will inevitably compete for new investment. Michael Porter's study concludes that tax incentives are the best form of competition, because they force businesses to undertake projects only when they see the prospect of an economic return. The Commonwealth legislative monopoly over direct and indirect taxation forces States to resort instead to cash subsidies, which delay adjustment and innovation rather than promoting it, and are usually associated with chronic failures.[219]

Races and resources. Professor Coper's view that, apart from *Engineers*, the races power in s.51 (xxvi) would never have supported the *Native Title Act* 1993 (*NTA*) has already been noted. That Act was passed in the wake of Mabo,[220] on the basis that returning native lands taken during the colonial period would restore and revitalize the Aboriginal people, giving them dignity, self-respect and self-reliance. The Act created a new form of title which, unlike other interests in land, the States could not control.

Its immediate effect was to transfer control over natural resources to the Commonwealth, which had no experience with land management. The proportion of Australian territory affected by the Act greatly exceeded original estimates. Claims actually lodged in Western Australia cover 82 per cent of the State's area, with high concentrations in mineral - rich areas. Up to 27 conflicting claims have been made for the eastern goldfields.[221] The Act confers a "right to negotiate" that enables claimants – not merely owners – to obstruct land access to mineral developments and thus effectively impose a *danegeld* tax on the mining industry. That right is usually worth more than the native title itself.[222]

Before the *NTA*, the mining industry comprised a few major companies, many specialized exploration companies, and numerous smaller operations based on one or two discoveries. These

small companies were the driving force in new developments and ideas. The *NTA* has blocked the pipeline of new ventures, with some 2,500 projects held up by claimants in Western Australia alone.[223] This has made the smaller operators unviable, as they can no longer sell their discoveries or otherwise raise finance.

The uncertainty of title created by the *NTA*, and the very expensive process of reaching access agreement through the negotiating and consulting industry, have proved fatal to all but the largest, usually British-controlled, companies.[224] Only one major Australian-owned mining company now remains, and it is expected to be broken up soon. Most new minerals exploration has moved offshore, with domestic search activity mainly confined to "brown field" sites. These are existing developments (as opposed to new, or "green field" ventures) where there is some confidence of being able to secure ground access to the site.

Finally, these heavy costs have not brought the predicted improvements in Aboriginal life. The anthropologist Professor Kenneth Maddock notes that "some of the most wretched and dysfunctional Aboriginal communities sit on broad expanses of their own land".[225] Some people had predicted this, pointing out that the condition of Aboriginal peoples in Melville Island and East Arnhem Land, who had never been dispossessed of their land, was no better than that of other Aboriginal groups. Thus native title, like the takeover of the universities, is another example of the Commonwealth using the broad literalistic interpretation of its powers to assume responsibility for solving a problem and then making it worse.

The cult of uniformity. Without variation, there is stagnation; the old Soviet empire proved that. Yet one of the results of *Engineers* and its exalting of central power has been, as Professor Campbell Sharman observes, a ceaseless harping on uniformity that leads to shapeless, remote government, inefficiency, unresponsiveness and alienation.[226]

The States are increasingly being pressured to refrain from using their remaining powers. The Commonwealth is currently urging them to refer to Canberra their powers over *de facto* relationships. Because there is so little experience with them on anything like the present scale, *de facto* relationships are precisely the kind of area in which a federal system's capacity for independent experimentation and diverse solutions should be allowed to operate.[227] Besides, the results of Lionel Murphy's *Family Law Act*, the most unpopular single enactment in Australian history,[228] give no grounds for believing that the Commonwealth will discover the best, or even a tolerable, approach. The Canberra bureaucracy is too vulnerable to the intellectual fashions of the moment, too inclined to see itself as a kind of occupying power charged with subduing a backward and rebellious population, to perceive and give legal effect to the *mores* of ordinary Australians.

Again, a concerted political and media campaign has led to the States referring to the Commonwealth their powers over corporations, another area where, as United States experience shows, interstate competition could have led to productive innovation.[229] At the very least, State-based corporation laws are likely to be simpler, if the history of federal income tax after the *Uniform Tax Cases* is any guide. As a Victorian Attorney-General has noted, the Victorian *Companies Act* 1962 was adopted by all States in Australia, as well as in Malaysia and Singapore, where it remains in force. It is not obvious that those two countries have suffered by retaining the 1962 Act, or that Australia has benefited by abandoning it.[230] By the standards of modern Commonwealth legislation, it was a masterpiece of conciseness and clarity.

Bigger government, higher cost. Public choice research shows that the more direct the citizens' influence on political outcomes, the smaller is the scale of government.[231] Functioning federations have an advantage here, because there are more levels of government for public opinion to affect. Thus Switzerland, which has a strongly decentralized federal structure, has the smallest public sector of any developed country, spending 30 per cent of GDP on government.[232] This is despite (or perhaps because of) having 26 cantons (States) for its population of 6.9

million.

Conversely, when government becomes more centralized, it becomes harder for the people to influence policy outcomes, though correspondingly easier for interest groups and bureaucrats, most of whom seek a larger role for government. This tendency is aided by "fiscal illusion", which helps large central governments to hide increased tax burdens from the voters. Inflation is used by central planners to raise tax rates surreptitiously – Commonwealth policies have in this way destroyed 97 per cent of our currency's value since 1945, most of it following Frank Crean's inflationary federal Budgets of 1973 and 1974. Even the currently low inflation rates cause a gradual but substantial rise in the tax take. Further, the more complex the tax structure, the harder it is for voters to estimate the burden.[233]

As the centralization of government power has continued, the proportion of Australia's GDP spent on government has grown from 21.4 per cent in 1970-71 to 32.7 per cent today.[234] (The eminent Australian economist Colin Clark argued long ago that any excess over 25 per cent would be counterproductive).[235] That is still a better performance than that of unitary states such as New Zealand (39.6 per cent),[236] the United Kingdom (40.1 per cent, before devolution) or France (52.4 per cent). But even an improvement of one or two per cent, to something closer to Switzerland's figure, would free enormous sums for investment in, say, education or the care of an ageing population.

Misunderstood causes. It has sometimes been said that *Engineers* and the centralist literalism for which it became the banner should best be viewed as an adjustment of the Court's approach that was called for by changing times. RTE Latham wrote in 1949 that the Court's view was that "the words of the Constitution permitted the view of the federal relationship which the times demanded".[237]

In an equally well known passage Justice Victor Windeyer said that in *Engineers* "the Constitution was read in a new light", that Australia was now "one country and that national laws might meet national needs".[238] The case "was a consequence of developments that had occurred outside the law courts", and meant only that "the enunciation of constitutional principles ... may vary and develop in response to changing circumstances".[239] But, as was noted above, in 1920 there was no push for wider Commonwealth powers, quite the contrary in fact. Like the *Tasmanian Dams Case* 63 years later, it damaged the Court's community standing.[240] Later pro-centralist decisions of the Court handed to the Commonwealth wider powers than the federal government actually wanted.[241] But once granted, the lobby groups would see to it that they were exercised.

Canada, land of contrasts

As the Canadian-Australian academic Ian Holloway has observed, Australia and Canada have more in common than perhaps any other two countries in the world.[242] Further, both countries were exposed to the 20th Century pressures of world war, depression and international tension. Yet the Canadian courts did not seek to centralize their system of government. Instead, they interpreted the unpromising *British North America Act* 1867 so as progressively to develop a genuinely co-operative, decentralized federation based on "reflexivity", such as Australia was designed to be. They categorized challenged laws according to their "pith and substance", not by crude, myopic and one-sided rules of thumb. They did not use federal legislative supremacy to destroy whole swathes of provincial legislative power; rather, they sought to enable federal and provincial laws to stand together. They evaluated legislative schemes according to their evident substance and purpose, rather than pretending disingenuously that the overall plan did not exist.

Justice Dawson and others have argued that the main reason for Canada's decentralization is that the Provinces, like the federal Parliament, have a list of enumerated powers that are easier to expand than the residuary power of the Australian States.[243] But Canada's central government

was given wide enumerated powers, including many that were left to our States, such as trade and commerce generally, criminal law and penitentiaries, and was envisaged as financially dominant. The enumeration of provincial powers was conceived as a way of limiting the Provinces' role. The constitutional scholar KC Wheare was so impressed by provincial subordination that he described Canada's structure as only "quasi-federal".[244]

Further, the Canadian Supreme Court's early constitutional cases were clearly *centralist* in orientation.[245] Professor CD Gilbert's comparative study concludes that the Canadian Constitution's double enumeration:

> "… is not sufficient to explain the High Court's overall preference for pro-Commonwealth solutions in areas where the Canadian courts have generally devised pro-Province doctrines and answers".[246]

Nor does the question of Quebec explain the difference, he continues, pointing out that the 1980 Quebec secession referendum (like its 1995 replay) was defeated, while Western Australia's 1933 referendum was carried by a large majority.[247] Further, other Canadians seem just as happy with the nation's decentralized, co-operative federalism as the Quebecois. Indeed, some are given to a certain friendly condescension towards Australia's quasi-colonial structure. The "balkanization" that some observers see in Canada is an illusion created by the country's first-past-the-post (plurality) voting system, which greatly exaggerates minor differences and marginal swings.[248]

Life After Literalism

Federalism's new age. It is ironical that a majority of the High Court from the 1970s onwards carried the *Engineers* centralizing method to extremes at the very time when the rest of the world was rediscovering the advantages of federalism. Worldwide interest in federalism is greater today than at any other time in human history, stimulated by a growing conviction that a federal structure enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and diversity, creative experiment and liberty.[249] All the world's geographically large nations are now federations, although *de facto* rather than *de jure* in the case of South Africa and China. The only exception is Indonesia, which is belatedly, and intermittently, considering the federal option.

The few remaining highly centralized nation states, such as the United Kingdom, France, Spain, Italy, and Sri Lanka have all faced major crises of secession or separatism. Papua New Guinea is another case close to home, and it is not generally realized that the High Court's decision in *Teori Tau*, a piece of gross Diceyism, was the key factor in triggering the 30 years of secessionism and civil war in Bougainville.[250]

Unproved assumptions about the necessity and efficiency of centralism, such as those voiced by Chief Justice Mason,[251] have been refuted by public choice studies, new economic insights and commonsense observation – such as the fact that China did not emerge as an economic superpower until it became a *de facto* federation (in practice, China appears to be more genuinely federal than Australia today). The spread of free markets has stimulated socio-economic developments that favour federalism: the emphasis on autonomous contractual relationships, recognition of the non-centralized nature of a market economy, consumer rights consciousness, and the thriving of markets on diversity rather than uniformity. Related to this are advances in technology that are shrinking the optimum size of efficient businesses, and models of industrial organization with decentralized and flattened structures involving non-centralized interactive networks.[252]

Most of the ideological visions favouring centralism have waned. Marxism survives only in Western universities. Dicey's model of unitary government is obsolete. It has failed spectacularly in the United Kingdom, which has been slowly disintegrating for a century, losing a quarter of its territory in 1920, suffering three decades of civil war in Northern Ireland since the 1970s, and in

1998 temporizing with a jumble of devolutionary half-measures that are already showing signs of instability. Dicey's parliamentary omnipotence model has been discarded in New Zealand, quietly overruled in Canada, questioned in Australia and abandoned in Britain in the wake of EU supremacy.[253]

Cosmopolitanism remains a potent force for centralism, especially in the hands of single-issue lobbies such as the environmentalists, but it is partly offset by the centripetal aspects of globalization mentioned above. Competition in a worldwide economy gives States or Provinces an interest in controlling as many as possible of the factors that influence investment and productivity growth. Further, the discrediting of Keynesianism has removed yet another argument for centralized government.

Legal responses. These changes call to mind Justice Windeyer's remarks about *Engineers* merely reading the Constitution "in a new light", and that the enunciation of constitutional principles "may vary and develop in response to changing circumstances". Well, circumstances *have* changed. What now?

Until the last decade, the United States Supreme Court had for 60 years interpreted the Constitution to give the interstate commerce clause the same unlimited scope as we have seen in the High Court's handling of Commonwealth powers since *Tasmanian Dams*. Like the Commonwealth Parliament today, Congress had reached the point where it no longer even stopped to consider whether it had a grant of power to enact the legislation it was passing. But in recent years, notably in *United States v. Lopez*,[254] the Court has turned its back on the 1937 revolution and returned to a more rigorous process of characterization in federalism cases. The cases since 1937, Justice Thomas observed, had been:

> "… coming close to turning the Tenth Amendment [our s.107] on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution".[255]

The new, pro-federalist trend is continuing.[256]

In Australia, on the other hand, no such change has occurred. Chief Justice Mason remained of the view that it was impossible to transform "general notions of the federal balance and the desire of the founders to preserve the States as strong constituent elements in the federation into a precise and practical limitation on federal power".[257] But the Canadians have shown how it can be done, and the High Court regularly uses Canadian cases in other constitutional contexts. The Gibbs High Court was starting to develop a practical, balanced federalist approach in *Gazzo* and *Coldham*. Such an approach could make use of insights such as Professor Lumb's point that the conjunction of ss 106 and 107 shows a link between the preservation of State constitutional structure and preservation of power, including the undifferentiated power to legislate "for the peace, order [or welfare] and good government of the State". He advocated the hardly revolutionary idea of reading all power-conferring or power-recognizing sections in a total context and recognizing their interaction.[258]

The objection that it is impossible to be "precise" about limits to federal power is a mere diversion. As the US Supreme Court said of its approach in *Lopez*, "These are not precise formulations, and in the nature of things they cannot be".[259] Nor has the High Court displayed any undue preoccupation with precision in its human rights decisions. That is not necessarily a criticism, but it does show that some Justices measure their task with a different ruler when federalism is the issue. A court that can perform the legal acrobatics needed to develop and apply the "incompatibility" principle in *Kable*[260] should have no difficulty in devising an intelligent doctrine of federal balance.

Conclusion

Engineers inaugurated a method of one-sided interpretation that reversed the polarity of the Commonwealth Constitution in a way that contradicted the document's plain intention and ignored the first principles of legal interpretation. It has violated the wishes of the Australian people as consistently expressed in constitutional referendums, and mocked the sovereign power recognized in them by s.128. *Engineers* literalism has destroyed the Constitution's self-adjusting "reflexivity", and eroded the fundamental right of State communities to govern themselves. It has denied the people the advantages of competitive federalism and increased the burden, cost and remoteness of government. Since the 1970s especially, it has pushed the constitutional order to the brink of breakdown.

The High Court has in recent years discarded the formalistic *Engineers* approach in other constitutional contexts, such as the express human rights guarantees (s.117, for example) and s.92. In the implied rights field it has left the *Engineers* strictures against implications far behind, to the extent that it has sometimes outrun its conceptual supply lines. (Some of the implications it has discovered would not have been needed, of course, if the Court had not over-extended the Commonwealth's power grants in the first place).[261] The Court on occasion has even put aside literalism in order to give the States some small token victories.

The decline of Diceyism and the failure of the British unitary model, as well as the other social and intellectual changes mentioned above, make *Engineers* stand out more than ever as an aberration. Among other things, it conflicts, as Dr Peter Bayne observes, with the emerging ethos of civic republicanism which favours decentralized components of government.[262] That ethos was always there in the Commonwealth Constitution, but until the *Australia Acts* 1986 it was stifled (or thought to be) by the overriding residual suzerainty of the British Parliament. Now it is being recognized more clearly, along with the companion idea of the people as the source of all sovereignty, as part of what Justice Paul Finn calls a more general reconceptualization of the Australian polity in the common law itself. These values, he argues, provide a medium through which the judicial response is made to a long-standing set of concerns of the common law: the legitimacy, the limits, and the exercise and abuse of power in society.[263]

To preserve *Engineers* literalism for the sole purpose of ensuring that Canberra wins all major federalism cases cannot be defended on legal or philosophical grounds. Yet the present state of constitutional interpretation calls to mind Justice Stewart's comment in an American merger case:

> "The sole consistency that I can find is that in litigation under s.7, the Government always wins".[264]

The Gleeson High Court has yet to decide any major federalism cases. But in *Sue v. Hill*,[265] the Court's construction of s.44 (i) (parliamentarians not to be aliens) in light of the historical changes since Federation displayed no signs of enslavement to *Engineers* literalism. And while *Re Wakim*[266] has been described as not involving any important constitutional values,[267] the case did bring a stop, or at least a pause, to Canberra's longer-term program of marginalizing the State judicature.[268] On the other hand, a majority of the seven current Justices sat in *Riordan*, and three were in the majority in *Ha*.

The political dynamics of Australian society are highly federal, in fact there is hardly a human activity of any scale that is not organized on a federal basis. The States are dominant in the delivery of services, and initiate wide areas of policy. They are highly effective in articulating strongly held feelings of dissatisfaction with the central government.[269] But the *Engineers* complex has driven the constitutional structure itself close to breakdown.

The present federalism case-law is untenable. But the Federation is still besieged, and federalists would be unwise at present to assume that help is on the way.

Endnotes:

1. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd*, (1920) 28 CLR 129.

2. J Nethercote, *The Engineers' Case: Seventy Five Years On*, in *Upholding the Australian Constitution* (*UTAC)*, Proceedings of The Samuel Griffith Society, Volume 6 (1995) at 239; LR Zines, *The High Court and the Constitution*, 3rd edn, Butterworths, Sydney, 1992, 1-7.

3. *Federated Amalgamated Government Railway and Tramway Service Association v. NSW Rail Traffic Employees Association*, (1906) 4 CLR 488, 534.

4. *Baxter v. Commissioners of Taxation (NSW)*, (1907) 4 CLR 1087, 1093.

5. *D'Emden v. Pedder*, (1904) 1 CLR 91, 109.

6. JA La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, at 17, 27-8.

7. *Deakin v. Webb*, (1904) 1 CLR 585, 606.

8. *Baxter*, *loc. cit.*, 4 CLR at 1111-12, 1125.

9. *Peterswald v. Bartley*, (1904) 1 CLR 497, 507.

10. *R. v. Barger; Commonwealth v. McKay*, (1908) 6 CLR 41, 72.

11. *Baxter*, *loc.cit.*, 4 CLR at 1105.

12. *Ibid.,* at 1109; also 1106.

13. *Ibid.,* at 1104.

14. *Ibid.,* at 1112-13.

15. (1819) 4 Wheat.316.

16. (1868) 74 US 70, 7 Wall. 700, 725.

17. *Barger*, *loc. cit.*, 6 CLR at 67.

18. *Attorney-General (NSW) v. Brewery Employees Union of NSW (Union Label Case)*, (1908) 6 CLR 469, 503.

19. *Huddart Parker & Co v. Moorehead*, (1909) 8 CLR 330, 351, 361, 370.

20. *Peterswald*, *loc. cit.*, 1 CLR at 507.

21. J Goldring, *The Path to Engineers*, in M Coper, G Williams (eds), *How Many Cheers for Engineers*?, Federation Press, Leichhardt, NSW, 1997, 1, 35; Nethercote, *loc. cit.*, 242.

22. 4 Wheat. at 406-07.

23. C Howard, *Australian Federal Constitutional Law*, 3rd edn, LBC, Sydney, 1985, 160.

24 RD Lumb, *The Franklin Dam Decision and the External Affairs Power: A Comment*, (1983) 13 *University of Queensland Law Journal,* 138 outlines such an approach.

25. Goldring, *loc. cit.*, at 35.

26. 4 Wheat. at 406.

27. 1 CLR at 105.

28. 28 CLR at 154.

29. Howard, *op. cit.*, at 160, 163.

30. Coper and Williams, *op. cit.*, xiv-xv; PH Lane, *Lane's Commentary on the Australian Constitution*, 2nd edn, LBC, Sydney, 1997, 864-876, 880, 895.

31. Coper and Williams, *op. cit.*, at 75.

32. PB Maxwell, *On the Interpretation of Statutes*, London, 1875, 1.

33. *Bank of Toronto v. Lambe*, (1887) 12 AC 575, 579.

34. PW Hogg, *Constitutional Law of Canada*, 4th edn, Carswell, Scarborough, Ontario, 1997, 116-17.

35. Zines, *op. cit.*, at 11-12.

36. *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 489.

37. *Barger*, *loc. cit.*, at 113.

38. *Victoria v. Commonwealth*, (1971) 122 CLR 353, 395. See also n. 240 below.

39. G Sawer, *Australian Federalism in the Courts,* Melbourne University Press, 1967, 199.

40. *R. v. Public Vehicles Licensing Appeal Tribunal; ex parte Australian National Airways Pty Ltd*, (1964) 113 CLR 207, 225; D Dawson, *The Constitution – Major Overhaul or Simple Tune - Up?*, (1984) 14 *Mebourne University Law Review* 353, 356; *Commonwealth v. Tasmania (Tasmanian Dams Case)*, (1983) 158 CLR 1, 127-28 (Mason J).

41. Sawer, *op. cit.*, at 201.

42. G Craven, *The High Court and the States*, (1995) 6 *UTAC* 65, 69-70; also G Craven, *The Engineers' Case: Time for a Change?*, (1997) 8 *UTAC* 81.

43. Sir Harry Gibbs, *The Constitution: 100 Years On*, (2001) 13 *UTAC* xi, xvi.

44. S Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162, 181.

45. See generally R Manne, *The Shadow of 1917: Cold War Conflict in Australia*, Text Publishing, Melbourne, 1994.

46. Sir Anthony Mason, *The Role of a Constitutional Court in a Federation*, (1986) 16 *Federal Law Review* 1, 23.

47. AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1885.

48. Lane, *op. cit.*, at 128.

49. G Williams, *Engineers and Implied Rights*, in Coper and Williams, *op. cit.*, at 105, 107; G Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, 128.

50. G Barwick, *A View on External Affairs*, (1995) 6 *UTAC* 1.

51. Sir Harry Gibbs, Address Launching Volume 1 of *Upholding the Australian Constitution*, (1993) 3 *UTAC* 135, 140.

52. K Minogue, *Aboriginals and Australian Apologetics*, (1998) 10 *UTAC* 357, 384.

53. P Walsh, *Labor and the Constitution: Forty Years On*, (1997) 9 *UTAC* 153, 159.

54. Sir Anthony Mason, quoted in G Davis, N Sunderland, *A Federation amid Global Imperatives*, in C Sampford, T Round (eds), *Beyond the Republic*, Federation Press, Leichhardt, NSW, 2001, 146, 147-48.

55. K Minogue, *National Sovereignty versus Internationalism: The Importance of Repealability*, (2000) 12 *UTAC* 327, 344.

56. K Minogue, *Constitutional Mania: A Preliminary Diagnosis*, (1995) 6 *UTAC* 159, 165.

57. Davis and Sunderland, *loc. cit.*, at 155.

58. Sampford and Round, *op. cit.*, at 36.

59. Goldring, *loc. cit*, at 43-44.

60. *Ibid*..

61. Sawer, *op. cit.*, at 133.

62. P Ayres, *Federalism and Sir Owen Dixon*, (1999) 11 *UTAC* 273, 275.

63. *West v. Commissioner of Taxation (NSW)*, (1937) 56 CLR 657, 681-82.

64. Sawer, *op. cit.*, at 130.

65. Nethercote, *loc. cit.*, at 249-51.

66. Craven (1997), *loc. cit.*, at 86-91.

67. Mason, *loc. cit.*, at 2.

68. LR Zines, *The Present State of Constitutional Interpretation*, in A Stone, G Williams (eds),

The High Court at the Crossroads, Federation Press, Leichhardt, NSW, 2000, 224, 238.

69. *Engineers*, *loc. cit.*, 28 CLR at 148.

70. DC Pearce, *Statutory Interpretation in Australia*, 2nd edn, Butterworths, Sydney, 1981, 16-17.

71. *Ibid*., 15-16.

72. M Cooray, *The High Court – The Centralist Tendency*, (1992) 1 *UTAC* 105, 133; LR Zines, *Characterisation of Commonwealth Laws*, in H Lee, G Winterton (eds), *Australian Constitutional Perspectives,* LBC, Sydney, 1992, 33, 39-40.

73. *Re Lee; ex parte Harper*, (1986) 160 CLR 430, 448.

74. *R. v. Brislan; ex parte Williams*, (1935) 54 CLR 362; *Jones v. Commonwealth (No.2)*, (1965) 112 CLR 206, 218, 225-27; *Herald and Weekly Times Ltd v. Commonwealth*, (1966) 115 CLR 418, 433-34, 439-40.

75. *R. v. Coldham; ex parte Australian Social Welfare Union*, (1983) 153 CLR 297, 314.

76. *Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board (Qld)*, (1985) 157 CLR 605, 627-28.

77. *Tasmanian Dams Case*, *loc. cit.*, at 269-70.

78. *Ibid.,* 127-28.

79. *D'Emden v. Pedder*, (1904) 1 CLR 91, 110.

80. *Actors and Announcers Equity Association v. Fontana Films Pty Ltd*, (1982) 150 CLR 169, 192.

81. *Alexandra Private Geriatric Hospital Pty Ltd v. Commonwealth*, (1987) 162 CLR 271, 279.

82. CD Gilbert, *Australian and Canadian Federalism 1867-1984: A Study in Judicial Techniques,* Melbourne University Press, 1986, 27.

83. Sir Harry Gibbs, *The Threat to Federalism*, (1993) 2 *UTAC* 183, 185.

84. Pearce, *op. cit.*, at 31. Higgins J acknowledged this principle in his concurring judgment in *Engineers*, 28 CLR at 162.

85. *Russell v. Russell*, (1976) 134 CLR 495, 539; Zines, n. 2 above, at 21-23.

86. Lane, *op. cit.*, at 897.

87. *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 510.

88. *Victoria v. Commonwealth (Industrial Relations Act (IRA) Case)*, (1996) 187 CLR 416; G Williams, *Labour Law and the Constitution*, Federation Press, Leichhardt, NSW, 1998, 119-20.

89. *Russell*, *loc. cit.*.

90. Zines, n. 2 above, at 21-22.

91. *Ibid.*.

92. *Dawson*, *loc. cit.*, at 360.

93. Sir Harry Gibbs, n. 51 above, at 137.

94. *Tasmanian Dams*, *loc. cit.*, at 302; Colin Howard, *When External Means Internal*, (1992) 1 *UTAC* 141, 149-50; H Lee, *The High Court and the External Affairs Power*, in Lee and Winterton, *op. cit.*, at 60, 86-88.

95. *Bank of New South Wales v. Commonwealth (Bank Case)*, (1948) 76 CLR 1, 184-85.

96. Goldring, *loc. cit.*, at 53.

97. *Engineers*, *loc. cit.*, at 145.

98. *Tasmanian Dams*, *loc. cit.*, at 129, 222.

99. *New South Wales v. Commonwealth (Incorporation Case)*, (1990) 169 CLR 482, 499.

100. K Booker, A Glass, *What Makes the Engineers' Case a Classic?*, in Coper and Williams, *op. cit.*, at 70.

101. Dawson, *loc. cit.*, at 361.

102. C Sharman, *Federalism and the Liberal Party*, in J R Nethercote (ed.), *Liberalism and the Australian Federation*, Federation Press, Leichhardt, NSW, 287, 301.

103. Lane, *op. cit.*, at 10.

104. *Ibid.*.

105. *R. v. Phillips*, (1970) 125 CLR 93, 118.

106. Lumb, *loc. cit.*, at 138-39.

107. *Gazzo v. Comptroller of Stamps (Vic.)*, (1981) 149 CLR 227, 240; *Coldham*, *loc. cit.*, at 313.

108. Zines, in Coper and Williams, *op. cit.*, at 90-91.

109. C Saunders, *The National Implied Power and Implied Restrictions on Commonwealth Power*, (1984) 14 *Federal Law Review* 267, 268.

110. *Davis v. Commonwealth*, (1988) 166 CLR 79, 93.

111. Parliament of Victoria, Federal - State Relations Committee, *Australian Federalism: The Role of the States*, Government Printer, Melbourne, 1998, 27-28; Dawson, *loc. cit.*, at 355.

112. P Hanks, *Constitutional Law in Australia*, 2nd edn, Butterworths, Sydney, 1996, 236-37.

113. *Melbourne Corporation v. Commonwealth*, (1947) 75 CLR 31.

114. *Re Australian Education Union; ex parte Victoria*, (1995) 184 CLR 188.

115. *Richardson v. Forestry Commission*, (1988) 164 CLR 261.

116. *Western Australia v. Commonwealth (Native Title Act (NTA) Case)*, (1995) 183 CLR 373.

117. As to public servants, see *Re State Public Services Federation; ex parte Attorney-General (WA)*, (1993) 178 CLR 249. As to the mining industry, see below.

118. *Richardson*, *loc. cit.*, at 308-12.

119. *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 30-31, 101.

120. F Wheeler, in Coper and Williams, *op. cit.*, at 131.

121. M Crommelin, *Federalism*, in PD Finn (ed.), *Essays in Law and Government*, Vol. 1, LBC, Sydney, 1995, 168, 180.

122. *Davis*, *loc. cit.*; *Re Dingjan, ex parte Wagner,* (1995) 183 CLR 323.

123. See above; also G Williams, in Coper and Williams, *op. cit.*, at 107-08.

124. *Attorney-General (Vic.) ex rel. Black v. Commonwealth (DOGS Case)*, 146 CLR 559, 652-53.

125. E.g., *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Willis*, (1992) 177 CLR 1.

126. *Street v. Queensland Bar Association*, (1989) 168 CLR 461.

127. (1988) 165 CLR 360.

128. PH Lane, *Recent Trends in Constitutional Law*, (2002) 76 *Australian Law Journal* 154.

129. JR Forbes, *'Just tidying up': Two Decades of the Federal Court*, (1998) 10 *UTAC* 143, 158.

130. *Taikato v. R*, (1996) 186 CLR 454; *Durham Holdings Pty Ltd v. New South Wales*, (2001) 75 ALJR 501.

131. *Engineers*, *loc. cit.*, 28 CLR at 154.

132. *South Australia v. Commonwealth*, (1992) 174 CLR 235, 246-47. In *SGH Ltd v. Commissioner of Taxation*, (2002) 76 ALJR 780, the Court said that s.114 should not be interpreted narrowly, at least in relation to what kind of government-owned entity should be taken to be the "State", but then proceeded to give it a relatively narrow application. The majority did so, however, in such a way as to provide a basis for a narrower reading of some Commonwealth powers in the future, as it distinguished between governmental and other functions: pp. 783-84.

133. *Queensland v. Commonwealth*, (1987) 162 CLR 74.

134. *Port McDonnell Professional Fishermen's Association Inc. v. South Australia*, (1989) 168 CLR 340, 381.

135. *R. v. Licensing Court of Brisbane; ex parte Daniell*, (1920) 28 CLR 23; *Oxford Companion to the High Court of Australia,* Oxford University Press, South Melbourne, Vic, 2001, 337.

136. *Clyde Engineering Co. Ltd v. Cowburn*, (1926) 37 CLR 466.

137. *Oxford Companion*, *op. cit.*, at 337.

138. *Ibid*., at 338; *NTA Case*, *loc. cit.*, at 468.

139. *Oxford Companion*, *op. cit.*, at 338.

140. Gilbert, *op. cit.*, at 153.

141. *Engineers*, *loc. cit.*, at 151.

142. *Ibid*., at 154.

143. *Huddart Parker Ltd v. Commonwealth*, (1931) 44 CLR 492.

144. Zines, in Coper and Williams, *op. cit.*, at 83.

145. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 79; Lane, n. 30 above, at 133.

146. *Murphyores Inc. Pty Ltd v. Commonwealth*, (1976) 136 CLR 1.

147. *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth*, (1993) 176 CLR 555.

148. *Arthur Yates and Co. Pty Ltd v. Vegetable Seeds Committee*, (1946) 72 CLR 37, 73, 77; *Bailey v. Conole*, (1931) 34 WALR 18, 23.

149. *South Australia v. Commonwealth*, (1942) 65 CLR 373.

150. DC Mueller, *Public Choice II*, Cambridge University Press, New York, 1991, 331.

151. Sharman, *loc. cit.*, at 296; Dawson, *loc. cit.*, at 356.

152. *Victoria v. Commonwealth*, (1957) 99 CLR 575. The *First Uniform Tax Case* expressly contemplated this result.

153. *Clark King & Co. Pty Ltd v. Australian Wheat Board*, (1978) 140 CLR 120; *Uebergang v. Australian Wheat Board*, (1980) 145 CLR 266.

154. *WR Moran Pty Ltd v. Deputy Commissioner of Taxation (NSW)*, [1940] AC 838, 849.

155. Gilbert, *op. cit.*, at 98, 104, 117.

156. FR McGrath, *Today's High Court and the Convention Debates*, (2001) 13 *UTAC* 1, 2, 5.

157. *Ibid.,* at 6.

158. *Ibid.,* at 8.

159. *New South Wales v. Commonwealth*, (1990) 169 CLR 482.

160. *Kartinyeri v. Commonwealth*, (1998) 195 CLR 337, 364.

161. Pearce, *op. cit.*, at 15.

162. G Craven, *The Crisis of Constitutional Literalism in Australia*, in H Lee, G Winterton (eds), *op. cit.*, at 1, 22.

163. M Coper, *The Proper Scope of the External Affairs Power*, (1995) 5 *UTAC* 47, 50-51.

164. F McGrath, *loc. cit.*, at 20.

165. McGrath, *The Intentions of the Framers of the Commonwealth of Australia Constitution in the Context of the Debates at the Australasian Federation Conference of 1890, and the Australasian Federal Conventions of 1891 and 1897-8,* PhD thesis, University of Sydney, 2000, 189-90 and Appendix. In view of the current pressure for drug legalization, it is useful to note that the rampant opium use among the Chinese at that time resulted from the Chinese government's 1860 attempt to control drug use by legalizing it. At the time about 10 per cent of the population used opium regularly, and critics argued, as they still do, that the drug was no worse than alcohol or tobacco and that probibition was causing official corruption. By 1906 regular users had soared to 40 per cent of the population, and the drug was causing such damage that the government was forced to revive the ban. This move was successful until the 1912 revolution resulted in general social breakdown: G de Q Walker, *Drug Legalisation and the China Syndrome*, in *Australia and World Affairs*, Spring, 1994, 46.

166. J Quick, R Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901)reprinted by Legal Books, Sydney, 1976, 632.

167. (1997) 192 CLR 1.

168. Sir Anthony Mason, *loc. cit.*, at 5.

169. *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1, 42.

170. Dawson J has criticized this élitist attitude to s.128: *loc. cit.*, at 366.

171. Sir Anthony Mason, *loc. cit.*, at 22-23 (emphasis added).

172. *Koowarta v. Bjelke-Petersen*, (1982) 153 CLR 168, 229.

173. *Ibid.,* at 250-51.

174. J Gava, *The Rise of the Hero Judge*, (2001) 24 *University of New South Wales Law Journal* 747, 755.

175. Craven (1995), *loc. cit.*, at 70.

176. *Australian Communist Party v. Commonwealth*, (1951) 83 CLR 1, 262-63.

177. *Engineers*, *loc. cit.*, at 151-52.

178. Gageler, *loc. cit.*, at 163.

179. *Koowarta*, *loc. cit.*, at 255.

180. *Tasmanian Dams*, *loc. cit.*, at 125, 128.

181. B Galligan, *Politics of the High Court*, University of Queensland Press, St Lucia, 1987, 242.

182. G Williams, *Judicial Activism and Judicial Review in the High Court of Australia*, in T Campbell, J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism,* Ashgate, Dartmouth, UK, 2000, 413, 416.

183. Sir Harry Gibbs, *'A Hateful Tax'? Section 90 of the Constitution*, (1995) 5 *UTAC* 121, 122, 125; Craven (1995), *loc. cit.*, at 86-87.

184. Coper (1995), *loc. cit.*, at 57-58.

185. Gageler, *loc. cit.*.

186. Craven (1995), *loc. cit.*, at 70; Craven, *Reforming the High Court*, (1996) 7 *UTAC* 21, 23-24.

187. Finn, *op. cit.*, at 6-8.

188. WR Ledermann, *Continuing Canadian Constitutional Dilemmas,* Butterworths, Toronto, 1981, 281.

189. SEK Hulme, *The External Affairs Power: The State of the Debate*, (1995) 6 *UTAC* 9, 30.

190. Mueller, *op. cit.*, at 337-39, 346-47.

191. The process began with *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, (1937) 301 US 1; *United States v. Darby*, (1941) 312 US 100; and *Wickard v. Filburn*, (1942) 317 US 111.

192. C Howard, *The Proposed External Affairs Referendum*, (1996) 7 *UTAC* 1, 5.

193. *Victoria v. Commonwealth (IRA Case)*, (1996) 187 CLR 416, 509.

194. *NTA*, *loc. cit.*. As to the vesting of judicial power in a body other than a Chapter III court, see, e.g., *Re Tracey; ex parte Ryan*, (1989) 166 CLR 518, 580; *Lim v. Minister for Immigration*, (1992) 176 CLR 1, 27-29.

195. Booker and Glass, *loc. cit.*, at 69; Craven (1992), n. 162 above, at 10; Crommelin, *loc. cit.*, at 180.

196. Zines (2000), n. 68 above, at 238.

197. Williams (1997), n. 49 above, at 105-110.

198. *McGinty v. Western Australia*, (1996) 186 CLR 140, 230-34.

199. *Kartinyeri v. Commonwealth*, (1998) 195 CLR 337, 381.

200. Williams (1997), n. 49 above, at 110-11; F Wheeler, in Coper and Williams, *op. cit.*, at 130.

201. *Abebe v. Commonwealth*, (1999) 162 ALR 1; *Ex parte Eastman; re Governor, Goulburn Correctional Centre*, (1999) 165 ALR 171.

202. *Damjanovic & Sons Pty Ltd v. Commonwealth*, (1968) 117 CLR 390, 396.

203. G Moens, J Trone, *Lumb and Moens's Constitution of the Commonwealth of Australia Annotated*, 6th edn, Butterworths, Chatswood, NSW, 2001, 24-25.

204. Lane (2002), n. 128 above.

205. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31.

206. Lane (1997), *op. cit.*, at 899; C Saunders, *Dividing Power in an Age of Globalisation*, in Sampford and Round, *op. cit.*, at 129, 138-39.

