Upholding the Australian Constitution Volume Sixteen

Proceedings of the Sixteenth Conference of The Samuel Griffith Society

Pacific International Suites, Murray Street, Perth

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Foreword

John Stone

As this Foreword is being written, the winter session of the federal Parliament is winding down, and there are even those who suggest that, before this volume is published, Australians will have voted in a federal election.

Be that as it may, what we do know is that, from a constitutional viewpoint, the federal election, whenever it be held, will be more than usually important.

For one thing, the leader of the federal Opposition, Mr Mark Latham, has committed his party to returning to the republic issue via, first, a plebiscite on whether our Constitution should be made over from a constitutional monarchy, as at present, to a republic. If the answer to that general question were in the affirmative, Mr Latham then proposes that there be another plebiscite to choose between several alternative republican models, and then a referendum to vote on the model most favoured.

The Samuel Griffith Society was not established to address the republic issue, which indeed was revived after a century-long slumber, via the agency of Prime Minister Keating, shortly after the Society was set up. Nevertheless, the issue is of such constitutional importance that speakers at a number of earlier conferences of the Society have addressed it. Having in mind that our membership includes some (though not, I think, a high proportion) of republicans of one persuasion or another, I shall content myself here with expressing a *personal* view.

In my opinion, for Australia to embark upon a re-run of the divisiveness which gripped the nation over the years 1992-1999, and so soon after the 1999 referendum proposal was so decisively defeated (in every State of the Commonwealth, and in 72 per cent of all federal electorates), will be little short of disastrous. Anyone interested in an elaboration of those views can find them in my article, *Constitutional Lies, Damned Constitutional Lies and Plebiscites*, in the Winter, 2004 issue of *National Observer*.

The republic matter is not the only constitutional issue on which the election will have a bearing. On 1 June, 2004 the Prime Minister tabled in the Parliament the report of the Consultative Group on Constitutional Change, *Resolving Deadlocks: The Public Response*. The Prime Minister said that his government endorsed the Group's recommendation that there be "a wider programme of consultation with the community, and more attention given to educating the public about the Australian Constitution and how it operates in practice".

On the face of it, who could reasonably disagree with that conclusion? Yet at the risk of appearing ungrateful, I wonder what kind of "programme" may be in mind. On the face of it, moreover, it is not so much the public that may need "educating" about our Constitution "and how it operates in practice", but our Government (and Opposition also).

The Prime Minister's statement responded, as noted earlier, to the report of the Consultative Group on Constitutional Change, established last year to undertake a process of public consultation on the government's discussion paper, *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution*. The Group found that there was not, in fact, "any substantial measure of support for either of the two options presented in the discussion paper" – a conclusion which suggests that the public had a very clear idea of the likely consequences of adopting either of the two options advanced in that discussion paper.

Concern about those likely consequences was, indeed, such that in organizing the Society's 16th Conference, held in Perth on 12-14 March, 2004, the first three papers on our program were devoted to this issue, under the session heading "The Prime Minister's Attack on the Senate". I note incidentally that the ministerial statement of 1 June, 2004 specifically

claims that "These proposals did not represent an attack on the Senate", a claim which can only bring to mind the well-known words of Ms Mandy Rice-Davies that "they would say that, wouldn't they".

The three papers in question, by the Clerk of the Senate, Mr Harry Evans, Professor Malcolm Mackerras, and Mr Ray Evans, respectively, bear careful reading. The first two, in particular, contain clinical dissections, each in its own way devastating, of the constitutional untruths, sloppy analysis, and prejudicial argument contained in the Government's original discussion paper on the issue.

In some ways even more devastating is Professor Mackerras' conclusion that the chief reason – and in practical terms almost the only one that has been significant – for the present Government's difficulties in shepherding its legislation through the Senate is to be found in its own 1998 election performance.

In 1998 the Coalition went to the electorate on a proposal for the introduction of a major new tax (the Goods and Services Tax, or GST). Although returned to office in the House of Representatives (albeit with the loss of 17 seats), the Government suffered a major reverse in its Senate primary vote which, at 37.7 per cent, was at its lowest on record since the introduction of our present Senate voting practices in 1949. The half-Senate then elected, which took its place on 1 July, 1999, will remain there until 30 June, 2005; and, as Professor Mackerras points out with a logic which is as unrelenting as it is undeniable, it is *that* diminution in Coalition Senate numbers which lies at the heart of the Government's frustrations. No amount of argy-bargy about "Senate obstructionism" and the like will alter that (which however does not mean that the Labor Party has not been guilty of such obstructionism – it has been).

One final point is also worth making on this issue. As Ray Evans points out in Chapter Three, if a government is convinced of the public desirability of a piece (or pieces) of legislation; has failed to enact it after two successive attempts qualifying it for double dissolution status; but does not wish, for whatever reason, to call a double dissolution, it would be open to it to put that legislation to the Australian people at a referendum to be held at the same time as the succeeding federal election. This would be, in effect, a small exercise in direct democracy and, in my opinion, would have much to commend it on those grounds alone.

The Society's Perth conference – of which this Volume in our Proceedings, *Upholding the Australian Constitution* , constitutes the record – was not however devoted only to the s.57 question. One of the other papers, *Error Nullius Revisited*, by Dr Michael Connor, was, in my respectful opinion, devastating in the light it has shed on the politicised "history" of Professor Henry Reynolds, and upon the equally notorious performance of those six High Court Justices who determined the *Mabo Case*. Dr Connor's paper deserves to be – and I am sure it will be – read, and read again, by lawyers, historians and, I hope, ordinary Australians. In its own, more narrowly focused way, it constitutes as important an exercise in setting the record straight as, on a broader canvas, Keith Windschuttle's work, *The Fabrication of Aboriginal History* – to which, indeed, it has a close link.

Although I have singled out two conference topics for particular attention, it would be invidious to fail to express appreciation of other contributions. One of them, by Professor Bob Catley, *The Northern Territory: Seventh State or Internal Colony*?, also bears upon a major constitutional question which could face Australians in the not distant future, and carries a sobering, and depressing, message in that regard. But all of them helped to make the Society's third conference in Western Australia memorable, and all of them are deserving of our thanks.

I also include in those thanks one contributor to our conference, Dr Jim Thomson, whose paper, entitled in the Conference Program (see Appendix III) *Federalism as a Structural Bill of Rights*, was appreciatively received by the large attendance, but which, nevertheless,

does not appear in this Volume.

Due to the length of the text and Endnotes of Dr Thomson's paper, and because he was not prepared to agree to shorten it or have it published only on the Society's website, neither this volume nor our website includes his paper.

One other matter should be mentioned. Ever since the Society's foundation our President, the Right Honourable Sir Harry Gibbs, has sent to members each year an Australia Day message. These communications have been greatly appreciated by our members and, although they do not form part of any conference Proceedings, they have certainly come to form part of the proceedings of the Society more generally. Accordingly, Appendix I to this Volume records those messages for the years 1993 through 2000, and the remaining messages (to, by that time, 2005) will be included in Volume 17 next year.

Volume 16, meanwhile, is once more tendered in the hope that, like its fifteen predecessors, it will contribute to the debate about Australia's Constitution, past and future.

Dinner Address
The State of the Law

Hon Bill Hassell, AM

I wish to add my own welcome to Western Australia to that you have already received, and observe that, true to the Society's fundamental charter to uphold the Australian Constitution, our organisers over the years have been meticulous in observing the federalist character of our nation in holding the conferences of the Society around the country – even in "remote" Western Australia.

Those organisers are not, of course, in our small Society anonymous back room operatives, but very much our esteemed President, Sir Harry Gibbs, and the indefatigable John and Nancy Stone. Between them, with the very willing support of others, they have set the course for the Society since its foundation, established its style and its character, set in place its standard of excellence and intellectual rigour, and ensured that the mostly learned outpourings of our many presenters of papers are preserved in the volumes of the Society's Proceedings.

Through this remarkable effort, the extent of which is not always understood, the influence of the Society has been recognised by many people who matter in the issues with which the Society grapples. Those who support the aims of this Society may today have some sense of satisfaction from seeing in place a High Court which, through its majority of members, may be seen as having returned somewhat to the more traditional role of a court of law, and especially that of a supreme constitutional Court.

The state of the law may not be overall as we would wish it, and the challenge of some judicial appointments by State Labor governments which are based on sociological and ideological criteria instead of legal excellence and knowledge, will continue to haunt us for many years to come. We must, while we can, be comforted by the approach of the Commonwealth to High Court appointments since 1996, and by the departure of several "activists" from that Court.

I think we should also be mindful that many judges and magistrates – indeed the vast majority – are fully attentive to the heavy responsibility they bear to the community not to become "activist" in the broad sense in which I use that term tonight. They are the epitome of judicial propriety. Unquestionably the most distinguished and respected judges are in this category, which is not to pretend that some of the activists are not extraordinarily able.

But, as John Stone has emphasised in talking to me of tonight's address, an after dinner address is not an academic paper, and it should be alleviated by some shafts of humour, if that is possible in dealing with such a daunting topic as "the state of the law". I know John will not take offence if I tell you that I chuckled, whilst looking for a particular quotation of Sir Robert Menzies, when I came across one of his gems. Menzies recounted of his colleague, the then leader of the Country Party:

> "Jack McEwen has been nicknamed 'Black Jack'. Now and again I address him as 'Black', and occasionally, when in highbrow mood, I call him '*Le Noir*'. That's only when I don't want other Country Party men to know what I am talking about".[1]

The actual quotation from Menzies I was looking for I found. Menzies is quoted as saying:

> "When I first told Sir Owen Dixon I intended to enter politics he said: 'It's quite easy to make a good lawyer into a politician, but reconversion is impossible' ".[2]

Thus I come to you tonight, a former lawyer with no pretence to Menzies' quality as a lawyer, and a former politician, speaking of the state of the law. So I must say very clearly that

my purpose is not to present a legal treatise, nor, you will be relieved to hear, is it possible to begin to cover the whole state of the law with any kind of comprehensive assessment.

Rather I want to skate over some aspects of the present state of the law in Australia, and add my voice to those who see danger in judges who have forgotten the traditional and safe role of the judiciary in our society, and in legal developments which are wholly out of step with community needs and expectations.

The danger from straying judges is very real, as ultimately their activities are undemocratic, and undermine the pivotal place of the law in civilised society. They invite disrespect of the law and its expositors, the judges themselves, and thereby contribute to a lessening of the authority of law as the final and accepted final arbiter of process, constitutionalism and conflict – the very characteristics that distinguish our society from the banana republics of the Zimbabwe variety.

If this charge against judicial activists, as I will call the category of which I am speaking, is true, as I do most passionately believe it is, it is important to remember that the felicitous circumstances which have brought to us the stability, continuity, and certainty of outcomes of our democracy and system of government, are qualities of life still enjoyed by far less than half of the world's population.

The Samuel Griffith Society focuses its attentions on threats to the essential federal nature of the Constitution of the Commonwealth of Australia. That is of course our charter. But a broader battle for law and democracy is involved in resisting the depredations of High Court Justices and others who are so keen to advocate their perceptions of the inadequacies of our systems and laws, and the so-called "international standards" which such Justices and others would have imposed on us regardless of the will of the Australian people.

This is often done through networks of international organisations at overseas conferences, amongst delegates in many cases wholly unqualified to appreciate our history, standards and most cherished beliefs.

There are several areas of activity in particular where, I believe, some judges should take a good look at themselves in terms of their responsibility to the law and the broad community interest they serve. I refer in particular to:

- those who indulge in a continual stream of social commentary, either through their courts and decisions or outside – including those unable to suppress their own ideological bent in so many areas;
- those who apparently believe that sentencing of criminal offenders is a matter for the sole expertise of judges, and, regardless of the views of the community expressed through the laws adopted by democratic Parliaments, seek to apply their own philosophies to this difficult and important area of the law; and
- the "activist" High Court.

You will now appreciate my reference to skating over these vast and complex areas and, at the same time, my recognition that my bluntly stated views may later be recognised as wholly in error. I can but offer them to the debate. As an American friend of mine has said of himself – often in error, but never in doubt!

My starting point in referring briefly to all of these issues is a truly remarkable paper[3] by a then Justice of the New South Wales Supreme Court and Court of Appeal, Justice Dyson Heydon, now a Justice of the High Court of Australia.[4]

On the rule of law Justice Heydon said:

> "The rule of law operates as a bar to untrammelled discretionary power. It does so by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions – an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures having objective existence and operating in

> paramountcy to any other organ of state, and to any other source of power, and possessing a measure of independence from the wrath of disgruntled governments or other groups. These independent arbiters are usually judges ……
>
> "A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge …… It is largely judges, not jurors, who now decide disputes. In fulfilling that task, judges need a reasonable minimum of application, balance, civility and intelligence: but they need two things above all. One is a firm grip on the applicable law. The other is total probity".

On judicial activism he said:

> "What is below described as 'judicial activism' badly impairs both qualities [a firm grip of the law and total probity], and in that way tends to the destruction of the rule of law …… The expression 'judicial activism' is here used to mean using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake".

On change to the common law, and the fierce criticism to which Sir Owen Dixon has been subjected for his orthodox approach, Justice Heydon said:

> "The mockery to which Sir Owen Dixon's enlightened critics, on and off the bench, have subjected him obscures an essential truth. He did not think that the common law was frozen and immobile, fashionable though it is to attribute this caricature of a view to him. He contemplated change in the law as entirely legitimate. When new cases arose, existing principles could be extended to deal with them, or limited if their application to the new cases was unsatisfactory. As business or technical conditions changed, the law could be moulded to meet them. As inconveniences came to light they could be overcome by modifications ….".

With the background of those comments, and bearing in mind that Professor Greg Craven will deal specifically with the subject of judicial activism during this conference, I turn to the somewhat broader areas of judicial activism I have chosen to comment on tonight. It will be obvious that my description of "judicial activism" is loose and broad, not falling within the strict limits imposed by Justice Heydon in his particular study.

May I mention in passing that some years ago, when reading with delight the expositions of Greg Craven on some of the extreme centralist interpretations of the Commonwealth Constitution, I first came across the expression he used, "It is *pellucidly* clear that the Founders saw no role for the High Court in relation to this judicial form of constitutional amendment [what he referred to as 'progressivism']".[5] It was a dash to the dictionary greatly enjoyed in the context of Greg's bold paper.

What then of magistrates and judges who have adopted the role of social advocates and social commentators? We have recently seen a South Australian magistrate publicly rejoicing in relation to a decision affecting refugee children in custody; a former Chief Judge of the Family Court of Australia fulminating through the public media on various issues; the Chief Judge of the ACT Supreme Court only last week addressing the National Press Club on his views of the government's anti-terrorism laws; and our own Chief Justice of the Supreme Court of Western Australia a frequent comment-er, if not commentator, on various social, legal and quasi-legal issues. Justice Michael Kirby of the High Court has a firm view on what he regards as social

reform, human rights and Australia's international obligations, which he expresses, with his customary vigour, thorough research and great authority both within and outside Australia.

I might say in passing that I share at least some of Chief Judge Higgins' concerns about the raft of anti-terrorism laws rushed through Australian Parliaments in recent years – but it is not for Judge Higgins to be saying it. He may well have to sit in judgment on the application of such laws.

I wonder what happens to the judicial method, or as put by Justice Heydon, to "the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge", when these judicial activists are confronted by cases which come before them at first instance, or on appeal, and such cases fall within the area of interest on which the learned judicial officer has been a commentator or public advocate of change?

Well, do I wonder? Rather do I fear that litigants and public alike will have a glimmer of concern as to the total impartiality of such officer of the law, that solicitors for parties who have a point of view in such matters will try so to manipulate the lists in the various courts that the cases in which their clients have an interest will come before a judge whose views are assessed as favourable to the client's case.

We cannot, I think, expect that the judiciary should be in these times hidden away, remote from public scrutiny and comment, and in an ivory tower of isolation from the reality of intense media scrutiny over high profile cases of public interest. It is for this very reason, this new reality, that judicial officers at all levels should be wary of entering the game, should keep back from the comings and goings of media commentary, keep clear of the issues to be decided by the court of public opinion, in Parliaments and by elections, and leave to Attorneys-General the role of representing the law to the public and moving for its reform if its outcomes are unsatisfactory.

If judges become advocates, of whatever cause, however good and worthy, however much in line with our supposed international obligations, or with whatever seemingly indisputable perception of human rights, the inevitable result will be that, in our free and open society, the judiciary will become politicised, will be dragged into the cut and thrust of the passing mood of public and political opinion. There will be, as there have been already, demands that judges become in some way accountable for their decisions, that their appointments be vetted by Parliament, or that the judges be elected.

In her retirement speech to the High Court Dinner of the Law Society of Western Australia in 2002, former Justice Mary Gaudron referred briefly, and in passing, dismissively, but as always incisively, to critics of the Court's activism who have sought some redress through systemic reform. She need look no further than her own sociological and ideological remarks in her judgment in the *Mabo Case* to realise, as I am sure she is capable of realising, why there were calls for changes of the kind she clearly abhors.

The Children's Court of Western Australia has become a long running battleground of judicial activism versus community activism in the matter of sentencing. In my first experience of that institution it was a creature of the then Department for Community Welfare, of which I was from 1980 to 1982 the Minister. Its quasi-judicial status was unsatisfactory, and I supported Labor government moves a few years later to reform it, and establish a truly independent court that would properly take care of the rights of those brought before it.

Unfortunately the Labor government appointed a District Court judge to the Court whose views on sentencing were, to say the least, progressive. When the revolving door syndrome became a scandal in the public arena, the Court Liberal government introduced the mandatory sentencing "three strikes and you're in" for burglary law. This, along with similar Northern Territory laws, brought howls of protest from many eminent persons, including complaint from the Chief Justice of Western Australia, and objections from the Law Council of Australia

– which never sought its members' views before speaking out in angry protest, allegedly on behalf of those members.

More importantly in exposing the point of these remarks, a subsequent Children's Court judge sought to read down the mandatory sentencing law, with intent to negate the full extent of its operation as intended by Parliament. Meanwhile the Labor Party, having succumbed to the reality of public anger at the depredations of multiple-repeat young offenders, came to office on a promise to leave the mandatory sentencing law in place. A cynic may say it has been comfortable to leave it with its limited operation, under a judicial regime determined from the outset that the full intent of Parliament and public to reform the appalling record of the Children's Court would, in the matter of sentencing, be thwarted.

There are three aspects of judicial activism in the High Court of Australia on which I want to comment briefly tonight:

- the Court's introduction of new law, which goes far beyond the process of legal development described by Justice Heydon;
- the Court's long history of distortion of the Constitution, from at least the *Engineer's Case* forward, to centralise power in the Australian Commonwealth in a manner never intended by those who framed the Constitution, nor by those who voted for its adoption at the creation of Federation, nor approved by the electors of Australia at referenda under the mechanism for change incorporated in it; and
- the incorporation in domestic law of foreign treaties not adopted as domestic law by the Parliaments of Australia.

The *Mabo* decision creating native title rights to land in favour of Aboriginal Australians was a high point of the High Court in its legislative mode. The issues arising in the community from *Mabo* are yet to be resolved, and will long confront us. The vast cost will continue to be imposed on generations of Australians.

The principle of racial inequality imposed by *Mabo* should continue to disturb all those who believe that equality before the law is fundamental to our system of liberty and democracy.

It is to be noted with interest that the New Zealanders are now realising the reality of their own *Mabo*-like decisions and seemingly moving back from them.

When *Mabo* was first decided its vociferous defenders said that it was not a new law. When they discovered that argument was hopeless in the face of a radical decision inventing radical title, they argued that the courts had always changed the law and it was entirely a legitimate process. They clearly did not have the benefit of Justice Heydon's analysis of common law development.

For my part, even now after the long period since the *Mabo* decision was handed down, I cannot accept it as a legitimate exercise of judicial power.

Leaving aside the particular case before the Justices, which had to be decided between the parties, they deliberately created a general regime of native title rights applicable to a different race of people, and covering the whole of Australia.

I can only believe that it was a conscious decision of six Justices to do something they believed should be done, which they knew legally could be reversed by the Parliament, but politically could not.

It was a fine judgment by the six, and a clever one, but not a proper one.

When Australia acceded to the international treaty extending the territorial limits 200 miles out to sea, the Federal Parliament enacted the *Seas and Submerged Lands Act*, asserting Commonwealth sovereignty over the vast area of seas around Australia. That was perhaps as it should have been, but one would naturally have expected that as an accretion to a federal nation, the seas would become part of the federation of Australia. That did not happen – an ever predatory Canberra claimed sovereignty for the Commonwealth to the exclusion of the

States, and the High Court of Australia upheld the claim.

So Australia moved from being a federation of States with some minor federal Territories, the only significant one being and remaining a candidate for statehood, to being a federation surrounded by a vast area under a unitary system of government. Of all the decisions of the High Court which were anti-federalist, that upholding the *Seas and Submerged Lands Act* of the Commonwealth must rank as one of the most damaging, and most inexplicable.