207. *Re Residential Tenancies Tribunal of New South Wales; ex parte Defence Housing Authority*, (1997) 190 CLR 410.

208. G Bolton, *The Civil War we Never Had*, (1993) 3 *UTAC* 83, 88-9, 100-01.

209. Australia's colonial-era variation of railway gauges does not seem quite so absurd when one realizes that coastal shipping was expected to remain the chief method of long-distance transport within Australia, with rail serving only a feeder role, carrying freight and passengers to and from the ports: AJ Rose, *Dissent from Down Under: Metropolitan Primacy as the Normal State*, (1966) 7 *Pacific Viewpoint* 1, 27. See also Walker (2001), n. 227 below, at 49-50.

210. B. Galligan, *Federal Renewal, Tax Reform and the States*, (1998) 10 *UTAC* 221, 237-38.

211. Sir Anthony Mason, *loc. cit.*, at 18, 22-23, 28.

212. *Attorney-General (Qld) v. Riordan*, (1997) 192 CLR 1, 41, 42.

213. W Kasper, *Economic Freedom Watch Report No. 1*, Centre for Independent Studies, February, 2002, 8.

214. ME Porter, *The Competitive Advantage of Nations*, Macmillan, London, 1998, 642. As to the OECD's view, see D Moore, *Judicial Intervention: The Old Province for Law and Order*, (2001) 13 *UTAC* 133, at 139.

215. *Ibid.* (Moore), at 133, 134-37.

216. *Re Australian Education Union; ex parte Victoria*, (1995) 184 CLR 188, 232-33, 237-38; *Re State Public Services Federation; ex parte Attorney-General (WA)*, (1993) 178 CLR 249, 294.

217. M Inglis, *Is Self-assessment working? The Decline and Fall of the Australian Income Tax System*, (2002) 31 *Australian Tax Review* 46.

218. E.g., *Income Tax Assessment Act* 1936, ss 14 ZAAA-AAM, 14ZAA-ZAZC.

219. Porter, *op. cit.*, at 640.

220. *Mabo v. Queensland (No 2)*, (1992) 175 CLR 1.

221. R Court, *Returning Power to the States: Risky or Responsible?*, (1997) 9 *UTAC* xi, xiii.

222. JR Forbes, *The Prime Minister's Ten Point Plan*, (1997) 9 *UTAC* 29, 43-48.

223. JR Forbes, *Native Title Now*, (2001) 13 *UTAC* 61, 99-100.

224. Minerals Council of Australia, *Annual Report 2000*, 18.

225. K Maddock, *After the Rapture, Unreality Set in*, in *The Australian*, June 3, 2002.

226. C Sharman, *Secession and Federalism*, (1993) 3 *UTAC* 97, 111.

227. G de Q Walker, *Ten Advantages of a Federal Constitution and how to Make the Most of Them*, Centre for Independent Studies, St Leonards, NSW, 2001, 9-13. Earlier, shorter versions under the title *Ten Advantages of a Federal Constitution* were published in (1998) 10 *UTAC* 283 and (1999) 73 *Australian Law Journal* 634.

228. Even the Chief Justice of the Family Court, Hon Alistair Nicholson, concedes that most of the complaints received by federal parliamentarians relate to Family Court or child support matters: *Re Colina; ex parte Torney*, (1999) 73 ALJR 1576, 1579; Walker (2001), *loc. cit.*, at 11-12, 68-69.

229. Walker (2001), *loc. cit.*, at 13, 46-47, 70.

230. Jan Wade, MLA, *The Future of the Federation*, (1995) 6 *UTAC* ix, xx.

231. Mueller, *op. cit.*, at 345-46.

232. *Ibid.,* at 321, 346.

233. *Ibid.,* at 342-43.

234. W Kasper, *Building Prosperity*: *Australia's Future as a Global Player*, Centre for Independent Studies, St Leonards, NSW, 2000, 93.

235. *Ibid.*.

236. Walker (2001), *loc. cit.*, at 41.

237. RTE Latham, in Coper and Williams, *op. cit.*, at 74, 76.

238. *Victoria v. Commonwealth (Payroll Tax Case)*, (1971) 122 CLR 353, 396-97.

239. *Ibid.*.

240. G Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, 41, 329, 243; Federal - State Relations Committee, *loc. cit.*, at 31; Sawer, *Australian Federalism in the Courts, op. cit.*, at 201.

241. Federal – State Relations Committee, *loc. cit.*, at 31; Sawer, n. 39 above, at 201.

242. I Holloway, *Australia, the Republic and the Perils of Constitutionalism*, (1998) 10 *UTAC* 95, 98.

243. Dawson, *loc. cit.*, at 365; C Saunders, n. 206 above, at 129, 135; *Huddart Parker v. Commonwealth*, (1931) 44 CLR 492, 526-27 (Evatt J).

244. Hogg, *op. cit.*, at 118.

245. RCB Risk, *Constitutional Scholarship in the late Nineteenth Century: Making Federalism Work*, (1996) 46 *University of Toronto Law Journal* 427, 435-7; FR Scott, *Centralization and Decentralization in the Canadian Federation*, (1951) 29 *Canadian Bar Review* 1093.

246. Gilbert, *op. cit.*, at 6, 152.

247. *Ibid.,* at 156.

248. B Smith, *Electoral Reform and Tensions in the Canadian Federation*, 2 *Federations* (Forum of Federations, Ottawa), March, 2002.

249. Walker (2001), *loc. cit.*, at 1-5.

250. *Teori Tau v. Commonwealth,* (1969) 119 CLR 564. Overruling prior authority, the Court upheld a law expropriating mineral rights without compensation, virtually without discussion. See D Oliver, *Black Islanders: A Personal Perspective of Bougainville 1937-1991,* (1991), esp. 125, 126, 130-31, 186-87, 201-02. The case is referred to, though not by name, at 125; J Goldring, *The Constitution of Papua New Guinea,* (1978) 31-32; S Dorney, *Papua New Guinea: People Politics and History since 1975,* (1998), e.g., 124-25; P. Sack (ed.), *Problem of Choice: Land in Papua New Guinea's Future,* (1974) 131-32; J Griffin, *The Bougainville Rebellion*, in D Anderson (ed.), *The Papua New Guinea - Australia Relationship: Problems and Prospects,* (1990) 70-74.

251. Sir Anthony Mason, *loc. cit.*, at 23.

252. Walker (2001), *loc. cit.*, at 3.

253. G de Q Walker, *The Unwritten Constitution*, (2002) 27 *Australian Journal of Legal Philosophy*, 142, 150.

254. (1995) 514 US 549.

255. *Ibid.,* at 589.

256. *United States v. Morrison*, (2000) 529 US 598; Walker (2001), *loc. cit.*, at 57, 86.

257. Sir Anthony Mason, *loc. cit.*, at 21.

258. Lumb, *loc. cit.*, at 138-39.

259. 514 US at 567.

260. *Kable v. Director of Public Prosecutions (NSW)*, (1997) 189 CLR 51. The result in Kable could have been reached on the simpler and sounder ground, for which there is legal and historical support, that British colonial legislatures had never been invested with judicial power, and attainder-type laws are predominantly judicial. This would have meant overruling *Clyne v. East,* (1967) 68 SR (NSW) 385, a Supreme Court decision from Diceyism's heyday that would not have been missed.

261. Thus, *ACTV*, n. 125 above, would not have been necessary if the posts and telegraphs power had not been extended beyond recognition in previous cases, to the extent that it could be considered to support a law restricting political advertising, paid or unpaid. Cf. *Nationwide News*, n. 125 above.

262. P Bayne, in Coper and Williams, *op. cit.*, at 136-37.

263. Finn, *op. cit.*, at 8-9.

264. *United States v. Von's Grocery Co.*, (1966) 384 US 270, 301.

265. (1999) 199 CLR 462.

266. *Re Wakim; ex parte McNally*, (1999) 198 CLR 511.

267. Zines, n. 68 above, at 234-35.

268. See generally Forbes, n. 129 above.

269. Sharman, n. 102 above, at 301.

Chapter Two
The Ghost in the Machine: Exorcising *Engineers*

Dr Nicholas Aroney

The *Engineers Case*[1] is widely regarded as the most significant High Court decision in Australian constitutional history.[2] Time and again, the Court has turned to *Engineers* for the requisite inspiration and guidance on that most fundamental of matters: the appropriate approach to be taken in interpreting the federal Constitution.[3] If Australian constitutional law has had a reputedly machine-like operation over the years, the *Engineers Case*, more than any other, has been its animating spirit.

However, recent cases and commentary have suggested that the *Engineers Case* no longer bears the authority that it once had. While the Court has never explicitly overruled the decision, a number of cases have cast doubt on many of its fundamental propositions.[4] Is it at last time for the Court to exorcise the *Engineers Case* from the machinery of Australian constitutional law entirely?

Since doubt has been cast on many of the propositions in *Engineers*, really to grapple with this question requires me to address what I call the resilient core of the decision, the proposition that the legislative powers of the Commonwealth enumerated in s.51 of the Constitution are to be interpreted prior to, and without substantial regard to, the impact on the remaining legislative capacities of the States.[5] Why do I regard this as the resilient core of the decision? Other fundamental propositions from the case have certainly proved persistent and influential. But despite their persistency and influence, most of these have now been undermined, in various ways. Let me give just two examples of this, before elaborating what I mean by the resilient core of the decision.

The first example has to do with the origin and fundamental nature of the Constitution. Prior to *Engineers*, the High Court had interpreted the Constitution as in the nature of a federal compact between the separate Australian Colonies.[6] But in *Engineers* the Court insisted that the Constitution was rather to be understood as a statute of the Imperial Parliament, and was to be interpreted as such, according to ordinary principles of statutory interpretation.[7] This approach prevailed for many years after *Engineers*,[8] and still has its supporters.[9] However, it has recently been challenged, in the most fundamental terms, by the suggestion that the Constitution really derives its force from the Australian people, rather than the Imperial Parliament.[10] Many of the Court's most adventurous constitutional decisions of the past decade have drawn on the idea that the Constitution is thus founded on popular, rather than Imperial, sovereignty.[11] In this way, *Engineers* has been undermined.

The second example of an *Engineers* proposition that has subsequently been undermined concerns the question of what doctrines or philosophies of government are central to the design and meaning of the Constitution. For almost two decades,[12] the High Court had said that federalism is an essential aspect of the system – and the immunity of instrumentalities and State reserved powers doctrines were the result.[13] But *Engineers* changed all that. In substitution for federalism, the *Engineers* Court asserted that the doctrine of responsible government was fundamental to the Constitution, indeed more fundamental than federalism.[14]

What exactly this amounted to, and how responsible government was precisely relevant to the question at hand, was not really made clear in the joint judgment, delivered by Isaacs J.[15] On the facts in *Engineers*, at least, it meant that the implied immunity doctrine was not available to protect State government agencies from the operation of federal industrial arbitration laws.

Some, it seems, understood this to mean that in the interpretation of the Constitution, implications had no role to play whatsoever.[16] Yet, as we all know, in less than thirty years the High Court under the influence of Sir Owen Dixon was again insisting that federalism was an integral part of the constitutional design. Sir Owen seems never to have been particularly fond of *Engineers*,[17] and he capitalized on some of the qualifications expressed in the judgment to formulate a modified, two-tier federal and State immunity doctrine.[18] Thus while the *Engineers* Court certainly abandoned the doctrine of the immunity of instrumentalities, it was not that long before a qualified, two-track intergovernmental immunity re-emerged in *Melbourne Corporation v. Commonwealth*[19] and *Commonwealth v. Cigamatic*.[20]

In these and other ways,[21] fundamental to the decision, *Engineers* has been undermined. Professor Williams has gone so far as to say that "*Engineers* is dead".[22] But despite all of these reversals, a resilient core of the *Engineers* decision has remained.

That resilient core is the proposition that federal legislative powers are to be interpreted in priority to, and without substantial consideration of, the "remaining" legislative capacities of the States.[23] Such a proposition was a direct challenge to the doctrine of State reserved powers, the idea that the Constitution impliedly reserves to the States a certain sphere of exclusive legislative power.[24] Ironically, while the *Engineers* case was not directly concerned with this doctrine, this aspect of the judgment has rarely, if ever, been criticised.[25] Indeed, the priority to be given to the interpretation of federal legislative powers became so well entrenched that it remained fundamental even in those cases, such as *Melbourne Corporation*, which challenged other aspects of "received" *Engineers* doctrine.[26] Thus truly to grapple with the question whether it is time to abandon *Engineers* entirely, one must address this, the resilient core of the decision.

I: To explain what this task amounts to necessitates some further remarks about the origin and nature of the Constitution, and about approaches to its interpretation.

In the first place, it is important to bear in mind the different theories of the origin of the Constitution at play in any critical discussion of the meaning and significance of the *Engineers Case*.[27] I have said that before *Engineers*, the High Court had emphasised the idea that the Constitution embodied the terms of a kind of federal compact between the constituent States. As the Preamble and covering clauses of the *Commonwealth of Australia Constitution Act* 1900 make clear, the federation was predicated on the agreement of the people of each of the Australian Colonies, the Original States were therefore constituent elements of the Commonwealth of Australia, and the Commonwealth was itself designated a Federal Commonwealth.[28]

On this view, there was an important sense in which the governmental powers of the Commonwealth were *derived from the Original States*, and this was reflected in the manner in which the legislative powers of the States and the Commonwealth were treated in the Constitution.[29] Only limited legislative powers on specific topics were conferred on the Commonwealth,[30] whereas the original legislative and other governmental powers of the States were said to "continue" under the Constitution.[31] The Constitution did not attempt to define – let alone to confer – the governmental powers of the States precisely because the States were the presupposition and basis of the entire federal system. In other words, the continuing powers of the States were undefined, not because they were a mere "residue" to be identified only after the prior and more important powers of the Commonwealth had been ascertained, but because it made no sense to define the powers of the States in the federal Constitution when the very emergence of the Constitution had been dependent upon the exercise of the political capacities of the States in the first place.[32]

Of course, the compact theory of Australian federalism is not without its difficulties, foremost of which is the patent fact that at federation the Australian States were still Colonies, and were dependent upon the Imperial Parliament to exercise its sovereign legislative powers in order to enact the Australian Constitution and bring the Commonwealth into being.[33] Justice

Isaacs was therefore on strong ground when he insisted – when writing the joint judgment in *Engineers* – that the Constitution is in essence a statute of the Parliament at Westminster and is to be interpreted as such.

Justice Isaacs's theory of the origin of the Constitution entailed a number of important implications. Some of these implications were not explicitly referred to in the *Engineers* judgment, but they become evident when we consult the contemporary writings upon which Isaacs J relied for his theory of federalism. Foremost among his authorities is a neglected figure, John W Burgess, whose *Political Science and Comparative Constitutional Law*[34] influenced not only Isaacs, but also Higgins, Quick and Garran.[35]

According to Burgess, a "federal state" is best understood, not as the result of a federal compact between original states, but as an essentially unitary state in which the ordinary powers of sovereignty are elaborately "divided" between federal and State governments. It was a position that nicely dovetailed with AV Dicey's theory of federalism, in which the division of powers between the federation and the States is of the essence of modern federalism.[36] On Burgess's view,[37] a federal system of government derives its being from some kind of superior or sovereign political entity that confers power on both the federal and State governments. The republican version of this theory thus maintained that the requisite sovereignty resided in the underlying "nation" as a whole, "the people". Within the context of the British Empire, it was a simple matter to say that this originating sovereignty lay in the hands of the Imperial Parliament – a position taken by Quick and Garran in their *Annotated* Constitution,[38] and the stance adopted by Isaacs J in *Engineers*.[39]

But here is the irony. Such a theory of the "division" of legislative power between the federal and State governments would, one might expect, lead to a relatively even-handed approach to the interpretation of federal and State powers. Indeed, such has largely been the result in Canada, in part because the Canadian Constitution explicitly defines and confers the specific legislative powers of both the Provinces and the Dominion of Canada.[40] However, as in Australia, where only federal legislative powers are explicitly defined, the "imperial" theory of the origin of the federal Constitution and the literal approach to constitutional interpretation that it seemed to entail, resulted in a remarkable priority being given to the articulation of Commonwealth legislative powers in priority to what are taken to be the "residual" powers of the States. As such, a scheme that was intended to reflect the original, constituent status of the States, as well as the derivative nature of the Commonwealth, has ironically facilitated an approach to interpretation in which the powers of the Commonwealth are accorded priority.

But the result, of course, was not just ironic, nor fortuitous. Justices Isaacs and Higgins – the only members of the *Engineers* Court who had been directly involved in the debate over the drafting of the Constitution – had from the very beginning adopted Burgess's nationalistic theory of the "federal state". It had been their misfortune during the Convention debates of the 1890s to be confronted with a majority of delegates who adhered to a relatively more "compactual" theory of federalism. Isaacs and Higgins persistently failed to convince their fellow delegates to construct a federal Constitution that would reflect their own nationalistic theory of the federal state. However, it was their fortune in 1920, not only to survive the first three Justices of the High Court (Griffith CJ, Barton and O'Connor JJ),[41] but to be joined by three others (Knox CJ, Rich and Starke JJ)[42] who were prepared to overturn 17 years of "compactualist" interpretation by the Griffith Court.

Not a few commentators have accordingly observed that, despite the ostensible emphasis in the *Engineers* judgment on the text of the Constitution and the adherence to established canons of statutory interpretation, the judgment rested much more on political considerations and conceptions of what the emergent Australian nation had become.[43]

II: What then are we to make of what I have called the resilient core of the *Engineers* decision? Before getting to this question, I want to emphasise at this point that I have sought to define the "compact" theory of federalism carefully, and I do not want what I have said to be taken as an unqualified affirmation of all that has in the past been associated with compact theories of federalism generally, particularly in their American guises.[44] Nor do I wish my remarks to be taken as unqualified support for all that was said or decided in decisions prior to *Engineers*. Elsewhere I have expressed a number of criticisms of particular compact theories of federalism.[45] On the contrary, I prefer to describe my own views as amounting to a "covenantal" theory of federalism which mediates between the extremes of the compactualist and nationalist points of view.[46] Let me briefly elaborate.

The classic compactual theory of federalism – most famously developed in the mid-19th Century by John C Calhoun,[47] but succinctly described more than fifty years earlier by James Madison[48] – holds that a "pure" federation is in essence a compact between *sovereign* states, and that *the states retain this fundamentally sovereign status within the federation*.[49] As Madison put it in one of his most famous essays, a properly "federal" government emerges from the unanimous agreement of several "distinct and independent States". Such a government derives its powers from those States "as political and co-equal societies", and these will necessarily be equally represented in that government. A properly federal government will, moreover, "operate" only on the States in their "political capacities" – its laws will *not* be executed directly against individual citizens, but only through the States. Likewise, a federal government will have only a limited jurisdiction over "certain enumerated objects", the several States retaining a "residuary and inviolable sovereignty over all other objects". Finally, a federal Constitution will only be amended with the "concurrence of each State", that is, unanimously.[50]

On the other hand, as Madison explained, a purely "national" government – if "republican" in character – is "founded on the assent and ratification of the people" of "one aggregate nation", rather than on an agreement between sovereign States. Such a government will therefore be composed of representatives of the people of the entire nation, its laws will operate directly on individual citizens, not the States, and the scope of such laws will be unlimited. A national government will therefore possess "supreme" authority over all local governments, and such localities will be "subordinate" to, rather than "independent" of, the national government. In a republic, the highest authority will therefore be the "majority of the people of the Union" as a whole, and they will "be competent at all times" to amend the national Constitution in any particular.[51]

However, the American Constitution diverged in important respects from both the compactualist and nationalist theories. As Madison himself concluded, the American Constitution was neither completely compactual nor completely national, but a "combination of both" – and the same can be said of the Australian Constitution in so far as it followed the American design.[52]

Certainly, the origin and foundation of both systems was largely compactual in nature.[53] Thus in Australia, notwithstanding the appeal to "the people" in referenda, it was the separate "peoples" of each Australian Colony that consented to federation, as the Preamble to the Constitution clearly affirms. However, the so-called "compromise" over representation in the federal legislature – under which the people of the States are equally represented in the Senate, and the people of the Commonwealth are represented in the House – reflects the "partly federal, partly national" character of both the American and Australian Constitutions.

Similarly, the method of constitutional amendment, which in Australia depends on a majority of Australian voters as well as a majority of voters in a majority of States, exhibits the "mediating" character of the Constitution. And most importantly so far as our present question is concerned, we can note that the treatment of federal and State legislative power under both the American and Australian Constitutions also manifests this "combination of both" characteristic. Thus on one hand, only limited powers are conferred upon the federal legislature (s.51), and the

States continue to exercise their original governmental powers (ss.106-7). However, a certain number of exclusive powers are conferred on the federal Parliament (s.52), particular prohibitions are directed at the States (e.g., s.90), and there is the overriding provision that valid federal legislation will prevail over inconsistent State legislation to the extent of the inconsistency (s.109).

So far, so good, you may say: but what light does this shed on *Engineers*? My point is that, if the Australian federal system is partly compactual and partly national in character, our first objective must be to identify the specific ways in which these two approaches are embodied in the treatment of federal and State legislative power under the Constitution. Ascertaining the answer to this preliminary question will shed light on our second and more substantive question as to what interpretative approach is appropriate in the circumstances.

As to this first and preliminary question, the decision by the framers of the Constitution to confer only limited heads of legislative power on the Commonwealth Parliament derived specifically from their decision to create a system that was, as to its foundation, what Madison would have called "federal" in character. *A fortiori*, the decision not to define the legislative powers of the States derived specifically from the idea that the Australian federation was "compactual" in origin.[54] It was inappropriate and illogical in such a system to attempt to define – let alone to confer – the powers of the States in the instrument under and through which (the people of) those States would agree to be united into a federal Commonwealth. The federal Constitution thus did not attempt to establish the States as bodies politic, nor to confer their powers, but rather confirmed that they would "continue" as such, subject only to the terms of union to which they had agreed under the Constitution. The order of priority, therefore, was (1) the original governmental powers of the States, (2) the limited conferral of powers to the Commonwealth, and (3) the supremacy of federal power, but only within these limited areas.[55]

The *Engineers* Court, however, totally ignored the *original* and *continuing* status of the Australian States in its interpretation of federal and State legislative power under the Constitution. Rather, the Court skipped to the second step in the formula – the definition of federal legislative power – and gave this priority. According to *Engineers* doctrine, only after prior and full attention is given to the scope of federal legislative power can any thought be given to the (merely) residual legislative capacities of the States. On this view, as Isaacs J put it in his dissenting judgment in *R v. Barger*,[56] there was no more logic in assuming an area of reserved State power than there would be in trying to find out the residue of a deceased estate before first finding out what specific gifts had been made.[57]

This, the "residue" theory of State power, is the first aspect of the resilient core of the *Engineers* case. The rest really follows from this. No longer is there any room, before considering the scope of federal legislative power, for a consideration of the original, so-called "reserved powers", of the States. As Barwick CJ later observed:

> "[T]he nature and extent of State power or of the interests or purposes it may legitimately seek to advance or to protect by its laws do not qualify in any respect the nature or extent of Commonwealth power. On the contrary, the extent of that power is to be found by construing the language in which power has been granted to the Commonwealth by the Constitution without attempting to restrain that construction because of the effect it would have upon State power".[58]

On this approach, the first question – and really the only question – concerns the scope of each grant of federal legislative power set out in ss.51 and 52 of the Constitution. The original and continuing status of the Australian States is irrelevant to the question.

III: But this is not all that needs to be said about what I have called the resilient core of *Engineers*. As formulated by the Griffith Court, the reserved powers doctrine did not rest solely on the supposed "reservation" of State powers in s.107 of the Constitution, but on the limited terms in

which specific heads of federal legislative power are conferred in s.51. More to the point, the Griffith Court treated what is *not* said and what is *not* granted in s.51 as being of as much significance as what *is* said and *is* granted. The classic exemplar of this was s.51 (i) of the Constitution, which gives the federal Parliament power to legislate with respect to "trade and commerce with other countries, and among the States". This latter aspect, the power to legislate with respect to "trade and commerce … among the States" (or "interstate trade and commerce") very soon became the focus of attention.[59]

Clearly, the *placitum* does not confer power to legislate with respect to *intrastate* trade and commerce. Much of the debate has therefore concerned how far the Parliament can legislate with respect to trade and commerce specifically under *placitum* (i). What does *interstate* – as distinct from *intrastate* – trade and commerce mean? Unlike the Supreme Court of the United States,[60] the Australian High Court has insisted that the words "among the States" require a substantial "interstate" element in federal legislation before it will be upheld under *placitum* (i).[61]

However, the scope of *placitum* (i) *per se* is not our particular concern here, for the question of its meaning in isolation was not central to the point of the reserved powers doctrine. The point of the doctrine, rather, was that the limited terms of *placitum* (i), together with s.107, imply that the federal Parliament does *not* have power *under other heads of power* to legislate with respect to *intrastate* trade and commerce. In other words, the limited terms of *placitum* (i) imply a "prohibition" on the scope of federal power under other heads of power in s.51.

The reasoning in the *Engineers* case completely reversed this approach to the interpretation of federal legislative power. As well as saying that interpretative priority is to be given to the construction of federal legislative power, the *Engineers* Court has been taken to insist on the general principle that each head of federal power is to be interpreted separately, each without implying a limitation on the scope of any other.[62] Thus, in principle, the federal Parliament *is* able to regulate *intrastate* trade and commerce, so long as it does so pursuant to some other head of power, such as the power to legislate with respect to "trading corporations" in s.51 (xx).[63]

This is the second aspect of the resilient core of the *Engineers* case. It raises a difficult issue precisely because it seems illogical to suggest that the scope of each head of federal legislative power is limited by the scope of all the others. For, if this were so, the federal Parliament would only be competent to legislate in areas on which all heads of federal power happen to coincide – which is, of course, absurd. This is not to suggest that the reserved powers doctrine was ever formulated in such bizarre terms. But the proposition that *placitum* (i) implies a prohibition, *if generalised*, would indeed have this result.

All of this is probably what led Sir Owen Dixon to observe that the reserved powers doctrine "lacked a foundation in logic".[64] It may also account for why this aspect of the *Engineers Case* has been so resilient. Just as it seems impossible to identify the reserved powers of the States if they are not defined in the Constitution, so it seems absurd to limit the scope of a positive grant of federal power by reference to what is not granted by another. It appears much more sensible to begin the inquiry with the powers that are specifically defined – the powers of the Commonwealth – and to designate as State reserved powers whatever happens to be left over, the residue.

IV: Where does this leave us, then? Given what has just been said, it would seem that the resilient core of *Engineers* has survived for good reason. Unless the reserved powers doctrine is somehow restrained in its operation, it appears to produce an absurd result. The alternative principle propounded in *Engineers* seems sensible and logical by all comparison.

But it does not end there. For just as there had to be a limit to the application of the reserved powers doctrine – as the Griffith Court recognised[65] – so the High Court has, unavoidably, limited the application of the countervailing *Engineers* doctrine. Two examples suffice to make the point.[66]

In s.51 (xxxi) of the Constitution the Commonwealth Parliament is given power to legislate with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". Now if the *Engineers* principle were to be applied in this instance, the *just terms* requirement in *placitum* (xxxi) could be easily circumvented simply by legislating for the acquisition of property under some other head of power. The High Court has recognised this theoretical possibility because it has said that, if it were not for the existence of *placitum* (xxxi), there would be a separate capacity to legislate for the acquisition of property in connection with *other* heads of power.[67] However, given the existence of *placitum* (xxxi), the Court has held that when the Commonwealth legislates with respect to the acquisition of property, it will in most cases be taken to be legislating under *placitum* (xxxi), and is therefore subject to the just terms requirement. (There are some exceptions to this, for example when the Commonwealth legislates to impose a tax or a penalty, but these need not concern us for present purposes.)[68]

Why has the High Court insisted that most other heads of legislative power are necessarily circumscribed by the just terms requirement in *placitum* (xxxi)? The easy answer is to say – as the Court has said – that *placitum* (xxxi) confers an "immunity", and is not just a conferral of "power", and that the immunity must limit the powers conferred by the other *placita* of s.51.[69] However, it is not clear simply from the text of *placitum* (xxxi) that the just terms element was meant to operate as a general prohibition against the acquisition of property by the Commonwealth other than on just terms. The corresponding American provision, which simply states that "private property [shall not] be taken for public use, without just compensation", is much clearer in this regard.[70]

In saying this, I do not want to be taken to be suggesting that the High Court has taken a wrong turn in its interpretation of the acquisition power. What I am saying is that – for good reason – the High Court has *not* consistently adopted the principle that Commonwealth heads of power are to be interpreted in isolation from each other so that limits expressed in one *placitum* do not limit the scope of another. Rather, at least in the case of the acquisition power, the Court has been prepared to apply limitations expressed in one head of power in its interpretation of others.[71]

Another example of this is the banking power in s.51 (xiii) of the Constitution, which empowers the Parliament to legislate with respect to "banking, other than State banking".[72] Under this *placitum*, the Commonwealth clearly has power to legislate with respect to banking generally, except that its power to do so does not extend specifically to State banking.[73] However, what the Court has *also* said is that the words "other than State banking" impose a general limitation on the scope of *other* powers. The Commonwealth *cannot* legislate with respect to "State banking" under other heads of power, even if the terms in which such other powers are conferred seem, on their face, to authorise such legislation.[74]

But let us compare the banking power with the trade and commerce power in s.51 (i). *Placitum* (i) confers power to legislate with respect to "trade and commerce … among the States". *Placitum* (xiii) confers power with respect to "banking, other than State banking". When each provision is read in isolation, it is clear that *both* qualifying phrases ("among the States" and "other than State banking") delimit a class of things in respect of which the Commonwealth can legislate. "Among the States" delimits the class of things designated as "trade and commerce", and "other than State banking" delimits that class of things designated as "banking". When each provision is read in isolation, the meaning is structurally and logically the same. Both qualifications function to delimit the class of particular things in respect of which the Commonwealth is authorised to legislate.

So what is the difference between these two provisions? Why have they been interpreted differently?[75] It might be said that the difference is that *placitum* (i) builds the qualification into the definition of the class of things to which it refers (in effect, "interstate trade and commerce"),

whereas *placitum* (xiii) first defines the class ("banking"), and then carves out an exception to it ("other than State banking") – an exception expressed in negative terms. As Professor Zines has put it, the wording of *placitum* (xiii) "expressly *extracts from* or *restricts* what otherwise might be included within" the power.[76] And this seems to be the difference that has made all the difference. The words "other than State banking" *extract from* the scope of federal power, whereas "among the States" builds the qualification into the definition of the class of things to which reference is made.

However, there is an outstanding question which is not resolved by this explanation. I said that the words "other than State banking" extract from the scope of federal power. But *which* repository of federal power do they extract from? Is it the specific head of power in which the words appear (*placitum* (xiii)), or is it the entirety of federal legislative power conferred by s.51? While the qualification "other than State banking" clearly extracts from the meaning of "banking", the real question is whether it also extracts from the meaning of *other* heads of power.[77] The Court has answered this second question in the affirmative – correctly, in my view – but it has not given a compelling reason why this must be the case. The literal terms of *placitum* (xiii) provide no clear answer, and in this respect, there is no relevant, textual difference between *placitum* (i) and *placitum* (xiii).

So why the difference, in substance? This is an unanswered question.[78] I do not suggest that there is an easy answer. But what can be said is that these two examples – the Court's interpretation of the acquisition and banking powers – represent important chinks in what I have otherwise so far designated as the resilient core of *Engineers*.

V: I have said that the resilient core of the *Engineers Case* is the proposition that primary and virtually exclusive attention is to be given to the interpretation of federal legislative power, without regard to the impact on State legislative capacity. The third dimension to this, the resilient core of the decision, is the idea that heads of federal legislative power are therefore to be interpreted as fully and completely as the terms allow,[79] without consideration of the impact of such an interpretation on what remains of the capacity of the States to legislate on topics without the possibility of legislative overriding by the Commonwealth.

Space does not permit a detailed examination of this issue.[80] Suffice to say that this approach to interpretation has enabled the Commonwealth to make very full use of its legislative powers. I could say that it has enabled the Commonwealth to legislate on topics that the framers of the Constitution would never have anticipated. But to pose this as an objection would be to adopt the view that the particular expectations of the framers as to the practical operation of the Constitution is a controlling principle in constitutional interpretation, and I do not adopt that view.

What I will say, however, is that what I have described as the "federal" structure of the Constitution – particularly the logical priority of what I have called the *original* powers of the States, over against the *limited* powers conferred upon the Commonwealth – does not support the view that federal powers are to be interpreted as fully and completely as their literal words can be interpreted to mean. Such a view, rather, derives from the idea that the Constitution is foremostly to be interpreted as a statute of the Imperial Parliament. Consequently, as was said in *Engineers*, the powers conferred upon the Commonwealth are to be interpreted by reference to 19th Century Privy Council decisions on the scope of legislative power conferred upon British Colonies, which decisions affirmed that the enacting words "peace, order and good government" conferred an authority "as plenary and as ample … as the Imperial Parliament in the plenitude of its power possessed and could bestow".[81] Isaacs J used this principle in the *Engineers* case to conclude that Commonwealth laws *could* bind the Crown in right of a State,[82] with the wider implication that the conferral of plenary power meant that the Court should "always lean to the broader interpretation".[83]

I have argued that such an approach, while sustainable in view of the patent fact that the Constitution is, in form, a statute of the Imperial Parliament, completely overlooks the federal basis and structure of the Constitution as a whole. This, the "compactual" logic of the Constitution, accounts for the decision to define the powers of the Commonwealth specifically, while deliberately providing that the existing powers of the States should "continue". It suggests that there is a real sense in which the continuation of State power in s.107 is *logically prior* to the conferral of federal power in s.51. Such a scheme also suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s.51 when determining the scope of what *is* conferred. There is, therefore, good reason to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow.

The treatment of State and federal power in the federal Constitution was predicated on the original status of the States and their powers, and by no means implies that federal legislative power is to be accorded interpretative priority. Quite the contrary.

Endnotes:

1. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, (1920) 28 CLR 129. The matter arose out of an industrial dispute between the Amalgamated Society of Engineers, a trade union, and some 844 employers throughout Australia, including three Western Australian State government instrumentalities. The question was whether the Commonwealth has legislative power under its industrial arbitration power (s.51(xxxv) of the Constitution) to make laws which are binding on State instrumentalities. The Court decided that it could, overturning the immunity of State instrumentalities from federal laws and, by implication, radically undermining the approach to the interpretation of the Constitution that the High Court had followed for 17 years previously.

2. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*, Cassell & Company Ltd, London, 1967, 30 ("a landmark in Australian constitutional interpretation"); Leslie Zines, *The High Court and the Constitution*, 4th Edition, Butterworths, Sydney, 1997, 8 ("it probably remains the most important case in Australian constitutional law, at any rate, from the point of view of principles of general interpretation").

3. E.g., *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 78 (Dixon J); *Victoria v. Commonwealth*, (1971) 122 CLR 353, 396 (Windeyer J); *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 488-9 (Barwick CJ); *Commonwealth v. Tasmania*, (1983) 158 CLR 1, 128 (Mason J); *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 44-5 (Brennan J).

4. See, e.g., G Williams, *Engineers is Dead, Long Live the Engineers!*, (1995) 17 *Sydney Law Review* 62.

5. As Isaacs J, who delivered the joint judgment in *Engineers*, maintained:

> "Where the affirmative terms of a State power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution. … [I]t is a fundamental and fatal error to read s. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an

express grant in s. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated". *Engineers* (1920) 28 CLR 129, 154.

6. *Federated Amalgamated Governmental Railway and Tramway Service Association v. NSW Railway Traffic Employees Association*, (1906) 4 CLR 488, 534 (Griffith CJ, Barton and O'Connor JJ); *Baxter v. Commissioners of Taxation (NSW)*, (1907) 4 CLR 1087, 1104, 1121, 1126 (Griffith CJ, Barton and O'Connor JJ).

7. *Engineers*, (1920) 28 CLR 129, 148-154 (Knox CJ, Isaacs, Rich and Starke JJ); 161-2, 165 (Higgins J). See also *Deakin v. Webb*, (1904) 1 CLR 585, 596-7 (Isaacs KC in argument); *Webb v. Outtrim*, [1907] AC 81; (1906) 4 CLR 356.

8. See, e.g., Sir John Latham, *Interpretation of the Constitution*, in Else-Mitchell (ed.), *Essays on the Australian Constitution*, 2nd edn, Law Book Company, Sydney, 1952, 5; Sir Owen Dixon, *The Law and the Constitution*, in *Jesting Pilate and Other Papers and Addresses*, Law Book Company, Melbourne, 1965, 44; *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106, 181-3 (Dawson J); J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robinson, Sydney, 1901, 285-6, 294-5, 324-8.

9. *McGinty v. Western Australia*, (1996) 186 CLR 140, 231 (McHugh J).

10. GJ Lindell, *Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence*, (1986) 16 *Federal Law Review* 29; M Kirby, *Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution*, (1996) 3 *Deakin Law Review* 129, 138.

11. E.g., *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106, 138, 210-1, 228; *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 69-74; *Leeth v. Commonwealth*, (1992) 174 CLR 455, 475, 483-4, 486; *Theophanous v. Herald & Weekly Times Ltd*, (1994) 182 CLR 104, 171.

12. The High Court was established in 1903. See *Hannah v. Dalgarno*, (1903) 1 CLR 1.

13. Under the first of these doctrines, the Commonwealth (and its instrumentalities) was declared to be immune from any law passed by a State, and the States (and their instrumentalities) were immune from laws passed by the Commonwealth, wherever such laws would in some way "fetter, control, or interfere with the free exercise of the legislative or executive power" of the Commonwealth or the States, respectively. Under the second of these doctrines, also known as "implied prohibition", heads of Commonwealth legislative power were read "narrowly", on the basis that specific areas of legislative competence were impliedly "reserved" to the States and necessarily outside the legislative competence of the Commonwealth.

14. *Engineers*, (1920) 28 CLR 129, 146-8.

15. For a discussion, see S Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162.

16. *West v. Commissioner of Taxation*, (1937) 56 CLR 657, 681-2 (Dixon J), 687-8 (Evatt J).

17. G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, 133.

18. See, e.g., *West v. Commissioner of Taxation (NSW)*, (1937) 56 CLR 657, 681-3; *In re Foreman & Sons Pty Ltd; Uther v. Federal Commissioner of Taxation*, (1947) 74 CLR 508, 528-32.

19. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 78-82.

20. *Commonwealth v. Cigamatic Pty Ltd (In Liquidation)*, (1962) 108 CLR 372, 376-8.

21. *Engineers* also rejected the use of American precedents in the interpretation of the Australian Constitution, but this embargo has clearly come to an end. *Engineers* counselled a certain judicial deference to Parliament, but this deference has been qualified in various ways, such as the implied freedom of political communication in *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106.

22. G Williams, *Engineers is Dead, Long Live the Engineers!*, (1995) 17 *Sydney Law Review* 62; G Williams, *Engineers and Implied Rights*, in M Coper and G Williams (eds), *How Many Cheers for Engineers?*, Federation Press, Sydney, 1997.

23. Compare RD Lumb, *Problems of Characterization of Federal Powers in the High Court*, (1982) *Australian Current Law Digest* 45, suggesting that a doctrine of "federal balance" was still discernible in the cases, but written before the decision in *Commonwealth v. Tasmania*, (1983) 158 CLR 1.

24. See *Peterswald v. Bartley*, (1904) 1 CLR 497, 507; *R v. Barger*, (1908) 6 CLR 41, 72; *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (*Union Label Case)*, (1908) 6 CLR 469, 502-3; *Huddart, Parker & Co Pty Ltd v. Moorehead*, (1909) 8 CLR 330, 350-52, 360.

25. Zines, *High Court and the Constitution*, 12, observes:

> "On the question of reserved powers doctrine, there had been general agreement that it is wrong to interpret Commonwealth powers on the basis that s.107 has left domestic matters to the States".

26. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 79 (Dixon J).

27. For a fuller discussion, see NT Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, (2002) 30(2) *Federal Law Review* (forthcoming).

28. *Commonwealth of Australia Constitution Act* 1900 (UK), Preamble, ss 3, 6.

29. This was recognised by the Judicial Committee of the Privy Council in *Attorney-General (Cth) v. Colonial Sugar Refining Company Limited*, (1913) 17 CLR 644, 651-4.

30. Commonwealth Constitution, ss 51 and 52.

31. Commonwealth Constitution, ss 106 and 107.

32. Thus the entire process of federation, from the election of delegates to the federal Conventions right up to the submission of the *Constitution Bill* to the Imperial Parliament,

was undertaken under the specific authority of the colonial legislatures expressed in a series of *Enabling Acts* passed in the 1890s.

33. While federation depended, in fact, on the exercise by the Colonies of their *ordinary political powers* to convene Conventions and hold referenda, the Colonies *qua* Colonies lacked the *constitutive power* to create the Commonwealth.

34. JW Burgess, *Political Science and Comparative Constitutional Law*, 2 vols, Ginn & Company, Boston, 1890. For background on Burgess, see BE Brown, *American Conservatives: The Political Thought of Francis Lieber and John W Burgess*, Columbia University Press, New York, 1951. See also JW Burgess, *The Ideal American Commonwealth*, (1895) 10 *Political Science Quarterly* 404.

35. See Convention Debates, Adelaide, 1897, 181, 698, 1022 (Isaacs); *Official Record of the National Australasian Convention Debates, Sydney, 1897*, 306-9, 426 (Isaacs), 433 (O'Connor's reply), 862 (Isaacs), 913 (Glynn's reply); Higgins (1900), 73; Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 325, 333-4.

36. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 5th edn, Macmillan, London, 1897, 130-55, 410-13. For Dicey's influence, see *Convention Debates, Sydney, 1897*, 312-3 (Isaacs); *Official Report of the National Australasian Convention Debates, Adelaide, 1897*, 910-12, 952 (Barton), 307 (Clarke); J Quick, *A Digest of Federal Constitutions*, JB Young, Bendigo, 1896, 12-4; RR Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Angus & Robertson, Sydney, 15-6, 76; Quick and Garran, *Annotated Constitution*, 325-8.

37. Dicey, on the contrary, accepted a kind of compact theory of the origin of federal systems. See Dicey, *Law of the Constitution*, 137-9.

38. See, e.g., Quick and Garran, *Annotated Constitution*, 380, 928.

39. Isaacs J combined both the republican and Imperial dimensions when he stated that the Constitution is "the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament": *Engineers* (1920) 28 CLR 129, 142; compare at 148 and 152.

40. See, generally, *Attorney-General (Cth) v. Colonial Sugar Refining Company Limited*, (1913) 17 CLR 644, 651-4; PW Hogg, *Constitutional Law of Canada*, 4th edn, Carswell, Toronto, 1997, ch. 5; CD Gilbert, *Australian and Canadian Federalism 1867-1984*, Melbourne University Press, Melbourne, 1986.

41. O'Connor J died in 1912 and was replaced in 1913 by Gavan Duffy J. In 1913, Powers and Rich JJ were appointed. Griffith CJ retired in 1919 (replaced by Knox CJ) and Barton J died in 1920 (replaced by Starke J).

42. The majority in *Engineers* consisted of Knox CJ, Isaacs, Rich and Starke JJ, Higgins J concurring and Gavan Duffy J dissenting.

43. RTE Latham, *The Law and the Commonwealth*, in WK Hancock, *Survey of British Commonwealth Affairs*, Vol 1, *Problems of Nationality 1918-1936*, Oxford University

Press, 1937, 563-4; *Victoria v. Commonwealth*, (1971) 122 CLR 353, 395-6 (Windeyer J); Zines, *High Court and the Constitution*, 15-6.

44. Compare the criticisms of a compact theory of Australian federalism in *Victoria v. Commonwealth*, (1971) 122 CLR 353, 370-2 (Barwick CJ), 395-6 (Windeyer J).

45. See Aroney, *Imagining a Federal Commonwealth*, *loc. cit.*.

46. For federalism as covenantalism, see DJ Elazar, *Exploring Federalism*, University of Alabama Press, Tuscaloosa, Alabama, 1991 and *The Covenant Tradition in Politics*, 4 vols, Transaction Publishers, New Brunswick, 1995-8.

47. See JC Calhoun's formidable *A Discourse on the Constitution and Government of the United States* (1853), in Ross Lence (ed.), *Union and Liberty: The Political Philosophy of John C Calhoun*, Liberty Fund, Indianapolis, 1992.

48. J Madison, *Federalist No 39*, in C Rossiter, (ed.), *The Federalist Papers*, New American Library of World Literature, New York, 1961.

49. Today, we would probably call this a "confederal", rather than a "federal", arrangement. What Madison described as "federal" more closely approximates the American Articles of Confederation of 1781 than the American Constitution of 1789.

50. Madison, *Federalist No 39*, *passim*.

51. *Ibid*..

52. *Ibid*..

53. Notwithstanding the famous opening words of the US Constitution: "We, the People …". Article VII of the US Constitution provides for the establishment of the Constitution upon ratification by conventions in at least nine of the American States.

54. See, e.g., the preliminary "resolutions" passed in 1891 and 1897: *Official Report of the National Australasian Convention Debates, Sydney, 1891*, 23, 499-50; *Convention Debates, Adelaide, 1987*, 17, 395.

55. I use "supremacy" in a wide sense here, covering both the "supremacy" of federal laws under s.109 in areas of concurrent jurisdiction (s.51), as well as the exclusive powers of the Commonwealth (s.52).

56. *R v. Barger*, (1908) 6 CLR 41 at 84-5 (Isaacs J); 113 (Higgins J). See Sawer, *op. cit.*, p.128. Isaacs J similarly observed in *Huddart Parker v. Moorehead*, at 391:

> "The reservation of a power to a State does not imply prohibition to the Commonwealth. The reserved powers are those which are not either *exclusively* vested in the Commonwealth, or *withdrawn* from the States. But a power may be *concurrent* in both; and such a power is reserved to the State though existing also in the Commonwealth. Consequently reservation to the States cannot be taken as the test of whether a given federal power includes the right to affect internal trade, and cannot amount to a prohibition express or implied. It is always a question of *grant*, not of prohibition, unless that is express".

57. For a brief critique of the analogy, see Sawer, *Australian Federalism in the Courts*, 199; Zines, *High Court and the Constitution*, 12. The supposed analogy breaks down in a number of ways. There is a significant difference between a *single* testator making a will and *several* states agreeing to create a federation. There is also a substantial difference between the status of beneficiaries under a will and the position of State and federal governments within a federation.

58. *Airlines of New South Wales Pty Ltd v. New South Wales (No 2)*, (1965) 113 CLR 64, 79.

59. The focus on "interstate trade and commerce" was in part due to s.92. See *W & A McArthur Limited v. Queensland*, (1920) 28 CLR 530, 549, affirming that the meaning of "trade and commerce among the States" in s.51 (i) and s.92 "must be the same".

60. US Constitution, Art I, §8, cl 3, discussed in Zines, *High Court and the Constitution*, 55-60. But see, more recently, *United States v. Lopez*, 514 US 547 (1995).

61. *Airlines of New South Wales Pty Ltd v. New South Wales (No 2)*, (1965) 113 CLR 54, 113-7 (Kitto J).

62. Contrast the situation in Canada, where specific topics are given to both the Dominion and the Provinces (ss 91 and 92), with the result that "the two sections must be read together, and the language of one interpreted, and where necessary, modified, by that of the other": *Citizens Insurance Company of Canada v. Parsons*, (1881) 7 App Cas 96, 109. See also *Bank of Toronto v. Lambe*, (1887) 12 App Cas 575, 581, 585.

63. See *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468. Compare *Pidoto v. Victoria*, (1943) 68 CLR 87, holding that the power under *placitum* (vi) was not cut down by the terms of *placitum* (xxxv).

64. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 83 ("the attempt to read s. 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic".)

65. See, e.g., *Farey v. Burvett*, (1916) 21 CLR 433, 441 (Griffith CJ: "the power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way".) See also *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (*Union Label Case)*, (1908) 6 CLR 469, 503 (Griffith CJ: "no exception from [the reservation of powers to the States] can be admitted which is not expressed in clear and unequivocal words".).

66. A further illustration of the problem is provided by the majority and minority judgments in *Russell v. Russell*, (1976) 134 CLR 495, concerning *placita* (xxi) and (xxii). See Zines, *High Court and the Constitution*, 24-6.

67. *Attorney-General (Cth) v. Schmidt*, (1961) 105 CLR 361, 371-2 (Dixon CJ).

68. See, e.g., the discussion in *Mutual Pools & Staff Pty Ltd v. Commonwealth*, (1994) 179 CLR 155.

69. *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 349-50 (Dixon J); *Clunies-Ross v. Commonwealth*, (1984) 155 CLR 193 at 201-2, using the expression "a constitutional guarantee of just terms".

70. US Constitution, Fifth Amendment. The particular way in which the Court has said that s.51(xxxi) limits the scope of other powers is discussed in *Mutual Pools & Staff Pty Ltd v. Commonwealth*, (1994) 179 CLR 155.

71. See the discussion of the problem in *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 507-8 (Menzies J).

72. Compare s.51 (xiv): "insurance, other than State insurance".

73. State banking is banking undertaken by or on behalf of a State government: *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 52 (Latham CJ), 78 (Dixon J).

74. *Bourke v. State Bank of New South Wales*, (1990) 170 CLR 276, 285. The Court, at 286-9, went on to say this did not mean that there was an exclusive State power over State banking, a limited revival of reserved State powers. Rather, it was said that a law that can be characterised as being with respect to "banking" (whether or not it can also be characterised as a law with respect to another head of power) must not "touch or concern State banking", except to the extent that such interference is so incidental that the law can no longer be regarded as a law with respect to State banking. In effect, this meant that even if a law *could* be characterised as a law with respect to another head of power (e.g., "financial corporations" under *placitum* (xx)), it would nevertheless be invalid if it could at the same time be characterised as a law with respect to State banking (prohibited under *placitum* (xiii)).

75. See the discussion in T Blackshield, *Engineers and Implied Immunities*, in Coper and Williams, *How Many Cheers for Engineers?*, 92-100.

76. Zines, *High Court and the Constitution*, 24 (emphasis added).

77. *Bourke v. State Bank of New South Wales*, (1990) 170 CLR 276, 285. The Court recognised that it was possible to interpret "other than State banking" as only qualifying the scope of the banking power (*placitum* (xiii)), but chose to read it as limiting the scope of other powers, in particular the corporations power (*placitum* (xx)). See also *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 203-4 (Latham CJ).

78. See Blackshield, *Engineers and Implied Immunities*, *loc. cit.*. The problem is exacerbated by the fact that *placitum* (xiii) adds the words: "also State banking extending beyond the limits of the State concerned". The latter words, read in isolation, are structurally identical to *placitum* (i): they build the qualification ("extending beyond …") into the definition of the class of things to which reference is made. Under the *Engineers* principle, such words would not (in isolation) imply a prohibition.

79. See *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association*, (1908) 6 CLR 309, 367 (O'Connor J); *Attorney-General for New South Wales v. Brewery Employees Union of New South Wales*, (1908) 6 CLR 469, 611 (Higgins J).

80. Another vital issue that I do not address concerns the characterisation of federal laws. When determining whether a law is indeed a law "with respect to" one of the heads of power indicated in s.51, should the Court seek to identify the "dominant" character of the law, or merely a "substantial" or "sufficient" connection between the law and the subject matter of the head of power? Compare *R v. Barger*, (1908) 6 CLR 41 and *Fairfax v. Federal Commissioner of Taxation*, (1965) 114 CLR 1.

81. *Hodge v. The Queen*, (1883) 9 App Cas 117, 132.

82. *Engineers*, (1920) 28 CLR 129, 153.

83. See *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 332-3 (Dixon J), who cites *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association*, (1908) 6 CLR 309, 367 (O'Connor J) and then immediately notes that the legislative power of the Commonwealth is "plenary in its quality".

Chapter Three
When "Maybe" means "No"

Hon Justice Kenneth Handley, AO

Immediately before the referendum on the Republic, which was held on 6 November, 1999, I had a close look at the voting provisions in s.128 of the Commonwealth Constitution to see if there was any point that could be taken on behalf of Australians for Constitutional Monarchy in the event of a cliff hanger result. As they say, the rest is history, but I have been asked by the Society to share with you what I discovered. I should first mention that although the absolute majority for the "No" case was 1,137,763, some 602,272 electors did not vote at all and another 101,189 recorded informal votes.

The relevant part of s.128 is short and, in my view, reasonably clear. It reads as follows:

> "And if in the majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's Assent".

It is clear then that the relevant majorities approving a proposed law, if the referendum is to be carried, must be "of the electors voting". Voting in a referendum is compulsory, but clearly those electors who ignore their duty to vote are excluded from the relevant calculations. But what of those electors who did obtain ballot papers and placed them in the ballot boxes whose votes were informal for some reason?

It seemed to be that an informal vote is, as the expression itself indicates, nevertheless, a vote. The fact that it is informal means that it cannot be recorded as either a vote of approval or as a vote of disapproval. Nevertheless, it seems on the language of this part of s.128 that informal votes had to be counted in order to determine whether "a majority of all the electors voting approved" the law.

Quick and Garran's *Annotated Constitution of the Australian Commonwealth* published in 1901 is not particularly helpful on this point. The authors simply state at p.992 that "more than half the electors voting must vote yes". The authors also referred to the cognate provisions in the Constitution of Switzerland, which required the approval of the majority of the electors to amend that Constitution. This is a more demanding requirement than that found in s.128 of our Constitution, as can be demonstrated by a simple example.

Assume that in Switzerland and Australia there were 12 electors, 6 of whom voted in favour of the referendum, 4 voted against it, and 2 failed to vote. The referendum would be lost in Switzerland because the 6 votes in favour did not constitute a majority of the electors, but the referendum would be carried in Australia 6 votes to 4 on the votes actually cast.

Thus under the Swiss Constitution, at least in its form in 1901, electors who failed to vote, or who voted informal, were effectively voting "No". The founding fathers were aware of the referendum provisions in the Swiss Constitution and they clearly rejected its requirement for approval by a majority of the electors. Under s.128 electors who fail to vote are ignored in the tally. On the other hand, it seems to me from the text of the section that informal votes, the "Maybe" in the title of this talk, cannot be ignored and are effectively "No" votes.

A search of the legal dictionaries brought to light the decision of the Court of Session in Scotland in the case of *Latham v. Glasgow Corporation*, [1921] SC 694. The case arose under the local option provisions in the *Temperance (Scotland) Act* 1913. Section 2(3) of that statute provided that a no-licence resolution, or a limiting resolution, put to the electors in a local government district should be deemed to be carried if certain percentages of "the votes recorded"

were in favour of the resolution. The Act provided in effect for a mini-referendum to determine whether there should be no licensed hotels in a local government district, or no more than a particular number. The Lord President, the equivalent of our Chief Justice, said at 712-3:

> "What is the meaning of the expression 'votes recorded'? According to one contention 'votes recorded' are those ballot-papers which, when submitted to the Returning Officer at the count, are passed by him as good and effective votes. If this contention is correct, spoilt ballot-papers, which the Returning Officer rejects at the count as either unmarked, or as marked ineffectually, are excluded in the computation of the statutory proportions. The other view is that by 'votes recorded' is meant all votes in the form of a ballot paper put into the ballot-box by a voter in the exercise of his right or duty to vote. If this view is the right one, it matters nothing whether on examination the vote so recorded turns out to be 'spoilt', because the ballot-paper is unintelligible to the Returning Officer or – not being marked at all – is purely neutral and ineffective. Between these two views we have to decide …
>
> "I think a voter records his vote when he puts his ballot-paper into the ballot-box; and I do not think it is material that, owing to carelessness or ignorance, or inexperience he has failed so to mark his ballot-paper as to make the vote he thus 'records' an effective exposition of his opinions. Moreover, having regard to the requirement of certain proportions and majorities of votes contained in sub-section (3) of section 2, I have difficulty in construing that sub-section on any other basis than that those proportions or majorities relate to the total number of persons who come and exercise their privileges at the poll, whether those privileges have been exercised effectively or ineffectively.
>
> "The view which the Lord Ordinary (the trial judge) took was that 'votes recorded' meant ballot-papers passed by the Returning Officer at the count. For the reasons stated, it seems to me that this view is unsound".

A computer search through case law databases for any later decision in which *Latham v. Glasgow Corporation* has been considered proved fruitless.

We are therefore left with the text of s.128 and this Scottish decision. Different minds may reach different conclusions on the question, but I find it hard to get away from the description of an informal vote as a vote. Section 45 of the *Referendum (Machinery Provisions) Act* 1984 makes voting at a referendum compulsory. I ask you this rhetorical question: "could a voter who voted informal be prosecuted for failing to vote?".

I raised the question with Professor Flint prior to the referendum and at that time in all events he seemed to think the point a good one. He raised the matter in correspondence with the Electoral Commissioner, who would not accept the point. Needless to say, we did not take the matter any further, and for the time being there the matter rests.

The point could be critical in a future referendum if there were cliff hanger results in the nation or in particular States. If the question were to come before the High Court, some of the Justices might wish to avoid a decision which would make it harder to get a referendum passed. Some of them may be tempted to read in, or imply, the word "validly" before voting. However, words should not be read into a Constitution where the text is clear, and the provision in question is workable as it stands.

In my opinion there is no justification for reading into s.128 any requirement that the votes must be valid.

Chapter Four
The Republic: Report from Corowa

Professor David Flint, AM

The invitation

The Corowa People's Conference was conceived and developed by the Hon Richard McGarvie, who insists he is neither a constitutional monarchist nor a republican, to approve a process to "resolve the Head of State issue". Mr McGarvie was formerly a judge of the Victorian Supreme Court, and then the Governor of Victoria. He is a distinguished jurist, and is the author of *Democracy – Choosing Australia's Republic*.

Australians for Constitutional Monarchy (ACM) were invited by Mr McGarvie to send sixteen delegates, but we explained we saw no problem with the issue of an Australian Head of State, as we already had one. Even our most republican Prime Minister held out the Governor-General as Australia's Head of State to foreign governments and the United Nations, and officially declared him to be so. We made it clear, therefore, that we would not support any process to resolve a problem which just does not exist. Nevertheless, Mr McGarvie, a courteous and very decent man, wanted us to come. It was on that basis that we accepted.

With the support of a Victorian government agency, there was a major advertising drive for delegates. It was clear that only republicans would be interested in such a conference, and that proved to be the case. Strangely, several celebrities whom the organisers had said were coming, including former Prime Minister Malcolm Fraser and Victorian Premier Steve Bracks, did not turn up. Apart from a few who favour the existing Constitution, the self-selection process resulted in the attendance of a considerable number of lawyers. We knew this because speakers had to announce their names and their work. Quite soon, the designation "lawyer" was met with amusement – even exasperation – from the other delegates, even from those who themselves seemed to be republican lawyers!

It reminded me of Edmund Burke's surprise in finding that a very great proportion of the French revolutionary assembly were lawyers. Burke obviously did not think much of them. Most of them, he said, were:

> "… the inferior, unlearned, mechanical, merely instrumental members of the profession…intoxicated with their unprepared greatness…(who)… must join in any project which could procure to them a litigious Constitution; which could lay open to them those innumerable lucrative jobs which follow in the train of all great convulsions and revolutions….".

I hasten to add that I have no reason at all to think this harsh description applies to those who came to Corowa!

The shortlist

Before the conference it became clear that it had been taken over, although it was all Richard McGarvie's idea, and his hard work. So rather than the one clear process designed by Mr McGarvie, other processes were invited and nineteen admitted. After an internet vote, five were shortlisted. They were Professor Winterton's (with Sir Rupert Hamer and Dr Philips), 40 votes; Richard McGarvie's (with Jack Hammond, QC), 39 votes; Bill Peach's, 19 votes; Dr Bede Harris', 15 votes; and Professor Greg Craven's, 14 votes. This was a very low turnout, only 127 votes cast out of 418 delegates, a mere 38.38 per cent! But if this were a fair sample, the Winterton proposal would win on preferences.

Of the eight proponents, four were academics (three of whom were legal academics) and five were lawyers. Although all were men, this was (unusually) not the subject of criticism.

The proposed processes fell into two classes. First, there was Richard McGarvie's, which tried to be neutral and fair, and particularly respectful of the original federal compact. Under this our Founders had unanimously proposed, and the Australian people had agreed – and in 1999 affirmed – that Australia should be an "indissoluble Federal Commonwealth under the Crown". To change this, you have to go back to the federal compact, the agreement of the people in each of the States. So the McGarvie process involved first, a plebiscite on the way the Head of State would be chosen if we were to terminate our relationship with the monarchy. This would be followed by a referendum to change the Federation and the States simultaneously into a republic. It would depend on an affirmative vote both nationally and in *all* States, not merely four.

All of the other four proposals began with a plebiscite asking Australians whether they wanted a republic. There can be no doubt that this goes against the spirit of the Constitution and the intention of the Founding Fathers, which I explained in my opening speech, which follows. Assuming that preferences would flow between these four proposals, and those who voted on the internet were a representative sample, it was likely that either the Winterton or the Peach proposal would win.

The threshold question

The Conference began with a speech by former Governor-General Sir Zelman Cowan, who in office had once affirmed that he was the Head of State. Sir Zelman is now a republican. Then the threshold question on whether the Head of State issue should be put was debated. Richard McGarvie spoke in favour and I spoke against. I said:

"Mr Chairman, I rise to speak against the motion.

"Alistair McGrath, referring to those who chose the glorious words of the King James Bible, but who relied so much on their predecessors, likens them to dwarves sitting on the shoulders of giants.

"He cites John of Salisbury, who wrote eight centuries ago:

> 'We are like dwarves sitting on the shoulders of giants. We see more, and things more distant than they did, not because our sight is superior or because we are taller than they, but because they raise us up, and by their stature add to ours'.

"So we are today, at best, dwarves sitting on the shoulders of our Founding Fathers.

"And the giant we honour first and foremost today is Sir John Quick. While the rule of law, self-government, democracy, the Westminster system under that ancient institution beyond political capture, the Crown, were all inevitable, Federation never was.

"We must thank Sir John Quick, and those other giants that it was achieved, the first of a whole continent, and one of the world's most successful.

"We must thank them that our Federation – unlike all the others – was the result neither of fear nor war, but, as Quick pointed out, because of the people's intellectual conviction of the folly of disunion and the advantages of nationhood.

"And we must especially thank Sir John Quick that it was the first federal Constitution to be approved by the people. Moreover, that this was through a referendum with all the details on the table, and not through the totally discredited constitutional plebiscite which asks the question first and gives the details later. The Founders well knew the plebiscite as the tool of a succession of deceitful governments, intent on obtaining a blank cheque from the people for nothing more than the abuse of power.

"And consistent with their wish not to hoodwink or deceive, the Founders insisted that the method of constitutional change – the sole method – should be the constitutional referendum with all the details on the table.

"This was to have particular application for any proposal to change the core of the new

entity – the 'indissoluble Federal Commonwealth under the Crown'. They considered such a change most unlikely. As Quick himself pointed out, 'not a solitary public writer or speaker seriously proposed the possibility, much less the probability' of its separation from the Crown.

"For the Crown was identified as that great heart of the political system, State and federal, a principal check and balance against the abuse of power by politicians and by political parties. To the Founders, it was a major part of the answer to Acton's warning that power tends to corrupt and absolute power corrupts absolutely.

"But Sir John Quick himself did not see this as freezing the Constitution in aspic. He saw the referendum – with all the details of change known by the people before, and not after the vote – as not being there to prevent or indefinitely resist change.

"It was there for one reason, and one reason only. It was to prevent those evils of change being made in haste or by stealth. It was there, Quick emphasised, to encourage discussion, and to delay change until there was 'strong evidence' – strong evidence – that the change proposed, and minutely detailed – was 'desirable, irresistible and inevitable'.

"The delegates today should carefully note this threshold, this onus prescribed by Quick himself – strong evidence that the change is desirable, irresistible and inevitable.

"I ask whether the proponents of the motion have satisfied the burden that is placed on them.

"The clear answer is that they have not. They have not even got to first base!

"We do not even know what change they are proposing. In fact, we haven't got the foggiest idea.

"But Mr Chairman, it's worse than that. Neither do they, unless of course they are hiding their hand, which I hope they are not.

"The proponents of this motion have had the better part of a decade to do this. They have produced two official and several other models. The latest – their preferred model – was supported by most of the politicians. It was supported by one of the major parties, the greater part of the organisation of another and the Australian Council of Trade Unions (ACTU). (But not, it seems, by their members). It had the support of the gallery, most of the political journalists, and the press. It had great wealth behind it. It had all the deadlines of the new Millennium, the Centenary of Federation, the Olympics with the threat that if we kept our Constitution and our flag we would be, as one university Vice-Chancellor declared, 'an international laughing stock'.

"But every State and the Northern Territory voted 'No'. Seventy two per cent of electorates, rising to 93 per cent in the States furthest from Canberra, noted 'No'. And those electorates represent more than 99 per cent of the landmass of Australia. In other words, a landslide.

"While a small and wealthy élite had succeeded in diverting millions and millions of dollars from the taxpayers' funds, from schools, hospitals and aged care – into their obsession, and while politicians across the Commonwealth had been diverted from their core functions – law and order, border control, the economy, as well as schools, hospitals and aged care – the people had clearly spoken.

"And now a mere 25 months later, at a time when the nation least needs to be divided, the élite are at it again.

"Mr Chairman, I continue to search for, yet I cannot find, the strong evidence that this change – unspecified, undefined and unknown – is desirable, irresistible and inevitable.

"No wonder then that we see the desperate insertion into this debate of that diplomatic term, unknown to any of our Constitutions, any of our several constitutional documents, and unknown, at least until a few years ago, in ordinary parlance, the term 'Head of State'. What a pity then, that Mr Keating himself had not only held out the Governor-General as

Australian Head of States to foreign governments, the United Nations and to all the world, but had also actually officially declared him to be so.

"Rather than having strong evidence for change, the proponents of this change cannot even agree on what they are talking about, Mr Keating not even agreeing with himself.

"It is a reminder of the occasion when, to the great amusement even of the republican press, Mr Turnbull and Mr Barns sought to have two words removed from the referendum question in 1999 – the word 'President', and believe it or not, the word 'republic'. Was it that Australia is already a republic? Or was it that voters linked the word to some unsavoury republics?

"As a last resort, we are told the evidence is in the polling. Some evidence! Polling funded by organisations with an agenda! Polling with words which are unknown, foreign to our Constitution, words and notions which are vague, imprecise and undefined, Alice in Wonderland words! There's a term for this. It is little more than push polling.

"If the proponents of this motion were *bona fide*, they would commission two questions.

"First, do you, the Australian people, want more money diverted from schools, hospitals and aged care into some vague, imprecise, unknown and unnecessary constitutional change?

"Second, do you, the Australian people, want the members of all the State and federal Parliaments to be diverted from their core functions – from defence, from border control, from law and order, from the economy, from schools, hospitals and from aged care – into a search for vague, imprecise, unknown and unnecessary constitutional change?

"The answer is of course obvious. As Mr Turnbull confided to his diary four months before the referendum, 'We have Buckley's chance of winning. Nobody is interested'.

"Nobody is interested.

"Mr Chairman, the organisation which I have the honour to convene has as its mission, the preservation, the protection and the defence of the Constitution of this indissoluble Federal Commonwealth under the Crown, our National Flag and our heritage. Without the luxury of calling for foot soldiers from the ALP and the ACTU, and without being able or wanting to pay them, ACM still managed in the referendum to field an army of over 50,000 volunteers across the length and breadth of the Commonwealth. That, and the result, means we represent a considerable voice, whatever our numbers at this conference.

"It would make my path easier and it would greatly assist ACM if the conference were to pass this motion. For by passing this motion the conference would demonstrate, to the nation and to the world, that it is completely out of touch with mainstream Australia.

"But notwithstanding the great advantage you would give us, I ask you to pause, and to reflect on what you are doing, and if not to vote in the negative, at least to abstain.

"For in this motion you are passing judgment on one of the world's most successful – if not the most successful – Constitutions. You must now know it will be difficult, if not impossible, to graft some new model republic onto our Constitution and yet maintain its strengths. Yet you are in effect doing what no reasonable American or Canadian would do: you are passing a motion of no confidence in the Constitution of our Commonwealth without having the foggiest idea of what is to replace it. And you will be asking the Australian people to do likewise; of which, in Mr Turnbull's own words, there is Buckley's chance.

"Remember three things. That first, that at most we are like dwarves on the shoulders of our Founders; that secondly, we are living under one of the world's most successful Constitutions; and that thirdly, in John Quick's own words, change must be delayed until there is strong evidence that change, in all its details, is desirable, irresistible and inevitable.

"And to those still committed to change for the sake of change, to use the words of that more reluctant republican, Oliver Cromwell, I beseech you, in the bowels of Christ, think it possible you may be mistaken.

"Thank you".

Once into my speech there were increasing interjections and booing, which reached a crescendo as I concluded.

Although not previously announced, Greg Barns (Australian Republican Movement (ARM) Chair) seconded the motion. He used the refrain "How dare you?" in his speech. This was, incidentally, the theme of the late Neville Bonner's address to the Constitutional Convention, the only one which attracted a standing ovation.

Kerry Jones followed, pointing out that as the people knew little about their Constitution – a fact which has been clearly established – they could hardly be asked to vote for change. Education was absolutely necessary.

And as we know, the motion was carried.

The five proposals discussed

Each proposal for a process to resolve the Head of State issue was then debated. One of the interesting interventions was by Andrew Robb. He supported the McGarvie process. He made the obvious point that it was unrealistic to think that any government would allow a constitutional plebiscite to be put at the same time as an election. It would distract people from the policies the government wished to fight the election on. So a government would have to be prepared to spend about $80 million on a separate plebiscite.

He also pointed out that no government would initiate a process which was programmed to produce a form of republic unacceptable to the government – that is, a directly elected President, at least one with any powers. But the republican audience seemed to refuse to accept these arguments.

Another intervention illustrates that the majority of republicans still see Australia from their "inner metropolitan republic", as Malcolm McKerras put it. Former Minister and Senator, Susan Ryan, strongly argued against the importance of the States, and the need for unanimity among the States, in the McGarvie proposal.

Eventually, the long day ended, but not before the Chairman, Barry Jones had agreed that proponents of proposals could discuss amendments and even mergers that evening.

So while constitutional monarchists enjoyed a good dinner and then slept well, republicans were condemned to an evening of Jacobean debate, negotiation and compromise.

The final three proposals

By Sunday the Winterton, Peach and Harris proposals had merged under the provocative title of the "Royal Hotel Resolution". (Dr Harris hails from Zimbabwe, and his principal reason for a republic is that his young daughter could aspire to be Head of State. When he said that constitutional monarchists would support the "least worst" model and then campaign against it, this understandably provoked the interjection that at the Constitutional Convention the constitutional monarchists had done exactly the opposite! At this point John Paul leaned across to me and asked if, in contrast to "the McGarvie process", Dr Harris' could perhaps be described as "the Mugabe process".)

There were now only two other proposals. First, Professor Craven's, who has been described as Australia's Talleyrand because he had previously changed his position from monarchist to McGarvie republican, then to favouring the Turnbull model. The other was Mr McGarvie's, who decided to compromise, unwisely in my view. He abandoned the need for unanimity among the States. I think this was unfortunate, because this is an important and fundamental principle. (In any event, only one referendum has succeeded with less than six States in support. That was the referendum on State debts in 1910, when only New South Wales voted against the proposal.)

An ACM explanation

Before the voting procedures were outlined by the Victorian Electoral Commissioner – a curious fact, as Corowa is in New South Wales – I was allowed to speak. Although I only asked for one minute, there was considerable opposition and hostility – but Chairman Barry Jones generously ruled that I could. Well before I had spoken for one minute, points of order were made about the time I had taken, as well as frequent noisy interjections.

I said that when we were invited, we had made it clear we would speak against there being a Head of State issue, and not support any process. Notwithstanding that, and on this understanding, we had still been invited and we had accepted. I pointed out that at the Constitutional Convention in 1998 there was considerable pressure, in the press and otherwise, for us to vote "strategically". This meant we should support the "least worst" McGarvie model at the Convention and yet campaign against it at the referendum. Had we done this, the people would have voted on the McGarvie model and not the Turnbull model in the 1999 referendum. But we refused to do this because we thought this would be unprincipled and improper.

I said we would do the same at Corowa. While we respected the right of republicans to do what they wanted to do, we neither wished to affect the result by our votes, which would be wrong and unprincipled, nor did we wish to support any process, for all were against our belief in the present Constitution. While I was speaking the points of order continued, as did the interjections, which were becoming even noisier and more emotional.

I stopped at what I estimated was one minute, Barry Jones remarking with some irony: "That was one minute and five seconds and I don't think I should have stopped Professor Flint". I would have concluded this way:

> "And finally, if we meet again on the battle field of yet another referendum, I hope that on that occasion we will all agree that the decision of the people will be final. We just cannot go on meeting this way".
>
> During lunch, two beautiful young ladies – about 16 to 18 – came up to me and said:
>
> "We are neither monarchist nor republicans, but we didn't like the way you were treated. We want to know more about the issues".

Yet Susan Ryan said on Melbourne radio a few days later that republicans will win because the monarchists are all dying off! (In fact, in 1999, after the oldest, the younger voters were the strongest "No" voters.)

The chosen process

The result of the vote was predictable – the Winterton merger won. But it was closer than I expected. A total of 418 participants were entitled to vote, but 36 did not. There were 47 informal votes, of which 36 had written "abstain" on the ballot paper. So an absolute majority of 168 was necessary. The Winterton proposal received only 159 first preference votes. On the allocation of preferences it scored 195, and was declared the winner.

Then an Enabling Committee was established to put the issue before the government and the Parliament. The members are:

Sir Gerard Brennan (a former Chief Justice) (Chairman)
Sarah Henderson (Deputy Chair)
Sir Darryl Dawson (a former High Court Justice)
The Hon Tim Fisher (former Deputy PM)
Dr Bede Harris
Barry Jones, AO
Bill Peach
Dr Phillips
Professor Winterton

The Hon Richard McGarvie, QC (I understand he has since left the Committee)

The task of the Enabling Committee is to seek the establishment of:

- A multi-party Commonwealth Parliament joint committee to consult the community and constitutional experts to prepare a plebiscite asking the following questions:
  - Should we become a republic with an Australian Head of State?
  - Should the Head of State be called the President or the Governor-General?
  - Should the Head of State be selected by the Prime Minister, a two-thirds majority of the Parliament or an electoral college, or be popularly elected, with defined powers?
- A Commonwealth Parliament joint committee to outline the core features of the models and prepare neutral information for the plebiscite.
- An elected Constitutional Convention to draft a constitutional amendment reflecting the will of the people as expressed in the plebiscite.
- A referendum to be held on the constitutional amendment.

The future

As I understand it, the Howard Government regards the people's decision in 1999 as having settled the issue, at least for now. After all, it's little more than 900 days since that vote! The Committee will probably have some chance of getting their programme onto the parliamentary agenda through a sympathetic Senator, and there are plenty of those. But without government support, it will not get further.

And the recent federal election confirms that pursuing the Keating élite social and cultural agenda is a "turn off" for both Coalition and Labor voters, that is about 90 per cent or more of the population.

The core of the élite agenda is now the three 'R's: the Republic, a Reconciliation Treaty (when this means not just practical reconciliation, but a Treaty with a separate indigenous State), and automatic admission as a Refugee to any client of the people smugglers.

The problem for the republicans is that any political leader who advances the republic will immediately announce to the electorate, including the "battlers" and the so-called "aspirational voters", that he (or she) is still running with Paul Keating's discredited social and cultural agenda. Labor, if it wishes to reconnect with its heartland, will surely let the inner city élites stay with the Greens on this and related issues. Obviously a Labor leader will not wish to demonstrate that he or she disregards – or even despises – the battlers. Even Kim Beazley, in his policy speech, had abandoned reference to his previously announced policy of a cascading series of plebiscites and referenda to turn Australia into a republic. And he seemed to have renounced the earlier policy of changing the flag. Now Simon Crean says the republic is a matter to be left to bipartisan agreement.