Although a political arrangement was made in relation to local laws and enforcement of them offshore, no economic regime in favour of the littoral States of the Commonwealth was ever put in place. Thus, when the multi-billion dollar arrangements were recently concluded for the development of the off-shore Gorgon gas fields in Western Australia, the outcome will result in no revenue passing to the State for royalties, resource rentals or otherwise over the whole long life of the project.

A tough State government might have used the powers available to it onshore to veto the project unless satisfactory arrangements for revenue sharing with the State were first put in place. It might have at least insisted on a regime of sharing, such as that agreed at a political level years ago to apply to the North-West Shelf development. But that was not done by the Gallop Labor government and the opportunity has now passed.

The injustice of this outcome is palpable. The State will bear huge costs over the years in supporting the developments which will underpin the Gorgon project, but will receive no revenue from the natural resource it produces. I am amazed that it was not made into a major political issue. But what is really riling is that this is a High Court outcome – an outcome from a Court created with the very purpose of maintaining the federal balance in a federation.[6]

Finally and briefly, to *Teoh's Case*.[7] This case has been the subject of a paper to this Society last year by our esteemed President, Sir Harry Gibbs[8] and I will not repeat his analysis or comments.

Suffice to say the case has established a doubt as to the well established general principle, as stated by Sir Harry:

> ". . . . . that when a treaty is ratified, although it becomes binding on Australia in international law, it does not become part of the law of Australia unless it has been given the force of law by statute ……. a treaty not incorporated by statute does not affect the rights or liabilities of Australian citizens".

Again I refer to a particular aspect of the situation, that being the manifest inclination of some judges to apply laws to us which are not part of our common, constitutional or statute law, but which are the outcome of the work of international networks of bureaucrats and judicial administrators who ***want*** to establish an international regime which is not answerable to any elected Parliament – certainly not one we have elected.

Whether this tendency is part of a trend to globalisation, the current fashion of right-thinkers, or simply further manifestation of the megalomania of those who believe they have risen above the common man and are best qualified to decide his standards for him, does not in the end matter. What does matter is that it should be resisted at all costs, as surely it will destroy our democracy.

I remain committed to the sovereign nation state as the greatest hope we have to protect our heritage, our culture, our history, our rights and obligations, our opportunities to participate and influence decisions about our lives and laws. The international networks of United Nations bureaucracies, judges at their conferences, and other linkages between peoples, nations, professions, interest groups and occupations have their place in advancing civilisation in the long term, but no evidence currently available to me suggests that my life or liberty would be enhanced by my being subject to laws created by any United Nations agency.

I remain willing and eager to rely on the Australian system of government with all its flaws and deficiencies. At least I occasionally get to vote for or against the governments elected under that system. I have never had a vote for the anonymous bureaucrats of the United Nations, or for Mary Robinson, the one-time United Nations Commissioner for Human Rights, who by-passed the horrors of Africa *en route* to Australia and her lectures about our laws.

Nor for that matter have I ever had a vote for Justice Michael Kirby of the High Court, who presumes so often to lecture me, my fellow countrymen and the international legal fraternity on the obligations he believes the government I did get to vote for has.

Again I draw on the enlightened words of Justice Heydon:[9]

> "The *soigné*, fastidious, civilised, cultured and cultivated patricians of the progressive judiciary – our new philosopher-kings and enlightened despots – are in truth applying the values that they hold, and which they think the poor simpletons of the vile multitude ought to hold even though they do not".

WS Gilbert, in collaboration with Arthur Sullivan, produced the Savoy Operettas. He had one of his characters describe his "little list". The list included a "judicial humorist", who, along with all others thereon, would not "be missed".

Would that all we had to contend with today were the judicial humorist. I would add to Gilbert's list the judicial activist. I'm sure he'd not be missed.

Endnotes:

1. From *The Wit of Sir Robert Menzies*, compiled by Ray Robinson, publisher Leslie Frewin: London, 1966, p. 65.
2. *Ibid*., p. 55.
3. I recognise that the author was not referring specifically to all these matters, and in relation to some his remarks may have limited or no application.
4. *Judicial Activism and the Death of the Rule of Law*, published in *Quadrant*, January-February, 2003. I am indebted to a Justice of the Supreme Court of Western Australia, who sent me the paper with the cryptic comment, "I am sure it will be of interest to you".
5. Gregory Craven, Foundation Dean and Professor of Law, University of Notre Dame Australia, the Alfred Deakin Lecture 1997, *The High Court of Australia: A Study in the Abuse of Power*. (Emphasis added).
6. A former Treasurer of the State has suggested to me that in 15 years the State Treasury will be in a parlous condition as this project reaches its maturity.
7. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.
8. *Teoh: Some Reflections*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 15 (2003), May, 2003.
9. Quoted by columnist Paul Murray, writing in *The West Australian*, 29 November, 2003, *Agendas drive justice off the rails – A bench full of High Court judgeswith their own barrows to push would be a dangerous thing*

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the sixteenth Conference of The Samuel Griffith Society, and our third in Western Australia, where we were welcomed last night at our opening dinner by a characteristically robust address from one of our most faithful WA members, the Hon Bill Hassell. It is a particular pleasure both for Nancy and myself to return to our own home State, to which, after more than 50 years non-residence here, we still look in terms of our State loyalties.

At the outset I should mention, for the benefit of those who were unable to attend last night's dinner, that despite what is printed in your Conference program, our President, Sir Harry Gibbs, is not in fact with us on this occasion. I know that you will all regret as much as I do that, on medical advice, Sir Harry has been forced to cancel his earlier plans to attend. Accordingly, at last night's dinner our Vice-President, Sir Bruce Watson, who chaired that dinner in Sir Harry's place, read to the assembled guests the following expression of regret which Sir Harry had provided:

> "I am grateful to Sir Bruce Watson for reading these remarks on my behalf.
>
> "I very much regret that for medical reasons I am unable to be with you at this Conference.
>
> "This is the 16th Conference held by the Society. That, in itself, is a matter for satisfaction. I have been able to attend all previous 15 Conferences. I have benefited from the many thoughtful and stimulating papers that have been presented on these occasions and from the discussion those papers have generated. I have, in addition, particularly valued the opportunity to meet the members of the Society who have attended the Conferences. I am disappointed that I shall not have that opportunity on this occasion.
>
> "The present program is interesting and topical. I hope that you will derive pleasure and profit from this Conference and I apologise for my absence.
>
> "I hope that I shall be able to see you at the next Conference".
>
> I am sure that we all echo that hope.

Last night Bill Hassell spoke about "the state of the law" in Australia. At the risk of over-generalisation, I think it might be said that many of the ills to which he pointed in the legal profession (while acknowledging the sterling worth of many in that profession) could be said to apply equally to many other aspects of life in Australia today.

We are, after all, at war. Yet, perhaps because we have not yet been vividly reminded of that fact via the dread agency of actual losses on the battlefield, Australians give little sign of appearing to recognise that fact. Do we too have to suffer the kind of tragedy which the Spanish people endured last Thursday in Madrid before we confront the unpleasant realities of international terrorism today?

Anyone reading our newspapers, or listening to or viewing our electronic media, could only assume that this is a nation of whingers. More money – that is, more of our taxes – for Medicare? Not enough. More money for universities? Not enough. More money for schools? Not enough to satisfy the ideological leanings of the teachers' unions. More money for defence? Wasteful expenditure. An almost completely successful termination of the previous people smuggling rackets? A heartless deprivation of illegal immigrants' (sorry, asylum seekers!) human rights. And on, and on, and on.

So as well as an address on "the state of the law", perhaps we need papers, at some

future Conference, on the state of the media, the state of the medical profession, the state of the teaching profession, the state of academia (and what used to be called the humanities in particular). The question of course would then be, in what degree, unlike our address last night, would papers on these topics bear on the central purposes of this Society?

That is a large question, and you will be relieved to hear that I do not intend to pursue it further here.

In our Conference this weekend we shall, however, consider a number of issues that do bear upon those central purposes, and none more central than the role of the Senate. The Prime Minister's regrettable attack on that institution, which is the subject of our first three papers, may be excused by many as a reaction to frustration. And it is true that having to deal with a "dog-in-the-manger" Labor Opposition, an Australian Democrats party which has been effectively brain-dead for decades, and a couple of malevolent dark Greens whose only objective appears to be the destruction of the successful society whose fruits they meanwhile continue to enjoy, would make even a saint feel frustrated. That excuse is not, however, I regret to say, good enough. So we can only trust that – as in fact I do believe – the Prime Minister will, before very long, put this temporary folly firmly behind him.

We have not, however, come here this weekend solely to talk about the Senate. Later today, Professor Greg Craven, whom it will be a pleasure to welcome back once again to our proceedings, will give us a paper discussing at more length the judicial activism malaise to which Bill Hassell's more general remarks last night were chiefly directed. And this morning, in what I suspect will prove to be one of the most significant papers we shall hear this weekend, Dr Michael Connor will revisit the abysmal depths of *Mabo* and reveal to us that – if that be possible – they were even more abysmal than we thought.

If at some future time we were to have a paper on "the state of the media", one of the topics which such a paper might profitably pursue could be the pattern both of general ignorance and deliberate – even malicious – falsehood which our media display towards our system of constitutional monarchy. So it is appropriate that, later today, we shall have two papers on the role of the Crown. One will be from the indefatigable Sir David Smith, who will be as illuminating about the role of State Governors as he has already been, in this Society and elsewhere, about the role of the Governor-General. The other, from Professor Gregory Melleuish, will examine the topic more generally.

And that is just today!

It is now time to get this show really on the road, with our first paper, from the Clerk of the Senate, Harry Evans, entitled *Why the Prime Minister's Proposals would Dismantle the Constitution*. Our Chairman for this Session will be our Vice-President, Sir Bruce Watson; and before I hand over to him I would like you to join me in congratulating him, in the usual manner, on the very high honour bestowed upon him in the Australia Day Honours list, six weeks ago, as a Companion (AC) in the Order of Australia.

Thank you. I shall now hand over to Sir Bruce.

Chapter One
Why the Prime Minister's Proposals Would Dismantle the Constitution

Harry Evans

The Prime Minister's proposals for changes to the Constitution, as set out in his discussion paper of 2003, are described as seeking to improve the procedures for resolving deadlocks between the two Houses of the Parliament.

They would do far more than that. They would involve a massive shift in power from the legislature to the Executive government, in particular to the office of Prime Minister. More than that, they would involve a breach of the compact which underlies the Constitution, and amount to a dismantling of the constitutional structure itself.

The foundation principle

It is well known that the constitutional provisions for the Senate, representing the people of each of the States equally, and possessing a veto over all proposed legislation, was *the* condition for the establishment of the Commonwealth. Federation would not have been agreed to if this condition had not been met.

The basis of these provisions was the principle of a double majority: any law would have to be passed by a majority of all the people of the Commonwealth, and a majority of the people of a majority of States, both majorities represented by their elected delegates in the two Houses of the Parliament.

This arrangement was to ensure that the legislative majority in both Houses would be geographically distributed across the Commonwealth. It would not be possible to form a legislative majority from the representatives of a minority of States, specifically, from the representatives of Sydney and Melbourne. The structure of the legislature would compel the legislative majority to come from at least a majority of States. This was repeatedly stated to be the very foundation principle of Federation, the essential ingredient of the federal compact.[1]

The fact that electors in all States now vote for the same political parties does not invalidate this foundation principle: the votes of the outlying States still count in the formation of the overall legislative majority to a far greater extent than they would without the Senate.

The two proposals and the principle

The first of the Prime Minister's proposals, that he should be able to hold a joint sitting of the two Houses to pass any legislation rejected or unacceptably amended by the Senate after an interval of three months, without first holding an election for both Houses, would remove this constitutional foundation. In effect, the Senate's power would be reduced to an ability to delay legislation for three months, a lesser power than that possessed by the House of Lords.

In normal circumstances it may be expected that a government's majority in the House of Representatives, even after a very close election, will outweigh its minority in the Senate. That is because the House electoral system is non-proportional, and the Senate's is approximately proportional. In a House election forty-odd per cent of the electors' votes can deliver a substantial majority, in some cases even when more people vote for the other major party. In a Senate election such a result is not feasible.

Thus under the first proposal, even a government elected with fewer votes than the "losers", as in 1998, would be able to pass any of its legislation with only a three-month delay

(if the three-month period of the current s. 57 of the Constitution is replicated). A three-month delay is little inconvenience; most legislation takes more than three months to pass in any case, even if it is uncontentious. So a government would simply accumulate for that minimal period the bills not acceptable to the Senate, and then force them through at a joint sitting just as they can be forced through the House of Representatives. There would be no incentive for a government to compromise with different views represented in the Senate, or to accept even the most improving amendments. The Executive would control the legislative process entirely.

This would devalue the votes of the electors of the outlying parts of the Commonwealth. In order to gain the necessary legislative majority, that is, the majority required to pass laws, political parties and governments would need to concentrate only on the three large eastern urban areas from which such a majority could be formed, and could neglect the outlying regions and States.

This is precisely the situation which developed in Canada, where governments and legislative majorities were formed from the seats surrounding Toronto and Montreal, and were able largely to ignore the ineffective Upper House. This led to the extreme alienation of the outlying Provinces, which bedevilled the politics of that country. Having effectively the same constitutional arrangement in Australia would ultimately produce the same situation. The secession movements which gained majority support in Western Australia and appeared in other States in the 1930s, and which have resurfaced from time to time, would soon reappear, as the electors of those States realised that governments relied for their legislative numbers on the three eastern cities. The condition on which Federation occurred, and which has since helped to hold the country together, would be removed.

The Prime Minister's second proposal, that he be able to hold a joint sitting to pass disputed bills after any general election, would undermine the foundation principle. Under the current provisions, a government must risk its own existence, at least six months before its term has expired, and also risk all of its Senate places, in order to have a joint sitting. Only after taking that risk, and achieving the necessary numbers in the House of Representatives, can a government use its House majority to override its Senate minority, in respect of legislation in dispute before the election. The proposed provision would allow the government to achieve that goal without the risk. Indeed, there would be an entirely risk-free method of passing the disputed legislation: simply by waiting until the next general election is due. If a government were returned with all but the narrowest of margins in a regular election, the Senate effectively would not count for all legislation previously in contention.

Dismantling safeguards

There is a broader sense in which the Prime Minister's proposals would dismantle the Constitution.

Our constitutional structure was intended to be one of divided power, with strong safeguards against the concentration of power in any office-holder or institution.

This commitment to such safeguards is illustrated by one of the debates at the constitutional conventions which drew up the Constitution. Some delegates to the conventions opposed the adoption of the British system of having a Cabinet, formed out of the majority in the Lower House, as the effective Executive government, and they recommended a different kind of Executive. They did so on the basis that the Cabinet system led to a concentration of power inconsistent with the division of power in the other provisions of the Constitution. There were references to Prime Ministers as the new autocrats.[2] While those who opposed the Cabinet system lost that argument, the constitutional structure which emerged was remarkable for its safeguards against concentrated power.

Leaving aside the division of power between the Commonwealth and the States, and the specification of the Commonwealth's legislative powers, which was to be the greatest

safeguard of the federal system, the following safeguards applied to the central government.

In the Executive government:

(1) The Governor-General would perform the role of the constitutional Monarch, with the prestige and independence and sufficient powers to act as a constitutional umpire and guard the integrity of the Executive.

(2) The Cabinet system, notwithstanding the criticisms by its detractors, would ensure that government decisions were collective decisions of the ministry. This institution of collective executive decision-making was reinforced by the references in the Constitution to the Governor-General in Council, that is, the constitutional Monarch acting with the advice of the ministry.

(3) Under the arrangement called responsible government, the ministry would be responsible to the House of Representatives, so that the House could at any time remove a ministry which had lost the House's confidence and install another, with the possibility, but without the necessity, of a general election.[3]

In the legislature:

(4) The two Houses of the Parliament, differently constituted and with virtually equal powers, would ensure that no law passed without the special majority already mentioned.

In the judiciary:

(5) Federal judges would be appointed by the Governor-General in Council, by the constitutional Monarch on the advice of the ministry, ensuring great integrity in appointments, and they would be irremovable except by the two Houses and the Crown acting together on grounds of proved misbehaviour or incapacity. This was especially significant for Justices of the High Court, who would interpret the Constitution.

Most of these safeguards have been removed or significantly weakened by political practice, not by amendment of the Constitution, since the constitutional structure was established:

(1) The Governor-General is now the appointee of the Prime Minister, dismissible by the Prime Minister. The aura of the Crown has largely dissipated, and the office no longer has the authority and independence to perform the major constitutional role assigned to it. (Much of the prestige and independence of the office derived from its link to what was called the Imperial Government; while we would not wish to restore that situation, the safeguard value of the office is diminished by its absence.)

(2) The Cabinet's deliberations are secret, but most of what we know about its operations indicate that, while it may debate matters, the Prime Minister's will is the deciding factor. Executive decision-making rests with the Prime Minister, perhaps in consultation with a few close ministerial supporters.

(3) The Executive government has a built-in, unfailing majority in the House of Representatives, which is notoriously a rubber stamp for government decisions. The perceived function of government backbenchers is to be a cheer squad for the Executive. Governments are not in any meaningful sense responsible to the House, and not even accountable to it, in that the government can use its ever-reliable numbers to suppress any serious accountability procedures. With the gag and the guillotine, the government determines whether and for how long any matter will be debated. Much the same complaints are made about Lower Houses in all so-called Westminster systems, but the Australian House is more rigidly controlled by the government than any other.[4]

(4) With one House of the Parliament under Executive control, the supposed separation of legislative and executive powers is undermined. The legislature operates as such

only to the extent that the Senate is not under government control. Legislative/Executive relations are Senate majority/Executive relations.

(5) It is widely accepted that, behind the mask of Cabinet, judges are the Prime Minister's appointees, and that he appoints judges who are on his ideological wavelength. This is significant when constitutional interpretation is permeated with ideology. Political parties tend to regard judges as "ours" or "theirs". Depending on when appointments are able to be made, a Prime Minister in office for any substantial length of time can have "his" judges, and determine the character of the High Court and the nature of its decisions. The difficulty of removing judges is still important for judicial independence, but ultimately depends on the Executive not controlling the Senate. If the government completely controlled the legislature, a judge appointed by a previous administration would have to be doubly careful not to commit any indiscretions which could provide plausible grounds for removal.

Thus, apart from the somewhat damaged independence of the judges, the only safeguard which survives to any extent is the ability of the Senate to exercise legislative powers when not under government control. Legislative and executive powers have otherwise largely fallen into the office of Prime Minister. Few systems called democratic exhibit such a concentration of power in one office-holder.

The Prime Minister's proposals for constitutional change would significantly increase this concentration of power.

The first proposal would essentially remove the last remaining safeguard. A Prime Minister would control law-making with only a three month delay.

The second proposal would also greatly increase prime ministerial power. One of the most serious defects of the unmodified "Westminster" design of the Lower House is that it gives a Prime Minister the ability to choose the time for a general election, so that an election can be held when it is most politically advantageous. Under Australia's constitutional arrangements, there are a number of disincentives to calling early elections for partisan advantage. An early election for the House of Representatives alone puts the two Houses out of synchronisation, and requires either another early House election or a separate Senate election, either of which may well be disadvantageous to the government. A double dissolution election in the first half of a year has much the same effect, by the backdating of Senators' fixed terms.

The proposal that a Prime Minister be able to hold a joint sitting to pass disputed bills after any general election would weaken these constraints. Indeed, the proposed provision would give Prime Ministers an additional excuse for early elections: it could be claimed that an early election is necessary to resolve disputed legislation, and that this is the constitutionally-mandated method. Early elections would thereby become respectable.

In effect, a Prime Minister would have a choice of an ordinary election, early or not, or a double dissolution election, both being equally advantageous from the point of view of passing legislation. Undoubtedly, the one chosen would be that which is otherwise most politically advantageous. If a Prime Minister wished to preserve the government's numerical advantage amongst the long-term Senators, as is believed to be the case with the current Prime Minister (and this is probably largely the reason for the issue of the discussion paper), an ordinary election would be chosen. If the political advantage for the government lay in sending all Senators to election, that option would be taken. In short, the proposal would simply increase the scope for prime ministerial manipulation of the electoral system, and the subjection of the Parliament to the prime ministerial will.

It has to be kept in mind that every addition to the Prime Minister's constitutional powers also strengthens his hold over his own party. The ability of a Prime Minister to call an election at any time has always been thought to encourage unquestioning loyalty amongst his

backbenchers. The so-called simultaneous elections proposal, which has been put to referendums, unsuccessfully, four times by successive governments, was objectionable partly because it would have allowed a Prime Minister to take the Senate to an election at the time of his choosing, thereby imposing the same insecurity on government party Senators. Giving Prime Ministers more room to manipulate the electoral cycle would be objectionable for the same reason.

The Prime Minister's proposals would not simply change the Constitution, but dismantle it. A system of separated powers with a representative legislature would finally be changed into a system of prime ministerial autocracy. Every three years, or at a time of the Prime Minister's choosing, the electorate would be able to select the autocrat to rule for the next three years or so. It would be more akin to the Second French Empire, with an Emperor ruling with endorsement by plebiscite, than a system of constitutional government.

Control of electoral and accountability laws

That comparison is not exaggerated, because a Prime Minister with full control over law-making would be able to alter any law to suit himself, including the electoral law under which elections take place, and other laws under which governments are accountable, such as the law governing the office of Auditor-General, the *Freedom of Information Act*, and so on.

The proposed new joint sitting mechanism might be used only once: to pass amendments of the electoral legislation to ensure permanent government control of the Senate. Then all other accountability legislation would be at the government's mercy.

The authors of the Prime Minister's discussion paper show some awareness of this fatal flaw in its proposals.

Thus the paper contains a suggestion that accountability legislation might be exempt from the proposed joint sitting mechanisms. How this would be set out in justiciable form in the Constitution, for future application to all such legislation, is not explained. The list of accountability legislation would be very long. The *Acts Interpretation Act* and the *Parliamentary Privileges Act* would have to be included, otherwise the ability of the Senate to disallow regulations could be removed, and the Senate's inquiry powers could be legislated away. It would not be sufficient, however, simply to list the legislation which could not be amended. If the government were prevented from amending the *Freedom of Information Act*, for example, it could very easily change the effective operation of the Act by passing other legislation.

It has also been suggested (not in the discussion paper but by others) that the proposed joint sitting mechanism could be confined to "money bills". This would not be an effective restraint. It would be very easy for a government to turn every bill into a "money bill" simply by including a large appropriation, especially as money appropriated does not have to be actually spent.[5] The only constitutional limitation on Appropriation Bills is that those for the ordinary annual services of the government must relate only to those services. This is not a justiciable limitation, as s.54 of the Constitution, the relevant provision, refers to proposed laws, not laws. Thus, even if the proposed joint sitting mechanism were confined to Appropriation Bills for the ordinary annual services, the government could load all its objectionable measures into those bills, secure in the knowledge that the prohibition in s.54 would be unenforceable. Currently the section can be enforced only by the Senate rejecting an offending bill.

The suggestion in the paper that the joint sitting mechanism be confined to "election commitments" could not be made justiciable unless it were limited to the actual texts of bills released before elections. How could the High Court otherwise determine that a piece of legislation conformed with an "election commitment"?

Extending the "waiting period" for a government to hold a joint sitting, another

suggestion in the paper, would provide little amelioration of the first option. Absolute power after four months is not much better than absolute power after three months.

Legitimising autocracy

It has been commonly suggested that the Prime Minister was not serious in advancing these proposals, and had no intention of ever submitting them to a referendum or campaigning for them. They were, it is surmised, simply a way of dramatising supposed Senate obstruction and putting pressure on other parties in the Senate.

There is one consideration in favour of this interpretation. The current Prime Minister must know that, if the proposals were successful, he would gain virtually absolute power for a time, but that power would also be delivered to every one of his successors. Even if he were able to keep his own party in office by doctoring the electoral law, future Prime Ministers could easily repudiate all his works. He would be able to pass his favourite legislation, but a future Prime Minister would be able to reverse it with equal ease. It would be a remarkably unreflective and short-sighted Prime Minister, however dazzled by his own power, who could not see that.

Even by raising these proposals, however, the Prime Minister has done some of the damage which would be incurred by proceeding further with them. His party have always represented themselves as the defenders of the Constitution; indeed, as defenders of the division of power and safeguards of the Constitution. Their main rivals were supposed to be the believers in centralised and concentrated power and the would-be destroyers of constitutional safeguards. The raising of these proposals legitimises the ideology of Executive absolutism. It will now be much more difficult for the current Prime Minister's party to resist any power-concentrating and safeguard-dismantling measures which may be put by others in the future.

Endnotes:

1. For example, *Australasian Federal Convention Debates,* 23 March, 1897, p. 28; 30 March, 1897, pp. 326, 340; 17 September, 1897, p. 784.
2. The major debates on the proposal to jettison the Cabinet system are recorded in *Australasian Federal Convention Debates,* 18 March, 1891, pp. 464-473; 17 September, 1897, pp. 782-793. A reference to Prime Ministers and Premiers as the "modern autocrat[s]" is at p. 787.
3. This was stated to be the essence of the British system by Walter Bagehot's classic exposition, *The English Constitution,* 1867, which was referred to by the framers of the Australian Constitution.
4. A collection of assessments of the debilitated state of the House of Representatives is in S Bach, *Platypus and Parliament: the Australian Senate in Theory and Practice,* 2003, pp. 240-242.
5. Examples of how the limitation in this proposal could easily be circumvented are contained in an advice to Senators incorporated in *Senate Debates,* 13 October, 2003, pp. 16118-16119.

Chapter Two
Prime Ministers and Reform of the Senate

Professor Malcolm Mackerras

In the matter of seeking amendments to the Australian Constitution we can, I think, divide the 20th Century into two parts, namely the first three-quarters with one pattern and the last one-quarter with a different pattern. That is a rough division of time, but it illustrates the point explained below. With the sole exception of the republic question, the Prime Minister of the day has promoted an affirmative vote. Therefore, by looking at the record of referendums, we can see what has motivated the leaders of our federal governments.

Consider the (chronologically) first 28 proposals placed before the people. This period begins with the first proposal put (*Senate Elections* in December, 1906) and concludes with the 27th (*Prices*) and the 28th (*Incomes*), polled on the same day in December, 1973. Of those 28, no less than 23 proposed to amend s.51 of the Constitution, which sets out the concurrent powers of the Commonwealth Parliament. In short, the Prime Ministers of that period were overwhelmingly motivated by a desire to increase the powers of the Commonwealth.

Now consider questions 29 through to 44 (a total of 16), for which referendums were held between May, 1974 and November, 1999. Not a single one of those sought to amend s.51. The priorities of our Prime Ministers had changed. What, then, were those priorities for the last quarter of the 20th Century when attention was given to constitutional change? One would have to concede they were more mixed than for the earlier period. Yet one item on the agenda of Prime Ministers stands out. All five men – Gough Whitlam (1972-75), Malcolm Fraser (1975-83), Bob Hawke (1983-91), Paul Keating (1991-96) and John Howard since 1996 – have proved themselves to be Senate bashers.

These five men were all significant holders of the office of Australian Prime Minister. Consequently their records can be checked. In the case of Whitlam, the Senate-bashing aspect of the man is so well established it scarcely needs to be re-stated. Nevertheless, I discuss below two aspects which have tended to be over-looked. In the case of Howard, this part of his agenda did not become clear until June last year, when he made a speech to the Liberal Party's National Convention in Adelaide. It is to that part of Howard's record this paper is mainly devoted. His record, however, should be seen in the context of his predecessors – Whitlam, Fraser, Hawke and Keating.

Gough Whitlam was a member of, in fact he was the leading light of, the Joint Committee on Constitutional Review established by the Commonwealth Parliament during the 1950s. Its 1959 Report came to 173 pages (not including Appendices) and was much praised by the progressives of the day. Yet its historical status is one of failure – a discredited, disreputable report which succeeded in achieving only one amendment, the repeal in 1967 of the old s.127 of the Constitution. In other words, only three of its 173 pages have been put into effect, pages 54, 55 and 56, or Chapter 9 "Reckoning of Population". What a dismal record! It was disparaged by both Sir Robert Menzies and Sir Garfield Barwick who, as Prime Minister and Attorney-General respectively, had carriage of constitutional reform. A powerful dissenting report was delivered by Senator Reginald Wright (Liberal, Tasmania) as Appendix B, constituting pages 176-188.

Chapter 5 was titled "Terms of Senators" and covered pages 34-38. Here was set out the most dishonest proposal to amend the Constitution ever put to the people in my lifetime. Under the title *Constitution Alteration (Simultaneous Elections) 1974* it was first put to the people at a May, 1974 referendum by the Whitlam Government. Purporting to provide for

simultaneous elections for the two Houses, its real purpose was to give the Prime Minister more power over the Senate. By doing away with the current senatorial fixed term of six years and replacing that with two terms of the House of Representatives, it would have given the Prime Minister the power at any time to dissolve half the Senate by virtue of his power to dissolve the House of Representatives.

Each of Whitlam's two successors tried to implement this same proposal without success, at referendums in May, 1977 and December, 1984, respectively. The only difference lay in the title. For the Fraser Government the title was *Constitution Alteration (Simultaneous Elections) 1977*, while for the Hawke Government it was *Constitution Alteration (Terms of Senators) 1984*. My case rests upon this notable similarity. Each of Whitlam, Fraser and Hawke were Senate bashers.

Paul Keating never actually caused a referendum to take place. Had he been given the power to do so he would surely have given priority to promoting the republic. My claim that he was a Senate basher lies in the simple fact that, speaking in Parliament as Prime Minister in November, 1992, he coined the memorable phrase "unrepresentative swill" to describe the Senate. I have more to say on that below.

I now come to John Howard. From 1996 to 2002 he seemed willing enough to negotiate his legislative programme through the Senate without making too many concessions to influential Senators whose votes he needed. However, on 8 June, 2003 he gave his closing address to the Liberal Party's National Convention in Adelaide. The transcript of that speech reads in part as follows:

> "We all know from our learning of Australian history that the Senate was essentially given its powers as a result of the federal compact between the various States of Australia at the time of Federation. The ideal was that it would be a State's house as well as a house of review. The reality is that long years ago the federal Senate ceased to be a State's house, and in more recent times it has certainly also dropped the pretence of being a house of review. Tragically for Australia, through the instrument of the Labor Party and the minor parties, the Australian Senate in recent years, so far from being a State's house or a house of review, has become a house of obstruction…
>
> "The deadlock provisions of the Constitution in section 57 were inserted way back at the time of Federation. And they contemplated the holding of a joint sitting after a double dissolution election in order to resolve deadlocks between the two Houses. The reality is that in a period of 102 years they have only been used to produce a joint sitting on one occasion and that was in 1974. . . .
>
> "And not surprisingly, when you look back through the history of constitutional examination you find some nuggets, and I found a nugget back in 1959. It was a Joint Parliamentary Committee on Constitutional Reform and it had impeccable bipartisan credentials. One member of it was the then member for Werriwa, Edward Gough Whitlam, and another was Sir Alec Downer. . . And what that Committee essentially recommended was that the Constitution should be altered by referendum to provide that if legislation were rejected on a number of occasions by the Senate in the way described in section 57, there could be a joint sitting of the two Houses called without the necessity to hold a double dissolution election: and that if the legislation were passed through that joint sitting then it would become law. I think that could offer, some years into the future, a way of providing a more modern and contemporary and workable method of resolving differences between the two Houses".

Howard's description of that Report is good for a chuckle from anyone acquainted with its politics. At the time, Labor chose to give its allotted places to its heavyweight Members and Senators, Arthur Calwell, Gough Whitlam, Reg Pollard and Eddie Ward from the House and Nick McKenna and Pat Kennelly from the Senate. By contrast, the Liberals chose (apart from

the dissenting Reg Wright) those among its members of lightest weight. In truth Sir Alec Downer was a less substantial figure than his son! Howard's description that the Report had "impeccable bipartisan credentials" would have been greeted with a hollow laugh by senior members of the Liberal Party at the time.

With that June, 2003 Adelaide speech Howard placed himself firmly in the line of Senate-bashing Prime Ministers, with Whitlam, Fraser, Hawke, Keating and Howard competing for the title of the man most willing to assert the supremacy of the House of Representatives over the Senate. More, however, was to come. As promised in that speech, the Howard Government would release in October, 2003 its official paper with the title *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution*.

Now for a brief diversion. My paper contains eight tables, and it is no accident that they are updated versions of the same eight tables which appeared in my chapter *Thoughts on the 1949 Reform of the Senate*, in the Proceedings of the Eleventh Conference of this Society held at Melbourne in July, 1999.[1] My theme today is exactly the same as was my theme then. So permit me to quote myself:

> "The 1949 reform was the result of a piece of ordinary legislation which passed through the Commonwealth Parliament in 1948. At the time debate was dominated by the short-term consequences of the new system. Looking back over 50 years, however, we can now give a verdict on the behaviour of the Senate. It is given in Table 1. Note that there have now been more parliaments under 'PR' than there were under previous non-proportional systems from 1901 to the election of the 18th Parliament in 1946".[2]

Table 1: Control of federal Parliaments, 1949–2001 [3]

Date of Election[a]	Number of Parliament	Prime Minister at Opening	Date of Dissolution
Hostile Senate[b]			
December 1949	19	Menzies (Liberal)	March 1951
December 1972	28	Whitlam (Labor)	April 1974
May 1974	29	Whitlam (Labor)	November 1975
October 1980	32	Fraser (Liberal)	February 1983
December 1984	34	Hawke (Labor)	June 1987
Government Senate Majority			
April 1951	20	Menzies (Liberal)	April 1954
May 1954	21	Menzies (Liberal)	November 1955
November 1958	23	Menzies (Liberal)	November 1961
December 1975	30	Fraser (Liberal)	November 1977
December 1977	31	Fraser (Liberal)	September 1980
Government de Facto *Senate Control*			
December 1955	22	Menzies (Liberal)	October 1958
December 1961	24	Menzies (Liberal)	November 1963
November 1963	25	Menzies (Liberal)	October 1966
November 1966	26	Holt (Liberal)	September 1969
October 1969	27	Gorton (Liberal)	November 1972
March 1983	33	Hawke (Labor)	October 1984
July 1987	35	Hawke (Labor)	February 1990
March 1990	36	Hawke (Labor)	February 1993
March 1993	37	Keating (Labor)	January 1996
March 1996	38	Howard (Liberal)	August 1998
October 1998	39	Howard (Liberal)	October 2001

a The date of the election is that for the House of Representatives, which was also usually a Senate election date. The government of the day at all times enjoyed a House of Representatives majority and, therefore, total control of the Lower House.

b A "Hostile Senate" is defined as one which was dissolved. Thus the Date of Dissolution column records the date of the double dissolution. In respect of rows for "Government Senate Majority" and "Government *de Facto* Senate Control" the dissolution date is for the House of Representatives only. It is important to note that there were only five double dissolutions but there were 16 dissolutions for the Lower House alone. Those 16 dissolutions produced five general elections for the House of Representatives only (1954, 1963, 1966, 1969 and 1972) and 11 House of Representatives plus half-Senate elections.

And "PR" means proportional representation. It was placed in inverted commas to recognize that the international literature on electoral systems calls our Senate system "semi-proportional" because of the malapportionment between the States, each always having the same number of Senators for very different population sizes. At the Census of March, 1901 the population of New South Wales was 1,354,800, that of Western Australia 184,100 and of Tasmania 172,500. At the August, 2001 Census the population of New South Wales was 6,371,700, that of Western Australia 1,851,300 and of Tasmania 456,700.

It can be ascertained that only five of the 21 Parliaments in Table 1 saw the government of the day with a Senate majority. Where I differ from Howard's paper lies in my explanation for the rarity of that. The contrast between the two explanations could scarcely be greater.

Consider, first, the Howard paper's description on pages 5 and 6:

"Today, there is a case for change. Two important legislative reforms have combined to alter the composition and function of the Senate fundamentally.

"First, the introduction of proportional representation in 1948, taking effect in 1949, has fostered the development of minor parties.

"This has been a valuable evolution in the representative character of the Australian Parliament.

"In addition to the introduction of proportional representation, there was an amendment in 1983 which increased the number of Senators elected in each State from five to six at a half-Senate election.

"In practice, the election of an even number of Senators at a half-Senate election, combined with proportional representation, has meant that it is virtually impossible for a government to obtain a majority in the upper house, no matter how large its majority is in the lower house".

Then on page 29 the discussion paper remarks:

"Critically, the increase to 12 Senators means that at each election there will be six, not five Senate spots available in each State.

"Therefore it is much more difficult statistically for a political party to win a majority of Senate seats from an even number at each half-Senate election than the odd number that existed before the amendment was made in 1983.

"When there were 10 Senators from each State, a party at a half-Senate election could win a majority of seats in a particular State (i.e., three out of five) with 50.01 per cent of the vote in that State.

"However, now with 12 Senators, a party needs 57.16 per cent of the vote at a half-Senate election to win a majority of seats in a State (four out of six)".

If one were motivated to be extremely charitable to the discussion paper one could (perhaps) say that there is "something in" all that. The trouble is that the discussion paper does not explain why only the Menzies and Fraser governments were able to get Senate majorities. The inference that the reader is meant to draw is to say "Menzies and Fraser governed before the amendment of 1983". The statement is true but is not central to the argument. The paper nowhere mentions the truly important trend – the declining shares of big party votes.

In a proportional representation system a government can fairly complain if it gets a majority of Senate votes, Australia-wide, but not a majority of seats in the Senate. Thus

Menzies could fairly complain when the 1949 election gave him a majority of the votes for both Houses but Labor continued to have a Senate majority in seats. However, no Prime Minister post-Fraser can so complain. Table 2 sets out the percentages at those elections when a "big party" received a vote in excess of 49 per cent. I regard a 49 per cent support as high enough to be called a "majority" of the vote.

It will be noticed that two of the four entries in Table 2 failed to give a majority in the whole Senate to the party with the majority of votes. Labor continued to have a majority in the Senate in the Menzies 19th Parliament. By contrast, Menzies had a Senate majority throughout the whole of the 20th and 21st Parliaments – even though Labor won 50.6 per cent of the vote at the May, 1953 separate election for half the Senate. In all three cases the reason had to do with the rotation of Senators.

Table 2: Senate first preference "majority" percentages

Party	1949	1951	1953	1975
Coalition	50.4	49.7	44.4	51.7
Labor	44.9	45.9	50.6	40.9

By contrast, the Coalition's 49.7 per cent in 1951 and 51.7 per cent in 1975 did produce a Senate majority in the 20th, 21st, 30th and 31st Parliaments. The reason has to do with the proportionality of the result when the most recent election was double dissolution, and the semi-proportionality of the result when the most recent election was half-Senate. I have more to say on that below, where I shall give a detailed explanation as to why Menzies and Fraser enjoyed the Senate majority which has wholly eluded the Howard Government.

The continuing refusal of the Australian people to vote for the government of the day in the Senate election has produced this consequence. The normal situation is that the government has *de facto* control of the Senate without enjoying an actual majority. While we may disagree, on the merits of each particular case, with the decision of the Senate to reject this or that piece of government legislation, it is difficult to object on democratic grounds.

In defence of my view I set out in Table 3 the percentage of the vote secured by the Government (which in 1983 and 1996 entered the election as the Opposition party) at the Senate election relevant to the main life of that Parliament. Note that in 1964, 1967 and 1970 the election in question was a separate election for half the Senate.

Table 3: Selected Government Senate percentages
(Parliaments where Government had *de facto* Senate control)

Election Date	Party	Percentage
December 1955	Coalition	48.7
December 1961	Coalition	42.1
December 1964	Coalition	45.7
November 1967	Coalition	42.8
November 1970	Coalition	38.2
March 1983	Labor	45.5
July 1987	Labor	42.8
March 1990	Labor	38.4
March 1993	Labor	43.5
March 1996	Coalition	44.0
October 1998	Coalition	37.7

While a Government may, perhaps, reasonably object to Senate rejection of its legislation by a genuinely hostile Senate (of which there have been only five cases in 21 Parliaments after 1949), it is difficult to see how any Government could reasonably object to Senate rejection of legislation during any of the Parliaments covered by Table 3. It is worthwhile noting that four of the Parliaments contained in Table 3 met the technical conditions of s.57 of the Constitution – as is set out in Table 4. It is also worth noting that none of Menzies, Hawke or Howard could justify to himself or his party the pulling of the "triggers" he had established for himself in the 22nd, 33rd, 38th and 39th Parliaments. That is why the subsequent election was of the conventional type, that is to say for the House of Representatives and half the Senate.

The discussion paper trades on the ignorance of readers in matters psephological. Take, for example, the assertion "that it is virtually impossible for a government to obtain a majority in the upper house, no matter how large its majority is in the lower house".[4] The reader is encouraged to assume that a large majority in the Lower House is based on a high share of the vote. Such is usually not the case – as can be seen by considering the example of the March, 1996 election, Howard's first win. In the House of Representatives vote the Coalition received 47 per cent of first preferences, which inflated to 54 per cent of the two-party preferred vote, which inflated to 64 per cent of the seats. In the Senate election, however, the Coalition received only 44 per cent (see Table 3). Could anyone seriously argue that there was an injustice to the Coalition that it lacked a Senate majority in Howard's first term?