Any future Liberal leader pushing the republic would divide his (or her) party, especially the rank and file, to say nothing of the voters. They, like Labor voters, are not interested.

A republican assessment

Professor Greg Craven commented in *The Australian* (7 December, 2001) that until Corowa, our chances of becoming a republic in the short term were slim. He says they now seem non-existent. Why? The process would ensure a "direct elect" republic would be the model put to a referendum.

He continues:

"So the republican debate has reached a historic point. Despite a lot of rhetoric about consultation, ARM bosses such as Greg Barns seem to think that direct election is their best bet. They are moving to lock it in. If so, this is the opening act of a protracted constitutional suicide.

The first casualty will be the crucial alliance between the ARM and the conservative republicans who worked warily with them in the 1999 referendum. Next, the ARM will

have given up the slightest chance of bipartisan support at any future republican referendum. Finally, the likely next Prime Minister, conservative republican Peter Costello, inevitably will cross ARM off his Christmas card list.

"Not bad for a weekend's work in Corowa……

"Presumably, the tactics of the ARM leadership are based on a fool's hope that conservative republicans will come on board once they realise that direct election is the only model on offer. What people such as Barns fail to understand is that the first loyalty of these cautious republicans is to the Constitution. They regard direct election as constitutional strychnine.

"So it appears the leadership of the ARM is progressing majestically towards a referendum where a complex and controversial model for direct election will be opposed, not only by monarchists but by every conceivable variety of non-direct election republican".

And then Professor Craven delivered the *coup de grâce*. He says the vote in that referendum will make the 1999 referendum result look like "a republican triumph"!

Conclusion

The republican movement is in some difficulty. When, on the recent Queen's Birthday weekend, Mr Barns came to the media – now an annual rite – he proposed the direct election of State Governors. All State governments seemed to distance themselves from the proposal. The now republican *Sydney Morning Herald* in its leader even declared the proposal to be an "ARM no-brainer"!

I have come to three conclusions. First, it is impossible to graft a republic on to the present constitutional system and not do it damage. Secondly, Australians, whom Richard McGarvie describes as "a wise constitutional people", came to this conclusion in 1999, and will repeat that if any further model is put to them. And, as we have seen, they are not at all interested in the issue, and will become irritated if it is put again, at least in the next few years. Thirdly, if Australia were to become a republic, a completely new Constitution would be necessary. Fourthly, while anybody can draft a Constitution, few, if any, ever rise even close to the standard achieved by those remarkable people, the Founding Fathers of the Commonwealth of Australia, and the Founding Fathers of the United States of America.

Chapter Five
Immigration Law and the Courts*

Professor John McMillan

For much of the last century Australian immigration law rested on two key controls: an officer of the Immigration Department had a discretion to decide who was allowed to enter Australia; and the Minister had a discretion to deport a person who was unlawfully in Australia.[1] Within the scope of that skeletal framework, government policy on migration could be developed, implemented and altered with few legal obstacles to surmount. Decisions on entry and deportation went largely unchallenged at the administrative level. The unfettered nature of the discretionary powers was respected as well by the courts.

In time, a different view took hold of the need for criteria on entry and removal to be spelt out in legislation and for procedural safeguards to be established.[2] This was reflected in the growth in size of the *Migration Act* 1958, from 35 pages in 1958 to nearly 500 pages (plus voluminous Regulations) in 2002.[3] The steady growth in legal rules was soon accompanied by a comparable growth in disputes about whether those rules were being correctly applied. The age of immigration law – now the most controversial, and the single largest, area of public law adjudication by courts and tribunals in Australia – had arrived.

Why did it happen? What does this trend tell us about our system of law and government? Has it become better and fairer? Will decision-making standards just keep getting better and better if we have more and more litigation?

The facts suggest a different story. In the 1987-88 reporting year there were 84 applications filed in the Federal Court challenging an immigration decision. That had risen to 320 in 1993-94, to 673 three years later, and to 914 in 1999-2000.[4] Now, roughly 70 applications are filed each week in the courts and the Administrative Appeals Tribunal. The active case load of immigration cases at 7 June, 2002 was 1,350 cases, including 287 applications before the High Court. In May, 2002 over 54 per cent of all cases decided by the Full Federal Court were immigration cases.

The explosion of litigation has also strained relations between the courts and government, and between the courts and the public. While the Minister for Immigration, on the one hand, has accused some judges of the Federal Court of undermining the will of Parliament,[5] the full Federal Court responded by asking the Minister to explain his comments to the Court – in the words of *The Australian*, serving on the Minister "a judicial press release".[6] Judges of the High Court have also rebuked Parliament for imposing a "great inconvenience" on the Court.[7] The controversy has extended as well to the public arena. At the height of the *Tampa* controversy, Paul Kelly wrote in *The Australian* of "a defiant court provoking political wrath", and warned of "the sound of a huge voter backlash against the arrogance of the judiciary".[8]

This controversy, it should be recalled, arose during a period dominated by two other across-the-board trends that should have worked against judicial expansion. One trend was that over this period Parliament and the Executive established a comprehensive system for non-judicial review and accountability, based around tribunals, Ombudsman, internal review, more detailed legislative and policy guidelines, and more open decision-making. Non-citizens were given the right to seek review or investigation of adverse decisions by the Migration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, the Ombudsman, the Human Rights and Equal Opportunity Commission, and to learn more about the background to a decision by utilising

the *Freedom of Information Act* 1982 or by requesting a statement of reasons. By any standard, the rights that had been conferred on non-citizens were extensive.

The other trend was a general overall improvement in government in the standards of administrative decision-making. That trend, while difficult to prove empirically, is noticeable in the way that decisions are now recorded and reasoned, in the consultation that is now extended to members of the public when decisions affecting them are made, and in the emphasis now given in the public service to staff training and recruitment.

Why, then, did immigration litigation become the behemoth that it has become? There are, of course, many factors that lie behind those developments, and they lie outside as well as inside the courtroom. Immigration control has become an acute problem for governments around the world, as a consequence variously of the population mobility that is a facet of globalisation, the growing ease of international travel, regional conflict, and the socio-economic aspirations of many people for an improved lifestyle in a different country. It was perhaps to be expected that litigation would become part of the strategy, to be used at least by some people in the pursuit of a favourable immigration outcome.

Litigation, in short, could be an end in itself. Over 90 per cent of judicial review applications in Australia fail at present, but the extra time that litigation buys is for many people a win in itself. It was perhaps to be expected too that this litigation would, to a point, be tolerated by many in government and the community. We live in an age when, as a community, we are reticent or coy about denying people the opportunity to ventilate fully any claim which they frame as a rights-based claim. There is as well a strong human and emotional reluctance to send families back to a life that is more wretched.

Courts, therefore, work in a difficult environment. They have an obligation to discharge their jurisdiction properly whenever it is invoked. They have a special responsibility, borne of our legal tradition, to be probing rather than compliant in the face of strong executive action. Moreover, in the great bulk of cases judges maintain a strong tradition of confining judicial attention to the legal issues, and of not being distracted by the factual, policy and humanitarian background to the litigation. Nor can one deny that government in Australia is better and fairer as a consequence of judicial review.

But, there is another side to the story. The problems of Australian immigration law and practice could not have occurred without some judicial input. Courts are not the child of circumstance and context: they play a large and adult role in defining the environment in which they work and in fashioning the rules that they apply. A judicial pronouncement is, after all, conclusive for the time being. The ruling has great precedential force in defining the legal principles to be applied in the next case, and in shaping the expectations that people have when they approach the courtroom.

The remainder of this paper takes up that theme, by discussing four judicial factors contributing to the problems of immigration law. The paper ends by drawing a few lessons for the future.

The impact of inappropriate decisions

The expansion of the law is often propelled by inappropriate decisions. Two cases that I will discuss illustrate this point.

The first is the now-famous decision of the High Court in *Kioa v. West*[9] in 1985. That decision held that natural justice – the right to be heard and to comment on adverse material before an unfavourable decision is made – applied to a decision to deport a person unlawfully in Australia. That aspect of the decision is understandable enough, because of the impact that a deportation decision can have upon a person and their family. The problem with *Kioa*, however, which is now felt across the board in administrative law, is that the case did not clearly define what

must be disclosed by a decision-maker in order to comply with natural justice, yet a failure to meet the standard – whatever it is – results in invalidity.

For example, one definition from *Kioa*, which is now repeatedly applied by courts, is that a person is entitled to be told of "adverse information that is credible, relevant and significant".[10] That standard does not have self-apparent meaning, as illustrated by countless subsequent cases in which, after an exhaustive administrative hearing, a decision is nevertheless held by a court to be invalid because a single fact or item of information, even one whose relevance was expressly discounted by the decision-maker, was not brought to the attention of the person facing deportation. Curiously enough, in many ways the rules for making a valid executive decision are in crucial respects more demanding than the rules for making a judicial decision.

A second illustrative decision was in 2001 by the High Court in *Re Minister for Immigration and Multicultural Affairs v. Miah*.[11] Relevant to the case, the *Migration Act* said three things about refugee decision-making: firstly, it spelt out precisely what a Departmental decision-maker had to do in consulting a refugee applicant before making a decision whether to accept or reject a refugee claim; secondly, the Act declared that the decision-maker "is not required to take any other action";[12] and, thirdly, the Act said that a person aggrieved by a rejection of their application had a full right of merit review in the Refugee Review Tribunal. Notwithstanding that scheme, a 3:2 majority of the High Court held that the common law doctrine of natural justice required the Departmental officer to go further still, and to disclose information obtained by the officer about the political conditions in the country of origin of the refugee claimant. The failure to do so meant that the decision was invalid, and could be challenged in the High Court even after the person's right to seek review of the decision by the Tribunal had expired.

The purport of the ruling in *Miah* was to safeguard procedural fairness, but it could ironically achieve an opposite result. The decision creates a practical disincentive for the legislature to create administrative appeal rights. To do so simply establishes a second and duplicate administrative hearing that, as *Miah* shows, does not correct an earlier error but runs the risk of introducing a new error.

Intrusive judicial review

The second major problem in immigration litigation has been over-reaching, over-zealous judicial review. It is a pattern in only a small minority of cases, but a point often overlooked by commentators is that a handful of single judge decisions, because they are conclusive for the moment and occur at the front-line of justice, can have a greater impact in defining the dynamics of a legal system than the more authoritative rulings of appeal courts. This point, put more bluntly, is the practical side of the lawyer's advice to the client, "You might be lucky and get judge X".

One area where excessive judicial rigour has been a particular problem is in the scrutiny of the reasons for decision given by decision-makers and tribunals. Over the years those reasons have become lengthier and more elaborate, but no less defective when viewed through the prism of court decisions. The reason is not hard to see. When put to the test, it is very difficult for any decision-maker, even the most skilled wordsmith, to explain convincingly on paper why, in a confused factual setting, a particular decision is being made. It is equally difficult to explain why the credibility of a person under oath is being doubted, or why self-serving information provided by a person is not being accepted by a tribunal that is unable positively to disprove what the person said. An attempt, even by the most skilled wordsmith, to rise to that challenge can compound their difficulty by resorting to exaggerated reasoning, by constructing an argument from a flimsy premise, or by shaky logic.

Unless a court accepts that the merits of administrative decision-making lie with the Executive, and that courts cannot provide the guarantee of procedural perfection and absolute justice that they might like to provide, the dividing line between law and policy, between law and

merits, will be irretrievably blurred. This danger of judicial overreach, of judicial merits review, has been repeatedly recognised by the full Federal Court and by the High Court, including in the case of *Wu Shan Liang*,[13] in which the Court warned of "over-zealous judicial review" and counselled that the reasons of a decision-maker should be taken at face value.

And yet the problem does not go away. At any time in the last decade there is one principle or other that holds sway as the basis for invalidating immigration decisions. The present battleground is a "privative clause" in the *Migration Act*,[14] enacted by Parliament in September, 2001, and the subject recently of a specially-convened hearing before a five-judge bench of the full Federal Court.[15] The purpose of the privative clause is to restrict judicial review to legal errors of an egregious kind. The meaning and scope of the clause is admittedly ambiguous, though it is noteworthy that at a very early stage in the elaboration of the clause the Federal Court has been split as to its meaning, much as the Court has been split on many pivotal issues of immigration law in the past. If the interpretation of the privative clause given in a handful of early decisions becomes established doctrine in the Court, it is probable that the privative clause will be largely ineffective. In short, it will be back to the parliamentary drawing-board to search for new ways of controlling immigration litigation.

Legal fallacies

A third problem in immigration litigation is that legal expansion in this area has been aided and driven at times by fallacies and shibboleths. An example is aptly provided by the controversial litigation in 2001 concerning the *MV Tampa*.[16] Those proceedings, challenging the validity of a Government decision to refuse to allow a ship carrying potential asylum seekers to land at Christmas Island, were instituted by a lawyer and a civil liberties group that had no instructions from or prior contact with the potential asylum seekers. Both were given standing by the Federal Court on the basis that they were acting in the public interest to protect a vulnerable group of people against government excess.

I argued at the time that that claim was an untested assertion, an assumption, and that the Court should have declined to handle the dispute as a non-justiciable legal dispute.[17] The public interest spirit of the plaintiffs was nevertheless accepted by the trial judge, and approved favourably by the full Federal Court, the Law Council of Australia, and a great many other lawyers.

Subsequent events have now undermined that untested assumption, at least so far as 131 people given asylum and permanent residence in New Zealand are concerned. The objective of the litigation was to ensure that those on the *Tampa* could land in Australia, which in practical terms would have meant spending the following nine months in detention in Woomera, Curtin or Port Hedland while their applications for asylum were processed. Nearly all those whose applications were subsequently processed at Nauru by the United Nations High Commissioner for Refugees (UNHCR) were refused refugee recognition, and have been required to return to a war-ravaged Afghanistan or elsewhere. Those who instead chose to go to New Zealand under the Government-sponsored plan have, with few exceptions, been given asylum and permanent residence in that country. With hindsight it seems clear that for many on the *Tampa* the Government initiatives delivered them a more favourable outcome than the "public interest" litigation.

There are countless other examples of assumptions which underlie assertive judicial review that are wrong or highly contestable. The scheme for Federal Court review of immigration tribunal decisions was frequently criticised by lawyers and judges for being restrictive, and producing great difficulty for asylum claimants, the Federal Court and the High Court. And yet, that scheme was less restrictive than that which has applied for more than 25 years to appeals from the Administrative Appeals Tribunal to the Federal Court.[18]

Similarly, the legislative model for the immigration tribunals was frequently criticised,

including by Justices Einfeld and North for "contravening every basic safeguard established by our inherited system of law for 400 years".[19] And yet, those criticisms do not take account of the fact that the tribunals were established to provide a measure of fair process in a controversial area of administration, involving over 11,000 appeals each year, and necessarily including the perspective of non-lawyers as well as lawyers on the appeal panel. There is no doubt that all legal claims would be resolved better if they could undergo the equivalent of High Court scrutiny, but merely to state that point is to highlight its impracticality.

Statutory interpretation

The fourth problem to beset immigration litigation has been the established principle in Australian law that the judiciary should not pay deference to the view expressed by the Australian government as to the meaning to be attributed to opaque statutory phrases. Immigration law is full of these – "well-founded fear of persecution", "member of a particular social group", "special need relative", "humanitarian and compassionate considerations". Interestingly, the courts often turn to the decisions of foreign courts, to the manuals of the UNHCR and to the opinions of international law text writers to elicit the meaning of those phrases. Yet there is a firm legal tradition of not turning to the views of the elected Australian government as to what those phrases mean.[20]

The refusal to do so can mean that the statutory words operate in a vacuum: they derive meaning only from the dictionary, and are peculiarly susceptible to incremental growth in their scope and meaning. They can expand gradually to a point, well-described in a recent article by Janet Albrechtsen, when much of the world becomes an eligible refugee.[21]

An example from a few years earlier illustrates this point very well. Much of the immigration litigation in the 1980s related to the meaning of a visa criterion, "strong humanitarian and compassionate considerations". The Federal Court declined to accept the Government's argument that the criterion was intended as an exceptional category, to deal with about 100 cases a year of unexpected natural disaster, human misery and the like. Instead, the phrase was interpreted by the Court in reliance on the dictionary as meaning "evoke strong feelings of pity or compassion by Australians".[22] Predictably, the 100 or so applications expected each year rose quickly to 8,000.[23] The only option was to remove from the legislation this discretionary capacity to deal with hard cases.

Lessons for the future

And where do these legal problems leave us? With a better system of law and government? I will finish by briefly listing some of the consequences, some of the transactional costs of over-assertive judicial review.

First, as I outlined earlier, the litigation contributes measurably to the steady annual growth in immigration litigation, possibly exceeding 2,000 cases in 2002. It leads as well to a distortion of Australian government priorities – to a system in which we spend considerably more each year on litigating about 12,000 refugee places than we spend on our foreign aid budget to deal with the 22 million or so refugees and displaced persons.

Whether decision-making in Australia is better is even debatable. As Justice Gyles commented in a recent case:

> "In this case, the Tribunal member, instead of giving a decision on credibility promptly, with the real reasons expressed economically, adjourned for a very considerable time, to ultimately produce a relatively elaborate piece of reasoning which included a detailed refutation of individual facts claimed by the applicant … This is typical. The reason is not hard to find. For some years decisions of this Court … had a natural tendency to encourage elaborate reasons [by Tribunal members], designed to protect them from such criticism, although there is usually no need for elaborate reasons when evidence is not accepted …".[24]

Judicial activism of the kind that I have criticised also ends up producing a worse rather than a better system of administrative law. I gave the example earlier of the removal from the *Migration Act* of the discretionary power to grant a visa in a deserving case where there were "strong humanitarian and compassionate considerations". The *Migration Act*, and the protection of the human rights of potential visa claimants, is the poorer for the removal of that power.

Another example is the transformation of the system for judicial review of immigration decision-making. This commenced as an ideal system for review, built around tribunals and the *Administrative Decisions (Judicial Review) Act* 1977. As that framework broke down, the system has progressively worsened, and is now controlled by a privative clause. That, in my view, is the least best option, though it has to be said that it was adopted by the Government on the advice of six eminent QCs as being the "only workable option" left to the Government to curb excessive judicial review.[25] In short, the courts and the legal profession are not on strong ground in laying the blame for what has happened at the feet of Parliament and the Executive.

Equally, the legal developments have in my view contributed negatively rather than positively to Australian debate and to our sense of national identity. Not only are there sharp and heated divisions concerning the relationship between the Government and the courts, there is also a touch of schizophrenia in some of the controversy. The proponents of the need for a constitutional Bill of Rights to safeguard democratic debate are, in the next breath, the firmest critics of the Minister for Immigration for exercising that freedom of speech. Legal commentators who see judicial-Executive tension as a reminder that an assertive judiciary is essential to maintaining the rule of law are, in the next breath, highly critical of the Executive for sustaining that tension by its criticism of courts.

The views that I have just put are not fashionable in some (perhaps many) legal forums. The alternative argument more commonly presented is that judicial activism is an expression of the rule of law in safeguarding individual rights and civil liberties against Executive abuse. A related argument is that human rights standards should play a stronger and more overt role in judicial review in Australia, to keep pace with legal developments in other western democracies and with the globalising influence of human rights norms. It is also claimed, though not often explained, that judicial activism forms part of a new democratic settlement between the government and the community.

Those arguments are too easily made and too rarely justified. It is not enough to assume that general humanitarian concern, legal obligation and judicial activism go hand-in-hand, one justifying the other. A great many issues need to be addressed before that connection can safely and properly be made. If there are present deficiencies in the Australian system of administrative law and public administration, they need to be explained by example. If judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated. Acknowledgment must also be made of the impact that legal activism can have on the style and complexity of administrative decision-making, and of who benefits from that trend. Those issues are not being confronted at present. Until they are, judicial activism that forms part of that trend can rightly be criticised.

Endnotes:

* This paper draws from three other papers by the author: *Controlling Immigration Litigation – A Legislative Challenge*, (2002) 10 *People and Places*; *Federal Court v. Minister for Immigration*, (1999) 22 *AIAL Forum* 1; and *Have the Judges Gone Far Enough ... or too far?*, (2002) 30 *Federal Law Review*.

1. E.g., see s.6(2) (entry) and s.18(deportation) of the *Migration Act* 1958, as enacted in 1958; generally, see M Crock, *Immigration & Refugee Law in Australia*, The Federation Press, 1998, Chs 4, 10.

2. See Administrative Review Council, *Review of Migration Decisions*, Report No 25 (1985); Human Rights Commission, *Human Rights & the Migration Act*, Report No 13 (1985); Committee to Advise on Australia's Immigration Policies (Fitzgerald Committee); *Immigration: A Commitment to Australia* (1988) Ch.8; Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions* (1992).

3. The multiplicity of legislative changes occurring between 1991-2001 are summarised in *Refugee Law – Recent Legislative Developments*, in *Current Issues Brief, 2000-01* (Dept of Parliamentary Library, 2001), Appendix 7.

4. See Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheet No 9, *Litigation Involving Migration Decisions* (available on the Departmental website – www.immi.gov.au).

5. E.g., *Butt out*, *Ruddock tells Judges*, in *The Australian*, 4 June, 2002.

6. *Ruddock Cops a Judicial Press Release*, Editorial in *The Australian*, 4 June, 2002; and see *Statement to the Federal Court on Behalf of the Minister for Immigration and Multicultural and Indigenous Affairs* (4 June, 2002).

7. *Re Refugee Review Tribunal; Ex parte Aala*, (2000) 204 CLR 82 at para. 133; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*, (2000) 168 ALR 407 at para. 13; and *Abebe v. Commonwealth*, (1999) 197 CLR 510.

8. P Kelly, *Defiant Court Provoking Political Wrath*, in *The Australian*, 5 September, 2001.

9. (1985) 159 CLR 550.

10. (1985) 159 CLR 550 at 629 per Brennan J.

11. (2001) 179 ALR 238.

12. *Migration Act* 1958, s.69(2).

13. *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang*, (1996) 185 CLR 259.

14. *Migration Act* 1958.

15. The Court heard appeals on 3-4 June, 2002 in five earlier cases – *NAAV, NABE, Ratumaiwai, Jian Zhong* and *Turcan*.

16. *Ruddock v. Vadarlis*, (2001) 110 FCR 491.

17. See J McMillan, *The Justiciability of the Government's Tampa Actions*, (2002) 13 *Public Law Review* 89.

18. The *Administrative Appeals Tribunal Act* 1975, s.44 provides that a person can appeal from a decision of the Tribunal to the Court on the ground of error of law. The *Migration Act* 1958, s.476 provided that a person could appeal from the Migration or Refugee Review Tribunal to the Federal Court on the ground of error of law and on other grounds as well.

19. *Selliah v. Minister for Immigration and Multicultural Affairs*, [1999] FCA 615 at paras 3-4.

20. E.g., *Corporation of the City of Enfield v. Development Assessment Commission*, (2000) 199 CLR 135.

21. *Emotionalism Triumphs over the Law*, in *The Australian*, 12 June, 2002.

22. E.g., *Surinakova v. Minister for Immigration, Local Government and Ethnic Affairs*, (1991) 26 ALD 203.

23. See E Arthur, *The Impact of Administrative Law on Humanitarian Decision-Making*, (1991) 66 *Canberra Bulletin of Public Administration* 90.

24. *NAAX v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 263 at para. 56.

25. Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (Nos 4 & 5)* 1997 (1997) at para. 2.12; see also the report of the Committee the following year on the *Migration Amendment Legislation (Judicial Review) Bill* 1998, at paras 2.2-2.5.

Chapter Six
Immigration Policy and the Separation of Powers

Hon Philip Ruddock, MHR

I would like to thank The Samuel Griffith Society for the invitation to present this address, and I offer my congratulations to the Society for providing forums such as this one to facilitate discussion of constitutional issues, as I share its view that the Australian Constitution has served this nation well, and that we should strive to ensure that it continues to do so.

I am pleased to have this opportunity to present – in the context of the constitutional doctrine of the separation of powers – some of the major challenges that Australia is facing in relation to immigration issues, particularly with respect to the significant numbers of asylum seekers and unauthorised arrivals who have sought residence in Australia.

To set the context for my address, I will start by outlining Australia's migration and humanitarian policies and the factors that are putting pressure on these programs.

I will then move on to discuss how the legislature and the Executive have responded to these pressures by taking practical steps to strengthen the integrity of Australia's migration program and to allow Australia to continue to provide protection to people who are at greatest risk. In this regard, I will concentrate on the reforms that are of greatest interest to this forum, namely the legislative changes made in early October, 2001 to contain abuse of judicial review processes by unsuccessful visa applicants.

Finally, I will discuss the role of the judiciary in giving effect to the Parliament's response and its legislative intentions.

1. Managing migration

As we all know, Australia has a long tradition of immigration. Indeed, the nation has been built on settlement from other countries. In many ways, this has determined the very nature of our contemporary society:

- Almost one in four Australians today were born overseas.
- Around 40 per cent of Australians were either born overseas or have at least one parent who was born overseas.
- In recent years, people from around 185 different countries have made Australia their home.

Australia's immigration policies are implemented under legislation enacted primarily under the "immigration and emigration" and "naturalization and aliens" heads of power in s.51 of the Commonwealth Constitution.

We are one of only a few countries in the world that have operated a planned immigration program for over 50 years. In fact, the management of Australia's migration program is hailed as a model for other countries.

In a radio interview last month, Professor John Salt, a Professor of Geography at University College, London, and a consultant on migration to the European Union, the Council of Europe, and the OECD, commented that:

> "Australia has probably gone further than any other country in developing a comprehensive management policy which is transparent, which is highly organised, [and] which lays out clearly the rules and regulations under which migration will occur . . . [it] involves discussion amongst the various interested groups and has a research base to look at how successful [it is]".[1]

Next financial year, the Australian migration program will be the largest and most highly skilled in over a decade, with a planning level set in the range of 100,000 to 110,000 places.

Over the years, we have learned that sound immigration policy must be underpinned by some essential core values. For Australia, the first of these is that our approach to migrant selection must be strictly non-discriminatory as far as matters such as race, religion, colour or ethnicity are concerned.

The second is that our immigration policies must enable Australians with non-Australian partners or dependent children to be re-united in Australia as permanent residents and, in time, Australian citizens.

The third core value is that the overall immigration intake must be demonstrably in the national economic interest. If this were not the case, Australia's standard of living would deteriorate, community support for immigration would rapidly diminish, and Australia's capacity to provide a humanitarian program would be reduced.

The fourth core value is that Australia must contribute its fair share to the resettlement of those most in need – the principle of burden-sharing. In resettling refugees, the Australian government devotes very considerable resources to ensuring that these people have the support they need to fully participate as members of our community.

And last, but by no means least, we must have the capacity to manage the movement of people across our borders in an orderly and efficient manner. Without this critical capacity, the idea of a managed immigration policy rapidly becomes meaningless.

Since coming to power in March, 1996, the Liberal/National Coalition government has progressively implemented a considerable number of measures to enhance the integrity of Australia's immigration program. These measures have included adjustments to restore the Australian community's confidence in the program, by refocusing it to contribute to Australia's development and future prosperity, and other measures to meet changing situations challenging Australia's border integrity. All these measures contribute to Australia continuing to have the economic and social capacity to give practical effect to the nation's commitment to assist those at greatest risk.

Australia's humanitarian program

Australia has a proud tradition of providing safety for genuine refugees. Our humanitarian program is based on our obligations under various international human rights treaties, but Australia's commitment goes far beyond those obligations, particularly through our offshore humanitarian resettlement program.

Since World War II, Australia has resettled 600,000 refugees. The Australian government's humanitarian program currently provides, each year, around 12,000 refugees and others who are in humanitarian need with residence in Australia.

- Australia is one of only nine countries that operate a dedicated resettlement program each year.
- On a per capita basis, Australia's offshore refugee intake is one of the highest in the world.

The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that there are approximately 19 million persons of concern around the world. Against this context, Australia resettles, through its humanitarian program, those persons in the very greatest need – those who are at risk if they remain where they are, and who have no means of escape other than resettlement in a third country.

Offshore humanitarian entrants to Australia have access to some of the most comprehensive and generous services in the world to assist them to become fully participating members of the Australian community. The assistance provided is tailored to the individual's

needs, in recognition of the fact that refugees are particularly vulnerable. Each 1,000 refugees resettled under these schemes costs more than $30 million to the Australian Budget.

While our desire to assist these persons is strong, Australia has a finite capacity to give practical effect to this desire. The pressure placed on our resources by those arriving in Australia without authority, and seeking to engage our obligations to provide protection, limits our capacity to assist those at greatest risk.

2. Pressures on Australia's migration and humanitarian programs

Humanitarian program places are being diverted away from our offshore program for people who have been identified by the UNHCR as being in need of resettlement, many of whom have been living in appalling conditions in displaced persons camps for many years.

People smugglers seek to exploit the situation by manipulating those persons who can afford, and are prepared, to pay comparatively large sums of money to enter Australia without authority. People smuggling is a big business. The International Organisation for Migration estimates the worldwide proceeds of people smuggling to be $US10 billion a year. On average, it costs the Australian government $50,000 for every unauthorised arrival by boat from the time of arrival to the time of their departure from Australia.

Some asylum seekers come here from countries where there is little risk of persecution, but which are less prosperous than Australia. They seek to use our refugee determination processes to obtain the right to work in Australia, or to access health services and other support at Australian taxpayer expense while their claims are assessed. In 1997-98, the Australian government spent in the order of $80 million on the enforcement of immigration law. Three years later, in 2000-01, the cost was more than three times as great, at nearly $300 million.

3. Responding to the threats

Australia has addressed these problems by progressively implementing a range of measures to combat people smuggling and to stop abuse of Australia's refugee determination processes.

As outlined earlier, one of the core values underpinning Australia's immigration policy is that we must have the capacity to manage the movement of people across our borders in an orderly and efficient manner. Otherwise, the idea of a managed immigration policy rapidly becomes meaningless.

The Australian government is well aware of its obligation not to *refoule*[2] – we never have, and we never will. We are equally aware, however, that our international obligations do not give people any right to demand residence in Australia. Following the *Tampa* crisis in August and September, 2001 – the details of which are well known – legislative amendments to address the issues were passed by the Parliament. The changes included:

- A bar on visa applications for unauthorised arrivals at certain Australian island territories;
- Powers to move these persons to declared countries;
- Powers to detain vessels and persons; and
- Minimum sentences for people smugglers.

Further legislative amendments were introduced to Parliament in June, 2002 in response to indications that people smugglers were planning to land people at new destinations in the region. To combat the new threats, the amendments provide that additional Australian islands are included in the definition of "excised offshore place". Arrivals at such places are barred from applying for any visa to enter and remain in Australia.

New judicial review scheme for visa-related decisions. One of the important reforms introduced in October, 2001 that I will discuss in detail in this address was the creation of a new judicial

review scheme for visa-related decisions. This measure addresses the Government's long-standing concerns about the increasing cost and incidence of migration litigation.

The Government believes that access to judicial review in migration matters should be restricted in all but exceptional circumstances. This commitment was made in light of the extensive merits review rights in migration legislation and concerns over the misuse of court processes by those who seek to delay their stay and frustrate their removal from Australia.

A previous judicial review regime was implemented by the last Labor government in the early 1990s. It was part of a package of reforms that was intended to reduce Federal Court litigation and to provide greater certainty as to what was required from both decision-makers, and visa applicants and visa holders. These reforms included a significant expansion of independent merits review, including the creation of the Refugee Review Tribunal.

However, that scheme did not reduce the volume of cases before the courts. In fact, the volume increased. In 1994-95, there were less than 400 applications to the Federal and High Courts. In 2000-01, there were 1,340. And the number of applications continues to grow. It is expected that there will have been over 2,000 cases lodged in the courts in 2001-02. Litigation costs for my department soared from $5.8 million in 1995-96, to $15 million five years later in 2000-01.

This trend has occurred despite full and open access by applicants to heavily subsidised independent merits review by the Migration Review Tribunal and the Refugee Review Tribunal. Between one third to one half of applicants withdraw their applications prior to the court hearing. Of the cases that go on to substantive hearings, the merits-based decision is currently upheld in over 90 per cent of cases. It is hard not to conclude that there is a substantial number of applicants who are using the legal process primarily in order to extend their stay in Australia.

Faced with these problems, options were explored for best achieving the Government's policy objective of restricting access to judicial review. In light of the Australian High Court's original jurisdiction to consider challenges to the actions and decisions of Commonwealth officers under s.75(v) of the Constitution, the Government's legal advisers found that a "privative clause" would be the only effective mechanism.

A privative clause operates to give decision-makers wider lawful operation for their decisions and thereby reduces the grounds on which the courts can set aside such decisions as being unlawful. In accordance with High Court case law, namely the *Hickman Case*[3] and subsequent authorities, the wording of the clause in the *Migration Act* has the effect of limiting the grounds for finding a decision to be unlawful. As a result, a court can only overturn a decision where:

- The decision-maker was not acting in good faith in making the decision; or
- The decision was not reasonably capable of reference to the decision-making power given to the decision-maker; or
- The decision did not relate to the subject matter of the legislation; or
- The decision exceeded the limits in the Commonwealth Constitution.

These limited grounds are intended to facilitate faster resolution of court cases, thereby decreasing delays in removal of non-citizens and lowering costs.

I am aware that the introduction of the privative clause into the *Migration Act* caused concern for some people, and that the concern was based on a separation of powers issue – specifically, that the role of the judiciary was being interfered with in some way.

Anyone who holds such a concern will find comfort in comments that were made recently by the Chief Justice of the High Court of Australia, the Honourable Murray Gleeson, AC – the head of the judicial arm of government. In a speech entitled *Courts and the rule of law*, delivered in November, 2001 as part of Melbourne University's "Rule of Law" series, his Honour made the following statements about the legitimacy of parliamentary use of privative clauses as mechanisms to limit judicial review in particular areas:

"To the extent to which a privative clause, properly construed, lawfully amplifies power or limits jurisdiction, then respect for the rule of law requires courts to give effect to that expression of legislative will. Subject to the Constitution, the Parliament, in the exercise of its legislative power, is not obliged to maximise the area of potential justiciability of disputes between citizen and government".

The Chief Justice also said that:

"Subject to any constitutional limitations on their powers, it is for Parliaments to decide what controversies are justiciable, and to create, and, where appropriate, limit, the facilities for the resolution of justiciable controversies. Parliaments regularly expand and contract the subjects of justiciable controversy. That is what much law-making entails".

Although the new judicial review scheme for immigration matters was designed on the basis of long-standing High Court statutory interpretation of privative clauses in other areas of law, it was inevitable that some litigants would choose to contest the validity of the privative clause in the *Migration Act*. If at some point in the future the scheme is found by the High Court to be invalid in any respect, the Government will, of course, have to look for alternative ways of tackling the abuse of judicial review processes in migration matters. For the reasons to which I have already referred, it would simply be unsustainable and unacceptable to allow the ever-increasing immigration litigation load to grow unchecked.

4. Role of the judiciary in giving effect to the Parliament's legislative intentions

Up to this point I have been discussing actions taken by the Parliament and by the Executive in relation to immigration issues. If there were any doubts about the appropriateness of those actions in a separation of powers sense, I hope they have been dispelled.

I would now like to make some comments about the judiciary's role in relation to immigration matters. I believe that some decisions of the judiciary, particularly in the Federal Court, can rightly be criticised on separation of powers grounds in two respects.

The first is that some members of the judiciary have encroached on the functions of the Executive arm of government, by undertaking merits review under the guise of judicial review. Under established principles of administrative law, judicial review is a consideration of the way in which an administrative decision-maker or tribunal reached the decision made. Judicial review is not an opportunity for a reconsideration of the merits of an otherwise lawful decision.

The second is that there have been numerous instances where individual judges have reflected on the wisdom of the Parliament in passing laws which they personally do not support. These criticisms do not receive the same coverage as comments made by Members of Parliament in relation to judicial decisions.

I note that these issues are also of concern to the Right Honourable Sir Harry Gibbs. In his concluding remarks at this Society's thirteenth Conference in 2001, Sir Harry made the following comments:

"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, 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".

Those comments were made in relation to judicial handling of matters involving Aboriginal and industrial relations issues, but I am also aware that at previous Conferences of The Samuel Griffith Society, similar criticisms have been made in relation to immigration matters.

For example, some rather forthright comments were made by Dr John Forbes in a paper delivered to the eleventh Conference, in 1999. Dr Forbes accused some Federal Court judges of "ignoring the well-known limits of judicial review and effectively conducting appeals on the

merits". The previous speaker today, Professor John McMillan, has expressed similar views in various presentations and articles.

It goes without saying that nothing in this address is intended to influence or bring pressure upon the courts in relation to any case presently or in the future before them. The reason it goes without saying is that I know, as I am sure virtually all Australians know, that our courts are rightly impervious to anything I, or any other politician, would say.

Conclusion

One of the important messages I hope I have conveyed in this address is that the Australian Government remains committed to having a planned migration program and to meeting its obligations under international law by continuing to provide protection to people most at risk. The recent changes to Australia's immigration laws to which I have referred demonstrate that commitment.

The measures that have been put in place will ensure the efficacy of Australia's planned immigration and offshore humanitarian resettlement programs. By enhancing the protection of Australia's borders from unauthorised entry and preventing abuse of our judicial review processes, the new measures improve Australia's ability to assist those at greatest risk.

Immigration policy issues are complex. There is often a need to balance competing considerations in order to provide an effective and compassionate migration program and protect our borders. In our constitutional system, it is for the legislature to strike that balance in the national interest, and that is exactly what the Parliament did when it introduced the recent changes to our immigration laws. The Executive has been performing its role in implementing that legislation, and the judiciary is duty-bound to apply it in the courts.

Endnotes:

1. Radio National Breakfast Program, 6 May, 2002.

2. The French verb *refouler* means "to drive back", or "to expel [aliens]". [Editor's note].

3. *R v. Hickman; ex parte Fox and Clinton*, (1945) 70 CLR 598.

Chapter Seven
Immigration Policy, Sovereignty and the Media

Piers Akerman

In all modesty, I must begin with an expression of gratitude to the convenors of this meeting, because they've asked me to talk about immigration policy, sovereignty and the media – and I don't know of any other three subjects today ... well, hardly any ... that could be tied into one parcel and not be guaranteed to capture the widest audience.

But where to begin? Immigration policy is such a tremendous catch-all of talking points that we might easily start with an exploration of the first waves of dark-skinned people who found their way to this country ... and then we might talk about the curious reluctance of their descendants to join any serious attempt to trace their genetic origins…[1]

That, at least, would lead us into a fascinating aspect of history. But it would also lead us away from the other intended points of our discussion today. At the same time ... the word history suggests a starting point, because whenever we look at contemporary media, we are also looking at history of a kind. Or we like to think we are.

One of the many boasts of journalists – in their frequent bouts of self-congratulation – is that what they present today as news is, in fact, the first draft of history. Up to a point, here and there, this is true. But when news reports are wrong, in points of fact or emphasis, or because of subjectivity or outright ignorance, history flies out of the window.

As, indeed, it did last year – when anyone depending on newspapers for an understanding of Australia's immigration policy was left with a thin, pathetic grasp on historical reality. This is not because newspapers didn't have much to say about the subject. Not at all. They had a great deal to say. Hysteria, though not much history, was everywhere.

Immigration has become a topic very dear to the hearts of the left-leaning journalists and their editors who dominate the media in this country. No one listening to the ABC – the biggest media operation in the nation – could doubt the predominant role it has on their agenda.

The ABC pilgers on, one commentator said the other day. Look at the extensive campaigns run since the last election by *The Australian*, *The Age*, *The Sydney Morning Herald* and the national broadcaster to see how seriously they regard the subject.

Why are they so concerned? Is it because they genuinely want a better, fairer Australia? Are they concerned with the kind of ethnic mix we might become? Are they worried about how many newcomers this country might accept? Or about giving undue protection or exclusion to those ethnic people who would add their mosaics to the culture of Australia?

No. These campaigns have no other fundamental aim than to hammer the federal Government, in particular to denigrate John Howard, who – in their sad, myopic view – has wrong-footed every move since he entered The Lodge. Immigration policy here is merely another cudgel with which to hammer Howard and his team.

And look how they wield it. Almost every day brings new headlines about boat people, asylum seekers, refugees, children torn from parents ... only rarely does the media describe these people as they are: would-be illegal immigrants. Instead, the media presents them as poor and desperate wretches whose treatment by Howard's cruel, inhumane, cold and unfeeling bureaucracy has brought withering shame on Australia in the eyes of the world.[2]

Some shame – as we saw in Mr Howard's reception in Washington this week. Some shame – as we watch Britain and other European countries rapidly discarding unworkable policies and turning to Australia for a model on which to base immigration policy.

And some thick-headed blindness, let me say, from former Senator Gareth Evans. Biggles has a cushy job in Europe now, yet he was in *The Australian* on Thursday complaining that on the treatment of refugees – and other issues – Australia was walking away from any kind of good leadership role.[3] Perhaps, when he gets promoted, Gareth's new employers will take off his blinkers.

This is not the first time the media – or Biggles, for that matter – has been so thoroughly out of touch. A major attitudinal study by Queensland University Professor John Henningham in 1996 found the views of those employed in all forms of the media were well to the Left of the bulk of their public on almost every social issue – drug use, divorce, abortion, multiculturalism to name a few.[4]

Yet the press continues to insist that on illegal immigration, the press is the only one in step. A United Nations report this week showed how much in step they were. Of those 400-odd people who deliberately sank their boat so that the Norwegian ship *Tampa* would rescue them and carry them into Australia, the UN found only 25 could be classed as genuine refugees.[5]

Robert Manne who, like Philip Adams, tries to demonise and vilify everyone who disagrees, has written calling for the release of all people from detention centres who have passed health and security checks, but whose claims are either in process or have failed, if they cannot be repatriated to their homelands.[6]

To my mind, Mr Manne still fails to grasp what I believe is the principal reason why most Australians do not share his sentiments. It is this: Australians believe in a fair go.

And the way these so-called asylum seekers try to settle themselves in Australia is anything but fair. They are quite happy to travel through one or more countries in which they could legitimately contact refugee organisations or Australian consulates – but no. They prefer to try to break the law in the hope they might obtain an unfair advantage over others prepared to work their way through the established systems of refugee settlement.

The last election, I think, showed how very wrong the media can be on this subject. A post-election study for the Liberal Party[7] showed 81 per cent of those surveyed believed Labor should have supported the Government on the issue of illegal entrants – and that view was supported by 76 per cent of the Labor voters quizzed in the survey.

Moreover, for all the screaming front pages, the expensive, time-wasting lawsuits, the dreary hours of late-night television talk shows and the endless opportunities non-governmental organisations had to air their sludge on Radio National, where did the issue of illegal entrants rank when voters were asked to list in order the reasons they voted for the Liberal Party? I can tell you. It ranked Number Six.

Twenty-nine per cent of voters polled cited party reasons (either a long-standing commitment to the Liberals or opposition to Labor) for their choice of candidate, 22 per cent cited economic and financial management, 18 per cent cited John Howard's leadership, 14 per cent said they wanted the current path of government to continue, 11 per cent cited Kim Beazley's leadership.

The number persuaded to vote one way or another on the issue of illegal immigrants was just … 10 per cent. So much for an election driven by hatred and fear. So much for dividing the nation.

Perhaps even more interesting is the finding that 73 per cent of Australians from non-English speaking backgrounds supported the Government's border protection policies, and 79 per cent of those from a non-English speaking background believed the Labor Party should have supported the Liberals.

One more statistic. For those who claim the Government policies are inherently racist, fascist, or worse, consider this: 80 per cent of those surveyed believed Australians should welcome refugees from any country – provided they go through the correct processes.

All this suggests that the border protection issue is a matter of national sovereignty rather than one of racial or religious discrimination. Yet the race card is played frequently in media campaigns against those who believe in national sovereignty. This is a cheap trick – and it is not sustainable against Australia while we go on resettling refugees and other people on humanitarian grounds from Africa, the Middle East, the Balkans and West Asia.

Those who loathe the West would no doubt be astonished to discover that there is actually not a queue of refugees seeking resettlement from the UK, North America and Western Europe, too.

The intense fervour of the media campaign puts me in mind of the extensive education – or re-education – attempts foisted on the public by less liberal regimes.

And the fact that clearly, the media campaign has failed, would be demonstrated still more convincingly were the public to be asked: Who should make the laws for Australia – Australians or an international body? Or: Who should decide who is permitted to live in Australia – Australians or an international body? Does anyone doubt what the answer would be?

Mark Latham, the pugilistic Member for Werriwa, has made a number of speeches on this issue but has found stony media ground. In January, he wrote a stinging letter to John Robertson, the secretary of the NSW Labor Council, taking him to task over the simplistic approach adopted by the group Labor for Refugees, one of the organisations which applauded the actions of the rioters at Woomera.

The seven points he made demolished the emotional campaign run by the Labor group and, as Latham noted, suggested the replacement of "the rule of law with an open door asylum seeker policy".

"The first priority for a just society is to help needy people within the collective boundaries of the law. The first priority of your organisation is to find excuses for people who break the law", he wrote.[8]

Had such a high-profile MP from the Coalition side written so scathingly to a Conservative body, the press would have been full of stories of splits and divisions on party policy. Latham's letter languished largely unreported.

There is a mass of other evidence to demonstrate the media's disgracefully one-sided approach. Let me quote, as one example, an editorial from *The Sydney Morning Herald* in March[9] which demanded the release of children, with their parents, from detention, claiming that maintaining the policy of detaining them "becomes a kind of cruel madness. It disgraces those responsible for it, diminishes the nation and should be ameliorated".

Here we are: diminished again. If the critics go on diminishing us like this, there'll soon be precious little left of Australia. And I have to wonder, while newspapers go on crying about the vast numbers of so-called celebrities and other people forced by disagreeable government policies to leave this country, how it is that the Australian Bureau of Statistics manages to find that the population is actually growing.

Ever since those seal-saving seventies, when a stream of untalented young actresses trekked to join an ageing Brigitte Bardot on an icy strand of Newfoundland and, hopefully, kick-start their stillborn careers, it has been popular among public profiles to lend their names to causes. The illegal immigration issue has attracted most of the usual suspects – Tom Keneally, David Williamson, Peter Carey and so on, with attendant hand-wringing publicity.[10]

The media has also given spokesmen from non-government organisations the opportunity to make various unchallenged and nonsensical statements. Among them, Duncan McLaren, the secretary-general of the Vatican-based Caritas International, distinguished himself with this remark:

> "In terms of those seeking a better life in Australia and elsewhere, we have to work towards a more compassionate solution".[11]

It does not appear that Mr McLaren was asked if he believed all those who wished to live "elsewhere" were refugees, or whether every nation should be forced to open its doors to everyone who wanted a change of scenery. We might reasonably guess, however, that the reporter and editors who placed this statement in *The Sydney Morning Herald* knew he supported their attitudes, even if, as seems clear, he was ignorant of the detail of the argument.

Among the more notable public profiles, former Prime Minister Malcolm Fraser is to talk about asylum seekers at the national conference of the left-wing Australian Manufacturing Workers Union next month. Mr Fraser has no trouble finding a media audience for his views on this issue – notwithstanding his role in the downfall of Labor's supreme living legend, Gough Whitlam. Now that Mr Fraser has seen *their* light, those who once vowed to maintain the rage are cheerfully prepared, it seems, to forego the opportunity to relive their adolescent passions…

The Age, once one of Mr Fraser's natural enemies, had a change of heart about ten years ago when the distinguished Eminent Person appeared with the National Treasure, Mr Whitlam, at a rally in Melbourne's Treasury Gardens. They were protesting against the possibility of sound professional management returning to Spencer Street through the offices of Conrad Black.

The editors have apparently not forgotten the favour. They laid it on with a trowel in an editorial titled *Asylum seekers deserve better*: "Malcolm Fraser has rightly drawn attention to the conditions at Woomera's hellhole".[12] The newspaper claimed – wrongly – there was no evidence that fewer people were seeking refuge in Australia, but it has not yet apologised.

Mr Fraser's arguments can look different under close scrutiny – as, indeed, did the fence he built around his show ring – a little lower than usual so that the cattle would look bigger. Writing in the Fairfax newspapers in February, he said:

> "We also need to understand that Australia's problem is small compared with problems in Europe, a magnet for the Middle East and Africa. More than 400,000 asylum seekers and refugees move to Europe each year. Except for a short identification period, they are not in compulsory, mandatory, non-reviewable detention".[13]

He is perfectly correct in this description of some European countries, but he – and his editors – should have made clear that, because of the hundreds of thousands who have disappeared into the populations of their choice, many of those same countries are revising their policies rapidly and – as I said earlier – are looking – like Tony Blair's Britain – to Australia for inspiration.

It might be, of course, that perhaps Mr Fraser is ignorant of the revolution in thinking on strategies to deal with illegal migrants in Europe ... especially if he has been relying on the London bureaux of our major news organisations. They don't write much about the subject at all – though there is plenty of information on the websites of the BBC and London newspapers.

Just yesterday, European Union justice ministers agreed on a series of tough measures to crack down on illegal immigration, and there will be a major summit of EU leaders on the topic. Perhaps we shall soon witness an Incredible Shrinking Europe.

Very little has been published here about the British plan to educate the children of asylum seekers in segregated centres, forcing them to learn English, and to deport thousands of would-be refugees to their home countries before they can appeal to the courts.[14] Why not? Is it politically correct self-censorship at the London end ... or wilful censorship at this end because fair and honest coverage would prove the absurdity of the claim that Australia has become an international pariah?

Sadly, looking at how the international press reports events here, it is clear they lean heavily on information from various immigrant activist groups and a plethora of non-government organisations opposed to government policy.[15]

Many of their reports are so derivative they repeat the errors Robert Manne made in December – in *The Age* – when he failed to note that the period of mandatory detention is determined largely by the number of appeals lodged by applicants whose claims have been rejected, and he claimed wrongly that a 12-year-old boy had been raped at Woomera.

Nor have they made clear that all the detainees in Australia arrived here only by travelling through other countries in which they could have asked legitimately for asylum. The United Nations High Commissioner for Refugees has offices in Islamabad, Bangkok, Kuala Lumpur and Jakarta. But these facilities have escaped the attention of these sharp-eyed international newsmen.

On this subject, John Pilger's eponymous style of journalism prevails. His own contribution is masterly in its manipulation of the numbers of refugees and illegal entrants which Australia accepts.[16] If he, and those who parrot his figures, compared like with like, they would find that Australia resettles about 40 people per 100,000, while the US resettles 29 people per 100,000 and Germany resettles zero. Australia, in fact, is one of the few countries which actually has a pro-active resettlement program and does not merely try to cope with people crossing its borders illegally.

But advocacy journalists like Pilger have a free rein and what they write makes for potent, emotive reading. Yet what of the facts? What of the substantial arguments?

The Australian's Mike Steketee claimed in January[17] that the government's response to asylum seekers was unsustainable and falling apart. Perhaps Mr Steketee's crystal ball looks further ahead than mine – because nothing of the sort has happened yet.

Yet Mr Steketee – perhaps he really *is* an expert on the subject – appeals for minimal time of detention while the illegal immigrants' identity, health and character are checked. There are, of course, obvious and bigger questions concerning the millions who do not read his newspaper: at what point, for example, *should* a nation become concerned at an influx of illegal entrants, and at that time, with a much bigger problem, what should the response be?

Interestingly, Steketee also offers his views in the same issue of the media union's *Walkley Magazine*, as an article by ABC reporter Natalie Larkins who describes her arrest at Woomera. I make no comment on Larkins' piece, because it adds nothing to the debate. But something needs to be said about the objectivity of the organisation she works for. One week *before* the Woomera demonstration, a person from the ABC called the Prime Minister's Department to find out where he could be contacted during the following weekend.

This is not normally something the ABC – or any other news organisation – does every week. So why, we must ask, would the ABC do it this time? The answer is simple. Once the demonstration and burning and destruction of property at Woomera had begun, the ABC wanted to grace its on-the-spot report with instant reaction from the Prime Minister. Now ... is that news management or is it not!

Steketee argues that it is the media's role to identify the root causes of Australians' genuine concerns about border security, including the increased insecurity of employment and the downward pressure on incomes for many low to middle income earners. "And", he writes, "we should take up the debate on ways to address these problems, rather than accept them as the inevitable consequences of globalisation".[18] By *we*, I have to guess he means the media – those wonderful proponents of re-education.

Forget the news, let's get right into the process – which is precisely what nine Canberra press gallery journalists did in March, when they wrote a highly political submission to the Inquiry into a Certain Maritime Incident.[19]

John Howard, according to the almost unanimous view of the media, was very much alone in the stand he had adopted against illegal entrants in support of Australia's sovereignty.

If the dullards of the media were to be believed, the nation was an international pariah, and Mr Howard was the target of justifiable global opprobrium. I would like to remind the dullards that

there has been a resurgence of conservatism across Europe. Migrants are in the forefront of political discussion. Tony Blair's tough stance is being cheered by the French, to say nothing of the Dutch, the Italians and the Austrians.

What has been demonstrated here again is that there are two Australias – major and minor… The minor Australia is represented by the whingers in the media so determinedly out of touch with their public – off the pulse, I think is the current jargon. The greater nation is represented by those who enthusiastically support a proud and independent country.

Endnotes:

1. *Quadrant*, June, 2002, *The extinction of the Australian pygmies*, Keith Windschuttle & Tim Gillen.

2. For example, *The Sydney Morning Herald*, February 4, 2002, Robert Manne, *Howard squanders our good name*.

3. *The Australian*, June 13, 2002.

4. Professor John Henningham, University of Queensland, 1994 study of 173 journalists' attitudes compared to random survey of 262 members of the public, published *Independent Monthly*, February, 1996, *How Political Correctness Shapes the Media*.

5. *The Australian*, June 13, 2002, *UN denies Afghans refuge*.

6. *The Sydney Morning Herald*, June 10, 2002, *Oh for a show of mercy, sincerity*.

7. Lynton Crosby, Liberal Party federal secretary, National Press Club, November 21, 2001.

8. Latham letter to Robertson, January 2, 2002.

9. *The Sydney Morning Herald*, March 25, 2002, *Moral questions on immigration*.

10. *The Sydney Morning Herald*, February 13, 2002, *Writers attack dark chapter in asylum policy*.

11. *Ibid.*.

12. *The Age*, December 13, 2001.

13. *The Sydney Morning Herald*, February 21, 2002, Malcolm Fraser, *No refuge in a richer, meaner world*.

14. BBC Website, News, UK politics, June 11, 2002.

15. *The Australian*, February 14, 2002, Paul Ham, *Damned for desert hell-holes*.

16. *New Statesman*, January 28, 2002.

17. *The Australian*, January 30, 2002, Mike Steketee, *No excuse for all this inhumanity*.

18. *Walkley Magazine*, Issue 16, Autumn, 2002, Mike Steketee, *Puncturing the propaganda*.

19. The signatories were Graeme Dobell, Fran Kelly and Jim Middleton from the ABC, Geoffrey Barker, Andrew Clennell, Mark Forbes and Craig Skehan from the Fairfax newspapers, Chris Hammer from SBS and Ian McPhedran from News Ltd.

Chapter Eight
Memories of a Monarchist – now a Trappist Judge

Hon Justice Lloyd Waddy

It is as yet far too early to even attempt any serious assessment of the recent rout of republicanism by the people of Australia. So, too, it is too early to properly weigh the great contributions of so many individuals in what was a ten year campaign this year. So many Doctoral theses remain to be written …….

So tonight I will not try to be exhaustive or even historical. I can offer only some random reminiscences. Nevertheless, they may be thought to have a relevance to the present, and perhaps the future.

A further embarrassment comes from my having endeavoured to leave the field of political controversy (for at least a decade!) upon taking my oath as a Judge of the Family Court of Australia at 4.30 pm on 1 July, 1998 – some three hours after my last street demo! (Fear not: I marched through Sydney in the first Reservists' Parade at 1pm).

When I was appointed, I decided that I would pursue the conservative course once common to all Judges and avoid all media comment. My judgments, which I properly (and as it has turned out, correctly) thought would interest no-one but the litigants, would be my only public prognostications. As the media calls continued to come in, I repeatedly explained that I had become a Trappist. Far from enraging them, all those who contacted me seemed to understand perfectly. So silence it has been since. I have been a "shutta the trappa judga".

Until I had voluntarily forsaken my right to speak freely, I did not realise how greatly I had circumscribed my liberties as an Australian citizen. The right of free speech is such an incident of life that, until one loses it, one tends to forget what a precious gift it is. To abandon television appearances, spurn radio interviews and decline to submit newspaper articles may not appear to be a great loss to some; but to have to file in the waste paper basket every clinching letter to the Editor can become galling indeed. This was more so whilst the referendum was held on the republic.

John Stone's invitation to speak tonight, "among friends" as it were, and to follow our distinguished Chief Justice of Australia who spoke so eloquently last night, was, however, too tempting a bait for me to refuse. I hold John and Nancy, our President and Lady Gibbs, and the membership of our Society in too high a regard.

The achievements of this small group, through its Conferences and through its published volumes of Proceedings (to which Mr Ruddock referred earlier this afternoon), have had a significant influence on the general understanding of the implications of Australia's constitutional arrangements – and why some should change and others not. I deny that I am saying that our Constitution has been "Stoned". And for good measure I deny it for myself as well.

May I also say at the outset that I will not attempt to record here the great debt I, and indeed the nation, owe to those who have contributed so greatly to the struggle in which we engaged: Sir Harry, Justice Michael Kirby (who drafted our Australians for Constitutional Monarchy (ACM) Charter, during which court hearing he would never say…), Dame Leonie Kramer, all members of our ACM Councils, and my irrepressible and highly successful successor as national convenor, Professor David Flint. So many of you are here tonight, including Digger James, Justice Ken Handley, John Paul, Sir David Smith, Julian Leeser and so on. To you belong the gratitude of our nation, and our thanks for all you have done, and are still doing, to educate

our compatriots in the glories of our federal and State Constitutions. In that endeavour John and Nancy Stone and Sir Harry and Lady Gibbs deserve special mention also.

Our two indefatigable executives, the Hon Tony Abbott and Mrs Kerry Jones, were each retained on the basis of raising their own salaries. They then had to raise all the money to fund all our activities. Their individual contributions have been outstanding. Then there were all the volunteers, the State Councils, the 50,000 supporters across Australia, and so on.

I repeat that I will not tonight attempt to evaluate or even do justice to any: an after-dinner speech should be at the least diverting, and is not to be taken seriously as history.

So here are some random thoughts from the judicial monk's cell …

The first shots

Sometimes I ruminate on how I became involved in the whole business in the first place. It was all so coincidental.

It is just a decade since the move for a republic (of a different type from the Crowned one we have), was made a political football by the Australian Labour Party National Conference of 1992. Tonight I felt it might go well with the cheese and cabernet if I touched on some aspects of the fray which followed. But I bailed out on my appointment to the bench in July, 1998, several months after the Constitutional Convention, and so the far greater labours fell on the shoulders of my successors to win that great tussle. Them I salute unreservedly, and win handsomely they did.

Legend has it that in 1992 a faction of the ALP wanted Mr Barry Jones as National President for the ensuing year. A deal was done with another faction, that, as a *quid pro quo* (I do not identify the *pro* and cannot say where the quid came from), the ALP conference would resolve that Australia would become a republic by the time of the Olympic Games in the year 2000. To add insult to injury, this motion was not to be debated, but merely carried on the voices!

This constitutional barbarism, tearing out the heart of each State's and the federal Constitutions, was blithely reported by the media. The sheer effrontery and ignorance of the mess it would make of the Constitution made my blood boil. As David Flint said this morning, it appears that it will not be possible to graft presidentialism onto our current arrangements with any facility.

As I walked to work up Phillip Street, the morning news fresh in my mind, I encountered Mr Peter King. Peter is now a Member of the House of Representatives, and son-in-law to the Rt Hon Ian Sinclair, who was eventually to preside over the Constitutional Convention of 1998. I had proposed a toast at Peter and Fiona's wedding and we were (and remain) on very friendly terms.

When Peter asked me why I looked so disconsolate, I sounded off about the ALP proposal, and I must say felt a lot better for it. I may even have concluded, "Over my dead body!".

However, having rid myself of the anger, somewhat to Peter's bemusement, I thought, I went off to my chambers for the day's work. It passed from my mind.

The following Sunday I was at my daughters' boarding school in the Southern Highlands. Several people avoided me (nothing new in that!), but eventually one said how very disappointed in me she was. When I asked why, I was told it was all over the front pages of the Sunday press!

Utterly mystified, we raced off to buy the newspapers. There it was, *Moves to Dump the Queen*. Still, I thought, how can I possibly be involved in such a story?

It transpired that Peter King, as State President of the Liberal Party (of which I had long been an inactive member), had pre-empted a Liberal factional move to support the ALP's republic, and had nominated a Liberal Party committee to oppose any republic. He would chair it. John Howard (then awaiting his political triple by-pass) was a member. Knowing my views from our encounter earlier that week, Peter had added my name, without reference to me.

However, the press article, read quickly, made it appear that I was on the committee not to oppose but to support a republic! It proved to be an extraordinary way to be dragged into the

ensuing political upheaval. My name being thus brought to the attention of the media, radio interviews and TV appearances soon followed. One thing led to another.

I might add that I only recall one meeting at Riley Street (then Liberal Party headquarters) of Peter's committee. We were all of the view that such fundamental change to our Constitution was *not* a party political matter.

One committee member later went to South Australia and for whatever reason became a republican. John Howard went on, of course, to become Prime Minister and the Chief anti-republican. No one should ever underestimate the brilliant contribution he made, both before and after his elevation, to the defeat of the republican push. He gave the Australian Republican Movement what it asked for, and it proved enough rope to hang itself.

John Howard and I were to speak about the republic only half a dozen times in the next six years. But the important introductions had been made. We knew where the key players stood. The rest is history, and so not for tonight!

Early days

About the same time as the ALP National Conference passed its motion, another group of ALP heavies and fellow-travellers formed the Australian Republican Movement (ARM).

The famous scene was set over that extra bottle of chardonnay at one of Neville Wran's exquisite Sunday luncheons: he announced that he did not want to die before there was an Australian republic. His friends raced to secure one as fast as they could! Tom Kenneally became its first Chair. Malcolm Turnbull, of the Wran-Turnbull merchant bank, became its financial and eventual mainstay. Franca Arena and Al Grassby became its fiercest shock troops, and so on.

The ARM's first proposition was that it was unpatriotic not to sign up immediately for their undefined republic! Their second was that a republic was inevitable!

Our first problem was whether or not to react to them. I had sufficient appreciation of the principles which underlie entertainment to understand that TV is drama, and that drama demands tension. If there were no counterpoise to or denunciation of the ARM, then, in theory, in due course they would become boring, no matter how valid their cause might be. In other words, unless there was a contradictor, any program would become like an ABC documentary, of interest only to those already persuaded.

Thus for a long time, after a short first flourish of interviews as individuals, we did nothing. But TV, like nature, abhors a vacuum. Into the breach strode the "Hang the Traitors" brigade. They were formidable polemicists, but way over the top. Prominent were the Rev Fred Nile in NSW and Bruce Ruxton in Victoria. Each had conviction and was very effective within their individual communities, the Festival of Light and the RSL respectively. Each knew well how to use the media to good effect. But neither was particularly persuasive to outsiders.

There was and remains a very respectable case for the retention of the Monarchy as a system of government. It is no mere chance that so many seek to flee to the United Kingdom, New Zealand, Canada and Australia. We all have a splendid reputation for stability and the rule of law. Our systems of government are not inferior to the great republics, like the USA and France, and many consider them superior. Obviously we are doing something right.

The essence of Constitutional Monarchy is to have only one fount of legitimacy (the Crown), which remains above the political fray and is thus unassailable. This gives immense flexibility in changing the Crown's advisers at the behest, and in accordance with the perceived will of the majority, of the people, without the necessity to have repeated elections. An Australian Bill Clinton, heaven forbid, could not hold on to power for years. He would be swept under the desk, if not into the waste-paper bin of history, by a mere meeting of his Cabinet or Party. I feel I should not say he would go up in smoke…

A republic without a Crown invests the President with either executive authority (think USA), or titular but moral authority (think Ireland), or something in-between. Long ago I

published in our first ACM volume a personal preference for the USA model. But it is wholly inferior to our own, I believe. The contortions of the ARM in trying to suggest a safe method to change our Governor-General to a President (during those weeks that they wanted to) illustrated how difficult such an operation was, and how much flexibility our present Constitution lost in the attempt.

Meanwhile others, beside the Liberal committee of which I spoke, had been wanting to oppose the republican push. And they were by no means all Liberals. Justice Kirby, then ironically "President" Kirby of the NSW Court of Appeal, and a formerly influential member of the ALP, was one. Dame Leonie Kramer, Chancellor of the University of Sydney, was another. Our own Sir Harry Gibbs was yet another. The then leader of the Gay and Lesbian Mardi Gras was another…

We came together in early 1993. We gathered others. We met in Kirby J's chambers several times, debating what it might be best for us to do.

Eventually we decided to launch an organisation publicly, on the eve of the Queen's Birthday weekend, 1993. We struggled to find a proper name. We did not want to be "anti" anything, so we did not choose "Anti-Republicans". We wanted to be "for" something. But how should we describe it?

The basic sentiment was that we loved our country the way it was. We wanted to defend our Constitution as it was, and to protect the centrality of the Crown in all the federal and State Constitutions. We are, after all, seven Monarchies! However, we were savvy enough to know that "Australians for the Constitution" would convey very little to the general public.

As second in the field, the battle ground had been set, and so we had to meet the ARM and ALP on their definition of "republic", as a system of government without a Monarch, although it would soon emerge that a republic with a Monarch is equally possible. (Paddy McGuinness suggested one variation today, writing in *The Sydney Morning Herald*, of a possibly elected Governor-General nominated to the Sovereign for appointment).

Forced to decide by the rapid approach of the launch day in 1993, we opted for the title "Australians for Constitutional Monarchy", but not without considerable misgivings that it would prove unwieldly. From then on we have been repeatedly urged to change our name, but to what?

Our first advertising advice was to use the phrase from our Charter, "Leadership Beyond Politics", which we thought best described the role of the Queen, and to have nothing to do with the flag or it would swamp us. We were advised to appear always in front of the title page of the Schedule to the Act of the Imperial Parliament containing the Constitution … It was hardly practical advice, even if it cost us nothing!

However, we did use the "Leadership Beyond Politics" nomenclature for a while, and LBP became our internal acronym. On every receipt and letterhead we also included the real message, "Defend the Constitution".

First rally

Our first rally was called for the Lower Town Hall in Sydney. Given only eight days' advertising, we wondered who might come. We need not have worried. Over 800 turned up and we were well and truly launched. Amongst the crowd were Sir James Rowland and many others of note.

Organisation

My then secretary, Heather Hindle and my Mac SE30 became the administrative hub. From 10 or so, our numbers advanced rapidly. We were without major backing of any kind. But we knew that unless we were always open and democratic, defeating the inevitable referendum, which alone could effect change to the Constitution, would be unlikely. Anyway, we had no choice, being short a political party and a merchant bank, unlike the ARM!

So we set out to recruit as many of the general public as we could. We aimed to be a genuine grass-roots group and to empower those without access to the élites with a voice, so long as they

sang the tune of our Charter.

We encouraged support without prior monetary commitment. It was free. This was entirely the opposite of the ARM. They charged a membership fee up front of $40 or so.

We operated on the Biblical principle of gathering the hearts and minds first and then asking for money in any amount: "For where your heart is there will your treasure be also", to invert the quotation from scripture.

On a more practical basis, numbers were as important to the Press and the apparent tide of battle as dollars. In this we were brave but pragmatic. I might also add, successful. No one was excluded from participation because of lack of money.

I came to regard giving a voice to those without means, as the greatest brief I had the honour to hold in 35 years at the Bar. During one interview I actually wept as I disclosed a letter from a pensioner sending $5 and promising another $5 on the next pension day. It was sacrificial giving like that which inspired us to keep going through thick and thin.

Tactics

We soon had to decide some basic principles as to how we would operate. Gareth (now Commissioner) Grainger produced a Speakers' Guide, which propounded fundamental principles:

- We would not attack our opponents personally.
- We would attack only their arguments.
- We would not throw around allegations of "traitor" to counter their allegations of "unpatriotic" and so on.
- We would not ally ourselves with any political party.
- We would try and make it easy to attract the at least one third of ALP voters shown by opinion polls to support the current system, but who were silenced by the ALP line. Councillor Doug Sutherland was our only ALP member of Council. The only other ALP member we could attract to speak out was Graeme Campbell, who spoke at a rally with Helen Sham-Ho, but that is another story.
- Similarly we tried to avoid any sectarian bias. We deliberately recruited prominent Catholics to the Council, and as it turned out both our chief executives were well known Catholic laity. I was horrified when Mr Keating claimed in Ireland that he was a republican because he was a Catholic. (A similar sentiment was later voiced by Archbishop Pell at the Constitutional Convention, but with more emphasis on evening old scores with the Church of England).
- We tried at all times to avoid bigotry. It proved a useful contrast to our opponents' tactics. Those in doubt might like to read Al Grassby's tome, or Tom Kenneally's outpourings on St Patrick's Day, likening the monarchy to a colostomy bag…
- We would take our opponents seriously and meet them on their own terms. Above all, we would try and persuade and not belittle them.

Organisation

We were very worried about sabotage and pre-emption of our names in individual States, so we decided to register a company to protect our activities. Compliance with complicated company law would be a nightmare if we did not keep company membership small. We decided to use it to adopt our Charter and then to operate by seeking "supporters" to promote our cause.

The outcome was highly satisfactory. The Board of the company was able to nominate widely representative State committees to launch our operations in each State. This avoided for us the fiasco of the ARM launching their South Australian branch over and over again. The small company membership, through its elected Board and National Convenor (a title I invented to avoid being "Chairman" or "President"), was able to direct a decade long campaign without dissent.

Those who wanted to join in could. Others could do their own thing. Michael kept quoting Chairman Mao: "Let a thousand flowers bloom". In all we had extraordinarily little internal conflict, and when one considers what was achieved by volunteers that was truly amazing.

National headquarters were in NSW and our greatest support came from here. Hundreds of thousands of dollars were collected and disbursed and all company accounts were centralised in Sydney. Very few donations exceeded five or even four figures. So, too, the records of our members were kept in Sydney. Every last dollar was receipted by the one national bookkeeper with a computer system developed as we went along.

I refused to allow us to go online for interstate branches. Thus we avoided the troubles that struck the ARM when their computer system was allegedly penetrated by parties unknown.

However, whilst our data was protected and backed up daily, our actual computers and their replacements were stolen. Thefts occurred on several occasions, Kerry Jones even losing the entire first draft of her book.

A huge debt is owed by ACM to Phuong Van, a computer whiz, who operated a highly complex but effective system (and still does). His life story is worth a full address in itself.

Temptations

As national spokesperson, I had to decide, early on, what attitude to adopt. It soon became evident that I was to be given as little exposure as our opponents could devise. This came through the media outlets themselves. Republicanism was news. Stability was not. The Constitution was unknown and unread. The Queen was only good for bad vibes about her family, and so on.

Let me just recount one event when there was to be a televised national debate on the ABC. I was nominated to represent ACM. The late Andrew Olley, appointed its moderator, spent an hour on the phone to me trying to persuade me *not* to appear on this program. To miss a televised national debate was a grievous blow and I demurred.

Apparently someone else allegedly objected to me participating, and would not appear if I did! I told Andrew that that was his problem. However, he kept on and on until I was made to feel that it would be totally counter-productive were I to force the issue.

I was thus denied a national appearance at a crucial stage of the debate. Andrew did say he would have me on his morning program on ABC radio (how we all miss him on that!). However, the seven minutes substituted on radio was no compensation for missing the national debate on television. I never did find out who vetoed my appearance, but it drove home how compliant the media were going to be to the republican cause, if even Andrew Olley was put under such pressure to keep me off.

When I could get on TV, it was usually only for the "ten-second-grab". As you will know, the news editors want several of these, preferably making different points, so that they can compose "news" items to divert the public. In the end I had these down to a fine art (or so they told me), but nothing sensible could be said in such a forum.

I had to settle on a formula. I decided the only useful thing I could do was the opposite of the earlier campaigners: I would be the jolly fat man who didn't seem at all rattled by the republicans, and would be seen laughing as often as I could. Not only do the public like to be entertained, but I also thought that many were laughing at it all themselves.

Once during a televised joint interview this tactic so unnerved Malcolm Turnbull that he said on air, "Lloyd, will you stop laughing?", and before I knew it I had responded, "I'm so sorry, Malcolm, but it's so hard to remember that you take all this so seriously".

Malcolm and I actually got on very well on a personal level. We appeared at numerous dinners and meetings together and were always civil. Indeed it was not unknown for him to alter the seating so that we were seated together. (We deserve to share the Chicken in Clag award, having together eaten so much rubber in white sauce, unlike tonight!)

Once he said we were like "Tweedle-dum and Tweedle-dee", to which I could not refrain from quipping, "but which is dumb, we cannot yet agree!".

One night, for charity, at a dinner at Parliament House for 200 or so we ostensibly swapped sides in the debate. Malcolm tossed and asked me to call. I pointed out that a Monarchist could only call "Heads". He won and went in to bat, describing in hilarious detail all the foibles of the Royal family, and the constitutional strait-jacket that Parliament had placed them in as to marriage, religion and so on.

My rejoinder had to start at the famous Wran Chardonay Luncheon, which got boozier and boozier, as I imagined it for all. It was a riot, but we never did it again.

I treasure letters from Malcolm which might amaze the public. Even his description of me as an Edwardian gentleman can be forgiven by someone devoted to the memory of Queen Victoria. It is, I suppose, only a little more modern! (Incidentally, he and I shared a love of music hall, and had even sung the same song in days gone by. He made me promise that the annual Victoriana I conducted for 37 years would not cease with the republic. I merely told him I thought it in no danger of doing so.)

Racism

The first major challenge we had was in Tony Abbott's time. A rugged enthusiast from Canberra had threatened to start up a rival group in the ACT, if we did not act to do so virtually immediately. We moved within 10 days and it turned out very well.

However, one of the members of the new ACT branch then made a remark which implied that the republic was an Irish plot or some such thing. A commentator gave us twenty-four hours to endorse or disassociate ourselves from both the member and his racist remarks. We had him out of the organization within even less time.

Nazism

Another great challenge came in the campaign for the election of our selected candidates to the Constitutional Convention. One was a senior branch office holder in the Liberal party on the Mid-North Coast. The allegation was made that he was a Nazi and an anti-Semite. The information was leaked to the friend of a prominent former member of Mr Keating's speech-writing staff by the young Liberals. (The republic certainly made some strange bedfellows). Asked what I was going to do about it, I replied, "Put our youngest Jewish candidate on to investigate it!".

Julian Leeser will confirm that we ransacked the State Library of NSW and eventually came up with some incriminating material published 20 years previously. Its chief offence consisted of advertisements for Hitler's *Mein Kampf*. But it was sufficient evidence to secure the candidate's immediate resignation.

I was somewhat challenged to see the same work on the open shelves at Dymock's Booksellers. But that is politics, and there seemed to me to be two entirely different scenarios in general sale on the one hand, and pushing a single work for a select purpose on the other.

The League of Rights

One of our greatest fears was that we might be infiltrated by the League of Rights and then discredited. It was hard to know who their members actually were, of course, but we knew that it would be lethal were we to be compromised. Shortly after ACM became prominent I had an open visitation from a representative of that organisation.