Readers who compare this paper with my earlier paper for the Eleventh Conference of this Society may notice that I have updated Table 1 and Table 3 each by one parliamentary term, but I have updated Table 4 by two terms. The reason for the apparent discrepancy is that the history books have not yet determined whether or not the present (40th) Parliament ended up as a "hostile Senate" case. Personally I have no doubt there will not be a double dissolution. If I am right, then the 22nd Parliament (the fourth Menzies term) and the 40th (the third Howard term) will rival each other for the number and importance of "triggers" never pulled. As can be seen from this, I do not accept that the present can be described as a "hostile Senate". That becomes so only if the Prime Minister makes it so. He could do that by double dissolving.

There are very good reasons why I compare and contrast the comparable 22nd and 40th Parliaments. The two similarities are: (a) no double dissolution, notwithstanding the number and importance of "triggers"; and (b) a reasonable expectation of a Coalition gain in Senate seats at a half-Senate election. The three dissimilarities are: (a) five-seat Senate elections in 1958 but six-seat Senate elections in 2004; (b) the Menzies prospect to get an actual Senate majority in 1958 contrasting with Howard's chance to get "only" 38 out of 76 senators in 2004; and (c) the much higher Coalition Senate vote under Menzies than under Howard.

Point (c) above needs to be repeated and stressed. Whenever one compares like with like under each of Menzies, Fraser and Howard, one finds the Coalition's Senate percentages to be highest under Menzies, second highest under Fraser and lowest under Howard. Here we have the first example. When Menzies decided not to double dissolve in 1958, he was aware that the Coalition's Senate vote had been 44.4 per cent in 1953 and 48.7 per cent in 1955, an average of 46.6 per cent. However, when Howard decides not to double dissolve in 2004, he will be aware that the Coalition's Senate vote has been 37.7 per cent in 1998 and 41.8 per cent in 2001, an average of 39.8 per cent.

Table 4: Parliaments which have met the conditions of section 57

Number of Parliament	Date of Election	Prime Minister	Term of Office	Date S. 57 First Met	S. 57 Bills	Date of Dissolution	Next Election	Length of Parliament
5th	31 May 1913	Cook (Liberal)	First	28 May 1914	1	30 July 1914 (double)	5 September 1914	1 year 21 days
19th	10 December 1949	Menzies (Liberal)	First	14 March 1951	1	19 March 1951 (double)	28 April 1951	1 year 25 days
22nd	10 December 1955	Menzies (Liberal)	Fourth	27 March 1958	14	14 October 1958 (single)	22 November 1958	2 years 8 months
28th	2 December 1972	Whitlam (Labor)	First	29 August 1973	6	11 April 1974 (double)	18 May 1974	1 year 1 month 15 days
29th	18 May 1974	Whitlam (Labor)	Second	11 December 1974	21	11 November 1975 (double)	13 December 1975	1 year 4 months 2 days
32nd	18 October 1980	Fraser (Liberal)	Third	10 March 1982	13	4 February 1983 (double)	5 March 1983	2 years 2 months 10 days
33rd	5 March 1983	Hawke (Labor)	First	14 June 1984	2	26 October 1984 (single)	1 December 1984	1 year 6 months 5 days
34th	1 December 1984	Hawke (Labor)	Second	2 April 1987	1	5 June 1987 (double)	11 July 1987	2 years 3 months 16 days
38th	2 March 1996	Howard (Liberal)	First	25 March 1998	4	31 August 1998 (single)	3 October 1998	2 years 4 months
39th	3 October 1998	Howard (Liberal)	Second	26 March 2001	1	8 October 2001 (single)	10 November 2001	2 years 10 months 29 days
40th	10 November 2001	Howard (Liberal)	Third	3 March 2003	6 so far			

The creation of six-seat half-Senate elections under Howard (compared with five-seaters under Menzies and Fraser) was implemented by the Hawke Government in 1983. To get the numbers in the Senate, Labor persuaded the National Party to go along with its plan, which was opposed by the Liberal Party and the Democrats. That fact has enabled the Liberals to make a claim to the moral high ground which, on the face of it, seems reasonable. They can then proceed to claim that the Hawke Government wrecked the Coalition's position in the Senate. They can even do something which Howard actually did in his June, 2003 Adelaide speech quoted at length above. As part of that speech he said:

> "As a result of the changes that were made in 1983 when the size of the Parliament was increased, I might remind you against the determined vote of the Liberal Party, it is for practical purposes impossible for the Coalition in its own right to obtain a majority of the 76 members of the federal Senate".

It is quite wrong to make that "impossible for the Coalition" claim. Howard could double dissolve in 2004 and could easily get a Senate majority if the Coalition's Senate vote were high enough. It has been demonstrated in Table 2 that the Menzies Senate vote of 49.7 per cent at the 1951 double dissolution election was enough to give him a Senate majority. The Fraser Senate vote of 51.7 per cent at the 1975 double dissolution election was also enough to give him a Senate majority. With 12 Senators per State to be elected today (instead of 10 then) it would be even easier for Howard – provided that the Coalition's Senate share were high enough.

Howard must surely know that this "impossible for the Coalition" claim is nonsense. The truth was stated above: whenever one compares like with like under each of Menzies, Fraser and Howard, one finds the Coalition's Senate percentages to be highest under Menzies, second highest under Fraser and lowest under Howard. Surely the Liberal Party must know that.

This point is one of two reasons why I quoted Howard as I did immediately above. The other reason is to note his words "against the determined vote of the Liberal Party". That is a correct statement of history, but the reality is that the Nationals at the time understood the future electoral interests of the Coalition better than did the Liberals.

This assertion, the truth of which I demonstrate below, explains why I describe the Howard discussion paper as I do, namely as "a dishonest piece of current Liberal Party propaganda". Never do I use the expression "Coalition propaganda". The reason is that I do not associate the National Party with it.

Conversations I have had with senior Nationals leave me in no doubt about three key points. First, none of them really supports the paper. Second, they are very much aware that these six-seat half-Senate elections would never have come about but for the parliamentary votes of the Labor and National parties combining to give the plan (to increase the Parliament's size) a Senate majority in a circumstance where both the Liberals and Democrats were opposed. Third, the Nationals are well aware that in 1983 their parliamentarians did, indeed, understand the future electoral interests of the Coalition better than did the Liberals.

To demonstrate the truth of this assertion I begin with the Senate as it was composed from July, 1993. There is a good reason for that. The first Senate election under the increase (in December, 1984) was for seven Senators per State as a transition to the higher number. The second (in July, 1987) was a double dissolution. Thus the third and fourth elections (in March, 1990 and March, 1993) were the first cases of six-seat Senate elections. The state of Senate parties from July, 1993, therefore, constituted the first case where the numbers were composed from the combination of two preceding six-seat half-Senate elections. When I use the expression "37th Parliament" I refer to Senate numbers from 1 July, 1993. Consequently the Senate numbers for the 38th, 39th and 40th Parliaments mean from 1 July, 1996, 1999 and 2002 respectively.

In the 37th Parliament the Coalition had 36 of the 76 Senators (or 47.4 per cent), yet its March, 1993 Senate vote was only 43 per cent. In the 38th Parliament the Coalition had 37 of the 76 Senators (or 48.7 per cent) yet its March, 1996 Senate vote was only 44 per cent. In the 39th Parliament the Coalition had 35 of the 76 Senators (or 46 per cent) yet its October, 1998 Senate vote was only 37.7 per cent. In the present (40th) Parliament the Coalition has 35 of the 76 Senators (or 46 per cent), yet its November, 2001 Senate vote was only 41.8 per cent. It is clear, therefore, that from 1993 onwards so-called "proportional representation" has disproportionally favoured the Coalition, albeit at a lower rate than the "one vote, one value" House of Representatives.

It will be noticed that the number of Coalition Senators (35) is the same now as it was in the last (39th) Parliament. The reason for that is simply explained. In March, 1996 the Coalition won 20 of the 40 places (three out of six in each of six States and one out of two in both Territories) and exactly the same occurred in November, 2001. Bearing in mind that the Coalition scored a 50 per cent success rate both times in seats, one can have little sympathy for Coalition complaints when one also notices their shares of the vote: only 44 per cent in 1996 and 41.8 per cent in 2001.

The 35 present Coalition Senators are four short of a majority, which is 39 out of 76. A notional re-count of the 1998 and 2001 Senate votes into five-seat elections shows the Coalition the same four seats short of a majority as at present, but without Senators Brian Harradine, Len Harris or Meg Lees to negotiate with. The balance of power would instead be shared between three Greens and six Democrats. So, instead of being disadvantaged, the Howard Government holds eight of the additional 16 seats in the Senate expanded since the Menzies era, while Labor has only five. The essential reason for this is the ease with which the Coalition can win three places out of six in each State and one out of two in each Territory.

If I am right in my prediction that the next election will again be for half the Senate, then it is safe to assume there will be 37 Coalition Senators – as there were in the 38th Parliament, Howard's first term. Should Brian Harradine retire, then the Coalition would have 38 Senators, or 50 per cent of the seats, for a likely 42 per cent of the vote.

Essentially what I have been doing above has been measuring deviations from proportionality in translating votes into seats. These are questions vital to understand the distribution of political power. They are not mere academic questions. Yet they do raise two interesting questions for the academic. First, when does an election result cease to be proportional and become semi-proportional? Second, when does an election result cease to be semi-proportional and become non-proportional? The answer lies in a device of modern psephology known as the Gallagher least squares index of disproportionality. Named after the Irish political scientist Michael Gallagher, it measures in a single statistic deviations from proportionality.

In respect of recent events studied by me the highest index was that for the November, 1993 New Zealand general election. The index was 17.69. That composite statistic was calculated from a National Party over-representation of 15.46 (50.51 per cent of seats for 35.05 per cent of votes), a Labour over-representation of 10.77, an Alliance under-representation of 16.19, a New Zealand First under-representation of 6.38, and so on.

South Africa has the most proportional system in the world today. At the June, 1999 general election the Gallagher least squares index of disproportionality was only 0.16. For example, the African National Congress won 266 of the 400 seats in the National Assembly, which is 66.50 per cent of the seats. It had 66.36 per cent of the votes. The New National Party won 28 seats, exactly seven per cent of the 400 seats. It won 6.87 per cent of the votes; and so on.

Table 5 gives the equivalent Australian figures. Double dissolution elections are shown with the word "(full)" by their side, indicating an election for the whole Senate. It

should be noted that only in 1961 did the Senate election result turn out to be less proportional than that for the House of Representatives. It was a half-Senate election. My broad judgment is that an index of less than four constitutes a proportional result, while an index of more than ten constitutes a non-proportional result. Anything in between is semi-proportional. Thus I say that only when the whole Senate is elected can the system truly be said to be one of proportional representation. Notice that the index was 3.03 in 1951, 3.72 in 1974, 3.08 in 1975, 3.37 in 1983 and 2.60 in 1987.

Table 5: Least squares indexes for Australia

Election	House of Representatives	Senate
1949	7.50	3.42
1951	5.36	3.03 (full)
1953	–	3.29
1954	2.88	–
1955	6.84	6.52
1958	11.05	6.18
1961	7.12	9.75
1963	9.00	–
1964	–	2.06
1966	10.83	–
1967	–	3.80
1969	6.95	–
1970	–	3.16
1972	6.90	–
1974	5.96	3.72 (full)
1975	14.05	3.08 (full)
1977	15.02	7.30
1980	8.46	1.51
1983	10.41	3.37 (full)
1984	7.82	5.35
1987	10.41	2.60 (full)
1990	12.49	4.39
1993	8.06	3.33
1996	11.24	4.54
1998	11.85	7.34
2001	9.81	8.47

While Table 5 may seem somewhat academic, it illustrates a point which by now must be very clear to the reader. A half-Senate poll in 2004 will yield a semi-proportional result favourable to the Coalition. It would also enable the Coalition to preserve in full the benefits of the 2001 half-Senate election result, which yielded a semi-proportional result very favourable to the Coalition. By contrast, a double dissolution will yield a proportional result. Given its very low vote these days, that is the last thing the Coalition is likely to want. In terms of Senate seats, it means Howard choosing to have 32 Senators following a double dissolution compared with 37 or 38 from July, 2005 following a half-Senate election.

There is, therefore, only one outcome from a double dissolution likely to be attractive to Howard, namely the joint sitting it offers whereby he can pass all the legislation being the present and any future “triggers”. That is what truly motivates the Coalition in its desire for

"Senate reform". Whereas the present Constitution offers such an opportunity only after a double dissolution, the Coalition would ideally want that after a normal half-Senate election. As will be explained below, Senate reform means allowing Howard (and every future Prime Minister) to have his cake and eat it too.

I made the remark above that "whenever one compares like with like under each of Menzies, Fraser and Howard, one finds the Coalition's Senate percentages to be highest under Menzies, second highest under Fraser and lowest under Howard", and I gave two examples of that. Let me now draw that comparison together by taking the first four elections of each as Prime Minister or incoming Prime Minister. If one takes the Senate percentages (from Table 7) for Menzies in 1949, 1951, 1953 and 1955, the average is 48.3 per cent. If one takes the percentages for Fraser in 1975, 1977, 1980 and 1983, the average is 45.2 per cent. If one predicts a Senate vote of 42 per cent for the Coalition in 2004, and then takes an average for Howard's elections of 1996, 1998, 2001 and 2004, one finds the average is 41.3 per cent. It must by now be entirely clear that the Coalition has no basis to complain.

Tables 6 and 7 draw this all together. While Table 7 is self-explanatory, Table 6 needs some explaining. A "John Howard Prime Minister" is one who had been Leader of the Opposition but had led his party out of Opposition to victory at a general election. The Senate record of the five post-war cases is set out in Table 6. One notices the decline in their Senate percentages at their second wins. Most of all, however, I am impressed by the magnitude of the Howard decline, and the low overall vote, a miserable 37.7 per cent, in 1998. It is my confidence that the Coalition will get a better figure in 2004 that causes my prediction that there will be 37 or 38 Coalition Senators from July, 2005 following the 2004 election, which will be for half the Senate. I am quite confident of my predictions both of the type of Senate election and of the number of Coalition Senators.

Table 6: Post-war cases of the "John Howard Prime Minister"

Prime Minister	1st Win	Senate % at 1st Win	2nd Win	Senate % at 2nd Win	Decline
Robert Menzies (Liberal)	December 1949	50.4	April 1951	49.7	0.7
Gough Whitlam (Labor)	December 1972	(a)	May 1974	47.3	—
Malcolm Fraser (Liberal)	December 1975	51.7	December 1977	45.6	6.1
Robert Hawke (Labor)	March 1983	45.5	December 1984	42.2	3.3
John Howard (Liberal)	March 1996	44.0	October 1998	37.7	6.3

(a) The December, 1972 election was for the House of Representatives only.

I remarked above that "Senate reform means allowing Howard ..... to have his cake and eat it too". In order to understand that assertion let me take the two options proposed in the discussion paper. Since the Coalition will choose to have its 37 or 38 senators (rather than 32) it will not get a joint sitting under the present Constitution, because no double dissolution will occur. However, both options would give the Howard Government the joint sitting in addition to their 37 or 38 Senators.

Option 1 is the "nugget" referred to by Howard in his speech to the Liberal Party's National Convention in Adelaide. It was recommended by the parliamentary Committee in 1959 which, according to Howard, "had impeccable bipartisan credentials". Option 2 is often referred to as the "Lavarch Model", though its alleged author Michael Lavarch (Attorney-General from April, 1993 to March, 1996 in the Keating Government) denies being its sponsor.

Table 7: Non-Labor Senate percentages [5]

Election	Vote %	Election	Vote %
1910	45.6	1949	50.4
1913	49.4	1951	49.7
1914	47.8	1953	44.4
1917	55.3	1955	48.7
1919	55.2	1958	45.2
1922	52.0	1961	42.1
1925	54.9	1964	45.7
1928	50.5	1967	42.8
1931 (highest)	55.4	1970	38.2
1934	53.2	1974	43.9
1937	44.8	1975 (highest)	51.7
1940	50.4	1977	45.6
1943 (lowest)	38.2	1980	43.5
1946	43.3	1983	39.9
		1984	39.5
		1987	42.0
		1990	41.9
		1993	43.0
		1996	44.0
		1998 (lowest)	37.7
		2001	41.8
Average 1910–46	**49.7**	**Average 1949–2001**	**43.9**

Note: The term Non-Labor means Liberal from 1910 to 1914, Nationalist in 1917, Nationalist-CP from 1919 to 1928, UAP-CP from 1931 to 1943, Liberal-CP from 1946 to 1980 and Liberal-National since 1983.

Now let me reproduce the drafting of the proposed new s.57A (Option 1):[6]

"57A Disagreement between the Houses

(1) If:

(a) the House of Representatives passes any proposed law; and

(b) the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree; and

(c) after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate; and

(d) the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree;

the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives. But such joint sitting shall not take place after the next dissolution of the House of Representatives.

(2) The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other. Any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried.

(3) If the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent".

And now let me reproduce the drafting of the proposed new s.57A (Option 2):[7]

"57A Disagreement between the Houses

(1) If:

(a) the House of Representatives passes any proposed law; and

(b) the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree; and

(c) after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate; and

(d) the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree; and

(e) after a dissolution of the House of Representatives, the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate; and

(f) the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree;

the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

(2) The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other. Any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried.

(3) If the proposed law, with amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent".

Media commentators have been unanimous in expressing the assessment that Option 1 is more radical than Option 2. Consequently they have judged that Option 1 is quite out of the question whereas, perhaps, there may be some point in considering the merits of Option 2.

The discussion paper itself has a conclusion which lists various things it does not propose to do, and then asserts:

"What this paper does not accept is that there should be a permanent and absolute veto for minority interests.

"Until such time as there is a more workable and efficient means of resolving deadlocks, the effectiveness of Australian governments will be impaired.

"Perhaps more significantly, the will of the electorate will remain subject to a veto for which there is no practical resolution.

"The solution must be to develop a model which more faithfully reflects the will of the people and the intentions of those who drafted the Constitution.

"It is a proposal therefore deserving of careful consideration and a constructive public debate".[8]

I expect that control-freak Prime Ministers would endorse the thoughts above. By contrast, I disagree with every sentence. I deny that the present s.57 gives a permanent and absolute veto for minority interests. Nor is it true to say that a century of operation of s.57 has impaired the effectiveness of Australian governments. It is absurd to assert that the will of the electorate is subject to a veto for which there is no practical resolution. Since there is no problem, there is no need for a solution. The proposals do not deserve consideration, because they constitute a further impairment of the bicameral system.

Option 1 effectively turns a bicameral Parliament into a unicameral one. My firm impression is that only two members of the current federal Parliament actually support it, John Howard and Alexander Downer. It is true, however, that some support exists for Option 2 which is, therefore, more worthy of consideration. There seem to be a few Ministers and Liberal backbenchers supporting Option 2.

Two important points need to be made about Option 2. The first is that, if carried at a referendum held in conjunction with the 2004 general election, it would enable Howard to convene a joint sitting after he had arranged and won a House plus half-Senate election. He would get the best of both worlds – which is the motive behind the whole exercise. The second point is to notice the extent to which it does impair the bicameral nature of the Parliament.

It is true that the present s.57 impairs bicameralism to some degree. The important point, however, is that the present s.57 was drafted in light of the need to get New South Wales to cast an affirmative vote for Federation. To suggest that the present words do not faithfully reflect "the intentions of those who drafted the Constitution" is quite absurd. Every word of it is exactly as they drafted it!

In my opinion s.57 is a splendid piece of wording which has worked remarkably well for over a century. The fact that there has been only one joint sitting is proof of the excellence of the checks and balances of the Constitution. It is bizarre to suggest that the occurrence of only one joint sitting makes the section a failure. What it really means is that New South Wales was persuaded to join the Federation with the minimum impairment of the bicameral system, a veritable triumph for the Founding Fathers. Overall the Constitution strikes the perfect balance between the power of the Prime Minister and the Parliament, between the House of Representatives and the Senate, and between the people and the politicians.

Now that this discussion paper has fallen flat on its face, Howard can make his choice. He can call an election for six Senators per State, or he can call an election for twelve. No doubt Bob Brown strongly hopes he will do the latter. The more The Greens hope for it the less likely it is that Howard will exercise his power to double dissolve. He may want his joint sitting, but he will not want to help Brown and his party to inflict such damage on Coalition numbers in the Senate. Consequently, he will prefer to negotiate the government's economic reform agenda through the next Senate, when the Coalition's numbers will be higher than in the present Senate.

Of all the comments in the discussion paper, the one with which I disagree the most is this extraordinary assertion:

> "Australia's experience since Federation is that section 57, as a practical means of resolving deadlocks between the houses, has been all but unworkable".[9]

That statement seems to assume that a deadlock must be resolved in favour of the House of Representatives. It is true that only twice (in 1951 and in 1974) has the deadlock been resolved in favour of the House. However, in 1914, 1975, 1983 and 1987 the deadlock was resolved in favour of the Senate. Whereas the paper asserts its "solution" to be "a model which more faithfully reflects the will of the people", such is exactly what the present arrangements achieve. Among the several reasons why Howard will not double dissolve is that he knows the will of the people is against him on all the disputed legislation.