I told him very frankly that were we to be in any way compromised, I and the whole committee would close down the entire operation. If they wanted to retain the *status quo*, they were free to do what they liked, so long as they did not become involved with us. Were they to try, I promised that it would be entirely counter-productive and achieve the opposite of what they said they wanted. Luckily I heard no more from them, and so far as I know they neither joined

nor influenced us in any way.

Another challenge was less serious. When we had all our candidates lined up and ready to launch to the media I had a mini-revolt on my hands, with the press waiting in our ante-room to televise the announcement.

I had accepted an invitation to be nominated by the Government (suggested by the republican Peter Collins and others). This meant that we could let an ALP man, Doug Sutherland lead our NSW team. Further, we alternated male and female candidates and alternated the young and the younger.

It was on this side that it nearly all came unstuck at the very last minute. We had printed the ages of each candidate. One of our greatest supporters suddenly objected that her age was private and disclosure of it might harm her employment. Not disclosing her age meant we could disclose no one's! Eventually I succumbed, not through gallantry, but because "Hell hath no fury like a lady's age disclosed …".

We were strongly advised not to run our candidates under a "Monarchy" banner, and so we ran a "No Republic ACM" ticket. The Monarchist League ran as monarchists and secured very few votes. The "No Republic" banner already had solved our need to provide democracy for every supporter. So long as they were registered with us at National Headquarters, each supporter had the right to belong to a local branch of their choice, named after the location of greatest influence. Hence we had No Republic Goulburn, No Republic Wollongong, and so on.

Each branch had to keep its own insurance and account for all monies raised. Each elected its own office bearers and thus could conduct its activities as it saw fit. This meant that any branch that got out of line could be closed down. None was. It also meant we had an instant local base waiting to distribute literature, monitor local papers and man polling booths.

Being local, each branch mainly interested the press in that area, and so we had no ugly attempts to speak on behalf of the national body. It was an ingenious administrative arrangement that avoided all hassles, clearly defined purposes and boundaries and led to great harmony.

Major fundraising was undertaken by Head Office, and advertising thus commissioned and paid for by those who raised the money.

I pay tribute to all who joined us on the big adventure.

Conclusion

May I conclude with a few observations evoked by today's session.

I do not share Peter Coleman's pessimism about the petty irritations forced on the local Governor by the ALP Government, although they do make me equally angry. As National Convenor I condemned republicanism by stealth, and I still think it underhand.

However, The Queen herself has said that the only justification for a monarchy in a modern democracy is if the people want it. A constitutional monarch must always act on the proper advice of the people through the people's duly elected representatives. The very concept of election means that as a matter of course many will disagree with that advice. That advice will also include the arrangements for the monarch and her representatives.

Furthermore, the monarchy is evolving at its own pace. The Queen is presiding over one of the greatest transformations of the institution in a century. She is doing it slowly but purposefully on the advice of her Ministers or with their consent. These last weeks have seen an outpouring of genuine affection and appreciation that has startled even her most ardent admirers. The tributes in the recent TV series were extraordinary. At long last, a great deal of all that she has done has been made public, and there has been almost universal appreciation.

Even Gerard Henderson has foreshadowed an Oscar for the Queen for her performance, "almost without blemish", he wrote, "as the matriarch holding together what seems like your average dysfunctional family".

Indeed, as a judge of the Family Court of Australia I can say that nothing that I have read or

heard about the Royal House of Windsor has been very much different from the human trials and tribulations of the families I see before me, or indeed my own.

But the system of Government that the Queen understands so well has been an inestimable boon to our country and to her other realms and territories. And it could be in no safer hands than her own as it grows with the modern world.

Yes, the Royal Mail has gone. (Its successor lost $2 billion pounds last year). Yes, curtsies have gone, but so have they in life except for Jane Austin remakes. Yes, the loyal toast The Queen herself sanctioned on her recent visit has become: "The Queen and People of Australia".

But the immediacy of TV has meant that we can share every moment of a service like that of Thanksgiving at St Paul's last week and see more than any guest or member of the crowd.

We were often criticised because we did not campaign on The Queen. But there were two very good reasons for that.

Firstly, she was not the issue: the system of government was what counted, as she would be the first to acknowledge, as she has done.

Secondly, she is such a brilliant campaigner herself that no one could improve by any gloss. But her campaign is simple. To live her life according to the precepts of her faith, to give herself in the service of her people day by day as figurehead, Head of State of the UK, wife, mother and daughter. She can trust to the sound instincts of her people to distinguish her humility of service from the ambition of those who seek to replace her role.

Wasn't it stunning that it was an Australian, Dame Edna Everedge, who announced to the world's assembled possums "The Jubilee Girl".

Now try and tell me that the monarchy isn't changing faster that we are. If we only catch up the future is bright.

Let us see if we cannot devise a new way of looking at the institution of monarchy in Australia so that our fellow citizens, republicans and monarchists alike, can share its rich heritage and devote our future efforts to improving and serving the world about us.

Chapter Nine
September 11 and International Law

Dr Stephen Hall

The established political democracies of North America, Western Europe and the South-West Pacific began their long weekend break from history with the collapse of the Berlin Wall and the dissolution of the Soviet Union a bit more than a decade ago. Those heady days were our Friday afternoon; we happily loosened our ties, kicked off our shoes and enjoyed the prospect of a well-deserved vacation after the horrors and tensions of the previous 75 years. Our relief was immense, and understandably so.

There were some memorable events which soured the mood somewhat. The swelling popular opposition to the dictatorship in Peking was savagely repressed in and around Tian An Men Square, and Kuwait was invaded by Iraq. Many people were optimistic, however, that the Chinese events could still lead to a Russian-style reformation. The successful military liberation of Kuwait supposedly offered the prospect of a "new world order" which, according to President George Bush Snr, meant that the United Nations would be able to "fulfill the historic mission of its founders" in which "freedom and respect for human rights find a home among all nations".[1] Nothing, it seemed, could really spoil our party.

In 1992 the European Economic Community proclaimed the completion of its Single Market project across Western Europe, and the *Maastricht Treaty* establishing the European Union and a single European currency was in the process of receiving ratification. Two years later at Marrakesh, 111 States signed treaties establishing the World Trade Organisation. These developments were salient features of a broader phenomenon which quickly came to be known as "globalisation". One of the best selling non-fiction books of 1992 was Francis Fukuyama's brilliant and passionate *The End of History and the Last Man*. Fukuyama argued that History (with a capital 'H'), understood as human progress towards a final political and economic destination, had concluded with the ideological triumph of liberal democracy. No political or economic theory with the power or appeal to rival the combination of constitutional democracy and market economics (i.e., liberal democracy) as universal doctrines could now emerge or re-emerge. Fukuyama spoke to us with the confidence and much of the spirit of an earlier long weekend – the Edwardian decade.

Long weekends normally conclude, as we know, with the resumption of work on a Tuesday morning. On a Tuesday morning last September, almost 3,000 of the people who turned up to work at the World Trade Center in New York City were massacred before lunchtime. More people were simultaneously murdered aboard the commercial passenger aircraft which were used as the executioners' weapons, and 189 mostly military personnel were killed when the Pentagon building in Washington, DC was unexpectedly attacked. Many more people suffered serious injuries.

Since then we have been back at work, with History apparently in fully functional mode once more. In the meantime, Fukuyama has argued that his thesis on the termination of History remains valid. He writes that "unlike Communism, radical Islam has virtually no appeal in the contemporary world apart from those who are culturally Islamic to begin with". Fukuyama also notes that for Muslims themselves, "political Islam has proven much more appealing in the abstract than in reality", as evidenced by the sharply declining political fortunes of the Iranian mullahs and the evident relief with which the removal of the Taliban regime was greeted by the population of Kabul.[2]

Fukuyama is undoubtedly right as far as radical Islam is concerned. Whatever its potential for terror and mayhem, totalitarian Islamist ideology does not represent a *political* threat to liberal democracy. It is highly unlikely ever to attract broad-based support around the world in the same way that other radically collectivist ideologies, such as Marxism and Fascism, once did.

It does not follow, however, that constitutional democracy and market economics do not face a serious challenge as we enter the 21st Century. Such a challenge is being mounted by an influential coalition of forces, consisting mainly of international law academics, activists from numerous Non-Governmental Organisations (NGOs), international bureaucrats at institutions such as the United Nations and the European Union, national bureaucrats ensconced in agencies with social regulation functions, swathes of judicial officers in Western democracies, a relatively small number of elected politicians, and their journalistic cadre. This coalition takes the shape of an identifiable movement, though it lacks a definite organizational form and is not anything as pedestrian as a conspiracy. It really is a movement in the sense that its diverse components orbit around a number of common principles and objectives.

This coalition dreams of, and works for, the establishment of an order in which International Law assumes a quasi-constitutional form. It seeks to superimpose on States, and especially liberal democracies such as Australia, an additional layer of legal regulation which directs the achievement of certain social, economic and environmental goals. This emerging layer of regulation resembles constitutional law inasmuch as it is said to consist of rules and principles legally superior to "lower" levels of national law, including national constitutional law, and to the extent that its scope *ratione materiae* lies within fields traditionally regarded as belonging to the domestic jurisdiction of States and subject to their exclusive national sovereignty. These international regulations prescribe legally mandatory standards, mainly in areas such as civil, political, economic, social and cultural arrangements, and the natural environment. Usually referred to as the "new International Law", perhaps a better name would be "Imperial International Law".

Imperial International Law goes far beyond the older and more traditional conceptions of International Law. For most of its history, from the emergence of recognizably modern States in the 16th Century until some time after the Second World War, International Law was concerned almost exclusively with regulating contacts *between* States. Thus International Law was concerned primarily with issues relating to territorial claims, navigation, the treatment of aliens, the *jus in bello* and the *jus ad bellum*, diplomatic status, sovereign immunity and international commercial relations. With the 19th Century's scientific and technological revolution came rules coordinating international activity in certain technical areas, such as postal and telegraphic communications and the protection of intellectual property.

The rules and principles pertaining to these issues represent what may be called "Necessary International Law"; i.e., that part of International Law which regulates the unavoidable contacts which States must have with each other on the plane of international relations. They are rules conceived primarily to minimize the risk of armed conflict or, if that fails, to ensure that armed conflict does not degenerate into barbarism. Necessary International Law does not seek to regulate choices which State institutions might make concerning their internal arrangements or the way in which their societies function. To the extent that Necessary International Law is manifested in treaties and customary rules, it results from the exercise of choices by States. Treaties are contracts which States are free to conclude or reject, while customary law emerges from practices which States have adopted and by which they feel legally bound. Rules resulting from treaties and international customs are real law, just as obligations resulting from domestic contracts and customs in some national jurisdictions can be legally binding.

The United Nations was itself established within the conceptual framework of Necessary International Law. The first purpose of the UN, set out in Article 1(1) of the Charter, is to

"maintain international peace and security". This is a purpose arising from the core of Necessary International Law itself.

The Charter also requires the UN to "develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples".[3] This emphasis on the equality of States and the right of all peoples to their self-determination underlines the importance which the Charter's drafters attached to the role of free and equal States in providing the means by which the world's peoples were able to govern themselves. Indeed, the Charter states unequivocally that the UN itself "is *based* on the principle of the sovereign equality of all its members".[4] There is, furthermore, a clear prohibition on any action by the UN which would "intervene in matters which are essentially within the domestic jurisdiction of any state", or which would require the member States "to submit such matters to settlement under the … Charter".[5]

The UN Charter's references to the "promotion" of human rights[6] was originally understood in this context. Thus, the 1948 *Universal Declaration of Human Rights* was adopted in the form of a generally-worded non-binding resolution by the General Assembly and "as a common standard of achievement".[7] Twelve years later, the General Assembly overwhelmingly adopted a resolution in which it reaffirmed the centrality of the right and principle of self-determination of peoples, and declared "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[8]

The UN was premised upon the ability of all peoples freely to govern themselves in their own States. It is true that the UN always possessed legally coercive powers under Chapter VII of the Charter. These powers, which centre on the Security Council and which are subject to the veto of any permanent member of that body, may be exercised only to "maintain or restore international peace and security", and only where there is a "threat to the peace, breach of the peace or act of aggression".[9] It was not intended to be a vehicle for constructing more enlightened societies.

Imperial International Law is vastly more ambitious, and like many other superficially "progressive" phenomena of the late 20th Century, assumed a definite form in the 1960s. It is characterised by its programmatic nature and by its usefulness as a means of coercively restructuring and regulating societies within liberal democratic States.

It is effective as a tool for re-ordering only the liberal democratic societies, for two reasons. Firstly, because it is only in such societies that the Rule of Law is a powerful institution possessing both political and moral authority. If something is said to be "unlawful" or "required by law", a strong reason is advanced for compliance. If that assertion is endorsed by a duly constituted judicial authority, then not even the State, literally armed with a power to resist, will stand in its way. Outside the sphere of liberal democracies, however, arguments based on law rarely enjoy much weight.

Secondly, Imperial International Law is deployed by those who take a broadly oppositional stance to the society in which they live. They are convinced of their society's fundamentally flawed nature, and frustrated by their ability to remedy the perceived defects by constitutional democratic channels; usually because they find it impossible or irksome to persuade their fellow citizens to their viewpoint. Oppositional political activity, whether based on democratic agitation or appeals to Imperial International Law, is a much rarer commodity outside the sphere of liberal democracy.

Imperial International Law is therefore, at most, a minor irritant to regimes in authoritarian or totalitarian States. All laws are relatively toothless, and opposition is generally clandestine or necessarily cautious. On the other hand, Imperial International Law can provide a useful political weapon on the plane of international relations with which non-democratic States can opportunistically beat the liberal democracies. It is especially useful as a rhetorical weapon against the United States, which is the most powerful liberal democracy and the one most tenaciously

hostile to Imperial International Law because of its radical incompatibility with democratic self-government and federalism.

The emergence of Imperial International Law has deep roots but, as I indicated earlier, became clearly visible in the 1960s. This phenomenon was associated with the radical cultural ferment affecting all the liberal democracies, as well as the emergence of a large number of newly-independent States many of whose constitutional orders quickly collapsed into despotism and who fell within the geopolitical orbit of the Soviet Empire. By the end of the 1960s, these States formed a majority bloc in the UN General Assembly, thereby substantially altering the Organisation's character. It was in 1966 that the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* were opened for signature.

These two immensely important UN treaties go much further than the 1948 *Universal Declaration on Human Rights* in several notable respects. They are much more detailed and prescriptive than the *Universal Declaration*. They provide more than simply "common standards of achievement"; they are legally binding international treaties. Most importantly, they establish an international bureaucracy whose function is to monitor "compliance", issue official (and often highly "creative") comments on the treaties' scope and meaning, and determine complaints of infringement. This bureaucracy can, and frequently does, determine that States are in breach of their treaty obligations. Needless to say, the bureaucracy is dominated by personnel from States where the Rule of Law is either weak or non-existent and whose own record of compliance is abysmal, and by personnel from liberal democracies committed to a programmatic restructuring of their societies by means of Imperial International Law.

It is the liberal democracies which are the most frequent targets of adverse reports and findings. Similar patterns exist with respect to a slew of subsequent UN treaties, dealing with subjects ranging from the basis upon which private associations may select or reject their members, to the relationship between children and their families. Few aspects of our private and civic lives remain unaffected by these Imperial treaties. States are simply required to comply with the treaties, as interpreted by their attendant bureaucracies, regardless of the wishes of the State's population or any internal constitutional arrangements it might possess for distributing and limiting official power.

It might be objected that States, including liberal democracies, are perfectly free to decline participation in these sorts of treaties. That is only partly true. These sorts of Imperial treaties sometimes do not provide for a State to withdraw once it has become a party, even though their interpretation and application is largely dependent on the agendas of unaccountable and ideologically-driven bureaucracies (e.g., the *ICCPR* and its *Second Protocol* on abolishing the death penalty, and the *ICESCR*). This means, of course, that a people through their constitutionally chosen Government are unable to change their mind once a commitment to such a treaty is made. These treaties are therefore rather like marriage contracts before the *Family Law Act* 1975, with the exception that infidelity by the other party is not a ground for dissolution.

Even where, as is often the case, a right of denunciation exists, once a State has become a party the opportunity is lost to make reservations to the treaty, even assuming reservations were permitted at the time of signing or ratifying.

States have sometimes been held to lodge reservations, at the time of signing or ratifying, which contradict a treaty's "object and purpose". Under the general law of treaties, the effect of such a defective reservation is to remove the basis for the State's consent and to render the State a non-party. With respect to multilateral human rights treaties, however, a novel doctrine is emerging according to which the reservation is simply ignored, and the State is held bound by the treaty regardless of the fact that its consent was premised upon the reservation's validity.

Finally, most non-International lawyers are surprised to learn that a State can become bound by the terms of a treaty it has never signed and which it would never desire to sign. This delicious doctrine, you may be unsurprised to discover, has its origins in the 1960s. According to the International Court of Justice, where a multilateral treaty has attracted "a very widespread and representative participation" by States, it may be possible for norm-creating terms of the treaty to develop into general customary rules binding on all States, even those which are not party to the treaty.[10] Thus a State such as Australia, even if it makes a deliberate decision to refrain from joining a treaty forming part of Imperial International Law, may nevertheless find itself bound by the treaty's substantive clauses. This doctrine, in effect, transforms the signing and ratification of a multilateral treaty into a legislative act.

Of perhaps greater structural significance to the consolidation of a system of Imperial International Law is a now well-entrenched view among academic international lawyers and international bureaucrats that resolutions of the UN General Assembly can have a certain law-making character. Such a view is appealing to those who seek to consolidate Imperial International Law because it bypasses the frustrating and tiresome processes of constitutional democracy. It also appeals to well-meaning international utopians who touchingly regard a World Parliament as a necessarily enlightened and civilized place, and to non-liberal authoritarian States, who still form a numerical majority in the General Assembly[11] and look to shape International Law in a direction more conducive to the preservation of their poverty-generating collectivist or kleptocratic regimes. This expansive view of General Assembly resolutions received a powerful fillip from a notorious 1986 decision of the International Court of Justice. The Court relied heavily on a series of General Assembly resolutions in effectively disregarding an unequivocal condition attached to the United States' acceptance of the Court's jurisdiction, in order to find for Nicaragua's Sandinista regime in its claims that the US had unlawfully used force against Nicaragua.[12]

There are a number of principles which Imperial International Law seeks to promote and which are especially inimical to democratic constitutionalism. These principles are characterised by a collectivist view of social organization which, with the rise of economic globalisation and the manifest failure and implosion of the European Marxist regimes, find significantly diminished support among the citizens of liberal democratic States. This collectivism finds particular expression in the enthusiasm to elevate economic, social or group interests to the status of human rights.

These interests are, because they function squarely within the realm of distributive justice, especially liable to produce an expanded role for government in the regulation of civil society. Imperial International Law is little concerned with the role of individual citizens, but focuses on prescribed groups (especially racial, ethnic and gender) in the consideration of public issues and the assignment of rights and duties. It tends to require affirmative action to achieve proportional representation of "under-represented groups" in public institutions and private associations. Majority rule by citizens, regardless of their "membership" of particular groups, is to be replaced as the main principle of legitimacy by the competing principles of multiculturalism, ethnic proportionalism and power sharing among the various groups.

There is, furthermore, a concerted effort afoot among academic international lawyers to hijack the institutions of globalisation such as the WTO – which are essentially deregulatory in nature – as vehicles to advance the effectiveness of Imperial International Law. In particular, there are serious efforts to make access to the benefits of free trade dependent upon the observance of Imperial International Law's requirements in the realms of social and environmental regulation. This is a clever move to force States and their peoples to pay a heavy economic price for non-compliance.

Although Imperial International Law is constitutional in that it is, or claims to be, superior to all forms of national law, it is starkly distinguishable from liberal democratic conceptions of

constitutional law. It does not prescribe procedures for the making and, just as importantly, the unmaking of laws by institutions subject to majority control and operating within defined constitutional limits. The élites who constitute the coalition promoting Imperial International Law are uncomfortable with liberal democratic States because they confer legislative authority on institutions the people know, can observe and which they can control. The peoples of these States remain stubbornly attached to traditions and beliefs which tend to frustrate the emergence of more progressive social orders. International bodies and processes have the advantage of being opaque, unfamiliar, remote, overlapping and subject to control by the enlightened élites who promote Imperial International Law. The legal rules they generate also have the advantage of being exceedingly difficult to amend or repeal, and vaguely defined so that they remain highly susceptible to "progressive development" by courts, bureaucracies and academic commentators.

Imperial International Law is not, therefore, truly constitutional. The new order it seeks to impose, supposedly on all States, but in reality only on liberal democratic States, is better described as "post-constitutional". It is also "post-national" and "post-democratic". It is an essential component of a competing "new world order" to that proposed by President Bush Snr some eleven years ago. It is this post-constitutional and post-democratic vision, built around Imperial International Law, which poses the next great *political* challenge to liberal democracy – not radical Islamist fantasies, which nevertheless remain a real threat at the more earthy level of security and defence policy.

The response by the United States, the United Kingdom, Australia and a raft of other liberal democracies to the September 11 acts of aggression dealt a blow to Imperial International Law. After the initial shock had worn off, its exponents were quick to demand that the whole incident be treated merely as a criminal justice problem – rather like a spectacular bank robbery. The attacks showed, according to them, the pressing need for the establishment of more international agencies such as the International Criminal Court. The perpetrators needed to be "brought to justice" before an international tribunal (but not, of course, a US criminal court). Furthermore, any use of force which might be necessary to achieve that sole legitimate objective had first to be authorized by the United Nations.

This approach has a certain superficial appeal. Civilised societies are properly reluctant to use armed force unless there are no alternatives. International criminal law seemingly provided such an alternative in this case.

Yet, the allies were right to reject demands which insisted on treating the armed attacks on the US simply as matters of criminal law. To have accepted this counsel would have betrayed a fundamental misunderstanding of the challenge which now confronts us. It is notorious that Middle Eastern terrorist networks receive extensive support from a number of national governments. This support takes the form of finance, intelligence, logistics, diplomatic cover, training and the provision of bases. Various components of these networks have publicly declared war on the US and its allies, and regularly attack Western civilian and military targets. The motivations are provided by a totalitarian and collectivist political ideology with a religious demiurge, and not criminal gain. This ideology is even more perilous to the peoples of Muslim countries, over whom it aspires to exercise absolute power, than to the Western democracies.

A criminal justice approach tends to produce a focus on the foot soldiers of political terrorism; the ones who leave their "fingerprints" at the "crime scene". The standard of proof, rules of evidence and procedural safeguards properly required at a criminal trial of a particular accused are inappropriate when dealing with the threat of State-sponsored acts of aggression. Adopting a primarily criminal justice approach to the Lockerbie bombing, the UN eventually persuaded Libya's government to surrender two scapegoats for prosecution. Meanwhile the political leaders who funded, planned, organised and ordered the mass murder above Scotland continue to be represented at the United Nations.

It is sometimes argued that international criminal law will act to deter crimes against humanity and war crimes. But what self-respecting suicide bomber or terrorist commander is likely to be deterred by the remote prospect of a jail term?

Any State substantially involved in the attacks on New York and Washington committed an act of aggression against the US. America and its allies were entitled to exercise their inherent right of collective self-defence as recognised by Article 51 of the UN Charter, a central pillar of Necessary International Law.

The attempt to remove the crisis to the realm of Imperial International Law was a move designed to diminish the scope of the Necessary International Law of self-defence, and replace it with an expanded role for international lawyers and international bureaucracy which would limit the freedom of manoeuvre of the world's pre-eminent liberal democracy. It was also an attempt to subject the exercise of the United States' inherent right of self-defence to prior approval by Security Council members such as China and Syria. By responding to the attack pursuant to the traditional requirements of Necessary International Law, the United States also reaffirmed the importance of liberal-democratic patriotism as an effective response to attacks on the State, and undercut those who sought refuge exclusively in opaque and byzantine "international processes".

The terrorist attack which snuffed out more than 3,000 lives last September 11 started a military struggle which will probably end successfully for the liberal democracies. It also signals a new phase in the struggle for the survival of liberal democracy itself against the challenge of post-democratic Imperial International Law.

The ability of all free peoples to govern themselves hangs in the balance.

Endnotes:

1. President George Bush's speech to Congress, 6 March, 1991.

2. Francis Fukuyama, *History Is Still Going Our Way*, in *The Wall Street Journal*, 5 October, 2001.

3. Article 1(2).

4. Article 2(1) (emphasis added).

5. Article 2(7).

6. E.g., Articles 1(3) and 55(c).

7. Preamble.

8. General Assembly Resolution 1514 (XV) of 14 December, 1960, Article 2.

9. UN Charter, Article 39.

10. *North Sea Continental Shelf Cases* (*Germany v. Denmark, Germany v. The Netherlands*), ICJ Rep (1969) 3 at para 73.

11. According to the Freedom House report *Freedom in the World 2001-2002*, which measures the extent to which countries are free according to criteria relative to civil rights and

political rights, there are 86 free countries (45 per cent), 58 countries which are only partly free (30 per cent), and 48 countries which are not free (25 per cent).

12. *Nicaragua v. US*, ICJ Rep (1986) 14.

Chapter Ten
National Interest versus International Law: The International Criminal Court

Dr Janet Albrechtsen

Last week the United States Senate approved a law authorising the use of force to rescue Americans held by the International Criminal Court at The Hague. Democrat David Obey said that meant sending US troops to invade The Netherlands. It was too preposterous, he said.[1] Obey is right – but not in the way he intended.

That international law has come to this – the US needing to invade a Court in The Hague to shore up its right to govern its own people – would be funny if it were not so very serious.

There is a spectre hanging over Western liberal democracy these days. It hardly seems secure. But the danger is not an external threat. The real danger is the enemy within.

Australia's "peace, order and good government" is being tinkered with. Our Constitution's Preamble may not have the glamour of America's "life, liberty and the pursuit of happiness", but it has served us equally well – in that understated Australian sort of way. But, increasingly, it's being threatened by a merry band of pseudo-intellectuals, cosmopolitan globalists, bureaucrats in Brussels, human rights activists, law-making judges and politicians who treat democracy with disdain, all united under the banner of international law.

At the domestic level – within a country such as Australia – these activists encounter too much of what Tennyson called the "common sense of most".[2] So their causes go nowhere.

At the international level, there is too little common sense. Supranational bodies are full of other so-called champions of social justice. There's no electorate acting as a brake on the inclinations of this élite mob. That's why they use international forums to do an end run around domestic democracy. International forums get them somewhere.

We have to understand their tricks. Calling something a matter of "social justice" – as if something were so incontrovertible only a philistine would question it – is one of the tricks used by globalists to override democracy. The other trick is to place yourself beyond "dirty" domestic politics, as if supranational or international status itself confers legitimacy. But they have no legitimacy because they suffer a democratic deficit.

For many, September 11 was the first step in a clash of civilizations – countries imbued with democratic ideals fighting it out for survival against those with very different religious and cultural beliefs. Samuel Huntington, a Professor at Harvard University seemed prophetic when, in 1996, he described this coming "clash of civilizations".[3]

Francis Fukuyama had got it wrong, it seemed. He argued that Western liberal democracy represented the end point in a long evolutionary trail of governance: democracy was inevitable.[4] His good news theory seemed overshadowed by those terrorist attacks of September 11.

But Huntington's darker theory is also incomplete. If we factor in the world's modern day obsession with international law, there is a battle – but it's with the enemy within Western liberal democracies.

If that all sounds a little dramatic, think about the exponential growth of international law in the last 50 years. We've gone from governing relations between countries to dictating relations between people. We've gone from asserting fundamental civil and political rights to force-feeding countries on a fashionable diet of new-fangled economic, social and cultural rights. And what each of those means depends upon who happens to be sitting on the relevant committee on a particular

day. In other words, your guess is as good as mine. At this rate, where will we be in 50 years time? One thing is clear – the western liberal democratic nation state will be neither democratic nor a nation state.

And so pervasive is this anti-democratic trend that even conservative politicians are getting in on the act. A couple of weeks ago our own Workplace Relations Minister was enticed. Faced with a Senate refusing to enact the Government's promise of delivering exemptions for small businesses from the unfair dismissal laws, Tony Abbott indicated he might take the high road – the road to international law.[5] It's all so convenient. When Parliament gets in the way, find a Convention in international law that allows you to get the result you want. Judges do it. And politicians do it.

As Professor Pat Lane said recently, "the Commonwealth government's innumerable international assurances lie in ambush", waiting to overturn the decisions of domestic democratic bodies.[6]

It's legislating through the back door – a strategy not normally favoured by conservative governments.[7] But as Mr Abbott told his gathering, "times change". Indeed they do.

Times have changed so much that German playwright, Bertold Brecht, is mixing in high society these days. His 1953 joke from the play, *The Solution* about the East German Communists losing faith in the people – and needing to elect a new people[8] – is no joke these days. Brecht is at work in the salons of Paris, in chic Sydney restaurants and, of course, in the labyrinth of offices housing international law bureaucrats.

Whenever democracy fails to deliver what you want, the tendency these days is to seek out a new, more sympathetic electorate. And what could be more sympathetic than a group of like-minded, self-proclaimed champions of social justice meeting in Geneva or Brussels or New York. And the International Criminal Court (ICC) – the newest and sexiest weapon in the armoury of international law – is a crystallisation of this trend and all that is wrong with international law these days.

Where is Australia headed on the ICC?

In March, as part of a 28-nation civics survey, the Australian Council for Educational Research reported that half of Australian students had little understanding of democracy. How could it be otherwise when our politicians seem to suffer the same affliction?

Last month the Parliament's Joint Standing Committee on Treaties rubber-stamped the Government's proposal that Australia ratify the 1998 Treaty of Rome establishing the International Criminal Court.[9]

That the push for ratification comes from Australia's top law officer says much about our respect for democracy, because the ICC threatens how we rule ourselves as a sovereign nation. But, as an international law devotee, the Attorney-General reverted to the popular bandwagon fallacy in explaining why Australians should not be concerned about the ICC impinging upon our national sovereignty. That fallacy rests on the flawed assumption that if enough countries say the world is flat, then the world is flat.

In his submission to the Treaties Committee, the Attorney-General said that all countries are concerned to protect their national sovereignty, and because other democratic countries have ratified the treaty, we should be comforted enough to do the same:

> "One can safely assume that ensuring that the ICC does not threaten national sovereignty is of as much concern to Canada, New Zealand, France, Germany, South Africa and Italy. Those countries are clearly satisfied on that front and have ratified the treaty".[10]

And so should Australia, says the Attorney-General.

But his logic is lazy. The ICC throws up a timely challenge to countries like Australia. So let's take a slightly more sophisticated path than the one our Attorney-General would have us

take. Let's meander a bit down the European Road, and then down the American Road, before we decide where Australia should go on the ICC. The two roads lead in very different directions.

The European road by-passes the national in favour of the supranational. This road leads north, away from the individual nation state to the highly regulated, highly bureaucratic supremacy of the supranational European Union (EU) and its love of all things global. The American road leads in the other direction – south – to the American people and the nation state.

Take the American road south?

Writing in *The Spectator* a few weeks ago, Mark Steyn said:

> "In America, power is vested in 'We, the people' and leased upwards, through town, county, state and federal governments, in ever more limited doses".[11]

America is the most democratic country on earth. Democracy is everywhere. It's in the school classroom, it's in the local town hall, it's in the State legislature and it's there on Capitol Hill. Importantly, democracy starts at the bottom and rises, giving the American people what Steyn calls the "spirit of liberty" – something lacking in Europe, where the supranational is extolled as superior to the national, and therefore far superior to the workings of suburban democracy.

In 1840, Frenchman Alexis de Tocqueville understood what millions of French people and their European neighbours just don't get:

> "Town meetings [suburban democracy] are to liberty what primary school is to science: they bring it within people's reach, they teach men how to use and enjoy it".[12]

In the days after September 11, friends kept asking Steyn why Mayor Giuliani, rather than the President, took charge of Ground Zero and the streets of Manhattan:

> "The implication seemed to be that the mayor is some kind of understudy, that the system isn't working unless the top guy's there".

But "that's to get it exactly backwards", according to Steyn. "It's in the mayor and ... and other municipal institutions that you measure the health of a society".

And America is much healthier than Europe, where the democratic deficit sees Eurocrats in Brussels wielding power over just about everything from speed limits on laneways in Cornwall to economic and foreign policy. As Steyn says:

> "The issue is not how to make the chaps in Brussels more accountable, but why all that stuff is being dealt with in Brussels in the first place – why so much of the primary school science can only be entrusted to the laboratory's men in white coats, like Chris Patten".

That same question applies to much of international law, and most certainly to the ICC. The question is not how to make unaccountable bodies more accountable – but why invest such power in supranational bodies at all.

The internationalists argue that we need international forums to deliver international justice. The US believes the opposite: only the checks and balances of the nation state can ensure international justice. In a speech to the Centre for Strategic and International Studies last month, US Under Secretary of State for Political Affairs, Marc Grossman said:

> "Nations with accountable, democratic governments do not abuse their own people or wage wars of conquest and terror.
>
> "A world of self-governing democracies is our best hope for a world without inhumanity".[13]

That's the American road.

The American road – unsigning the ICC treaty

That road led President George W Bush to do the unthinkable last month[14] when he "unsigned" the 1998 treaty establishing the ICC. Defence Secretary Donald Rumsfeld said, at the time, that the US will regard as illegitimate any attempt by the ICC to sit in judgment of American citizens.

Bush's action contrasts exquisitely with the Clintonesque logic behind America's initial signing of the treaty on New Year's Eve 18 months ago. Like so many things Clinton did in that busy midnight hour, signing the 1998 Rome treaty was foolish. Clinton noted "significant flaws" with the treaty but signed anyway, convincing himself that the US could then work from within to remedy the problems.[15]

That strategy failed. It simply proved that, for western liberal democracies like Australia and the US, embracing the current genre of international law means letting others define the issues for you. And that means subjecting yourself to one of two fallacies propping up much of international law these days – the bandwagon fallacy I referred to earlier (enough countries say X, so X must be true), or the appeal to authority fallacy (someone powerful says X, so X must be true).

As we've seen with our own Attorney-General, globalists busily rely on both fallacies in their quest to sell the ICC to the world. The "appeal to someone important" fallacy was given a boost when Clinton signed America's name to the ICC. The internationalists delighted in the apparent legitimisation of the Court. The most powerful country in the world agrees to the ICC and so other countries must follow, went the mantra. Last month Bush rejected both fallacies and renounced the treaty. It was a gutsy move.

The response from the internationalists was predictable: they immediately reverted to the bandwagon fallacy – 66 other countries have ratified, so the rest of the world must follow. When America still refused, you can image their disdain. The "anti-American pseudo-intellectual bourgeois clique", as Alexander Downer puts it, which derides President Bush as a simpleton, went into overdrive. Michael Kelly, an Associate Professor at Creighton University School of Law in Omaha, Nebraska was outraged:

> "Signature removal is unprecedented in American international legal practice and ... would signal to the world that democracies can unilaterally sign or unsign treaties whenever there is a change of government".[16]

What exactly is dangerous about sending the signal that democracies can unsign treaties, one wonders? National sovereignty is in serious trouble when, even as a matter of practice, democracies cannot unsign treaties, as Kelly would have it. The world needs more, not less, signature removals if the internationalists are to understand this thing called democracy.

The ability to make and unmake laws is fundamental to the functioning of liberal democracies. Laws are made, changed, unmade, remade, repealed, reformed by parliamentary representatives at the direction of the voting people. And if that means unsigning a treaty, it's still democracy at work. Bush understands this and knows an attack on democracy when he sees one. September 11 was an obvious one; under the guise of internationalism, the ICC is a less obvious but only slightly less sinister one.

Australia could do with a large dose of Bush's gutsy simplicity when it comes to protecting our own democratic institutions. The alternative is the European Road.

Or the European road north?

Take a short stroll down that path and it soon becomes obvious why even some of the original Euroglobalists are starting to question the wisdom of supranational bodies.

Historically, Europe's geography – countries living cheek by jowl – has seen the nation state cause immense problems. Europeans have grown used to supranational solutions as an antidote to excesses of nationalism. But the EU – that gargantuan supranational bureaucracy in Brussels – has simply created a different sort of excess – a supranational one. That excess was obvious in Austria when Jorg Haider's right wing Freedom Party won government in 2000 only to be greeted by sanctions imposed by the EU! It was Brecht at work: the EU pseudo-intellectuals longing for a new electorate and showing their utter disdain for the nation state.

And so the EU is busy selling its supranational model to the world. And it uses its superior numbers to create international bodies (such as the ICC) that have the power to override independent nation states.[17]

But as Daniel Johnson said in London's *Daily Telegraph*,[18] there is a revolt against the ruling élites and their brainchild, the European Union and its derision of national sovereignty. We saw that revolt when the far-Right French politician, Jean-Marie Le Pen, dealt Socialist Prime Minister Lionel Jospin a knock-out blow in France's first round Presidential elections in April. The press cried foul, and denounced Le Pen's win over Jospin as a "blow to democracy" – Brecht at work again. But they were mixing their prepositions. Le Pen's win was a blow *by* democracy.

For all his faults – and his hotchpotch of anti-globalisation, anti-genetic foods, anti-Americanism suggests many policy flaws – Le Pen rode the wave of resentment building in countries like France, where "national interest" is treated by mainstream politicians, on both the Left and Right, as a dirty word. To raise the question of national interest on issues like the EU and immigration is to question the unquestionable.

The orthodox view was that nothing more that apathy explained Le Pen's win in April. Many voters did not bother to vote, so disaffected were they by politics – the corrupt Jacques Chirac, the bland Lionel Jospin and the fissiparous French Left. The BBC reported that a record 28 per cent chose to stay home or leave town to enjoy the spring weather. Writing in *The Australian* at the time, I said that apathy and good weather can hardly explain Norway, Denmark, Austria, Italy, Spain, Portugal and Belgium, where precisely the same reactions have taken place.[19] That's an awful lot of apathy and sunshine.

Others label any swing to the Right in Europe through the prism of 1933 Nazi Germany – Fascism at work again. But neither apathy nor Fascism gets to the heart of what's happening. It's a backlash – a revolt – against a smug establishment, who treat the genuine concerns of the masses over national sovereignty, multiculturalism and immigration with disdain.