Essentially it is for that reason I refuse to define a "hostile Senate" as a case where s.57 "triggers" are merely in place. That has been true of the 22nd Parliament (Menzies), the 33rd (Hawke) and the three terms of Howard (see Table 4). Until there is a double dissolution, however, I refuse to accept that the majorities for the two houses are out of harmony. The majorities may be different, in part because of differences in the electoral systems (the more important reason) and in part because so many people split their votes. That cannot be said to produce discord. It merely produces legislation by negotiation.

Table 8: Years House of Representatives and Senate majorities not in harmony in 20th Century

Number of Parliament	Years	Prime Minister	Length of Discord
5	1913–14	Cook (Liberal)	One year
6	1917	Hughes (Nationalist)	Two months
12	1930–31	Scullin (Labor)	Two years
19	1950–51	Menzies (Liberal)	One year
28/29	1973-75	Whitlam (Labor)	Three years
32	1982	Fraser (Liberal)	One year
34/35	1987	Hawke (Labor)	Ten months
Century Total			Nine years

From time to time the majorities in our two Houses do get out of harmony. In Table 8 is set out my assessment in that regard. It shows just nine years out of 100 in which those majorities were out of harmony; not a great number of years of discord.

In my opinion the proof of the pudding lies in the eating. When four double dissolutions have resolved the dispute in favour of the Senate and only two in favour of the House of Representatives, it is more reasonable to assume "the will of the electorate" (or "the will of the people") prefers the politicians in the Senate to those in the Lower House. To use the expression "minority interests" to describe the Senate is just propaganda. It is merely polite language for "unrepresentative swill" and is just as wrong. The Government's discussion paper is nothing more than a dishonest piece of current Liberal Party propaganda. It is very reminiscent of the kind of Labor Party propaganda which was so nauseating during the Whitlam years.

Let me utter a final thought. When I set a recent exam for my students, one question on the paper was this:

> "The main purpose of an election is not to reflect 'the will of the people', but rather to provide voters with an opportunity to change the government without bloodshed. Do you agree? If so, why? If not, why not?".
>
> There is no prize for guessing the kind of answer I would give.

Endnotes:

1. *Thoughts on the 1949 Reform of the Senate*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 11 (1999), pp. 251-272.
2. *Ibid.*, p. 252.
3. Source: Ian McAllister, Malcolm Mackerras and Carolyn Brown Boldiston, *Australian Political Facts*, 2nd edition, Macmillan, 1997, pp. 8, 78 and 80. Updated for the 38th and 39th Parliaments by Malcolm Mackerras.
4. *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution*, Commonwealth of Australia, October, 2003, p. 6.
5. Source: Ian McAllister, Malcolm Mackerras and Carolyn Brown Boldiston, *op. cit.*, pp. 100-106.
6. *Resolving Deadlocks*, *op. cit.*, p. 47.
7. *Ibid.*, p. 48.
8. *Ibid.*, p. 46.
9. *Ibid.*, p. 26.

Chapter Three
The Answer to the Prime Minister's Section 57 Dilemma

Ray Evans[1]

I begin this paper with a quotation from Sir John Downer, who at the Adelaide Convention on March 29, 1897, when discussing the intractable issue of responsible government on the one hand, and the existence of a Senate with the power to deny supply to the Executive on the other, said this:

> "We only know responsible government through the evolution of centuries; but in this instance we will have evolved it not in centuries but in days. The result of this will be a good understanding between the two Houses, great mutual respect, and peace and happiness".

There hasn't been much mutual respect, peace and happiness between the House of Representatives and the Senate in recent years. Paul Keating, who really didn't have much to complain about as far as the Senate was concerned, famously described Senators as "unrepresentative swill".[2]

In his statement of 25 February, 2004, entitled *Australia's Demographic Challenges*, the current Treasurer, Peter Costello, discussed desired labour market reforms in the context of jobs for older people. He said:

> "A number of further workplace relations reforms are currently proposed: reform of unfair dismissal laws to minimise the impact on employment, particularly for small business; simplification of procedures for agreement-making; improvements to the remedies and sanctions against unprotected action; improvements to bargaining processes; and improvements to the processes for union right of entry to the workplace. These reforms have been blocked in the Senate".

Amendments to the *Workplace Relations Act* are one of the Bills which have been twice refused passage by the Senate. The procedure for resolving such deadlocks is prescribed in s.57 of the Constitution, the key elements of which are the simultaneous dissolution of both Houses and, if necessary, a subsequent joint sitting of both Houses where an absolute majority will carry the contested legislation.

Currently there are six "triggers" and three potential "triggers" which provide grounds for a double dissolution, and they are measures which are of prime importance to the Government. But it seems clear that the Prime Minister is not of a mind to follow through by calling a double dissolution. In the Government's Discussion Paper, *Resolving Deadlocks*, which was issued in the latter part of 2003, we find a number of suggested alternatives to s.57 described, every one of which suffers, in my view, from the difficulty that it would seriously fail in a referendum that would be required to amend s.57.

In preparing this paper I have read through the debates at the Conventions in Adelaide and Sydney in 1897, where this issue dominated proceedings and threatened to derail the Federation train. In their commentary,[3] *The Design of the Senate*, Brian Galligan and James Warden summarised the arguments which took place at these Conventions about the Senate, and its incompatibility with the doctrines of responsible government which had become entrenched in British constitutional practice during the 19th Century, and which had been transferred to the Australian Colonies at the same time. These debates were focused on the Senate's power with respect to appropriation and taxation bills. In 1975, of course, this issue became central when the Senate refused to pass supply.

In the 1890s there were two well defined and opposing views. The nationalists, Deakin,

Higgins and Isaacs, were strong for responsible government and saw the Lower House as the prime engine of the new polity, and they were hostile to the argument that the Senate should have the power to block supply or amend money bills. Higgins, in fact, was basically opposed to a Senate at all, unless it was elected on the same basis as the Lower House.

The States' righters, Baker, Downer, Braddon and Forrest, argued for a Senate with equal power to the House, including the power to amend money bills.

This division threatened the whole federalist project, and a compromise was necessary if Federation was going to succeed. The compromise, prescribed in Sections 53 through 57, does not, however, resolve the essential incompatibility of responsible government on the one hand, and a Senate with veto power on all legislation, including money bills, coming up from the House of Representatives, on the other. It is worth noting that this incompatibility is not present in the US Constitution, which reflects the state of English politics as it was thought to be practised in the 18th Century.[4]

The time which the Founding Fathers spent arguing about money bills, and the Senate's powers with respect to them, seems to us today a bit quaint, although it was a serious issue in 1975. Governments today take and spend 40 per cent, give or take a percentage point or two, of the citizens' income, and legislation which the current Senate has rejected includes measures to constrain spending on the Pharmaceutical Benefits Scheme, a budget item which is increasing annually by about 15 per cent. We are talking here about many billions of dollars annually, and nobody, to my knowledge, has argued that this action by the Senate is a serious attack on the doctrine of responsible government.

The difficulty faced by the Government is therefore a very real one, and it demonstrates very clearly the deep contradiction which the Founding Fathers identified, but could not resolve. It is the Government, not the Senate, which is accountable to the people at election time for its carriage of the nation's affairs. The doctrine of responsible government is embedded in our political culture, and is particularly pertinent in the fields of taxation and expenditure, where a Government (such as the Whitlam Government) which has been profligate, must, eventually, answer to the people. But we now have a Senate which, as I have mentioned, refuses to pass legislation in the particular policy area of health services, which has direct and massive budgetary implications.

On the other hand, it has become increasingly manifest that the Australian electorate prefers to have a Senate which the Government does not control. The Democratic Labor Party was the first political party to hold the balance of power in the Senate in the post-1949 era, and since June 30, 1964 no Government has commanded a majority in the Senate except for the Fraser years of 1976 until June, 1981, during which time a number of measures which had been resolutely blocked by the Senate during the Whitlam era, were duly enacted.

The 1967 referendum on breaking the nexus between the Senate and the House, a proposal which did not entertain any weakening of the Senate's powers, and which was supported by both major parties, was defeated soundly. The gap between votes for the major parties in House of Representative seats, and votes for the major parties in Senate elections, has widened steadily during the last twenty years.

Any political leader who believes that the Australian people will support a constitutional change which would result in a Senate with diminished powers with respect to the Executive, or which could be perceived to have that consequence, has, I believe, lost touch with public opinion. If the proposal for constitutional change were supported by both major parties, it would provide the minor parties with the opportunity for a real triumph, and if the referendum were held at the same time as an election, they would benefit electorally from such a contest.

The attempt by the Prime Minister to engage in dialogue with the Labor Party to produce bipartisanship on changes to s.57 was, in my view, doubly foolish: first, it gave Labor

bargaining power; and second, any success in producing bipartisanship would have, in my view, ensured failure at a referendum. The 1967 referendum on the nexus is pertinent in this context.

So we are back to the debates of the 1890s, where the commitment to responsible government clashed with the people's commitment to a Senate with powers which make responsible government a doctrine without substance.

This situation is the major cause of the Howard Government's predicament of appearing adrift and becalmed. There is no "third term agenda" because the Senate will not permit a third term agenda, and there will be no fourth term agenda, if the Howard Government is returned, for the same reason.

The Howard Government's problems have arisen not so much from the constitutional compromise of 1897, but because of changes to the number of Senators, and the method of deciding who wins a Senate seat at an election (none of which are constitutional matters). In my view it is beyond argument that the Senate, like the ABC, is no longer representative of mainstream Australian opinion on key issues affecting the nation and its future. This view is, predictably, strongly contested by some current Senators, but if major issues that have arisen in recent years and have come to the Senate for action of some kind are considered, it is apparent that opinion which is representative of the ABC usually triumphs over mainstream opinion. A recent example was the disallowance by the Senate of regulations which excised Melville Island (amongst many others) from Australian territory for the purposes of claiming refugee status. The fact that the Labor Party often supports the Greens and the Democrats on these issues, indicates that gnostic influences have made substantial inroads into Labor circles.

The current problem of the unrepresentative nature of the Senate arose from two separate events; the system of proportional representation which was introduced by the Chifley Government in 1948, and the enlargement of the Senate to 76 which took place under the Hawke Government, with the support of the National Party, in 1984. At a half-Senate election, therefore, the sixth position from every State can, and usually does, fall to minor party candidates, or to independents, whose success is due entirely to the way in which preferences flow as unsuccessful candidates are eliminated from the bottom of the heap. This preference flow can reasonably be described as a series of random events. Australia would have a more representative Senate if Senators were chosen randomly from the telephone directory, an argument supported by the fact that the people who seek election to the Senate from single issue groups, or religious sects such as environmentalists, are very far removed from mainstream opinion.

But it is they, not mainstream Australians, who, like Koko the Lord High Executioner of Titipu, find themselves "wafted by a friendly gale", "by a set of curious chances", into positions of great power. Unlike the major parties, who seek to win a majority of seats in the House of Representatives, they are competing for votes and electoral manpower exclusively from a small group of Australians, loosely described as the "chattering class" or, to use David Flint's term, "the élites"; or to use my own preferred description, the "gnostic classes". They also attract votes from the wider public because they are seen as a check on the executive power of the government of the day. Don Chipp's slogan, "Keep the bastards honest", was a brilliant appeal to this sentiment.

It is important to note that those Democrats who were closer to mainstream values have been pushed out, and that the Greens, who are the hard-line gnostics in this spectrum, are now triumphant; the Democrats seem to have lost that contest. This supports my thesis that the Greens' and the Democrats' constituency is comprised of the gnostic or chattering classes, and it is the contest for leadership of this sector which determines their behaviour.

There are further consequences which follow from electing six Senators at a half-Senate election. To win 3 out of 5 Senate positions a party needed 49.8 per cent of the vote.

Normally, with preference flows, 47 per cent was enough to get 3 out of 5. To win 4 out of 6 positions requires 56 per cent of the vote. For this to happen it would be necessary for one of the major parties to lose all interest in winning elections. This happened in the ALP in 1954, but there were unusual circumstances at that time.

A non-constitutional remedy to the Government's problems would be to cut the size of House and Senate to 120 and 60 respectively (i.e., return to the pre-1984 position); to shrink the ACT to a largely non-residential area containing Parliament House, the High Court, the Lodge, the War Memorial, etc (and abolish, as a consequence, its two Members and its two Senate positions); and to return the Northern Territory to South Australia (with a similar consequence for its two Senators). This would leave Australia with a higher than average politician per capita rating; it would be electorally popular; and would perhaps provide governments with the possibility of winning the Senate, particularly on issues of major importance. The current Senate, however, is unlikely to agree to such measures, and it would thus require a double dissolution, and a joint sitting, to pass them, and another double dissolution to bring the new numbers situation into effect. It is not likely therefore to appeal to a Government which is clearly reluctant to go down the double dissolution route.

It should also be noted that, following the introduction of proportional representation under Chifley, the double dissolution option has lost its potency. Of the present 76 Senators, 64 Senators would be quite confident, assuming their pre-selections are not in doubt, of returning to the Senate after a double dissolution. The last two Senators from each State might have cause for concern, but really only the last six would have cause to see their positions under threat. In the House of Representatives, however, out of 148 (currently 150) members, arguably 20 to 25 would see themselves as threatened, the majority from the government side.

Prior to 1948, the threat of a double dissolution did have real potency as far as the Senate was concerned. Today, the response of virtually all Senators, particularly from the fringe parties, is: "Make my day". And this fact permeates all political debate and calculation in Canberra.[5]

There is an option, however, which in my view would command sufficient support at a referendum for it to succeed, and would change behaviour in Canberra much for the better. This option, which was debated intensely in Adelaide and in Sydney in 1897, is to ask the people to decide the fate of deadlocked Bills directly through the referendum process itself.

Since a majority of voters in a majority of States will decide whether to change s.57 or not, then the same criterion will have to apply to deadlocked Bills, and I see no reason why that should not hold. Proposals for a simple majoritarian plebiscite, which were strongly supported by H B Higgins, and are now supported by the Democrats, will not find favour outside Victoria and New South Wales.

I would argue that deadlock is reached when the Senate fails to pass a Bill the second time after a three month interval, and I would not require an election to precede a referendum. I should also make it clear that, if the people pass the deadlocked Bill at a referendum, then that Bill becomes another Act of Parliament, which could be repealed by a subsequent majority of both the House and the Senate. It would not be a change to the Constitution.

It should be noted that, if the Prime Minister wants to have a referendum to change s.57, the current Senate does not have to pass the legislation required to hold the referendum. If the *Referendum Bill* fails to pass the Senate a second time, after a three month interval, the Governor-General can then, without further delay, issue the writs.

The conservatives of 1897 and 1898 found the proposal for a referendum to resolve a deadlock situation highly distasteful. However, as the following remarks of Richard O'Connor, then Attorney-General of New South Wales and subsequently Senator and Justice of the High Court, indicate, they were prepared to accept a referendum if there were no other course.

Thus, the Hon R E O'Connor (when speaking of entrenched deadlock between the House and the Senate):

> "If you come to a condition of that kind, then you are face to face with a very dangerous position of things. Although I am strongly opposed to any of these mechanical processes of bringing to a conclusion that which should only be concluded by discussion and the arbitrament of reason, at the same time I say that you may be brought face to face with a position in which these solvents will not be applicable. What is the position then? The position is one of danger, not only to what has been called here the federal principle, but to the union itself. You are face to face then with that position which brought about the terrible appeal to arms which took place in America. I do not suppose for one moment that any resort of that kind could be possible in this community of Australia.
>
> "I am altogether opposed as a general rule to the process of referendum. I am altogether opposed to it certainly in the case of a unified state, and I am opposed to it in the case of this Constitution if there were any other way out of the difficulty. . . I am strongly opposed to the referendum for the reasons I have pointed out, if any other mode of settlement can be adopted". (p. 574)[6]

O'Connor went on to explain that he accepted the inevitability of a referendum to resolve a deadlock, but argued for the necessity of a double dissolution before a referendum could be held.

I understand that the Prime Minister, like Richard O'Connor, is strongly opposed to the referendum, but he has reached a position where, in order to put wind into the listless sails of his becalmed Government, he must either use s.57 as it now stands, or he must put a constitutional change regarding s.57 to the people which will enable him to move forward on those crucial issues, notably labour market reform, and on the costs associated with the health system, which are central to his political program, and to the integrity of the budget.

If he were to go for the referendum principle that I have outlined, I doubt that he would run the risk of bipartisan support from Labor. He would be able to hold the constitutional referendum well before the election which is due by March, 2005 (although that might be seen as opportunistic), and then combine the election with a referendum on the deadlocked Bills.

This proposal for resolving deadlocks will be criticised on grounds of cost, and on the grounds of too much democracy in our system of representative government. The cost issue should be addressed as part of the necessary reform required of our electoral processes, in which the technology of the 19th Century should be replaced with 21st Century computer technology, including the need to address electoral fraud. In any case, the costs of conducting a referendum are trivial when compared with the economic consequences of, for example, failure to reform our labour market regime.

The more profound issue of the need for intermediating institutions to run the nation's political affairs can be answered shortly, first, by reference to the USA, where referenda are much more frequent; where congressional terms are limited to two years; where the Senate has much greater powers of oversight and legislative initiative than the Australian Senate; and which, despite this surfeit of democracy is, curiously, the world's greatest power. Second, it cannot be forgotten that the present mess which now engages us is the outcome of the debates and deals done by our representatives, and certainly not approved by the people as a whole.

Third, we should not forget that the campaign for a republic, which culminated in defeat for the republicans in the glorious referendum of 6 November, 1999, foundered on the issue of direct election.[7] This question of direct election of a President is the same issue as that of the Senate versus responsible government, although here it is not the Senate which

diminishes or threatens the power of the Executive, but a directly elected President. In my view, it is now beyond argument that Australia will only agree to a republic if the people elect the President, as they do in the US, and I note that because the new Labor leader, Mark Latham, is on record as being a direct electionist, the republicans are seeking to put the republic back onto the political agenda.

The idea of direct participation in these matters now seems well entrenched in Australian political culture.

If Mr Howard were to go down the referendum road, and succeed ultimately in passing crucial legislation by direct appeal to the people, there can be no doubt that the political landscape in Canberra would change, and that Senators who now are extremely casual about vetoing legislation, might have a different attitude.

These measures, however, would leave intact the problem created by proportional representation, the election of 6 or 12 Senators at a time, and the consequent unrepresentativeness of the Senate.

One of the great lines from the debates of the 18th Century which has come down to us is:

"The Power of the King has increased, is increasing, and ought to be diminished".[8]

Today the King is powerless and the Prime Minister is more powerful than George III could have imagined. The Senate is a constraint on the power of the Executive, and I would like to see the power of the Senate increased, but only if the Senate were to become more representative of Australian opinion. That, in my view, can only happen if, as in America, Senators were elected one at a time. If we were to have eight year terms, with Senate elections every two years, that would provide for a small Senate of 24. If we could create another two or three States – North Queensland, New England, and perhaps the Riverina (including most of the Australian Capital Territory) spring to mind – that would mean 36 Senators. And, more remotely, if New Zealand were to come in as two States, that would provide 44 Senators.

Critics will deride these ideas as politically naive, and I'm aware that some of my colleagues view the proposal that New Zealand should come into the federation, given its record as a socialist, welfare state, as an extremely foolish idea. But Henry Parkes' great line at the 1891 convention in Melbourne, "The crimson thread of kinship which runs through us all" is still true, and the geo-strategic position in which we are placed in this part of the world, hasn't changed since the 1890s. In my view we should keep the New Zealand option alive. I also note that the two Prime Ministers met two weeks ago and committed to further economic integration, and that proposals for a common currency appear regularly. Whether the protagonists for a common currency are aware of it or not, a common currency denotes a common sovereignty (which is why the issue of Britain abandoning the pound sterling and adopting the euro is so important).

All political arrangements are flawed, but some less so than others. In my view the flaws that are embedded in the Westminster system of responsible government are most manifest when we look at the mess the United Kingdom now finds itself in with the European Union. This is not the occasion to traverse the history of this amazing abandonment of proud and successful nationhood, except to note that it was carried out, with gross deceit, by an arrogant political establishment that knew best what was right for Britain, and was insufficiently constrained by the checks and balances which we see throughout the American polity.

In Australia we have, in the last two decades, at last escaped from the protectionist delusions which enfeebled us for 80 years. The results are now clear to see. We need to move forward, now, to secure those gains; to reform the labour market; to reduce the size of the government take; to diminish the power of Canberra and revitalise the States. We need to do these things in order to make our future as a sovereign and independent nation more secure.

The Senate, as it now stands, is the lion in the path stopping us from going forward. Let us go forward, then, and put this thing to the test.

Endnotes:

1. The author is grateful to John Nethercote and John Roskam for comments on this paper. However, any mistakes or illusions are the author's responsibility.