The globalists deride the so-called "lurch to the Right" in Europe, but it's getting pretty hard to define the European Right these days. The only thing the ex-military man, Le Pen has in common with the late Pim Fortuyn – the 54 year old openly gay, former television personality and sociology Professor shot down nine days before Dutch elections in May – is their distrust of the EU, immigration and multiculturalism.

If the Euro-globalists long for a new electorate after the latest swing to the Right across Europe, then there is a large rump of voters in France, The Netherlands, Norway, Denmark, Austria, Italy, Spain, Portugal and Belgium – by the last count – who hanker after that relic, the nation state.

Time for a wake up call for international law

Politics at the national level are mirrored at the international level. So that what happened in the French presidential elections in April and May is precisely what happens at the supranational level. Whenever the electorate – in this case a member state – disagrees with the accepted wisdom of the international élite, immediately the member is denounced as an international pariah. Every time a country questions a treaty or a Convention, it's awarded this badge of shame.

It happened when Australia refused to sign the *Kyoto Protocol*. It happened a couple of years back when Australia refused to sign the *Optional Protocol to the Convention for the Elimination of Discrimination Against Women*. And as for America, it has so many of the international pariah badges, it's running out of lapel space.[20]

But if the recent trend to the Right at the national level of politics is any indication, then the enemy within may be in for a wake-up call. The one big difference between national and international politics is that a national electorate can deliver this wake-up call on a regular basis at democratic elections. Delivering that same message at the supranational level is much harder.

There are no elections. And so the globalists have been allowed to get away with so much in recent times. The International Criminal Court is their latest win.

The ICC – a monument to all that is wrong with international law

When 120 countries adopted a treaty in Rome in 1998, it was as if they agreed to build a monument to all that is wrong with international law. And they did a mighty fine job of it. Ex-President Jimmy Carter told *CNN* that the ICC would be a great deterrent. And if we can't deter, then at least we can prosecute the next Milosevic, said our Foreign Minister, Alexander Downer.[21]

Look a little closer at the *Statute* and it becomes clear that the ICC does more than seek to prosecute the butchers of the future. It subverts a free people's ability to govern itself. The ICC is an altogether different beast from those *ad hoc* bodies set up to prosecute the Nazis in Nuremberg, genocide in Rwanda and ethnic cleansing in the Balkans.

Illegitimate jurisdiction – the rule of complementarity and opting out

In a disturbing break with accepted principles of international law, the Court – having reached the requisite number of ratifications in April this year – now, rather audaciously, claims power over the whole world. The notion of consent – the very foundation of international law 50 years ago – is being undermined by this new international beast. It has power to investigate, try and punish citizens of countries that have not signed and ratified the treaty.

This shows how far international law has moved from its original purpose of dealing with the rights and obligations of sovereign nations. The Rome Treaty, like a myriad of international law treaties, conventions and committees, regulates individuals. What's novel about the ICC is that it regulates individuals from countries who have *not* ratified the treaty.

While a member state can "opt out" of any new crimes added to the ICC Statute, thereby exempting its nationals from the Court's jurisdiction for those new crimes, a non-member who has never ratified the treaty is caught by any new "crimes".

For those who do ratify the treaty, the ICC says, magnanimously, that it won't intervene if a member state "genuinely" investigates the alleged crime. But the motley crew of ICC judges has absolute power to review and reject that country's decision.[22]

Earlier this month, Malcolm Fraser said it was "unlikely" that Australians would be tried without our consent.[23] Quite frankly, "unlikely" is not good enough. And understandably, "unlikely" is not good enough for the Americans with their global deployment of military forces in peacekeeping efforts and in the war on terrorism.

It's revealing that those who opposed US military intervention in Afghanistan are the very same crowd who cheer the ICC. But their desire to curb US military might is as dangerous as it is naïve. As Jeremy Rabkin, from Cornell University, points out:

> "Much of the world wants to pretend that international justice can be delivered on the cheap. Mass murder in Rwanda? No need to send troops and risk casualties of your own. Just send in a team of lawyers to show you care".[24]

These globalists make a serious mistake in misunderstanding the differing roles of military action, diplomacy and justice.

The more realistic position is that the world will continue to look to the US for military muscle. But in light of the ICC, that's untenable for America. So Americans are in the laughable position of having to legislate to reaffirm their right to rule their own citizens.[25] And they will now be reluctant to play saviour in the next Kosovo, for fear of ending up at the mercy of a political court on trumped-up political charges.

A month ago Washington signalled it might pull its peacekeeping forces out of East Timor unless it is given a guarantee that Americans serving with the UN will not be turned over to the ICC in The Hague. It is, of course, highly unlikely that an American peacekeeper in East Timor

would end up before the ICC. But Washington is serious about establishing the principles of immunity which apply next time its military is required in one of the world's hotspots.

The exact same problem emerges for Australia when we send our military to those same places. And what about those still serving in East Timor? The potential for political prosecutions is there in the language of the ICC Statute.

A problem with language

The globalists have followed Napoleon's advice that a good Constitution should be short and confused. The ICC *Statute* needed to be short, said the globalists, to give the world time to understand the difference between "ordinary" and "extraordinary" criminals. And confused it certainly is. The *Statute* is littered with highfalutin' but nebulous language like "war crimes", "crimes against humanity" and "genocide".

This abuse of language is a common feature of international law. And, like so much else in international law, the original *Statute* is treated as just the beginning – the ICC was always seen as growing into something much bigger.[26] In fact, the ICC is already a jurisdictional leviathan and there is potential for many more currently unknowable crimes. No wonder the globalists are so excited about the ICC.

There are 15 actions which amount to a "crime against humanity". That list includes the sorts of things one might expect to see – murder, torture, rape. But of course it doesn't stop there. It is also a "crime against humanity" to severely deprive someone of one or more of their fundamental rights contrary to international law based on their political, racial, national, ethnic, cultural, or religious beliefs or their gender.

This clause raises obvious problems. The recent Fitzgerald Report found that violence in Queensland's Cape York Aboriginal communities is so endemic that a ban on alcohol is needed if substance abuse continues at current rates. Could that amount to depriving people of a fundamental human right based on their race?

If national sovereignty is to cede to international law where human rights are violated, then the exact content of these human rights becomes vital. But if you look at some of the reports by the CEDAW – the Committee for the Elimination of Discrimination Against Women – the list of fundamental human rights grows by the day.

CEDAW will point to the Taliban as reason enough for their excessive reach, but has then proceeded to advise countries like Germany, Spain and Luxemburg on the need to "eradicate stereotypical attitudes" from their democratic societies.[27] It admonished Belarus for re-instituting Mother's Day celebrations.[28] It criticized Norway and Hong Kong for granting exemptions to religious institutions from those countries' discrimination laws.[29] It criticized the Irish for thinking, living and voting like Catholics, especially in relation to abortion.[30] Could these, one day in the future, be matters dealt with by the ICC?

So you get the feel for where the ICC might be going. And then there is the catchall phrase – another common feature of international law. So it's a "crime" to inflict great suffering or serious injury to someone or to his or her mental or physical health, by means of an inhumane act. Going back to the Fitzgerald example, journalist Kate Legge reported in *The Australian* that:

> "… a doctor in Cape York who assisted Fitzgerald said that if white communities were suffering a tenth of the neglect, violence, sexual abuse, truancy and foetal alcohol syndrome, governments would have sent SWAT teams in to remove the youngsters long ago".[31]

If these indigenous children are removed, can we really assume that indigenous activists won't rush to The Hague for a hearing before the ICC, claiming injury to mental health by removing children from their families? Another so-called "Stolen Generation"?

In response to the Fitzgerald report, ATSIC Commissioner Brian Butler said that a long history of colonialism, racism, assimilation and dispossession bred systemic violence. And these claims are made all the time about government action.

Like other international forums, the ICC will be a tempting arena for these activists. If Australia were to hitch its star to the ICC, can you imagine the fun to be had over immigration policy, and our mandatory detention policy, using these nebulous terms.

With predictable hyperbole, two weeks ago the United Nations Human Rights Commission said human rights violations at Woomera were the worst seen in a string of overseas camps. Foreign Minister Alexander Downer shot back, in Parliament, that "whatever the rights and wrongs of these issues, we will decide them for ourselves, not have bureaucrats in Geneva decide them for us".[32] Brave words, but sheer rhetoric in light of the ICC. These issues may well be decided, not by bureaucrats in Geneva, but by ICC judges at The Hague.

These vague definitions would be unacceptable in a domestic law criminal statute. Why should we countenance them at the international level?

Recently, the Law Institute of Victoria gave the ICC the thumbs up and spoke excitedly about being at the "forefront of the development of international law, for example, through the prosecutions for the crime of aggression".[33] Only problem is that this crime has yet to be defined. Signing up to a Court that has power over a crime yet to be defined is surely a sign of madness. The next time the Australian Navy boards a boat full of illegal immigrants, they might be committing the "crime of aggression". And small facts, as with *Tampa*, where some of the boat people threatened violence, may be ignored. The only thing we know for certain about this new "crime" is that it will be defined with similarly nebulous language. And there will, no doubt, be a catch-all phrase tacked on at the end.

This genre of international law is objectionable for the same reason that domestic judicial law-making is objectionable. It's policy-making, social engineering and governance by an unelected, unaccountable group of élites who by-pass the traditional democratic processes of law reform.

And you won't be surprised to hear that Amnesty International and Human Rights Watch wanted the ICC's power extended beyond deciding the guilt or innocence of a party, to the murky area of awarding reparations to victims. Western activist judges must be salivating. What could be more noble than applying your well-practised law-making skills to these amorphous notions? And awarding damages to boot. Makes tinkering with the domestic law of negligence look pretty boring.

The flip side of activist Western judges are non-Western judges who defer to government before deciding anything. No Chinese judge would dream of deciding anything without getting a rubber stamp from what passes for his government of the day. And with China and Syria on the UN Security Council, expect to see a Chinese and/or Syrian judge on the ICC some time soon.

It's bad enough ceding national sovereignty to a foreign Court which is based on liberal democratic traditions. Australia decided to abolish appeals from our High Court to the English Privy Council sixteen years ago. Why would we even consider subverting our judicial system to a supranational one in The Hague made up of activist judges and judges from countries with no history of democracy?[34]

A court of politics, not law

So the ICC will be a court of men, not laws; a court of politics, not principles. This was clear on the day that the ICC became a reality. When 66 states ratified the treaty, an Israeli-Arab politician suggested that the Israeli Prime Minister and his Cabinet be immediately investigated for war crimes.[35] This should have come as no surprise, because international bodies have always been about subjective politics, not objective law. Delve a little into the recent history of some

international forums and the writing is on the wall for the ICC. Look at what happened in Durban last year.

When the United Nations was awarded the 2001 Nobel Peace Prize for their work for "a better organized and more peaceful world", it brought to mind the best of that tireless British sitcom, "Yes, Minister". The UN gets a prestigious gong just a month after hosting what can only be described as the most disorganized and disastrous UN conference ever. Disastrous because the most significant outcome of the Conference on Racism, Racial Intolerance, Xenophobia and/or Related Intolerance was to inflame large doses of racism, racial intolerance, xenophobia and/or related intolerance – against the Jews and the West. Over 150 nations couldn't agree on how to define racism and religious intolerance, let alone how to eradicate it. That the gabfest in Durban went ahead at all says much about what the United Nations is about: it is not about uniting nations. It is about pointing the finger at the West for the world's growing list of woes.

That the Third World was born guileless and innocent, only to be brutalized by the West, is a popular slogan in many parts of the world. It's especially popular with the globalists in the West. And the Nobel Prize-winning UN has done little to correct it. As delegates dispersed from Durban, they were left with the resounding message that slavery is only slavery when carried out by the West. Never mind that African countries like Sudan and Mauritania still tolerate the ownership of black slaves. And, racism is only racism when whites discriminate against blacks, or when Christians or Jews discriminate against Muslims. Never mind that racism and religious intolerance is rampant in countries like Saudi Arabia, India and Malaysia. And the globalists wonder why Israel has taken the American Road and renounced the ICC! As Edward Greenspan said at a conference in Toronto, Canada this year, "How can the world expect Israel to trust the UN or any organ created by it after that debacle?".[36]

When the French Ambassador to Britain referred to Israel as "that shitty little country" in an off-the-cuff remark back in December last year,[37] he summed up the animosity that Israel faces from the so-called "international community", meaning Europe and the Arab world.

Writing days after the Durban conference and a few days before the terrorist strikes on September 11, Arnold Bleichman, a research fellow at the Hoover Institute, expressed concerns in *The Washington Times* about "[t]he majoritarian power of Islamic culture in the United Nations – 22 Arab League members, 55 Organisation of Islamic Conference members and various pro-Arab delegations…".[38] That majoritarian power was clear in Durban. It was also evident when Muslim and Arab countries tried to distance themselves from the US military response in Afghanistan. And it's there in the UN's opposition to Israel's self defence against Palestinian terrorists.

The Nobel Prize Committee's own words reveal a rich, and no doubt unintended, irony. The Committee described the UN as "an organization that can hardly become more than its members permit". Durban revealed just what sort of organisation it has become: one that encourages anti-West sentiment under the banner of "tolerance", and one that preaches democracy from a very undemocratic pulpit.

Look at the UN Human Rights Commission. Once it probably enjoyed a certain cachet. But, like Durban, too many activist groups hoping to cash in on the cachet to push their own pet causes have left the Commission's legitimacy and credibility seriously damaged.

Less than half the UN member states are democracies. Many have not signed human rights treaties, yet that doesn't preclude them from sitting on the Human Rights Commission. In May, 2001 the US was dumped from the Commission, despite having been a founding member in 1947. Instead, the overseeing of human-rights abuses is left to one-party states such as China, Cuba, Pakistan and Libya. Again, it might be funny were it not so serious. And the ICC is likely to go the same way.

Last month, a Commission resolution supported the use of "all available means, including armed struggle" to achieve a Palestinian state. It condemned "mass killings" of Palestinian civilians by Israeli incursions on the West Bank, but said not a word about Palestinian terrorism –

the suicide bombing of Israeli civilians. The resolution exposed how the Human Rights Commission is completely captured by anti-American and anti-Israel forces. The 57 member Organisation of Islamic Conference (OIC) drew up the resolution, and all but one OIC member on the Commission voted in favour. Most of the EU members fell in behind the Arabs.[39] Even those who indicated they did not fully support the resolution decided to sign anyway.[40]

The Commission is the latest manifestation of "bourgeoisophobia" – a long word for what David Brooks in *The Weekly Standard* calls the newest and most virulent form of racism – anti-American and anti-Israel sentiment[41] – now flowing through the veins of the three stooges – the EU, the UN and the Arab world. It looks set to run through the judicial veins of the ICC. But as Greenspan said: "Today Israel is the favourite whipping boy of the UN. Tomorrow it will be another country [that] today supports the ICC".[42]

Conclusion

Modern international law is often described as a new political movement.[43] But this new order is looking less like a political movement, and more like a religious one. There is a zeal to international law and all its accoutrements these days. It's built around a moral authoritarianism, and the people are required to cede power to a higher authority. The underlying thesis is, as the New Zealand politician Max Bradford said a few years back:

> "… that the closer to God you are, the greater the moral authority you have to impose your view of the world on those below you. As international organizations are perceived to be closer to God than member states, the greater is the moral authority they can wield …".[44]

And wield it they have, and under the ICC they will continue to do so. In fact, the ICC sits at the pinnacle of the international law monolith, and thus sits closer to God than any other international body. It's a hard line to swallow for us pagans who believe we make the laws. And when pagans challenge the religion of international law, we are reviled for not believing in "human rights". In fact it's the globalists who have little time for "human rights" – real human rights, like the democratic right to vote.

The ICC, like so many international organs, is a blunt instrument in the quest for "global justice". It might just manage to prosecute this century's Milosevic, but the collateral costs to free nations along the way are too enormous. There are other ways of dealing with the hard men of history. But there's only one way to protect the ability of a free people to govern itself. The ICC deserves the thumbs down. Sometimes it really is best to do nothing. The ICC is one of those times.

So the decision on which road to take is no decision at all. Taking the European Road means joining the enemy within – becoming a member of bourgeoisophobia, as David Brooks calls it, or what Mark Steyn calls the slyer virus: the West's anti-westernism. Whatever you call it, the irony is that the West's tolerance and associated liberties have created this road that leads to the enemy within – this perverse trend to deny the achievements of the Western liberal democratic tradition.

This road is best left untravelled. At every opportunity Australians need to remind the Government that, as Alexander Hamilton once said, "Here, sir, the people govern". And the Government can pass that message on to the rest of the world.

Endnotes:

1. *International Herald Tribune*, 13 May, 2002.

2. *Locksley Hall*, (1842).

3. *The Clash of Civilisations and the Remaking of World Order*, New York, Simon & Schuster (1996).

4. *The End of History and the Last Man,* Avon Books (1993).

5. *The Australian Financial Review,* 31 May, 2002.

6. See Professor P H Lane, *Recent Trends in Constitutional Law*, March, 2002, 76 *Australian Law Journal* 154 at 155.

7. See J T Ludeke, *The High Court exceeds its brief*, in *The Australian Financial Review,* 30 July, 1993.

8. *"Would it not be easier*
In that case for the government
To dissolve the people
And elect another?"

9. See Report 45, *Statute of the International Criminal Court,* Joint Standing Committee on Treaties, May, 2002.

10. *Ibid*., para 2.16 at p.19.

11. *The Spectator*, 18 May, 2002, pp. 19-20.

12. *Democracy in America* (1840).

13. Speech given on May 6, 2002. Text at http://usinfo.state.gov. See also *Why Sovereignty Matters: The Erosion of Democracy*, by Geoffrey de Q Walker, *National Observer*, Summer, 2002, pp. 33-38 at 37.

14. On May 6, 2002.

15. *Chicago Tribune,* 1 January, 2001.

16. *USA Today*, 16 April, 2002.

17. See Greg Sheridan in *The Weekend Australian,* May 11-12, 2002. As Sheridan asks, in an aside, if the EU is so keen to be seen as one entity, why does it get so many votes in international forums?

18. *France is still in denial over threat posed by Le Pen*, in *Daily Telegraph*, 6 May, 2002.

19. *The Australian,* 8 May, 2002.

20. According to Amnesty International and Human Rights Watch, on human rights America is no better than Tibet or Rwanda. See *The Human Rights Lobby Meets Terrorism*, by Adrian Karatnycky and Arch Puddington, *Commentary*, January, 2002. Reprinted in the Institute of Public Affairs *Review,* March, 2002.

21. Interview on Channel Nine's *Sunday*, 2 June, 2002.

22. See *The United States and the ICC: Concerns and Possible Courses of Action*, Lee A Casey, Eric J Kadel, David B Rivkin and Edwin D Williamson, 8 February, 2002 at 13.

23. *The Sydney Morning Herald,* 3 June, 2002.

24. *A Dangerous Step Closer to the International Criminal Court*, American Enterprise Institute, January, 2001.

25. The *American Service Members' Protection Bill* requires immunity guarantees for US troops on UN operations and authorizes action to free Americans detained or held by the ICC.

26. See Donald W Shriver, *The ICC: Its Moral Urgency*, in *Monitor,* No. 7 (www.igc.org/icc/monitor.htm).

27. CEDAW/C/2000/I/CRP.3/Add.7/Rev.1, paras 25-28 (Germany); CEDAW/C/1999/L.2/Add.6, paras 24-27 (Spain); CEDAW/C/2000/I/CRP.3/Rev.1, paras 25-26 (Luxembourg).

28. CEDAW/C/1999/L.2/Add.3, para. 30; CEDAW/C/2000/ I/CRP.3/Add.5/Rev.1, paras 9, 23-27 (Belarus).

29. A/54/38, para. 314 (China/Hong Kong); A/50/38, para. 460 (Norway).

30. CEDAW/C/1999/L.2/Add.4, para. 20.

31. *The Weekend Australian*, 24-25 November, 2001.

32. *Now the world is watching*, in *The Sydney Morning Herald,* 8-9 June, 2002.

33. Statement issued 30 April, 2002.

34. See John Stone, *Mad Government*, in *The Adelaide Review*, May, 2002.

35. Mohammad Barakeh, a Communist member of Knesset, the Israeli Parliament. See *The Washington Post,* 12 April, 2002.

36. Speech given at conference at Osgoode Hall Law School of York University, Toronto and co-sponsored by the Friends of Simon Wiesenthal Cente for Holocaust Studies on 20 January, 2002. See *Legal minds at odds over global court of law*, in *Globe & Mail*, 21 January, 2002.

37. *Daily Telegraph* (London), *Islamists overplay their hand but London salons don't see it*, by Barbara Amiel, 17 December, 2001.

38. See *A War of Cultures*, in *The Washington Times,* 6 September, 2001.

39. Of the eight EU members on the UNCHR, six voted in favour – Austria, Belgium, France, Portugal, Spain and Sweden. Britain and Germany sided with Canada to oppose the resolution. Italy abstained.

40. Canada's *National Post* newspaper reports that Sweden's Ambassador approved the resolution "without joy" because the resolution's sponsors, the Organisation of Islamic

Conference, would not accept "improvements to the resolution". Portugal's Ambassador said that his country's support "did not imply total support for some of the formulations of the text".

41. *Among the Bourgeoisophobes*, 15 April, 2002.

42. *Loc. cit.*.

43. See Professor Kenneth Minogue, *National Sovereignty versus Internationalism: The Importance of Repealability*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 12 (2000), p.337. See also *The Ideological War within the West*, by John Fonte, *Orbis*, Summer, 2002.

44. Hon Max Bradford, *The ILO and Sovereignty: New Dawn or New Dinosaur?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 12 (2000), pp. 50-51.

Chapter Eleven
Treaty of Waitangi: Only Good Intentions?

Steven Franks, MP (NZ)

"The Treaty is moving in as surely as the tide. In the statutes of our Parliament, in bureaucratic operations, in the level of the administration of the courts and in local authority planning, the Treaty is now well known. You know when we stand at the foreshore we do not always see the movement of the tide. We see no more than the regular breaking of the waves, as if no painful inch is gained. But look back to the creeks and inlets. There, silently, it is plain to see the tide running at full flow …" (Edward Taihakurei Durie, 1989, Chief Judge of the Maori Land Court and Chairman of the Waitangi Tribunal).

Summary

This paper is a situation report for Australians on the claims of indigenous people in New Zealand. It argues that the claims have surfaced as a flood tide of race discrimination. That tide is propelled by many of the forces evident in other countries – a combination of understandable grievances about cultural arrogance and abuses of state power, with majority group guilt, charitable intent and radical chic. In New Zealand, as elsewhere, academics give "reverse racism" a spurious legitimacy with their theories of post-colonialism.

In addition, New Zealand has a unique element – the *Treaty of Waitangi* between the Crown and many Maori chiefs in 1840. It provided for, and assumed, eventual assimilation of legal equals. Much of the law being minted elsewhere to reassert indigenous self-determination is a poor fit in New Zealand, at least for those who simultaneously want to use historicist legitimacy to advance Maori political claims. Yet even the *Treaty* has been pressed into service by those fostering race discrimination.

This paper suggests that in New Zealand at least, legislating for indigenous privilege is now close to its high water mark. There may be some low lying marsh areas still to flood, and the full tide may hold for some time yet under pressure from a strong but local onshore political breeze. But out in the main channel, if it is not slack water, the ebb has started.

This paper will:

- Record the approach New Zealand has taken to the UN's *Draft Declaration of the Rights of Indigenous Peoples*.
- Outline New Zealand's 1840 *Treaty of Waitangi*.
- Review the political history of the *Treaty*.
- Summarise the current political status of the *Treaty of Waitangi.*
- Review the Courts' *Treaty* jurisprudence.
- Consider the current authority of the Waitangi Tribunal.
- Outline the reasons for extensive litigation and tension among claimants.
- Focus on shifting positions on these matters by significant politicians, including New Zealand's main opposition party (the National Party).
- Outline the valuable role the *Treaty* could fill in constitutional terms, by acting as New Zealand's guarantee of respect for property rights.
- Identify what needs to come next in New Zealand's political debate.

The paper urges a revived power for the values that drove many New Zealanders who campaigned to end apartheid in South Africa. Those values would be easily recognised by the earlier generation who produced the universal *Declaration of Human Rights*, and the *United*

Nation's Covenant for Elimination of all forms of Racial Discrimination. Those values were drawn from our common inheritance, the work of men such as Thomas Paine, John Locke, Edmund Burke, the founding fathers of the United States, JS Mill, and myriad other western intellectual forebears.

They underpin the rule of law Maori bargained for, and got, when they signed the *Treaty of Waitangi*. It was not universal franchise democracy. The core elements were individual rights and property rights. They give the fundamental assurance of freedom necessary to sustain and restrain the tolerant state operating under a colour-blind law.

Many of the people and their arguments for indigenous rights are fundamentally hostile to the Enlightenment values. For a modern state that wants to uphold its founding values there may be little room for compromise with them.

New Zealand and the *Draft Declaration of the Rights of Indigenous Peoples*

New Zealand has been an active member of the UN Working Group on Indigenous Populations. It has promoted efforts to establish the Permanent Forum on Indigenous Issues to function as an advisory body to the UN Economic and Social Council. New Zealand claims to be "firmly committed to achieving a declaration on the rights of indigenous peoples".[1]

We appear to have been relatively uncritical supporters of the promoters of the *Draft Declaration*. Whether that has been a matter of conviction, or instead of calculated alignment for diplomatic advantage, it is not clear.

We have not, for example, been prominent with the US, the UK, France, Japan and The Netherlands in seeking amendments to the draft to uphold individual rights of members of indigenous people groups, instead of group or collective rights. Our approach has been to see potential coexistence of collective and individual rights. It appears New Zealand did not press the United States' concern that collective rights can be exercised in a manner detrimental to individual rights. The US was willing to support wording that allowed persons to exercise their rights "individually as well as in community with other members of their group".[2]

In relation to draft article 3 that would guarantee indigenous peoples the right to self-determination, New Zealand was with the countries that required qualifications to protect against secession arguments. Exactly what the reservations would mean in wording terms appears not to have been detailed.

Clearly there is tension between demands for self-determination by indigenous peoples and official UN policy. It argues that self determination should:

> "… not authorise or encourage any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of legal rights and self determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[3]

On the contentious issue of definition of "indigenous peoples", New Zealand supported proceeding without a definition. This is effectively support for self-identification. This is consistent with the New Zealand Government's current approach to Maori status in New Zealand law. Entitlement to vote on a Maori electoral roll or to qualify for various services confined to Maori, is largely based on self-identification. The New Zealand Government is, nevertheless, helping the governing structures of traditional tribes (*iwi*) to establish registers that will enable conclusive determination of *iwi* membership. $600,000 was allocated in last year's Budget to facilitate access to the government electoral roll to keep track of *iwi* members, and to help people to apply. *Iwi* leaders will decide whether applicants for registered membership of *iwi* are entitled by descent.

In the result, the Working Group on the *Draft Declaration* failed to present its report on the anticipated date of 15 April this year. It may never get much further.

New Zealand supported the establishment of the Permanent Forum that met for the first time last month. We urged that it have a permanent mandate and permanent funding, against the objections of countries (including many in Asia) that wanted it more limited.

The Permanent Forum may be seen as a compensatory sop. Perhaps opponents of expanded indigenous rights expect it to be an ineffectual talking shop. The New Zealand Government must suspect from its experiences with New Zealand Maori that large conferences and meetings on indigenous peoples' issues will infrequently result in concrete decisions and action.

New Zealand may have felt insulated from some of the potential costs of a *Declaration of Rights of Indigenous Peoples* because it will not have much relevance to New Zealand. If our *Treaty of Waitangi* is regarded as a valid treaty of cession, and New Zealand Maori are recognised as having largely assimilated, as contemplated by that Treaty, most of the *Declaration's* "rights" are spent. On that view, it was costless for New Zealand to pose as a sympathetic supporter of indigenous peoples.

Alternatively, New Zealand's diplomacy was conducted without proper regard to the contradictions with our constitutional position and elevation of the *Treaty of Waitangi*. There is good reason to consider that New Zealand's position is constitutionally unique.[4] Many of the troublesome doctrines and the ballooning jurisprudence from Canada and the US relating to first nations are not applicable to New Zealand.

This leads us to the *Treaty of Waitangi*.

Treaty of Waitangi

In 1840 the British signed with over 400 Maori chiefs a short three-article treaty. Article 1 purported to cede sovereignty to Britain. In Article 2, Maori were assured respect for their property rights and rights of self-determination in relation to their property, and in Article 3 they were assured the rights and privileges of British subjects, thus extending the rule of law to all New Zealanders.

There is much learned (and not so learned) disputation about the proper interpretation of the Treaty. Whether, and to what extent, it extinguished aboriginal or indigenous rights may turn on this dispute.

It was signed in an English version and a Maori version. The versions are clearly different. For example, the Maori version omits the English version's express assurance to Maori of the exclusive possession of their forests and fisheries. The Maori version refers in Article 2 to *tino rangatiratanga*, or the chieftainship of Maori chiefs and individuals over their land and property. Chieftainship is said to mean many things. Professor Ranganui Walker of Auckland University claims:

> "The guarantee … is in effect a guarantee of … the sovereignty of the chiefs. … Therefore the second clause of the Treaty was diametrically opposed to the first clause of the English version".[5]

An alternative view, also from a writer sympathetic to Maori aspirations, refers to chieftainship as "a kind of authority" operating "across that domain of meaning inhabited by such phrases as 'authority over' (people), 'authority on' (a subject matter), 'authority with' (certain people), 'property in', 'rights in and over things', 'rightful power', 'rightful control', 'leadership', 'stewardship', 'trusteeship', and so on". He resolved the sovereignty/chieftainship tension, saying:

> "The autonomy [many Maori] claim … is like the autonomy of the sixteenth-century English justice of the peace: self government at the Queen's command".[6]

The Maori word *taonga* in Article 2 was translated in the early days as meaning possessions or valuable property. More recently it has been asserted to mean "treasures", and to cover intangibles such as language, customs and spiritual values. In a current claim before the Waitangi

Tribunal (WAI 262), given significant credence by supporters of an expansive role for the Treaty, Maori want the ownership of intellectual property rights in indigenous flora and fauna.

Background

From 1810 to 1840 Maori had endured a holocaust of war. War was customary for Maori. But the casualty rates and the displacement increased dramatically as grievances and vendettas old and new were pursued using muskets. Though there were probably no more than 2,000 Europeans in New Zealand in 1840, Maori were amongst those seeking the intervention of the British Government to ensure an end to war. Over that thirty-year period as many as half of the population had died, and vast areas had been depopulated. Expeditionary forces conducted operations with a ferocity more savage than reported recently from Rwanda and Bosnia. Cannibalism was common.[7]

Many Maori also wanted from the Treaty certainty of tenure to enable land trading. Those who understood the British system wanted transferable titles because they wished to attract Europeans amongst them. European (*Pakeha*) trade was widely seen as both an assurance of prosperity and some underpinning of access to weapons. They knew they were stepping into a new world in which British religion and customs would contend for their souls.

The Treaty through the years

In the absence of significant military force, the British rule of law extended only slowly throughout New Zealand. There were early breaches of the Treaty by tribes. This resulted in the landing of British troops and significant battles within a few years of signing.

After 1860 there were sustained land wars as the settler Government pressed for land transfers. Maori increasingly resisted because of the huge rate of European immigration.

By 1877 the Chief Justice of New Zealand[8] described the Treaty as a simple nullity. In 1941 the Privy Council confirmed what by now was the conventional approach, namely that it was of no legal effect, except to the extent it was expressly incorporated in domestic New Zealand law by deliberate act of Parliament.[9]

Throughout the latter half of the 19th Century Maori sold land. After 1865 a Maori Land Court individualised titles in a process that made sale easier and more land available for settlement. Demoralisation and disease reduced Maori numbers to as few as 40,000 by the 1890s. At the turn of the century a New Zealand politician felt able to describe government efforts for Maori as "smoothing the pillow of a dying race" because Maori seemed so debilitated.

Maori communal land holding meant that few Maori would have qualified to elect parliamentarians under a land holding criteria. Instead, four seats were reserved for Maori after 1867. When the land holding qualification was dropped, this segregation served to reduce the settlers' fears that Maori voters would swamp *Pakeha*.

In the early decades of the 20th Century a renaissance revitalised Maori. It was led by some extraordinary men, very well educated in both Maori custom and European scholarship. They adapted traditional structures within new legal frameworks to overcome some of the disadvantages of communal land holdings, and to use remaining Maori land better. They pursued political power within Parliament, to improve health, and to extend education more widely.

Maori participated in New Zealand expeditionary forces to South Africa during the Boer War (though they had to Anglicise their names to avoid a British edict that Maori should not participate in a white man's war). The First World War saw Maori pioneer units, as well as service by Maori using the now recognised route of Anglicisation. In the Second World War the Maori Battalion brought martial glory for Maori generally.

In the first six decades of the 20th Century the expectation on both sides was generally for assimilation. The extent of accommodation or respect for Maori culture was seen as more a matter of courtesy or good manners than a requirement suitable for reflection in law. Various

long-pursued complaints of breaches of the *Treaty of Waitangi* were investigated between 1920 and 1950. So called "final settlement" agreements were reached and legislated for between 1943 and 1946, usually involving compensation by way of annual payments to trust boards established for the claimant tribes.

Consistent with the assimilatory ambition of the times, in 1971 New Zealand passed a *Race Relations Act* as part of its effort to implement the *Covenant for the Elimination of All Forms of Racial Discrimination*. The language of the *Covenant* and the *Race Relations Act* reflect the common commitment to work toward a state and a society in which race was officially irrelevant, and race distinctions would become illegitimate.

The four Maori Members of Parliament had over many years pressed long-standing Maori grievances over Treaty breaches. But they were also concerned about the vulnerability of Maori land to new depredations. Maori ownership was often widely dispersed, and resulted in land being undeveloped. As such it was often a prime target for taking for public purposes. In 1975 the third Labour Government, to which the four Maori MPs belonged, established a Waitangi Tribunal to consider claims of Treaty breaches from that date.

Around this time a new generation of young Maori were debating decolonisation theories. Renascent Maori consciousness began to show itself in political activism. Among the young this was associated, as elsewhere, with anti-establishment left-inspired activism. It often amalgamated opposition to patriarchal hegemony, and to capitalism or the market economy, with anti-colonialism.[10]

These young enthusiasts emboldened older folk. They disliked continuing land sales, and the social consequences in traditional tribal areas of rural depopulation when people followed work to the cities.

By 1981 the rhetoric of the young activists had developed strong separatist characteristics. At the same time the majority of left/liberal activist New Zealanders were tearing the country apart over opposition to sporting contacts with South Africa. They demanded "one person, one vote" and "colour blind law" to end apartheid in South Africa.

In 1985 the fourth Labour Government, in a burst of idealism following a promise that had not gone through the party's correct policy-making process, extended the jurisdiction of the Waitangi Tribunal. It was now empowered to consider grievances dating back to the signing of the Treaty in 1840. But the Tribunal was instructed not to make decisions affecting private land. Though the Tribunal's powers largely confined it to making non-binding recommendations to the Government, Pandora's box was opened.

In 1987 that Labour Government ran into trouble when it corporatised State trading businesses. Leading Maori saw an opportunity for tactical use of the courts. They wanted to bring urgency to the Government's consideration of certain Treaty breach claims. As a political compromise, section 9 had been inserted in the *State Owned Enterprises Act*. It declared that the Act could not authorise anything that would be in conflict with the "principles of the *Treaty of Waitangi*".

When Maori went to court, the judges had to start working out what to make of these references to principles.

Current legal status of the Treaty

The legislative dam having broken, references to the so-called (and largely undefined) "principles" are now scattered liberally in New Zealand legislation. There are few references to Treaty provisions themselves (notably a reference to Article 2 of the Treaty in Part 3A of the *Maori Fisheries Act* 1985).

By way of example, significant laws with Treaty references now include:

- The *Resource Management Act*. Local authorities must have regard to Maori concerns when considering building consent and other land use applications. Maori

are paid consultants' fees. Maori groups can withdraw culturally based objections in return for compensation. This effectively gives local Maori groups all over the country an opportunity to extract Danegeld. As an observer described it:

> "The Danegeld industry probably adds a race tax of tens, if not hundreds of millions of dollars a year to the economy's cost base in an uncontrolled and unaccountable manner".[11]

- After a considerable political furore, the *Health and Disability Services Act* 2000 reserves seats for Maori on the new boards providing local health services. The Bill initially required that Maori health services have priority over services provided to other New Zealanders. That was modified but not eliminated.
- The *Hazardous Substances and New Organisms Act* 1996 requires the Environmental Risk Management Authority to have regard to Maori concerns. These include animistic superstitions. The Chief Executive of the Authority interprets its task as to take "account of the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *wahi tapu* (sacred places), valued flora and fauna and other *taonga* (treasures)".

Other official developments may not include direct Treaty references, but they rely on the general impetus:

- In 2000, a Royal Commission on Genetic Engineering urged the Government to make all speed in responding to a Maori declaration of property rights in all indigenous flora and fauna.
- An Act last year authorised one regional territorial authority to establish a separate Maori electoral roll. From it, Maori will elect members of the local authority in proportion to Maori population in the area. A new *Local Government Bill* will extend that system across the country.
- Maori were granted rights to a quarter of radio spectrum auctioned in 2000. The Government established a trust for the rentals they will derive from it.
- A current tax reform grants to Maori owned companies and trusts a tax rate of 19 per cent, whereas all other taxable corporations pay 33 per cent.
- A proposal to abolish New Zealanders' right of final appeal to the Privy Council in London will involve the establishment of a new Supreme Court. At least one judge selected on race or cultural grounds is to be a requirement.
- New Zealanders are becoming inured to periodic scandals as students or public servants suffer discrimination for failure to render ritual obeisance to Maori culture, particularly in classes designed to engender support for the theories that underpin legal privilege for Maori. The term "cultural safety" covered the replacement of 20 per cent of the curriculum time in nurse training with indoctrination by teachers of Maori culture. Some of this has involved unmistakeably racist hostility to things European.

The Treaty and the courts: the living document

The courts have taken up with enthusiasm Parliament's invitation to develop new law when it referred to the "principles of the Treaty". Notably, they ordered the Government not to dispose of radio stations without ensuring adequate resources to promote Maori language broadcasting.

Lord Cooke of Thorndon, when he was President of New Zealand's Court of Appeal, accepted submissions that:

> "[the Treaty] should be interpreted widely and effectively and is a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty".[12]

The just retired President of the Court of Appeal, Sir Ivor Richardson, was a member and stated in the same Case:

> "Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise".

In another case in 1989 Cooke P said "the principles of the Treaty have to be applied to give fair results in today's world".[13] In a 1990 case he said:

> "The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change".[14]

The author of a *New Zealand Law Journal* article, after noting that Cooke P described the Treaty as "an embryo rather than a fully developed and integrated set of ideas", commented:

> "It is as though the courts believe that the Treaty is an ever speaking, ever changing constitutional instrument, a chameleon document for all seasons, capable upon interpretation of delivering beneficial results (for the lucky some) indefinitely into the future, a fructuous tree indeed and bountiful with it. … It is the very epitome of myth and of the apparent wishful desire of some of our judges for a 'higher law' Constitution which, fortunately for the rest of us, does not exist and, with continuing good political management, will never be imposed upon us".[15]

Since that was written we have acquired a *New Zealand Bill of Rights Act* 1990. Initially it was to have incorporated the *Treaty of Waitangi*. That became too controversial. In hindsight that is regrettable, for our *New Zealand Bill of Rights Act* omits property rights. The Treaty might have supplied that want. Those who signed our Treaty would never have expected the general law to stop respecting classical property rights.

Many Commonwealth Constitutions were framed during the baleful intellectual reign of the post-War Fabians at the London School of Economics. Independence leaders often saw property rights as an unfortunate impediment to "land reform". Yet only Singapore among Commonwealth countries fails to make any provision for property rights.

The significance of this omission, and the extraordinary New Zealand ignorance of its importance, can be seen in Tom Allen's comprehensive work, *The Right to Property in Commonwealth Constitutions*.[16] New Zealand does not even have an index entry. Of the hundreds of case citations, only four are New Zealand cases, none upholding property rights. Among over 200 works in his bibliography there is only one with any recognisable New Zealand connection.[17]

So despite the Treaty's assurance of property rights to Maori, and its consistency with mainstream understanding of fundamental rights, there is no New Zealand constitutional entrenchment of property rights. Yet the courts have not endeavoured to extract or assert property rights as one of the principles now proliferating in our legislation. It is not even mentioned judicially as part of the spirit of the Treaty.

Tino rangatiratanga as property rights

After more than three hundred years of painful post-feudal political growth, British common law asserted:

1. The law should be no respecter of persons, treating the great and the small alike;
2. Property rights must exclude the arbitrary power of the state to requisition or interfere with the exclusive possession, use and enjoyment of property (absent war or extraordinary exigency); and
3. Judges should enforce contracts freely entered by adults, not substitute their view or the State's view of what contracting parties ought to have decided.

That was the law extended by the Treaty to Maori and *Pakeha* alike. Accordingly, *tino rangatiratanga* need be no mystery. Article 2 of the Treaty is not in conflict with sovereignty.

"The Englishman's home is his castle" summarised the jealously guarded right of the British citizen to do as he would inside his private property without interference from princes, priests or any other despots. Sir Edward Coke (d.1634) expressed it in his Report on *Semayne's Case*:

> "The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose".

That was the full chieftainship assured to "all the people of New Zealand", both *rangatira* and ordinary Maori.

Properly understood, the first part of the Second Article merely expresses the classical features of property rights. Full and undisturbed possession is the right to keep others out. The right extends without consideration of rank or status, so that the weak are protected against the strong.

Ownership also gives the right to the fruits or benefits of the property, to receive the income. It must include the right to transfer the property to others, whether by inheritance or by sale.

The Crown's right of pre-emption in the Treaty conflicted with that. In the English version, it is a "right of first refusal" qualification, not a negation. But in the Maori version, and in Governor Hobson's opinion, it was an exclusive right to the Crown to buy. This was both paternalistic and potentially exploitative. And exploitation ensued, though arguably less of it than would have accompanied unrestricted trading. In either case, pre-emption conflicted with the equality of rights promise to Maori in Article 3.

This "property right description" solution to the debate about *tino rangatiratanga* is elaborated by the author in a paper presented to the New Zealand Law Conference in October, 2001.[18]

Instead of extracting conventional fundamental rights of property, the courts in New Zealand have extracted a partnership principle. This was so convenient for those who wanted to advance the Treaty for political use that it has passed immediately into the vernacular. Without defining shares, or how far the parties could bind each other, or what the analogy was supposed to achieve other than as a rhetorical device, the Court of Appeal stated, "The Treaty signified a partnership between races".[19]

There is nothing in the text or in the context of the Treaty to suggest that the Crown, or Maori, contemplated what we are now told is partnership. Even if it had, they could only have been multiple partnerships, each between the Crown and a signatory tribe or chief, because Maori were hostile separate tribes. David Lange, Prime Minister at the time the Court invented this partnership, has since expressed to the writer his view of what the Court extracted from the statutory reference to the "principles":

> "I am not an expert in Victorian history, but I do not believe for one moment the Queen ever thought her loyal servants were signing her up to a partnership with 400 thumb prints".

The Treaty did not assume, and nor was it followed by, any mechanisms by which the Maori partner or partners could act as such. In 1852 the *New Zealand Constitution Act* contemplated regulations to preserve application of Maori customary law in particular districts, but it was not followed by significant implementation. In 1860, needing to secure majority Maori neutrality in the looming war with Waikato Maori, the Government convened an assembly of Chiefs. The Chiefs were given some hope (which proved to be vain) that it would be a regular occurrence. They entered into what is called the *Covenant of Kohimarama*, affirming the Treaty.[20]

On the other side, the Crown party no longer has a character that is suitable for domestic political partnership. To New Zealanders there is now no Crown in the sense of an embodied counter party. In a democracy we are all participants in "sovereignty". It is hard to see how

some of us (claiming Maori descent) can be in partnership with all of us including themselves, when we all collectively determine what the Crown can or must do. Governor Hobson's repeated greeting to each signatory at Waitangi after signing was "*He Iwi Tahi Tatou*" – "we are now one people". That cannot be twisted into any notion of constitutional partnership.

Nevertheless, partnership rhetoric can help New Zealanders focus on the positive side of the expectations that motivated the signing of the Treaty. The fears that also propelled it are equally important. Neither gives rise to principles that justify racism – that is, privileges and special power conferred by historical brownness rather than by ordinary principles of property succession.

The founding document?

Another claim of substantial political significance has been that the Treaty is essential to the legitimacy of *Pakeha* presence in New Zealand. Clearly it does now have constitutional significance in a political sense. It also legitimised the Rule of Law applied by the British in New Zealand, from the perspective of many Maori.[21] In this New Zealanders have a gift that few other peoples have. The near universal human experience of different peoples trying to share one geographical area is of seizure of authority and occupancy by force of arms (or treachery), and subsequent legitimisation by practical demonstration of effective control.

For at least 130 years New Zealand's government has been legitimate in legal terms because it has enjoyed the obedience of the people. Accordingly, though the Treaty provides useful evidence of legitimacy very early, it is neither necessary nor conclusive to those who want to contest our unitary sovereignty.

Historicism and appeals to legitimacy have a powerful and often baleful influence. They lead to an extraordinary investment in debate over the circumstances of the signing, which is the authoritative text, the extent of common understanding or the meeting of minds, and 150 years of Maori/Government and Maori/European transactions.

Yet unreported discourse and radio talkback suggest many ordinary New Zealanders sense a hopelessness in trying to remedy grievances so old, or even in determining conclusively the rights and wrongs of the dispute. So far those views have not prevailed against political and judicial fascination with at least the rhetorical force of legitimacy and historicism.

Positive duty of active protection

One of the principles extracted by the Courts has been Treaty partner responsibility "analogous to fiduciary duties". Cooke P said:

> "Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people and use of their lands and waters up to the fullest extent practicable".[22]

He says *Pakeha* and Maori owe a duty to act toward each other "reasonably and with the utmost good faith".[23]

This responsibility has become a justification for positive discrimination and privileges of many kinds. A group launched in 1986 by the then Governor-General called "Project Waitangi" was officially sponsored to promote "understanding" of the Treaty. It describes the Crown promise as being "to guarantee and actively protect Maori absolute authority (*tino rangatiratanga*) over Maori systems, possessions and resources".[24]

This perception of a duty to achieve partnership is so pervasive that many territorial local governments now think it is stated somewhere in law. In Wellington, for example, both layers of local government have self-nominated representatives of local Maori *iwi* (tribes) on the payroll, as members of consultation committees. Most councils have so far resisted demands that these unelected persons be given voting power equal with, or superior to, elected members, but in status and influence these consultation organs can have real power.

From this so-called fiduciary principle has emerged a duty to consult Maori. In 1988 the

Lange Labour Government issued a statement of the "Principles on which the Crown Proposes to Act" in relation to the *Treaty of Waitangi*. Principle 4 is "the principle of co-operation". It stated:

> "Reasonable co-operation can only take place if there is consultation on major issues of common concern and if good faith, balance and common sense is[sic] shown on all sides. *The outcome of reasonable co-operation will be partnership*". (emphasis added).

While the duty to consult has been expressly held not to constitute a veto power, in practice consultation rights can interact with procedure in many spheres so as to create a *de facto* veto power. If Maori undertake not to exercise rights of objection, that forbearance can cost them money.

The current status of the Tribunal and the Treaty claims process

The Treaty now has talismanic powers. Its penumbra in the so-called principles extends into many statutes. The Waitangi Tribunal is grinding through more than 900 claims for redress for alleged historical breaches by the Crown of the Treaty. Only a handful of settlements has been concluded. They include some with tribes that have previously had full and final settlements, several times before. To date the Crown has paid, or provided for payment of, over $500 million (excluding fisheries settlements). It has signed formal apologies and acknowledgments of fault. It has established special guardianship status for Maori in respect of areas of public land and undertaken to co-administer some sites of significance, and to give rights of first refusal over Government asset sales within tribal areas.

Many millions of dollars have been expended in historical research, much of it funded by the Crown or from a body called the Crown Forestry Rental Trust, which receives cutting rights revenue from land over which state forest plantings were established in the 1930s.

The Waitangi Tribunal has enjoyed official and media respect. It has determinative power on few matters. Generally it can only recommend to the Government.

That respect is now fraying. It is not seen as the independent "truth commission" envisaged by the more well meaning Labour Ministers who in 1985 extended its jurisdiction back to 1840. One of them, the Hon Dr Michael Bassett, since 1994 a member of the Tribunal, and a reputable historian, recently caused uproar by publicly describing one Tribunal report as "extravagantly written", and containing " a lot of very tendentious words". He was referring to a claim that Maori in one area had suffered a "holocaust" as a result of Crown actions in the 1860s. Maori had been displaced, but the casualties were few. In comparison with the Scottish clearances and the ethnic cleansing among the same Maori only two decades earlier, the "holocaust" claim indicated a serious lack of perspective on the part of the Tribunal.

Dr Bassett stated on nationwide television:

> "It is true there are a lot of agendas at the Tribunal, and the dominant one is a feeling that one detects quite early in the piece that the staff are there on behalf of the claimants rather than making an historical judgment that will come to the truth …
>
> "The balance is missing, and what worries me is that too many people just start from the assumptions that Maori are always going to be right and the settlers … who benefited from the land are always wrong. That worries me because while it's true some of the time it ain't true all of the time".[25]

Maori applicants immediately took proceedings to have Dr Bassett excluded from hearing a claim before the Tribunal.

New Zealand's fisheries quota management system was being established when Maori claims to compensation for loss of customary fishing rights came to a head. Broadly, Maori obtained a half share in New Zealand's major fishing company and quota rights, which together amount in value to over $1 billion.

The fisheries claims offer an interesting example of debatable scholarship by the Tribunal.

In its *Muriwhenua* report the Waitangi Tribunal held that Northland Maori had been deprived of their fisheries in breach of the Crown's duty actively to protect them. The report was widely lauded. Boiled down it says: Maori once could have fished all the fish in the adjacent seas. Now they can't. The Crown must compensate them.

Cases and legislation have recognised common law customary rights to fishing. These may be distinguished from the broad Aboriginal or indigenous rights which may be more familiar to Australians. It is not denied that the Crown has the right to control fisheries by statute. The common law customary rights are accordingly interstitial, applying where permitted by express exception, or by absence of statutory prescription.

But the *Muriwhenua* report failed to explore *ahi ka*, a custom that governs Maori customary title. Title can be lost through voluntary lack of use – the situation prevailing among many Northland Maori pursuing the *Muriwhenua* claim.[26] This was pointed out by an expert practitioner in Maori land law, Marcus Poole, but ignored then and since.

In the ten years since the fisheries fund was established, little if any benefit has been seen by ordinary Maori. The fund has accumulated. Fishing rights have been leased to foreign operators. The highest public profile for the Treaty of Waitangi Fisheries Commission has been for the litigation in which it has been embroiled. Essentially it is litigation over the distribution model.

Who gets the spoils: tensions among claimants

The Treaty was with Chiefs as representatives of their tribes. But most Maori now no longer live in their tribal areas, and more than a third have little or no connection with, or perhaps even knowledge of, their tribal descent. If the settlement assets are distributed to traditional tribal leaders, three things are likely:

- For some *iwi* there will be continuing dispute over who has authority now for those purposes. Tribal elders or *kaumatua* are recognised by custom, but new corporate or trust structures are needed to hold the assets. They need a process for establishing a mandate. There is argument over whether those processes must be democratic, or whether traditional methods of conferring leadership authority, and determining succession, can still work.
- Corporate tribalism is largely rurally based. There is tension between tribe members who have stayed around the traditional areas, and those who now visit from their urban homes. Some of the best qualified are living in cities, and many thousands in Australia.
- There is considerable debate over how the spoils should be distributed. Some want permanent endowment, some tradeable rights or shares for beneficiaries, some want to engage in business specifically employing beneficiaries, and others favour "commercial" investment policies.

If Treaty settlements are treated in accordance with principle as compensation they should go to tribes(*iwi*). *Iwi* are the successors of those whose rights were breached. If proceeds are instead put in some kind of trust for detribalised urban Maori generally, they could be going to descendants of Maori who assisted the Crown in land seizures or other activities that gave rise to the claims.

Some of the most active and forward-thinking Maori leaders come from urban areas. John Tamihere, a Labour Member of Parliament, came to public attention for his leadership of the Waiparaira Trust, which had a range of contracts with the Crown for delivery of training and health and employment services. These urban authorities have been strongly challenging the proposed distributions to the successors of traditional *iwi* leaders. This issue is unresolved.

The Treaty has thoroughly permeated official New Zealand. Solemn statements purporting to uphold the *Treaty of Waitangi* are found everywhere. It has particularly penetrated academia. For example, the charter of Auckland University of Technology sets out "Guiding Principles".

After committing to "international standards of scholarship, learning, teaching, and research, excellence, innovation and creativity", they commit to "The *Treaty of Waitangi* and the aims and aspirations of the Maori people".

The University's stated goal number 2 is "To give effect to the *Treaty of Waitangi* within the context of university education", and goal 3 is "To effect equitable opportunities and *outcomes* for the diverse communities the university services".[27] (emphasis added).

Such preferences and race distinctions multiply. New Zealand was an early signatory of the *International Covenant for the Elimination of all forms of Racial Discrimination,* but the *Covenant* is now an embarrassment, not a guide. The writer has not seen the threshold test for positive discrimination[28] applied for any official purpose for many years.

Recent politics

The National Government in power from 1990 to 1999 attempted to confine Maori expectations of windfalls from the Treaty claim process. They set a $1 billion maximum total envelope for claims. The Labour Government that took power in 1999 has formally repudiated the envelope, but to date claim settlement negotiations appear still to be working within its constraints. The Waitangi Tribunal and Maori representatives frequently refer to claim amounts as being acknowledgements, or tokens of good faith, and not true damages compensation, because they are so much smaller than the claimed losses. Some claimants talk openly of the next generation's claims, despite this round requiring acknowledgement of "full and final settlement".

In 1997 the ACT Party was described as radical, and was attacked as racist, for a Bill which would have set a time limit on the receipt and handling of claims to the Waitangi Tribunal. This became National Party policy early this year.

When the current Labour Government took office their stated intention was to propound new principles for dealing with claims. In the end they simply restated the principles outlined by the Lange Labour Government in the 1980s. More significantly, Labour planned to develop principles on which to approach so-called contemporary issues. These claims arise essentially:

- from political partnership or shared sovereignty notions;
- from the Court-evolved notions of positive duty on government to propagate Maori language and culture; and
- from the claims of continuing breaches, through failure to ensure Maori health, wealth and happiness.

The promised elucidation of principles for contemporary claims has not been seen. Instead, *ad hoc* arrangements are developed by different ministries and Ministers, to deal with particular pressures at particular times. For example, a long delayed reform of our trademark law now requires the Commissioner of Trademarks to cancel, without compensation, marks for which there is evidence of cultural offence to Maori.

The Labour Government began office making a programme of "closing the gaps" its flagship policy. The gaps were those alleged to exist between Maori and *Pakeha* wealth and well-being. With an initial specific Budget allocation of over $240 million per year, and a requirement for a "whole of Government focus" on advancing Maori, it soon ran into both credibility and achievability problems. Promised objective measurements of results and progress have never been applied, or even defined. Officials questioned about the measurements have prevaricated. The Government no longer uses the term "closing the gaps".

The primary torpedo of the "closing the gaps" policy was the release of analysis[29] by a Dr Simon Chappell, an official in the Labour Department. He reviewed statements attributing disadvantage to race and appears to have established that race was not the appropriate discriminant. Conventional socio-economic class factors were a much better predictor of disadvantage. Put simply, there are plenty of *Pakeha* who are poorer than average, and plenty of Maori who are better off than average.

Dissolving political consensus

From 1985 through to 2000 there was very little mainstream inter-party political debate about Treaty matters. Labour had boasted the Maori MPs since the 1930s. Labour was responsible for inserting Treaty clauses in legislation generally, and for extending the Waitangi Tribunal's jurisdiction.

National had a long tradition of respect for aristocratic Maori leadership, and ministerial championship of Maori concerns, though it was generally hostile to Maori irredentism. Sir Douglas Graham, who was the Minister of Justice and the Minister in Charge of Treaty Settlements, seems to have found in the redress of Maori grievances an emotionally satisfying cause for which he could crusade within his Party. A liberal in the US sense, he publicly speculated about the possibility of parallel justice systems.

The consensus among the political élite meant that *Pakeha* expressions of concern about the direction of policy were characterised by both main political parties and the media as "back lash" at its most innocuous, and "racism" in general rebuttal.

Winston Peters, MP, a Maori, in 1996 performed the almost magical political feat of separating Maori voting support from the Labour Party. His New Zealand First Party secured a position in a Coalition government with National. His electoral power base comprised disaffected and grumpy superannuitants, conspiracy theorists who saw National and Labour as having conspired with business and the privileged in applying economic rationalist policies, and Maori disappointed with the pace of the Treaty settlement process. Mr Peters has periodically criticised the "sickly white liberals" who promoted the Treaty industry. Because he was Maori, news media felt able to publish his statements even while they suppressed similar sentiments from others. As a consequence, Mr Peters has enjoyed an enduring respect from concerned *Pakeha* who believe he is the only politician with the courage "to tell it like it is".

Over the three years from 1996 to 1999 Mr Peters' party squandered its electoral support as his members became engulfed in a series of minor scandals. They showed his Maori Ministers and Members of Parliament as trivially venal, arrogant, and focused on Maori constituency development to the exclusion of general New Zealand interests. New Zealand First was severely punished in the 1999 election, losing all its Maori seats back to Labour.

Over the past two years the cosy political consensus has evaporated. Throughout 2001 the *Bay of Plenty Empowering Bill*, to enable a region to establish segregated voting for local authority positions, was debated for many hours. The debates were scheduled on Wednesday fortnights. Though broadcast as part of normal parliamentary coverage, they went unremarked. By the end of that debate, National, New Zealand First and of course my party, ACT, had made very plain our apprehension about what segregation could portend.

For the ACT Party none of this is new. For advocating a colour blind equality before the law we have been frequently attacked as racist and insensitive to Maori, though one of our nine members, Donna Awatere Huata, MP, the author of *Maori Sovereignty*,[30] was one of the most fiery radicals two decades ago.

But the National Party seems now to be re-positioning itself with an intellectual foundation to reject the cult of Treaty worship. Their Leader, Bill English, delivered an important speech last month.[31] He:

- Urged that the Treaty be approached on a more contractual basis, looking at its actual words and context instead of the "spirit" and "principles" favoured by earlier National Party politicians.
- Emphatically endorsed the view that it permanently ceded or confirmed cession of sovereignty to a unitary state. Maori and *Pakeha* were integrated as subjects and eventually citizens.

- Challenged the *contra proferentum* rule in application to resolving differences between Maori and English versions of the Treaty, by citing both contemporaneous circumstance, and the United Nations 1969 *Vienna Convention of the Law of Treaties*, ratified by New Zealand in 1971.
- Cautiously rejected arguments that there is an unextinguished aboriginal right to self-government. He therefore also implicitly rejects the relevance of North American precedent, and its tensions between equality before the law and collective self-government by indigenous folk.

The speech has not received enough attention. It is the foundation for a major repositioning of National. It is possible that we will see during the campaign leading up to the election on 27 July, 2002 a genuine debate between the two main parties about the role of race discrimination and the Treaty.

Valuable contemporary role for the Treaty

The ACT Party sees a very strong and positive role for the Treaty. It was a compact to establish the rule of law and to recognise and secure property rights. Both sides sought those blessings from it in 1840. Property rights remain essential to equality before the law. The Treaty was a crystallisation of the finest work of our 19th Century forebears. It envisaged the primacy of individual liberty, and contract, over status and a classical Lockean view of property rights.

It extended to its signatories what was then an internationally *avant-garde* protection of personal and property rights. The ownership assured to both Chiefs and ordinary Maori over their property was a reflection of the English law aphorism, "Every man's home is his castle".

The framers of our *Bill of Rights* in 1992 funked it when they omitted the fundamental assurance of property rights. For all New Zealanders the Treaty can, at the insistence of Maori, remedy that deficiency. In that sense, the Treaty's true constitutional significance can become equivalent to the "takings" provision of the American Constitution. *Iwi* or tribal successors to the signatories of the Treaty could be the guardians of that feature of our Constitution, to the benefit of us all.

What next?

If National has the courage of its scholarship, it will now undertake to support ACT's policy of eliminating from our law all references to the so-called principles of the Treaty of Waitangi, and to restore certainty to our law. Any references must be to the actual text of that agreement.

It is not enough to just assert that we are one people incorporating two or more cultures, without setting out a vision for the kind of people we are, and the Constitution we will have to protect our cultural freedoms.

Will we continue to encourage Maori down the blind alleys of collective institutional responses to problems? Tribal government and communalism have already failed in this country and everywhere else. Will we stand up for our inheritance of a tolerant, colour blind, democratic state? That will require eliminating the statutory privileges created for Maori superstition. Will we continue to excuse usurpation of resources for "porkbarrelling" to Maori electors? That will require our state to stop delegating authority and giving resources sourced from taxpayers to unsuitable Maori people and institutions that do not adhere to hard won standards of stewardship for all. Can we reassert personal responsibility as the foundation for a healthy society in the face of romantic tribalism or communalism?

Will we support a rule of law that restrains the government, genuinely respects freedoms, allows Maori and *Pakeha* to choose the kind of education their children will have, who they work for and on what terms, and how they want to express themselves about others, so that we all may live our various beliefs and cultures?

Will they join the ACT Party in restoring and building the New Zealand envisaged by Hobson and the Treaty signatories, where we are all equal under the law?

Endnotes:

1. www.mft.govt.nz.foreign/humanrights/overview.html

2. Reported by Julie Debeljak, *Barriers to the Recognition of Indigenous Peoples' Human Rights of the United Nations*, Monash University Law Review, Vol.26 (2000), pp.159-84.

3. General Assembly resolution 2625(XXV). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970).

4. For an accessible summary of this viewpoint, see former New Zealand Cabinet Minister Simon Upton's 23 May, 2002 commentary at http://www.arcadia.co.nz/

5. From a contribution to *New Zealand in Crisis? A Debate About Today's Critical Issue*, GD Publications, 1992, p19.

6. Andrew Sharp in *New Zealand in Crisis*, *loc.cit.*, pp.27 and 30.

7. Crosby RD, *The Musket Wars – A History of Inter-Iwi Conflict 1806-45*, Reed, 1999.

8. *Wi Parata v. Bishop of Wellington*, (1877) 3NZJur (NS) 72.

9. *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] AC 308.

10. See, for example, *Maori Sovereignty*, (1984) Broadsheet, Auckland, the youthful work of Donna Awatere Huata, MP, now a colleague in the ACT Party.

11. Michael Coote, *The Free Radical*, December, 1999 – February, 2000, p.9.

12. *NZ Maori Council v. Attorney-General*, [1987] 1 NZLR 641 on appeal at p.655.

13. *Tainui Trust Board v. Attorny-General*, [1989] 2NZLR 513 (CA) at p.530.

14. *Te Runanga O Muriwhenua Inc v. Attorney-General*, [1990] 2 NZLR 641 (CA) at p.656.

15. Guy Chapman, *The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making*, in *New Zealand Law Journal*, July, 1991, p.228.

16. Cambridge University Press, 2000.

17. That is an essay by Michael Taggart in Forsyth and Hare (Eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade, QC*, Oxford: Clarendon Press, 1998, pp.91-112. Michael Taggart is also acknowledged as having read a draft of Chapter 7 of Allen's book.

18. Shortly to be published in the *New Zealand Law Journal*. Simon Upton's reflections on the unique consequences of the Treaty (*supra*, note 4) includes what he calls a "lament" from Herman Merivale, Permanent Under-Secretary of the Colonial Office (taken from *The Colonial Office: A History*, Henry L Hall, Longmans, 1937). The lament very clearly shows the British view that what the Treaty conferred was property rights, an outcome Merivale deplored.

19. *NZ Maori Council Case*, *loc. cit.*, p.664.

20. See Orange, Claudia, *The Covenant of Kohimarama*, in the *New Zealand Journal of History*, XIV, 1 (1980), pp.61-82.

21. Records of debate at the Kohimarama Conference evidence this view.

22. *New Zealand Maori Council Case*, p.664.

23. *Ibid*., p.667. It may be quibbling, but one would hope a government would feel an equal responsibility to act in good faith toward all its citizens.

24. Undated Project Waitangi pamphlet.

25. Transcript of TV One *Assignment* interview published in *National Business Review*, 10 May, 2002, pp.35-39.

26. Marcus Poole, *Maori Fishing Bill and the Interpretation of Article 2*, Law Talk 307, 1 (22 June, 1999). Mr Poole cites Norman Smith, *Native Law and Custom*, (1936) p.57.

27. For amusement, note that guiding principle 5 is "Equity of access, experience and *outcome*". (emphasis added).

28. The provisos in Articles 1.4 and 2.2 of the *Covenant*, which permit even positive discrimination only if it is temporary.

29. *Maori socio-economic disparity*, Paper for the Ministry of Social Policy, September, 2000. The paper can be accessed at: http://www.act.org.nz/content/20887/maorisocioeconomicdisparity.pdf.

30. *Loc. cit*..

31. http://www.national.org.nz/wcontent.asp.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

We were privileged at the outset of the Conference to be addressed by the Chief Justice of Australia, who spoke on the rise and fall of s.74 of the Constitution. Among other things, he pointed out that that section of the Constitution, in allowing appeals to the Privy Council, provided for an important organ of the Government of Australia which was outside Australia and controlled by other than Australians. I hope you will agree, after that opening, that we have had a succession of excellent papers on a number of issues of great public importance. It is not my intention to attempt to summarise them, but I would briefly refer to some of the questions raised.

The two papers on the *Engineers' Case*, by Professor Walker and Dr Aroney, revealed the insubstantial intellectual basis on which that decision rested, and that a number of subsequent decisions are inconsistent with the reasoning in the judgments in that case. It is not suggested that there should be a reversion to the doctrines which that decision over-ruled, but rather that it should be recognised that the Constitution is a federal one and that it should be construed accordingly. Whether the repeated demonstration of the deficiencies of the *Engineers'* approach will have any effect on the law is a matter for the future.

Mr Justice Handley's paper was presented under the title of the Republic but it concerned a broader constitutional issue. His argument was that s.128 of the Constitution, on its proper construction, has the effect that in determining the majorities necessary for a referendum to succeed, it is necessary to take into account informal votes. How this question would be decided is unpredictable, but Mr Justice Handley's argument is a strong one.

Professor Flint detailed, with his usual irony, the proceedings of the conference at Corowa which was designed to stimulate the movement towards a Republic. No signs of stimulation have so far been detected.

One of the most strongly contested issues of public policy today is that of immigration. We had three most informative papers on this question. Professor McMillan clearly explained the reasons for the expansion of the litigation challenging immigration decisions, and made a compelling case that this has been due to such things as inappropriate decisions, over-zealous judicial review, contestable assumptions and generally judicial activism. The Minister for Immigration, Mr Philip Ruddock explained the principles on which the government policies rest, and the pressures on that policy, including the very great cost to the community of unauthorised boat people. He too contended that some judges have gone too far in ignoring the effect of privative clauses in the legislation, and even in criticising the policies of the legislation. Mr Piers Akerman convincingly demonstrated the bias of the media on this issue.

Dr Stephen Hall, in a paper which should concern us all, showed how a movement to establish an imperial system of international law enforced by an unaccountable international bureaucracy, is designed to subvert the sovereignty of liberal democracies such as Australia, and to compel them to accept the standards of civil, political, economic, social and environmental activity which the international bureaucracy prescribes.

Dr Janet Albrechtsen deepened our concern at this trend, and discussed a current example of the tendency – the establishment of an International Criminal Court which she left us in no doubt we ought to reject. Even if one favoured an International Criminal Court, which I do not, the vagueness of the definition of the crimes in the statute creating it would be enough to reject it. General James pointed out that soldiers in the First World War could well have been brought before the International Criminal Court had the statute been enacted at that time, and the same is

true of World War II. No one has yet explained how Australia could validly subject our citizens to the International Criminal Court, since our Constitution vests the judicial power of the Commonwealth in the High Court and the Federal Courts.

We were pleased to have, for the second time, a representative of the New Zealand Parliament to join in our discussions. Mr Stephen Franks gave us a most enlightening address on the effect of the *Treaty of Waitangi* – a document once thought to be inoperative, but which has enjoyed a remarkable renaissance and has important consequences for the New Zealand economy.

This is the 14th Conference which we owe to the vision and dedication of John and Nancy Stone. We again owe them our thanks.

Appendix

Contributors

1. Addresses

The Hon Justice Murray GLEESON, AC was educated at St Joseph's College and the University of Sydney (Arts/Law, 1961). Admitted to the NSW Bar in 1963, he practised as Barrister-at-Law while tutoring in Law at St Paul's College, University of Sydney (1963-65) and lecturing in Law part-time at the University of Sydney (1965-74) before becoming Queen's Counsel in 1974. He was a member of the Council of the NSW Bar Association (1979-86) (President 1984-86). In 1988 he was appointed Chief Justice of the Supreme Court of NSW, serving in that post (and as President of the Judicial Commission of NSW) until his appointment, in 1998, as Chief Justice of the High Court of Australia.

The Hon Justice Lloyd WADDY was educated at Cranbrook School, The Kings School Parramatta and the University of Sydney (LLB, 1962). He was admitted to the NSW Bar in 1963 and practised there as Barrister-at-Law (Queen's Counsel, 1988) until his appointment, in 1998, as a Judge of the Family Court of Australia. He was the Foundation President (1963-65) of the University of Sydney Law Graduates Association; Foundation Director of the Australia-Britain Society of NSW (1971-97); a Fellow of St Paul's College, University of Sydney since 1971; Director of the Marionette Theatre of Australia (1974-88); and Chairman of the Australian Elizabethan Theatre Trust since 1992, among many other such activities. In 1992 he became the Foundation National Convenor of Australians for Constitutional Monarchy, attending in that capacity (as an appointed delegate) the 1998 Constitutional Convention in Canberra, but resigning from that role on his judicial appointment later that year.

2. Conference Contributors

Piers AKERMAN was educated at Christchurch Grammar School and Guildford Grammar School (Perth) before embarking on a lifelong career in the media commencing at *The West Australian* in 1968. After working in Melbourne, Sydney and New York, he became Foreign Editor of *The Australian* in 1983, Special Projects Editor of *The Times*, London in 1987 and then, successively, Editor of *The Advertiser*, Adelaide (1988) and *The Sunday Herald*, Melbourne (1990). During 1990-92 he was Editor-in-Chief of The Herald and Weekly Times group in Melbourne before becoming a Vice-President of Fox News, USA in 1993. Since 1994 he has been a regular columnist for *The Daily Telegraph* and *The Sunday Telegraph* in Sydney.

Dr Janet ALBRECHTSEN was educated at Seacombe High School, Adelaide and the University of Adelaide (LLB Hons, 1987). After admission to the NSW Bar in 1988 she worked as a solicitor with Freehill, Hollingdale and Page (1988-91), and as a tutor at the University of Sydney Law School while studying for her PhD in Law which she completed in 2000. Subsequently, as a journalist, she has written for *The Sydney Morning Herald*, *The Age* and *The Australian Financial Review*. Nowadays, she contributes a regular weekly column to *The Australian*.

Dr Nicholas ARONEY was educated at Wahroonga Christian Academy, at the Universities of New South Wales (BA, Political Science, 1988) and Queensland (LLB Hons, 1992; LLM, 1994), and at Monash University (PhD, 2001). As a Senior Lecturer in Law at the University of Queensland, he teaches constitutional law, human rights and equal opportunity law, and legal theory, and has

published widely in constitutional law, including his book *Freedom of Speech in the Constitution* (1988). His prize-winning PhD thesis was on the topic *The Federal Commonwealth of Australia: A Study in the Formation of its Constitution*, and his next book, *Federal Constitutionalism: Theory and Practice*, will be published in 2003.

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.

Steven FRANKS, MP (NZ) was educated at Taihape College, central North Island, and Victoria University, Wellington (BA/LLB (Hons), 1974; Dip.Acc., 1979). He was admitted to the New Zealand Bar in 1975, spent two years in the Office of the Ombudsman (1977-79), and in 1979 joined the national law firm Chapman Tripp, of which he subsequently became Chairman (1993-95). His law career was chiefly in the area of company and securities law, which in turn involved acting in an advisory capacity to numerous governmental and industry bodies and appointment as a member of the New Zealand Stock Exchange's Market Surveillance Panel (1989-1998; Deputy Chairman 1994-95). A widely reported commentator on company and securities law, he became a Member of the New Zealand Legislative Assembly in 1999, representing the ACT Party (being re-elected for that party on 27 July, 2002).

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.

Dr Stephen HALL was educated at Mt Carmel College, Charters Towers and at the University of Queensland (LLB, 1987), the University of Technology, Sydney (LLM, 1991) and Oxford University (D.Phil, 1994). A Senior Lecturer in Law at the University of New South Wales, he was formerly the Director there of its European Law Centre, but now publishes and teaches in the area of European Union law and international law. He has recently been appointed Associate Professor at the City University of Hong Kong's School of Law, where he took up his duties in August, 2002.

The Hon Justice Kenneth HANDLEY, AO was educated at Cranbrook School and the University of Sydney (BA, 1954; LLB Hons, 1957). After admission to the NSW Bar in 1959 he spent 30 years as a Barrister-at-Law (Queens Counsel, 1973), becoming President of the NSW Bar

Association (1987-89) and President of the Australian Bar Association (1988-89). In 1990 he was appointed to his present post as Judge of the Court of Appeal of the NSW Supreme Court. In 1980 he became Chancellor of the Anglican Diocese of Sydney, and in 1986 a member of Lincoln's Inn (London). Among his publications are *Res Judicata* (1996) and *Actionable Misrepresentation* (2000).

Professor John McMILLAN was educated at Canberra High School and the Australian National University (ANU) (Arts/Law, 1972), and became Associate to the then Chief Justice of the High Court in 1973. After lecturing in Law at the University of NSW (1974-77) and some time in private legal practice, he worked in the Office of the Commonwealth Ombudsman (1979-80) before returning to lecturing at the ANU. In 2000 he became Professor of Law there, holding the Alumni Chair in Administrative Law. He is currently President of the Australian Institute of Administrative Law, a consultant to the national law firm Clayton Utz, and a frequent commentator on developments in immigration law in Australia.

The Hon Philip RUDDOCK, MHR was educated at Barker College (Hornsby) and the University of Sydney (BA, 1964; LLB, 1966). After a brief career as a solicitor (1967-1973), he entered the House of Representatives in 1973 as Liberal Member for Parramatta and is now, as Member for Berowra, the longest serving Member of the House. After periods as Shadow Minister for Immigration and Ethnic Affairs (1984-85 and 1989-93) and Shadow Minister for Social Security (1993-96), in 1996 he became (and remains) Minister for Immigration and Multicultural Affairs. Since the last federal election (2001) he has also become Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs.

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*.

Professor Geoffrey de Q WALKER was educated at a number of State High Schools and the Universities of Sydney (LLB, 1962) and Pennsylvania (LLM, 1963 and SJD, 1966). He was admitted to the New South Wales Bar in 1965, and practised both there and in industry before becoming an Assistant Commissioner with the Trade Practices Commission (1974-78). He taught law at the University of Pennsylvania (1963-64), the University of Sydney (1965-74) and the Australian National University (1978-85), before becoming, in 1985, Professor of Law (and, in 1988, Dean of the Faculty of Law) at the University of Queensland. In 1996 he retired from that post to resume private practice in Sydney. He is the author of four books and a large number of articles on a variety of legal topics, including in particular citizens-initiated referendum systems and, more recently, federalism.