2. Prime Minister Paul Keating, *Hansard* , 4 November, 1992:

   "Then you want a Minister from the House of Representatives chamber to wander over to the **unrepresentative** chamber and account for himself. You have got to be joking. Whether the Treasurer wished to go there or not, I would forbid him going to the Senate to account to this **unrepresentative swill** over there—

   "Opposition members interjecting—

   "Mr Speaker – Order! The House will come to order.

   "Mr Keating – where you are into a political stunt.

   "Mr Downer interjecting –

   "Mr Speaker – Order! The honourable member for Mayo will cease interjecting.

   "Mr Keating – There will be no House of Representatives Minister appearing before a Senate committee of any kind while ever I am Prime Minister, I can assure you".

3. Brian Galligan and James Warden, *The Design of the Senate*, 1986; *Commentaries on the Convention Debates 1891-1898*, Volume VI, edited by Greg Craven, Legal Books Pty Ltd, Sydney.

4. The events in Washington of September-November, 1995 are of interest in this context. In November, 1994 the Republicans had gained control of both Houses with a spectacular campaign, led by Speaker Newt Gingrich, based on a "Contract with America". In 1995, according to normal practice, President Clinton presented to the House the Executive's Budget "wish list". In response the House produced a Budget which was in accord with the Republicans' campaign platform. This Budget the President vetoed, as he did two successive compromise Budgets. Because the Republicans could not command a two-thirds majority in the Senate, the presidential veto was valid. Each time President Clinton exercised his veto he blamed Congress for failure to pass a Budget, and persuaded public opinion that Congress was at fault. In this way President Clinton destroyed Speaker Gingrich as a political force.

5. It is worth recalling that in the very early years of the first Howard Government, the threat of a double dissolution did appear to have potency. In particular, during the months preceding the passage of the *Workplace Relations Act* (September, 1996), when Peter Reith was negotiating with Cheryl Kernot, then leader of the Democrats, the Prime Minister explicitly and incomprehensibly ruled out a double dissolution election. Some years after, as a Labor front-bencher, Ms Kernot defended her policy position in those negotiations as being determined by the threat of a double dissolution.

6. Some additional quotes from the Adelaide Convention:
   Sir Joseph Abbott (NSW):

   "I do not want to allow the Senate to be dominated by the ministry of the day, but I want to see that body dominated by the people of the country. . . .If the people desire to dominate the Senate, they should have the right and power to do so; but how can it best be provided that they should have that power? Can it be done best by the referendum, or by a dissolution of the Senate?". (p. 568)

Sir George Turner (Vic):

> "I think that the feeling in Victoria is very strongly in favour of a referendum as the first expedient. . . . we will be prepared to accept. As a first trial, a double dissolution, and if that fails, then, we ought to be prepared to go a step further. . . . I feel very certain of this, that if we can go to our respective Colonies and say that after having fully discussed, considered, and fought out this subject, we have, practically, unanimously – as I hope it will be – come to the conclusion that there should be a mode of settling these difficulties, if unfortunately they do occur, by a double dissolution, and, if that fails, by a dual referendum, I think we shall have very little, if any, difficulty, in convincing the people we represent that they may fairly and reasonably adopt it". (pp. 634-5)

7. The campaign by the Hon Peter Reith, who fought the republicans as a direct electionist, was important in the defeat of the republican cause.

8. Attributed to John Dunning, later Baron Ashburton, in a debate in the House of Commons on 6 April, 1780. John Dunning, who lived from 1731 to 1783, was then a member of the House of Commons. The motion was termed "the Crown", not "the King". It was part of the concerted agitation led by Edmund Burke against the North Administration. The resolution was carried by 233 to 215. Dunning played a key role in the campaign. The elegance of the sentence is such that we can wonder whether Burke was responsible for it.

Chapter Four
Error Nullius Revisited

Dr Michael Connor

My paper is only another dismal example of the imposition of intoxicating and brutal theory over reality.

Terra nullius is our original sin. Giving modern historians a bitter ethical superiority over our past, *terra nullius* is the intellectual foundation for the history writing of a generation. My argument is not about "correct" meanings of the term. A doctrine or theory of *terra nullius* had nothing to do with our colonial history. *Terra nullius* is part of the "history of the present".[1]

Before 1977, perhaps the only reference to *terra nullius* in Australia by an historian was by Sir Ernest Scott, and only in answer to an enquiry from an American academic. Just before the Second World War, a Professor of International Law at Columbia University wrote to Scott asking if the concept of *terra nullius* had any relevance to the British annexation of Australia. Scott's published reply defined the Latin term as "land not under any sovereignty". He scarcely mentioned Aborigines, being more concerned with the acts of European powers to gain and settle new territories. It was a slightly interesting essay in a specialist journal and had no influence on succeeding generations of historians.[2]

In 1965 Professor DP O'Connell, Professor of International Law at the University of Adelaide, used Australia to illustrate occupation as a mode of acquisition in his textbook *International Law* :

> "Since the Australian aborigines were held incapable of intelligent transactions with respect to land Australia was treated as *terra nullius*".[3]

It was no more than a sentence in a two-volume text book. O'Connell did not define the phrase, and he did not say Aboriginal Australia was *terra nullius*, but that it was treated as such.

The 1960s and 1970s reinvigorated earlier awareness of Aboriginal rights. Since 1788 this has been a strand of our history. In 1970 an article in the *Journal of the Royal Australian Historical Society* by Barry Bridges set out to examine *The Aborigines and the Land Question*.[4] It was one of the last considerations of the situation in 1788 before the superstition of *terra nullius* imposed itself. Bridges' explanation didn't require a Latin named doctrine. "Discovery and settlement", before these words acquired their modern distaste, told his story.[5]

Terra nullius came to Australia from Algeria, not England. An obscure term, confusingly defined, it was not the legal doctrine behind the 18th Century British occupation of Australia. An argument of modern racial politics, it is not the basis of national sovereignty. In 1977 Paul Coe of the Redfern Legal Service introduced *terra nullius* into a case he was arguing before Justice Mason of the High Court. Before then few Australians had ever heard the term. Coe, claiming restitution and compensation for Aborigines, argued Australia had not been *terra nullius* at the time of European settlement. No-one in the 18th Century had said it was.

Coe had not found *terra nullius* in the *Historical Records of Australia*, but in the International Court of Justice's *Advisory Opinion on Western Sahara*, on the 1975 dispute between Algeria and Morocco over Western Sahara. The Algerian lawyers defined *terra nullius* as a "territory belonging to no-one". Seldom reported is the Moroccan lawyer's comment on Algeria's arguments as a "real piece of intellectual conjuring".[6]

Coe rightly sensed the usefulness of *terra nullius* for the emerging political arguments in favour of Aboriginal land rights. Today it scarcely seems possible that in the mid-1970s

Senator Neville Bonner argued in the Senate for recognition of the Aborigines' prior ownership of the land without using the term. If *terra nullius* were accepted as the basis of British settlement, the opportunities for eternal legal battles over land were alluring, but Coe's arguments went nowhere. His case was dismissed by Justice Mason, and two years later, in 1979, his appeal was heard by four High Court Justices. Returning to the courtroom, Coe argued both *terra nullius* and that Australia had been conquered by the British. His case was disorganised and badly prepared. In dealing with it Justice Gibbs called it "embarrassing", while recognising "that some of the allegations hint at the existence of questions that might be regarded as arguable".[7]

It was the dissenting opinion of Justice Lionel Murphy which moved *terra nullius* into modern Australian politics. Summing up Coe's case, he made *terra nullius* – which appeared in no dictionaries or history books, and very few texts on international law – seem to be the accepted legal and historical explanation of Australian sovereignty.

The term moved from the High Court to the historians, seemingly as something that had always been firmly imbedded in the 18th Century.

In 1980 Professor Alan Frost wrote an article, *New South Wales as* Terra Nullius: *the British Denial of Aboriginal Land Rights*".[8] He defined it as " 'no person's land', that is, belonging to no-one". Perhaps it could have been made clearer that *terra nullius* was something to do with international law. Frost gave it historical reality when he wrote that James Cook, on seeing Australia, had to ask two questions:

> "Had a population established a right to possess the territory ; or, was it a *terra nullius*? [I]f it were a *terra nullius* , was he the first European discoverer of it?".[9]

This is supposition, speculation, imagination, but it reads as if it actually happened on the *Endeavour*.

The phrase was unknown to 18th and 19th Century Australian colonists; it was not referred to in colonial courts or the Privy Council; it was never used by the British government to explain their appropriation of New Holland. It was so new that it didn't appear in the first edition of the *Macquarie Dictionary* in 1981. It isn't in the *Oxford English Dictionary*. If *terra nullius* had been sitting in the dictionaries all the time, perhaps it would not so effectively have been able to colonise modern minds.

In 1970 Charles Rowley's *The Destruction of Aboriginal Society* put forward a modern tragic version of Australian history, and did not mention *terra nullius*. Building on Rowley's work, Henry Reynolds rapidly became the best known and most trusted historian on Aboriginal and white conflict. He was prolific; he dealt with the media skilfully, and his books were quickly accepted into schools and universities. Admitting he had never heard of *terra nullius* as late as the 1960s, by the late-1980s it was the theoretical underpinning for his best-selling narratives of racial conflict.[10]

In 1987 Reynolds published *The Law of the Land*. A book called *The Law of the Land* should never have been written by an historian. A lawyer, a judge should have done it – and preferably a dull, boring, conscientious creature seriously concerned to do justice to the topic.

This sad book, tedious but tragically influential, is still in print, updated by its author; it offered the definitions of *terra nullius* which have influenced subsequent dictionary makers and textbook writers. Here rests the conscience of our nation. The whole magnificent edifice of a generation's history writing is based on this. Law making has been influenced by it. What a muddle, what a mass of eloquence has sprung from it. Books, articles, sermons, passion, bitterness, self-righteousness, Higher School Certificate courses, university courses: all from ten and a half lines in a Penguin paperback. On page 12, in 101 words, Henry Reynolds forged a career: successful for him, heartbreaking for Australia, a third of a page that guarantees Henry Reynolds his own place in our history.[11]

Reynolds stated that:

> "..... the doctrine underlying the traditional view of settlement was that before 1788 Australia was *terra nullius*, a land belonging to no-one".

Note that he may be suggesting that this is only theory – it is "the doctrine underlying the traditional view of settlement".

There was no 18th Century "doctrine" of *terra nullius*.

The definition of *terra nullius* offered by Professor Frost had grown. The Reynolds definition is that now given in the *Oxford Companion to Australian History*:

> "Confusion has abounded because *terra nullius* has two different meanings, usually conflated. It means both a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all, where no tenure of any sort existed".

Reynolds actually offers three meanings, introducing a literal meaning of "uninhabited".

This should have been the end of *terra nullius*. For purposes of analysis it is useless; it doesn't clarify, it confuses. At any time it has to be established, should be established, must be established what meaning the user is attaching to it. Without this clarity, meaningful communication is impossible.

This was the beginning of my interest because I couldn't quite see how these meanings could be "conflated", turned into and/or. And of course Reynolds has muddled *terra nullius* with a real legal term, *res nullius*, "a thing which has no owner", and is "conflating" sovereignty and land ownership.

Reynolds's definition of *terra nullius* may be the most cited page of history writing dealing with our sin of settlement. What then of his own referencing for the definition he offers? If *terra nullius* was the "doctrine" Reynolds claimed it was, he was incredibly careless in locking into place evidence to support his view. He gives authorities for only the first half of his definition: three texts are given, but only one of them actually agrees with him – a 1938 book which says *terra nullius* means "land not under any sovereignty".[12] This definition was that used by Professor Scott in 1940 – not surprising, since Scott was using the same book. Reynolds does not point out that just before this definition its authors state:

> "It has been found necessary, in certain instances, to adopt a particular terminology for the purposes of this book".

Neither of the other two references mentions *terra nullius*. One of these texts, *The Principles of International Law* by TJ Lawrence, was originally published in 1895.[13] It was an odd choice on which to base a definition of *terra nullius*, for the author uses the phrase *res nullius*, not *terra nullius*:

> "All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation".

Later Reynolds quoted some of these words, and altered the author's text to agree with his own. Replacing clarity with confusion, he deleted "*res nullius*" and inserted "*terra nullius*" within square brackets. They are not good synonyms. A *terra nullius* is not always a *res nullius*, and a *res nullius* is not necessarily a *terra nullius*.

In *Yanner v. Eaton*, before the High Court in 1999, the *res nullius* was a crocodile. In that instance the *res nullius* was killed, and went into the respondent's deep freeze.[14]

Before his confused/confusing definitions Reynolds wrote:

> "We need to ask what this obscure Latin concept actually means and if it was legitimately applied to Australia in the late eighteenth century".

TJ Lawrence's discussion, in a section on "occupation", clearly refers to the modern world of the 1890s, and is not relevant to the 18th Century:

> "We will endeavour to state as clearly as possible what may be termed the modern

doctrine, warning our readers, however, that in some of its parts it must be taken to represent tendencies towards law rather than rules of universal acceptance".[15]

Reynolds's definitions overlook the most common modern usage of *terra nullius* – an unpeopled land, such as Antarctica – even though, in his own books, he commonly uses the phrase in this sense and makes it synonymous with "uninhabited".

After fixing the term in place, Reynolds's career was based on disproving its validity. The work of the mirrors was done. His mangling of international law, common law, and translation produced a late 20th Century superstition. Once introduced, the Latin tag was quickly loved by historians, social scientists, lawyers, clergy, journalists, and racial activists. It meant whatever its users wanted it to mean. Impressive sounding, it was ridiculously easy to mock. It was possible, and quite probable, that when two people discussed *terra nullius*, they could imagine they were agreeing, when at any time they could have been using quite different meanings.

We all became infatuated with *terra nullius*, to the exclusion of all other explanations for the founding of the first Colony – and it became so elastic that it was used by *Mabo* Justices to explain the later acquisition of the Murray Islands by the Colony of Queensland. And anything which suggested that Aborigines in 1788 were not able to deal in a meaningful way with rights to the land they lived on became signs of incipient colonialism and racism. It was only in 1965 that Professor O'Connell made the statement that "the Australian aborigines were held incapable of intelligent transactions with respect to land". Few law, or history, professors would dare to make such a claim in 2004. A lot has happened.

Confusion over supposed correct meanings of *terra nullius* make it a mutating linguistic virus. If you bought the third edition of the *Macquarie Dictionary* in 1997 your definition was illustrated with a 1988 quotation by Al Grasby, which made the phrase synonymous with "uninhabited": "a land without people, the evil fiction that no one lived here when Captain James Cook arrived". What "evil fiction"? Was the *Macquarie* licensing stupidity, or catching popular usage? From Phillip onwards every colonial Governor was loaded with instructions for dealing with the Aborigines.

In 2001, after *Mabo*, after *Wik*, the *Macquarie* revised itself, deleting Grasby and inserting a 1980 quote from Professor Alan Frost:

> "According to international notions, New South Wales was *terra nullius*, to be occupied on the basis of first discovery, without purchase from the indigenous inhabitants".

Both Grasby and Frost accepted *terra nullius* as the unbearable darkness at the center of our nationhood.

Even as the *Macquarie* was being revised, its publisher, Susan Butler, used the "Australian Word" column in *The Weekend Australian* on 16 June, 2001 to explain that *terra nullius* was "a legal term introduced into Australian legal jargon and popular knowledge by first the *Mabo Case* and then *Wik*". In her explanation she talked of "civilised people who owned property, basically – and people who didn't count – uncivilised people who didn't own property". Even as her own dictionary was dumping the previous Grasby citation, she illustrated usage with another quotation from the same source,[16] and ended: "The phrase *terra nullius* sums up the colonial view, even though it was never actually used at the time". Many academics were still under the impression that this really was vocabulary from the 18th Century.

It is possible to go through a university education from first year to doctorate without actually reading a book from cover to cover. It is possible to talk confidently of Locke, Hobbes, Vattel, Blackstone without having read these authors. University history writing is assembled from quotations, often taken from secondary sources.[17]

On All Saint's Day, 2002, over a year after the *Macquarie* publisher had pointed out that *terra nullius* had not been used in the 18th Century, there was a request on an internet site for

academic historians, H-ANZAU:

> "Dear colleagues, does anyone out there know when the TERM itself, 'terra nullius', was first used to describe the principle of colonization in Australia? And who by and in what context?"[18]

The responses were:

- "The effluxion of time, and the Lawyers' love of dog latin [sic], have taken the idea of the land of no-one and perverted [it] into the fiction of terra nullius. I do not have access to an original edition of Vattel, but I suspect the phrase was first used by him. He is cited as a source by Chief Justice [sic] Brennan in the Mabo (No2) decision".
- "May I suggest Fr Frank Brennan at ANU as a most likely informant".
- "Why do I feel that the Dutch explorers used this term in reference to Australia? I might be wrong, but I think I read it somewhere..."
- "As far as I understand it – the 1889 privy council decision on Cooper v Stuart was the first ruling asserting TN. This was the judgement overturned by Mabo".

These are real people, academic historians who teach and make their livings from *terra nullius*. In these responses to a genuine query, not one seemed worried that they didn't really know the source of something with which they were so familiar.

Lawyers and judges are as confused as the historians. The *Mabo* Justices, who introduced *terra nullius* into their deliberations, thought the phrase was imbedded in the past. Both Justices Brennan and Toohey quoted identical words from the opinion of the Vice-President of the International Court of Justice in its *Advisory Opinion on Western Sahara*:

> "Vattel, who defined *terra nullius* as a land empty of inhabitants".[19]

Vattel did not define a thing called *terra nullius*. He wrote in good, clear, 18th Century French, not Latin. In his *The Law of Nations or the Principles of Natural Law*, Chapter 18 was titled "Occupation of Territory by a Nation".[20] Vattel discussed, in section 207, taking possession of "a country uninhabited and without an owner": "*pays inhabité et sans maître*". Section 208 deals with difficulties in this matter, and he moves on, in section 209, to deal with another subject. He has finished his discussion of uninhabited and unowned territory and clearly addresses a new topic. He wrote:

> "There is another celebrated question ... It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes where small numbers can not populate the whole country".

Incredibly, Justice Brennan claims this as the first "justification for the application of the theory of *terra nullius* to inhabited territory".[21]

Vattel gave two examples of what he was talking about here: New England, and William Penn and his colony of Quakers in Pennsylvania. Vattel praised these colonial occupiers, for "they bought from the savages the lands they wished to occupy". Vattel was discussing two quite distinct aspects of "occupation". New South Wales does not fall under the first – it was not considered uninhabited – but under the second, a "vast territory" with "wandering tribes". Vattel discussed two separate matters: it is illogical to conflate them under a single dodgy Latin tag.

Vattel wrote of international law in the 18th Century, New South Wales was founded in the 18th Century. A Vice-President of the International Court, and two High Court Justices, believed Vattel's description of "a country uninhabited and without an owner", was his definition of what they called *terra nullius*. If Henry Reynolds was seriously seeking an 18th Century concept, surely this was the 18th Century source he needed: not those doubtful texts of the 1890s and 1930s and '40s.

Reynolds dipped into this section. He took one sentence, and ignored the next, on uninhabited and unowned land, which modified the first and was the core of Vattel's discussion. Vattel's 18th Century ideas on the rights of occupation of uninhabited and

unowned land under contemporary international law, are excluded from *The Law of the Land* discussion of *terra nullius*. If included, those conflating Reynolds's definitions may have been controlled, or *terra nullius* deleted from his discussion of our sovereignty.[22]

Twentieth Century *terra nullius* is magical; unlike non-magical phrases it has "enlarged" notions to fit any circumstances. Justice Brennan tied it to inhabited territory, and the Legal Information Access Centre performed this hocus pocus:

> "In the 1979 case of *Coe v. Commonwealth*, which directly challenged the legitimacy of Crown sovereignty over Australia, the doctrine of *terra nullius* was expanded yet again, this time to apply to lands which 'by European standards, had no civilised inhabitants or settled law' ".[23]

The judge they quoted was Justice Gibbs. He had not mentioned *terra nullius*, and was actually writing of the common law.

At all times there were two little things which should have been known about *terra nullius*: it has something to do with international law, and it is not part of common law. Introducing a collection of legal essays on the *Mabo Case*, Sir Harry Gibbs was puzzled that the Court had reportedly overturned *terra nullius*, which he found "unknown to the common law".

Few legal writers noted his words, and judges and lawyers continue to reveal their own confusion: for instance, Justice Michael Kirby, who said here in Perth:

> "It was lawyers who invented the notion of *terra nullius* and denied Aboriginals their land rights until, in *Mabo*, lawyers changed the law's direction".[24]

Kirby has written of the "common law doctrine of *terra nullius*".

Geoffrey Robertson, in his book *Crimes Against Humanity*, referred to:

> ". . . . . the pernicious common law theory of *terra nullius* – which in countries 'discovered' by European explorers allowed native inhabitants to be treated as if they were part of the flora and fauna".

Law and history are two different disciplines which have come together without a true understanding of each other. Justice Brennan wrote that:

> "International law recognised conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty. No other way is presently relevant".[25]

That's interesting. Perhaps that is how the discipline of the law understands these matters. To write history only within those parameters is the constipation of the historical imagination. An historian has a responsibility to the records, not the courts. Histories have been written as though they were submissions in land rights cases.

If we removed *terra nullius*, would historians continue to tell the same story?

And perhaps our expectations of historians have changed. Must the historian be a constitutional lawyer?

In 1955, in the pre-*terra nullius* period of history writing, AGL Shaw in his long-selling history *The Story of Australia* asked:

> "How could the nomadic food-gathering tribes be protected 'in the full enjoyment of their possessions', when they owned no land but all the land, and every new arrival was likely to impinge upon some ancient hunting ground?".[26]

In a 2001 *Australian Historical Studies* article, Merete Borch examined official documents influenced by the evidence of Sir Joseph Banks to the 1785 Commons Committee:

> "The government seems to have believed that there would be room for everybody without further arrangements; however, revision of this policy in the light of better knowledge of actual conditions was clearly allowed for".[27]

Phillip's Commission asserted sovereignty over a vast area. It was a cheeky try on that was never tested by another power setting up a colony on the land. The actual settlements in

1788 were two, not very big, prison farms. Towards the land ownership there was a nuance in Phillip's Commission:

"And Wee do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of ...".[28]

It was three years before Phillip made the first land grants. In those three years a lot had happened.

Aboriginal land was taken by the British government and the settlers. Loss, dispossession, theft, are far clearer in plain English. The gradual way colonisation happened is not served by *terra nullius*, and does not allow for the real stories; for each Aboriginal community faced, at different times, and in different ways, the trauma of dealing with an encroaching civilisation. Their individual responses deserve detailed study, detailed accounts.

There is also the question of chronology: 1788 and 1830 and 1879 are vastly different. *Terra nullius* seduces the legalistic modern mind, which can't believe that a great swathe of territory could be possessed without a sheltering legal theory. The history of our beginning needs a new beginning. It needs examining without 20th Century error and prejudice. Go into the archives with a preconception, and that is only what you will find.

Terra nullius is the present's denial of the past. In this misordering the colonists become vile racists, and the Aborigines are struck from the record. Accept the incantation of *terra nullius*, and it is possible to believe that the government and settlers simply did not see the Aborigines. The colonists are despised, but the Aborigines of 1788 are made to appear passive nonentities. We have taken the land from the Aborigines, we are not going to rob them of their history. Pierre-Bernard Milius was with the Baudin expedition. On 13 January, 1802 he wrote of his first sight of the Tasmanian Aborigines: "We are burning with impatience to communicate with the inhabitants".[29] The creators and users of *terra nullius* threaten to extinguish that fire, and have damaged Aborigines, Europeans, and the soul of the joint entity called Australia.

In 1788 Aborigines on the shores of their harbour were joined by colonists from another world. Some of those moments have been preserved in the writings of one of those two groups. *Terra nullius* destroys an utterly unique memory in the history of the world by pretending that one party was completely, utterly, oblivious to the other.

And sometimes with these records we have scarcely scratched the surface of their meanings. When Aborigines encountered Europeans for the first time, they sometimes seemed confused about the sex of their male visitors, and humorous incidents followed where trousers were opened to reveal the hidden key. This was not what was going on at all. The Aborigines, probably, were seeking to see if the strangers were initiated men. This was not the comedy early visitors relate, and historians repeat, but the basis of male Aboriginal communications between strangers.

History is being written with both eyes on the law courts, and sometimes in the pay of parties arguing in the courts. Disputes between historians are exciting and interesting and necessary, but they are not for the courts. The two disciplines do not mesh; we really don't understand each other. Historians have enough problems sifting the materials of the archives; to have their selections taken into the courts as "evidence" will only end in tears. There is always an old document waiting to be rediscovered, there must always be new interpretations. Historians, and their theories, date very rapidly.

Law Professor O'Connell wrote that bad history makes bad law. History makes bad law. We act to cure the past, we sow problems for the future. Laws are for the living, they can't bandage the past. Attempt to do so and you make the present even worse. Conciliation must be between the living.

History does not belong to the conquerors, to the winners. She is the unfaithful mistress of every generation, to each of them she whispers a different story. The classic historians can

be read by all generations. The volumes of conformity of the last twenty years will not be read for beauty of language, or originality of ideas, but for amazement at the fawning stupidity, cupidity of a generation, and their willingness to believe the unbelievable.

Poor fellow my country.

Endnotes:

1. A nice phrase attributed to George Kennan in Timothy Garton Ash, *History of the Present: Essays, Sketches, and Dispatches from Europe in the 1990s* (New York, 1999), p. xii.
2. *Journal of the Royal Australian Historical Society* in 1940.
3. DP O'Connell, *International Law*, Volume 1, 2nd edition (London, 1970 [1965]), p. 409.
4. Barry Bridges, *The Aborigines and the Land Question*, in *Journal of the Royal Australian Historical Society*, Volume 56, Part 2, June, 1970.
5. *op. cit.*, p. 93.
6. Malcolm Shaw, "The *Western Sahara* Case", in *The British Yearbook of International Law: 1978* (Oxford, 1979), p. 131.
7. *Coe v. The Commonwealth of Australia*, 1979.
8. Alan Frost, *New South Wales as* Terra Nullius: *the British Denial of Aboriginal Land Rights*, in *Historical Studies*, Volume 19, 1980-81, pp. 513-523.
9. *Ibid.*, p. 519.
10. Henry Reynolds, *Why Weren't we Told?: a Personal Search for the Truth about our History* (Ringwood, 1999), p. 186.
11. Henry Reynolds, *The Law of the Land* (Ringwood, 1992 [1987]), p. 12.
12. The three references cited by Henry Reynolds are: TJ Lawrence, *The Principles of International Law* (London, 1910 [1895]), pp. 151 and 160; GH Hackworth, *Digest of International Law* (Washington, 1940), 1, p. 402; AS Keller et al, *Creation of Rights of Sovereignty through Symbolic Acts, 1400 – 1800* (New York, 1938), p. 4.
13. *loc. cit.*.
14. *Yanner v. Eaton* [1999] HCA 53.
15. Reynolds offers another page from this same book which says that, because Australia has a large number of settlements, it has "a perfectly valid title" even though other countries would have been entitled to make colonies when the only settlement was at Botany Bay. This does not seem to have any relevance to a definition of *terra nullius*. See TJ Lawrence, *op. cit.*, p. 160.
16. "Despite his professed admiration for the New Hollanders, Cook took their lands as if they did not exist; they became from that moment a shadow people with no rights of any kind to their hearths and home. This was an application of the dictum [sic] of *terra nullius* (land without people); following it no restrictions were recognised on occupation or exploitation". Credited to Al Grassby [sic] and Marji Hill, *Six Australian Battlefields* (1988) in *The Weekend Australian*, 16 June, 2001.
17. Author John Connor writes:

    > "The argument of *terra nullius*, first cited by John Locke in his *Second Treatise on Government* (1689 – 90) to justify the British dispossession of the native Americans, was used to ignore native sovereignty of the Adaman Island in 1789 as

well as to claim that Australian Aborigines had no title to their land".

Locke did not mention *terra nullius*. Connor's footnote references are to secondary historical studies and not to Locke. (John Connor, *The Australian Frontier Wars 1788 – 1838*, Sydney, 2002, p. 7).

18. This material was taken from a search for *terra nullius* on H-ANZAU discussion site: www.h-net.org/~anzau/ .

19. See Brennan on p. 28, and Toohey on p. 142, of Richard H Bartlett, *The Mabo Decision* (Sydney, 1993).

20. E de Vattel, *La Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains*, Volume 1, reproduction of 1758 edition (Washington, 1916), pp. 193-196. Alternatively, E de Vattel, *The Law of Nations or the Principles of Natural Law*, Volume 3, translation of 1758 edition (Washington, 1916), pp. 84-85.

21. Justice Brennan: "a justification first advanced by Vattel at the end [sic] of the 18th century", in Richard H Bartlett, *op.cit.*, p. 21.

22. Reynolds quotes only from the first of the following two sentences. He also deletes Vattel's word "men", and inserts "people":

> "All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation". (E de Vattel, *The Law of Nations or the Principles of Natural Law*, *op.cit.*, p. 84).

See Reynolds, *The Law of the Land*, *op.cit.*, p. 13.

23. http://www.austlii.edu.au/au/other/liac/hot_topic/hottopic/2000/2/1.html.

24. Michael Kirby, *85 Journeys to Perth*, Law Society of Western Australia, High Court Dinner, 24 October, 2001.

25. Richard H Bartlett, *The Mabo Decision* (Sydney, 1993), p. 21.

26. AGL Shaw, *The Story of Australia* (London, 1960 [1955]), p. 23.

27. Merete Borch, *Rethinking the Origins of* Terra Nullius, in *Australian Historical Studies*, Volume 117, 2001, p. 235.

28. *Historical Records of Australia*, Series I, Volume I, p. 7.

29. 13 January, 1802: "*nous brûlons d'impatience de communiquer avec les habitons*". Pierre-Bernard Milius, *Voyage aux terres Australes* (le Havre, no date), p. 30.

Chapter Five
The Role of State Governors: An Endangered Species?

Sir David Smith, KCVO, AO

Australia's early Governors-General, and our State Governors until fairly recently, were in reality British civil servants. They were appointed by the Sovereign on the advice of British Ministers, and their first duty was to the British government. After the 1926 Imperial Conference, the Governor-General ceased to have any relationship with the British government: henceforth his constitutional relationship was to be with the Australian government, and it was to be the same as the King's relationship with the British government. Following a decision of the 1930 Imperial Conference, the Governor-General henceforth was to be appointed by the Sovereign on the advice of the Australian Prime Minister.[1]

State Governors, on the other hand, continued to be appointed by the Sovereign on the advice of British Ministers until the passage of the *Australia Act 1986*. Since the passage of that Act, State Governors have been appointed by the Sovereign on the advice of State Premiers, and have had the same constitutional position in relation to their respective State governments as the Governor-General has had in relation to the Commonwealth government since 1926.

The *Australia Act*, in sub-section 7(1), provides for the powers and functions of the Queen in respect of a State to be exercisable only by the Governor of the State, a provision which is analogous to that made by the Founding Fathers in 1901, in respect of the Governor-General, by s.61 of the Australian Constitution. By virtue of sub-section 7(4) of the *Australia Act*, the Queen may exercise any of the Governor's powers while she is personally present in a State. That provision is analogous to that made by the Australian Parliament when it passed the *Royal Powers Act 1953*, which enables the Queen to exercise any of the Governor-General's statutory powers while she is in Australia.

Under both the *Royal Powers Act* and the *Australia Act*, it is for the Prime Minister or a State Premier respectively to decide whether the Queen is to be advised to exercise a power held by the Governor-General or by a State Governor.

Under the Australian and State Constitutions, the Crown is the central feature of our system of responsible parliamentary government: its place is inside, not outside, the Parliament, unlike, for example, the United States Executive which is outside Congress; and, except for the prerogative or reserve powers, the Crown is subject to the laws made by Parliament – in other words, Australia is a constitutional monarchy, under which supreme power rests with the people and their elected representatives.

The vice-regal roles of Governor and Governor-General are essentially very similar, and much of what could be said about the one applies equally to the other. For example, it is to Sir Paul Hasluck, Governor-General from 1969 to 1974, and the fourth Australian to hold the office, that one State Governor, Richard McGarvie, Governor of Victoria from 1992 to 1997, has given the credit for bringing to the offices of Governor-General and Governor:

> "..... the markedly increased emphasis on the traditional role of maintaining a current working knowledge of the operations of government and, on occasions, giving encouragement or suggesting caution to a Minister regarding a proposed course of action".
>
> McGarvie has described Hasluck as:
>
> "..... the founding architect of modern governorship in Australia. His approach, outlined in his memorable lecture, *The Office of Governor-General*, showed an appreciation of the advantage of a watchful eye at the highest level, able to observe any signs of

departures from the integrity of operation of complex modern government and to bring them to the attention of the Ministers who have the political power to ensure that integrity. He saw the potential a Governor-General has for doing that in a way that entirely complies with convention and maintains good relations with Ministers. Sir Paul has left his stamp on governorship in Australia".[2]

It was Sir Paul who said of the vice-regal role that:

"The part played by a Governor-General in Australian government may vary with the personality and the qualifications of the Governor-General and on the way each occupant of the office chooses to interpret his role. Conceivably, a Governor-General could be a cipher, do whatever he was told to do without question and have little influence on what happened. I have spoken on the assumption that Governors-General will be active and I fervently hope that Australia in future will never have the misfortune to have an inactive one".[3]

Sir Zelman Cowen is on record as saying on more than one occasion that he strongly supported these and other views expressed by Hasluck about the vice-regal role.[4]

I return to McGarvie for his summation of the modern vice-regal role:

"From discussions, particularly at the annual Governors' Conferences, with those holding office in recent times, it is clear that the discreet but influential role personified by Sir Paul Hasluck is now widely followed in Australia. It is an important part of the Governors' and Governor-General's role of upholding Australia's democratic system".[5]

A Governor's duties fall generally into one of three categories – constitutional, ceremonial and community.[6] In the words of Dr Davis McCaughey, Governor of Victoria from 1986 to 1992, these roles "are intertwined: each supports the other".[7]

Probably the most important gubernatorial powers are those leading to the dissolution of the Parliament or a House of the Parliament, the holding of elections, and the appointment of a Premier and Ministers. These powers are generally exercised on ministerial advice from the Premier, but in special circumstances they may become the subject of the exercise of the reserve powers.

The reserve powers enable a Governor to refuse to dissolve Parliament, or to dissolve it without advice or contrary to advice; or to appoint a Premier without advice or contrary to advice. Though they are exercised very rarely, the existence of the reserve powers enables the Governor to ensure continuity of government, or resolve deadlocks in circumstances where the constitutional conventions and processes have broken down. In each case, either the Parliament at its next meeting, or the people at an ensuing election, have the opportunity to pass judgment on the Governor's decision to exercise the reserve powers.

But by far the major part of a Governor's constitutional powers and functions are exercised on ministerial advice, and that most frequently in Executive Council. It is as Governor-in-Council that the Governor discharges his role in the ordinary business of government, and exercises the many powers which Parliament has delegated to him by legislation – where Parliament has required the Governor-in-Council to take action which the Parliament has considered to be too important to be entrusted to a single Minister acting alone. These include such divers matters as the making of regulations under Acts of Parliament, the appointment or removal of senior public servants or other statutory officers, powers in relation to local government matters or Crown leases, the issue of proclamations – e.g., the proclamation of industrial diseases under workers' compensation legislation, or the licensing of landowners to do certain things on their land: and the list just goes on. Richard McGarvie has described a count of the Governor's powers in Victoria which was discontinued when the number had exceeded 4,000.[8]

In his 1999 *Sir Robert Menzies Oration*, Sir Guy Green, then still in office as Governor of Tasmania, identified what he described as three distinct models of the Governor's role in

relation to the taking of ministerial advice: the interventionist, the benign mentor, and the mechanical idiot.

Green saw the interventionist model as being represented by the Hasluck view of vice-regal office,[9] namely, a responsibility not only to satisfy himself as to the legality and regularity of the advice being given by the Executive Council, but to look behind that advice as well. In studying his Executive Council papers, which he required should reach him in time for him to read them before the meeting, Hasluck sought first to satisfy himself that the Executive Council had the constitutional or statutory power to make the decision being recommended; that the Minister making the recommendation was the competent authority to do so; and that any preliminary action required by law had been taken. These matters were expected to be stated in the explanatory memorandum that accompanied each Executive Council minute.

Hasluck also sought to satisfy himself that the recommendation was consistent with government policy or previous decisions; that it was in accord with established procedures; that, where necessary, the Attorney-General's Department and other involved departments, such as Foreign Affairs or Treasury, had been consulted; and that there was no conflict between his advisers – in short, that everything the Governor-General-in-Council was being asked to do was in accordance with the law and with due regard to precedent and obligation.[10]

I have already quoted from McGarvie to show just how influential Hasluck's views were on State Governors. To this I can add my own knowledge of the interest shown in federal Executive Council procedures by more than one State Governor when called upon to act as Administrator of the Commonwealth during an absence by the Governor-General.

Green's second gubernatorial model is the benign mentor, and he cites as his example a view taken by the High Court of the responsibilities of the Governor-in-Council. The case was *FAI Insurances Ltd v. Winneke*,[11] and Sir Henry Winneke, a former Chief Justice of Victoria, was the Governor of Victoria at the time. The Governor-in-Council had been advised to refuse the insurance company's application for the renewal of an existing licence to carry on a particular class of business, and the company sought a declaration that the refusal of its application was void on the grounds that it had not been given a reasonable opportunity to be heard before the Minister had made his recommendation, and that this had been a denial of natural justice. The High Court held that the Governor-in-Council was subject to the rules of natural justice, and that therefore the decision of the Executive Council to refuse the company's application was void. A majority of the Justices took the view that, while the Governor was bound, in the end, to accept and act on the advice of his Ministers in Council if they persisted, he nevertheless had the right to question the advice he had been given, to seek further information, and to ask his Ministers to reconsider their advice.

While some commentators have sought to draw a distinction between the Hasluckian interventionist and the benign mentor, with a view to suggesting that there is some great difference between these two roles and that Hasluck went too far, I believe that this is a distinction without a difference. I attended every one of Hasluck's meetings of the federal Executive Council over a period of three and a half years, first as Secretary to the Executive Council and then as Official Secretary to the Governor-General. He was the epitome of the benign mentor, particularly when, more than half way through his term of office, he was faced with a change of government consisting of brand new Ministers with not a skerrick of prior ministerial experience among them. To suggest that he was an interventionist who went too far is to misjudge him.

In 1982, eight years after Hasluck had retired as Governor-General, the High Court delivered its judgment in the *FAI Case*. The Court, by a majority of six to one, defined in some detail the duties which they imposed on the Governor when presiding at a meeting of the Executive Council. Their Honours defined those duties exactly as Hasluck had described them

more than thirteen years earlier.

Gibbs CJ held that the Governor-in-Council is not above the rule of law when exercising a statutory power; that the applicant company was entitled to a hearing before a decision adverse to its interests was made; and that such a hearing was not a matter for the Governor or the Executive Council but for the Minister or his officials.

Stephen J, who was then Governor-General designate, and who within two months would be Governor-General and presiding over an Executive Council, also held that the applicant company was entitled to learn of the ground of the rejection of its application, and to have an opportunity to combat those grounds; and that such a hearing was a matter for the Minister or his officials.

Mason J agreed with the views of his brother Justices about the prior obligation on the Minister to give the applicant company a hearing, and for the Governor-in-Council to accord the company natural justice. He also referred to the convention that required the Governor-General or a Governor to act in accordance with advice tendered to him by his Ministers and not otherwise, but then went on to say that:

> "It is not to be thought that the Queen, the Governor-General or a Governor is bound to accept without question the advice proffered. History and practice provide many instances in which the Queen or her Australian representatives have called in question the advice which has been tendered, have suggested modifications to it and have asked the Ministry to reconsider it even though in the last resort the advice tendered must be accepted".

Aickin J similarly referred to the obligation to provide a hearing before a statutory authority affected the rights of individual citizens, and specifically rejected the view, which had been expressed by the Full Court of the Supreme Court of Victoria in an earlier appeal in this case, that the Governor-in-Council had an unfettered discretion. He also referred to earlier decisions by the High Court and the House of Lords:

> "..... in which the Court proceeded on the footing that it may investigate the exercise of statutory powers by Ministers of the Crown in order to determine whether such exercise of power was authorised by statute or was otherwise within the lawful scope of the powers of the Minister".

Wilson J similarly covered the matters dealt with by his brother Justices. He then described the situation in which a Minister had given a fair hearing to an applicant against which he proposed to make an adverse recommendation, and said that:

> "His [the Minister's] submission to the Governor-in-Council will show on its face that the dictates of natural justice have been observed. Neither the Governor nor the members of the Executive Council who constitute the quorum on the particular day are required to go behind that assurance".

Then His Honour went on to observe:

> "That is not to say that the Governor may not ask questions of his Ministers, directed perhaps among other things to the observance in a proper case of the principles of natural justice. Hence the desirability of an assurance to that effect appearing on the face of the submission. It would be absurd to suppose that the principle of responsible government requires the Governor to act purely as an automaton. He may be described as a rubber stamp, in the sense that his executive acts are based, and necessarily based, on the advice that he is given. But his responsibility is to administer the executive government, and to do so with integrity, discretion and a complete absence of political partiality. … I see no reason why in a case where it appears to the Governor that some further consideration by the Minister or the Cabinet would be desirable he could not request that further consideration be given before he acts on the advice that is tendered to him. Let it be said that such action may well be infrequent, but the possibility of it

serves to illustrate the true function of the Governor-in-Council and the practicality of a legislative step which commits to him a decision which imports the requirements of natural justice".

Brennan J also agreed with his brother Justices on the right of the applicant company to natural justice; on the obligation on the Governor-in-Council to satisfy itself that the company had received it; and on the duty imposed on the recommending Minister. As Brennan put it:

> "The legislature must be taken to have in mind the ordinary processes of government when it creates a power to be exercised by the Governor-in-Council, and therefore to have intended that the Minister administering the Act will see to the observance of any conditions upon the exercise of a power before the Governor-in-Council is advised to exercise it".

It fell to Murphy J to provide the only dissenting voice in this case. In his view the appellants were not entitled to any relief. Murphy saw the Governor as coming under the third of Green's gubernatorial models – the mechanical idiot – which Green described as a figurehead, a rubber stamp, a cipher or automaton. Murphy held that:

> "In the absence of authorising legislation, there is no power in the courts to inquire into questions of good faith, observance of natural justice or other propriety of an act of a Governor-in-Council which is otherwise within power. Leaving aside the controversy over vice-regal 'reserved powers' the Governor is bound to take the advice tendered by his Ministers. Under our system of responsible government the decisions of the Governor-in-Council are formal. A Governor is sometimes given the courtesy of explanations but is not entitled to them. The decisions give effect to the will of the Cabinet. Thus in theory the Governor-in-Council, and in practice the Cabinet, is the highest political organ of the State".

Fortunately for our system of responsible parliamentary government under the Crown, and under the rule of law, Murphy's views of how Cabinets should operate and on the role of Governors were idiosyncratic and, as Green has pointed out, "unsupported by any legal analysis or citation of authority",[12] elements which were not lacking in the judgments of the other members of the Court. But then, as many of us will remember, Murphy as Attorney-General in the Whitlam Government was able to advise his Prime Minister and the federal Executive Council that a loan for $4 billion (or more than $61 billion in today's money) with a maturity term of 20 years could be described as a loan for temporary purposes, in order to circumvent the legal provisions relating to government borrowings and the Loan Council!

I have quoted at some length from the judgments in *FAI Insurances Ltd v. Winneke* because six of the seven Justices clearly supported the most widely accepted view of the Governor's role – the one which Green has described as the benign mentor. This model of the Governor-in-Council derives its authority from Walter Bagehot's often-quoted view of the Sovereign's rights under a constitutional monarchy – the right to be consulted, the right to encourage, and the right to warn. And Bagehot was quoted with approval by Aickin J in his judgement in the *FAI Case*.

I referred earlier to both responsible parliamentary government and the rule of law as elements of our system of government. Responsible parliamentary government requires that, ultimately, the Governor will accept the advice of his Ministers, but, as the High Court has told us, the ministerial advice must be in accord with the law. I turn again to the words of Sir Guy Green to sum up this section of my paper:

> "It is certainly the case that if one has regard to the principles of responsible government alone it can be persuasively argued that a Governor must always follow the advice of the Ministry. But the application of the principles of the rule of law leads to a different conclusion. The rule of law also imposes an obligation upon a Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse

> to act when they are not. That duty is not confined to refusing to be a party to an action which is unlawful in the sense of being contrary to say the criminal law but includes acts which are beyond powers or acts which are within power but are being exercised irregularly as was the case for example in *FAI v. Winneke*".[13]

Clearly there is no place for Murphy's mechanical idiot presiding over Executive Councils in our system of government.

I turn now to the other two categories of a Governor's duties – ceremonial and community.

A Governor's ceremonial duties range from opening State Parliament, attending Anzac Day and Remembrance Day observances, swearing in Ministers of the Crown and Supreme Court Judges, and holding investitures under the Australian honours system, to presenting awards for community organisations such as the Scouts and Guides, St. John's Ambulance Brigade, or the Winston Churchill Memorial Trust. Governors are also called upon to receive the Queen and other members of the Royal family, foreign Heads of State and foreign heads of government, their diplomatic representatives, and other national and international representatives, whenever such persons make official visits to their State. Increasingly, State Governors may also be asked by their governments to make official visits or lead delegations to other countries to further the special interests of their State, and to improve relations between their State and the State, Province or community to be visited. And Dr McCaughey has quoted one of his predecessors, Lord Norman, Governor of Victoria from 1879 to 1884, writing to his successor, Sir Henry Loch, Governor from 1884 to 1889, to say that "it would be a kind of High Treason for a Governor not to attend the Flemington Races".[14]

In spite of the importance of the Governor's constitutional and ceremonial duties, it is through the third category – his community duties – that the Governor is known to the people of his State. These community duties include speaking at, and opening, State, national and international conferences; presenting awards at major public gatherings, ranging from exhibitions and sports meetings to university graduations or meetings of learned societies and professional institutes; attending functions held by organisations of which he is a patron or a principal office-bearer; making official visits to regions or local government areas within the State; visiting farms and factories, schools and elderly citizens' centres, Aboriginal and migrant communities, fire and emergency service organisations, voluntary organisations, and areas hit by disasters of one kind or another.

In fulfilling his non-ceremonial duties out in the community, and in inviting community representatives to functions held at Government House, or in receiving them as callers, the Governor uses the status and prestige which the community attaches to his position to acknowledge the vast number of organisations, institutions and individuals who contribute to the well-being of our society, and by his interest and his presence and his hospitality, encouraging the continuation of these activities. As Sir Zelman Cowen said in his farewell speech to the National Press Club in Canberra in 1982, and was to repeat in retirement in many speeches about vice-regal office, a busy and active incumbent:

> "..... offers encouragement and recognition to many of those Australians who may not be very powerful or visible in the course of every day life, and to the efforts of those individuals and groups who work constructively to improve life in the nation and the community".[15]

Politics has been described as a game, with opposing teams called Government and Opposition, a book of rules called the Constitution, and an umpire called the Governor (or Governor-General). Like any other game, while the teams are playing according to the rules there is very little for the umpire to do, but when the game gets rough and the rules are broken, the umpire must blow his whistle and give a ruling. Fortunately for our democracy, this does not occur often, but it can and does happen, and no review of the role of the State

Governor would be complete without an examination of at least a few examples. For this purpose I have chosen three – two from Queensland in 1986 and 1987, and another from Tasmania in 1989.

Sir Walter Campbell, a former Chief Justice of Queensland, was Governor of that State from 1985 to 1992. Sir Joh Bjelke-Petersen was Premier from 1968 to 1987. In June, 1986, less than a year after Sir Walter had been sworn in as Governor, *The Courier-Mail* reported that:

> "The Queensland Governor, Sir Walter Campbell, apparently is not prepared to rubber stamp Government decisions. He has sought and been given an undertaking that more details will be provided about certain appointments requiring Executive Council approval".

The article went on to give more details about that particular issue, which related to appointments to statutory bodies, and concluded with the following:

> "When Sir Walter swore in Sir Joh's latest Cabinet … the ceremony was conducted at Government House. This was a departure from the old arrangement where the Governor drove to the Executive Building for the swearing-in. This was seen in some circles as an indication that Sir Walter was prepared to play a more independent role".[16]

Next day, under the heading *The Governor Makes a Point*, *The Courier Mail's* editorial expressed support for the Governor's action in seeking more information about appointments requiring Executive Council approval:

> "Sir Walter has acted properly in seeking additional information about such appointments. … At Executive Council the Governor's task is often made difficult by the sheer volume of submissions. … Quite clearly, whether the Governor involves himself, and the extent of his involvement, will depend greatly upon the background and training of the vice-regal representative of the time. … [Other incumbents] might generally be expected to be less involved, certainly less interventionist, than a former Chief Justice of the Supreme Court with a well-developed appreciation of political history".[17]

Three months later, by early September, 1986, the political climate in Queensland was warming up. Even *The Sydney Morning Herald* was moved to speculate that:

> "The Queensland Governor, Sir Walter Campbell, could be called upon to decide who will govern after the State election due next month, an expert in Queensland politics said yesterday. The associate professor in government at the University of Queensland, Dr Ken Wiltshire, said a 'protracted constitutional wrangle' could follow an election in which none of the three major parties won enough seats to govern in its own right – the outcome considered most likely in the coming poll".[18]

Clearly there would be no place for a mechanical idiot here.

Three weeks later *The National Times* weighed into the debate. Dr Chris Gilbert, senior lecturer in constitutional and administrative law at Queensland University, was reported to have said the Governor was "uniquely equipped to handle a constitutional crisis because of his reputation as an upright, honest man and his considerable legal knowledge. 'If he receives conflicting advice from various political leaders he can be his own man', Gilbert said".[19]

By the end of October, *The Australian Financial Review* reported that:

> "Queensland's political partisans and constitutional experts agree on two things regarding Governor Sir Walter Campbell: that he has huge discretionary powers, and will use them with trained impartiality and fairness".[20]

The Australian was less restrained, and waxed lyrical about the possibility of a hung Parliament:

> "Usually the Governor is a mere cipher … But if, as widely predicted, none of the political parties gets a majority on Saturday and no coalition can be formed, Sir Walter suddenly will become the most powerful man in Queensland. He will have the power of

a dictator, the command of a despot. … The Governor's power will be absolute; though, under the Westminster system he should act as an impartial referee – a check and balance – to ensure democracy is maintained".[21]

On election day, 1 November, 1986, *The Sydney Morning Herald* contained a detailed analysis of the political and constitutional possibilities by Peter Bowers, arguably one of Australia's most experienced political journalists. It opened up with:

"The Queen's man in Queensland, Sir Walter Campbell, is powerfully equipped to impose a constitutional solution if the politicians prove incapable of resolving a deadlocked Parliament arising from today's election".[22]

After reminding his readers of the 1975 dismissal of the Whitlam Government, and of Whitlam's incorrect view that the Governor-General was bound to accept his Prime Minister's advice, and no other, Bowers wrote:

"There is no doubt about the authority of the Governor to consult whom he pleases if his intervention is required to resolve a political deadlock".[23]

In the event, the election produced a decisive result and the Governor was spared any agonising decision-making. However, the comments about the Governor's capacity to act, and the speculation that he might have to, send us important messages about the significance of the office of Governor and of the qualifications and personal qualities of its incumbents.

If Sir Walter breathed a sigh of relief over the result of the election, his relief was only to last a year. By November, 1987 he not only had to consider the possibility of using his reserve powers – he actually had to use them. With the Fitzgerald Inquiry into political and official corruption soon to report, the Queensland government was in turmoil, culminating in the sacking of a number of Ministers by the Premier.

In an attempt to shore up his own support in Cabinet, Sir Joh had proposed to the Governor the sacking of five Ministers. The Premier sought to do this by resigning his commission, being recommissioned to form a new Government, and choosing a Ministry that would exclude his five opponents. The Governor refused to be used in this way to bring about the removal of the five Ministers until the Premier had received the approval to his proposal from the full Cabinet. After a stormy Cabinet meeting and a second visit to the Governor, the Premier retreated from his original plan and received His Excellency's approval to a restructured Cabinet, but only after the Governor had received separate advice from the Deputy Premier that the changes would have the backing of the present Cabinet.[24]

The morning of 26 November, 1987 saw newspaper speculation that Sir Joh would be removed that day as parliamentary leader of the Queensland National Party, that nevertheless he might not resign his commission as Premier, and that the Governor would have to dismiss him. Four days later Sir Joh Bjelke-Petersen resigned and Mike Ahern became Premier.[25]

One year later, with the Governor's consent and "in the interests of historical accuracy", Premier Ahern released correspondence relating to the events which I have just described. The documents show the role that the Governor played in refusing to accept Sir Joh's resignation and to issue him with a fresh commission as a device to sack five troublesome Ministers. In a letter dated 25 November, 1987 to Sir Joh, the Governor wrote:

"Should you resign as Premier, it may be that I may not recommission you as Premier unless I was of the view that you were able to form a new ministry and that you would be able to obtain the confidence and support of the Parliament. It would be wise for you to discuss with all your ministers your proposed restructuring of the Ministry".[26]

On the following day, 26 November, Mr Ahern wrote to the Governor to tell him that he (Ahern) had been elected parliamentary leader of the National Party. Attached was a schedule signed by National Party members of Parliament, including two of Sir Joh's formerly staunch supporters. Following Sir Joh's resignation four days later, Sir Walter asked Mr Ahern to form a government on 1 December. This was a classic case of the proper use of the reserve powers

to refuse to accept the advice of a Premier who could not demonstrate that he had the support of his colleagues and the Parliament.

My third example comes from Tasmania, where General Sir Phillip Bennett served as Governor from 1987 to 1995, and where Robin Gray was Premier from 1982 to 1989. Tasmania went to the polls on 13 May, 1989, and when the polls were declared on 29 May it was clear that no party could command the support of a majority of the Lower House, although the Liberal Party led by Robin Gray had the largest vote of any single party.

Both parties had fought the election campaign on the basis that, should they fail to get a majority in the House, neither of them would form a coalition with the Independents. However, once the results were in, the Leader of the Labor Opposition, Michael Field, claimed that he had the support of the Independents and could therefore form a Government. Just to confuse the issue, the Independents claimed that:

> "We have set out in a formal accord what is agreed. On all other matters, we have input into Cabinet, but if we do not agree with a particular measure, we will oppose it in the House. And it could be that some Greens Independents will oppose a particular measure and others will not. There is no party discipline – we are not a party, we are a new force in Australian and Tasmanian politics".[27]

This was hardly comforting to a Governor charged with the constitutional responsibility for ensuring the stability of any Government that he might commission.

The Premier, on the other hand, claimed the right to a fresh commission to form a new Government because he believed he would be able to command a majority in the Lower House, which was to meet on 28 June, just one month away. His Government began to attack the Labor-Independent alliance, on the grounds that it was contrary to pledges made by both parties during the election campaign not to enter into an accord such as the one they had now reached after the election.

In the meantime, Tasmanians were divided over whether the Liberal Premier should hold on to power, whether Labor should form a minority Government, or whether a new election should be called. A case could have been made for any one of these three options. For the Governor the dilemma was very real – does he accept his Premier's advice and continue him in office until Parliament is able to make the decision, or does he exercise the reserve powers, reject the Premier's advice, and invite the Leader of the Opposition to form a Government? And if the latter, what of the Green-Independents' qualified and ambiguous support? In the end, with Parliament shortly to meet, the Governor accepted the Premier's advice and commissioned him to form a new Government, on the clear understanding that his support would be tested in the Parliament.

Within 24 hours of Parliament meeting, the Gray Government lost a no-confidence motion in Parliament. The dissolving of Parliament and the calling of a fresh election was publicly canvassed by some Liberals, but the Governor was entitled first to see if he could get a Government out of the Parliament that had just been elected. In the event, the fresh election option was not pursued by the Premier. By convention, he should have resigned and left it to the Governor to see whether Labor and the Independents could obtain a majority on the floor of the House. Instead, he held on to office and took the unusual and unconventional step of asking the Governor to determine for himself whether Labor and the five Independents could form a viable government.[28]

So the Governor began a series of meeting with all of the protagonists. In the course of the day the Governor met twice with the Premier, three times with the Leader of the Opposition, and separately with each of the five Greens-Independents. Sir Phillip in particular sought clarification from Mr Field about several points of his proposed agreement with the Greens-Independents, and specific assurances in writing of stable government under the accord. Once His Excellency was able to tell the Premier that he (the Governor) had received the assurance of stability he was seeking from each one of the Greens-Independents, the

Premier submitted his resignation, and Michael Field was sworn in as Premier of a Labor-Greens minority Government.[29]

Clearly the Governor had become actively involved in the formation of a new government, "but a common view among constitutional experts [was] that his actions were impeccable".[30] Premier Gray's advice to the Governor right after the election, that he believed his Liberal Government could command a majority in the new Parliament, was flawed, but the Governor was right in accepting it. Once the Premier had lost the confidence of the House, the Governor's exploration of options was meticulous, exhaustive and correct, and there was no criticism from the Labor Party.[31]

A Governor who was a mere ornament or a "mechanical idiot", to use one of Sir Guy Green's labels, could not have achieved what Sir Phillip Bennet achieved. As Professor James Crawford, of the Sydney University Law School, put it:

> "The crucial test in Tasmania was how you tell someone has won an election. It underlines the fact that it is very difficult to come up with a set of rules that has no discretion".[32]

To which I would add, long live the reserve powers of the Crown!

I turn now to try and answer the question posed in the title of this paper – are State Governors an endangered species?

As we know only too well, holders of vice-regal office under our system of government, and under all of our Constitutions, federal and State, have real and important constitutional powers which go to the heart of the operation of governments and Parliaments. Sometimes they may be called upon to exercise those powers, and I have given some examples. They also are able to have an important influence on the community by their example, particularly by their attendance and their speeches at community functions, and by the functions which they hold at their respective Government Houses.

Given this combination of powers and influence, it doesn't require a great leap of imagination to realise that there will occasionally be a State Premier who might find it irksome to have to work under a Governor of independent mind, such as we have seen in Sir Walter Campbell and Sir Phillip Bennett, and who might be inclined to seek to appoint as Governor someone who might be, or could be persuaded to be, more malleable. Alternatively, to return to the sporting analogy which I used earlier, occasionally it will happen that the captain of one of the teams in the game of politics, fearful of what an umpire with an independent mind might do, might try to nobble the umpire, either before or during the game. This might be done, either by choosing a malleable umpire in the first place, or by taking the pea out of the whistle of an umpire who might be suspected of being of an inquiring and independent mind.

There have been a few State Governors who were chosen precisely because they were, or their Premier thought they were, either deficient in the required personal qualities, or because they could be persuaded to be malleable in their application. I have too much respect for vice-regal office to attempt to name any of these, but I am sure many of you will be able to think of some examples. The best we might hope for in such cases is that, if their term in office is to be nasty and brutish, it should also be short; or that, as sometimes has happened, they grow and mature in office, and end up by surprising those who chose them in the first place.

There have also been many State Governors who have followed in the great traditions of the office – men and women who have had the intelligence, the wisdom, the integrity and, if necessary, the courage to uphold their oath of office. It would be invidious to name a few and leave out others equally deserving, so I will leave you to think of your own examples. The best way for a Premier to nobble such Governors is to reduce or remove some of the resources and facilities available to them to do their job.

I have already recounted how Sir Walter Campbell exerted his influence early in his term by changing the previous practice of the Governor going to the Executive Building to swear-in Ministers, and instead requiring his Ministers to come to Government House. And it is generally the case that Ministers go to their respective Government Houses for their Executive Council meetings, except in Victoria where the Governor drives each week to the Old Treasury Building, and in New South Wales, where the meeting takes place in the old Chief Secretary's Office. It may be argued that history and tradition are being preserved because these meetings take place in what are described in both States as the Executive Council Chamber, but I believe the practice to be an unfortunate one. The place for Ministers to be received by their Governor is Government House.

The quickest and most effective way of nobbling a Governor is to evict him from Government House and make his job a part-time one. This was the device used by New South Wales Premier Bob Carr in 1996, though it was by no means the first time this strategy was considered or used.[33]

On 16 January, 1996 Carr announced that the next Governor of New South Wales would be former Supreme Court Judge Gordon Samuels; that the new Governor would not live or work at Government House; and that he would retain his appointment as Chairman of the New South Wales Law Reform Commission. In seeking to justify his decision to change the role of the Governor, the Premier said:

> "The Office of the Governor should be less associated with pomp and ceremony, less encumbered by anachronistic protocol, more in tune with the character of the people".[34]

Under the heading *His Part-time Excellency*, *The Sydney Morning Herald* reported that, in announcing these changes, the Premier said that the Governor would continue to live in his own home at Bronte, would operate with a reduced staff, and would attend few of the ceremonial and entertaining functions that traditionally occupy vice-regal time:

> "The changes reflect Mr Carr's determination to shed functions he considers excessive, irrelevant and unbecoming, although he said they involved no alteration to the Governor's constitutional role".[35]

It was also reported that, at the end of the press conference at which he had presented the next Governor, the Premier, in a smiling aside, had said, "That's one for Jack Lang".[36]

That smart-alec remark, and the Premier's comment that the shedding of so-called irrelevant functions involved no alteration to the Governor's constitutional role, reveal the hypocrisy and cynicism of the Premier's decision. A Governor's constitutional role – assenting to legislation and presiding at meetings of the Executive Council – would occupy only a few hours a week of his time. The rest of a full-time Governor's time, and that of his wife, would be devoted to public duties: attending functions all over the State, or hosting them at Government House, in order to encourage and show support for all those worth-while community activities that governments cannot or should not do, and generally responding to the community's requests, be they for patronage of an organisation, or for a speech or a visit or some other mark of recognition of service well done. What the Carr Government had really said to the people of New South Wales was that those of the Governor's duties which serve the government's needs would be retained, and those which serve the community's needs would be dispensed with. That was the real, the selfish, the insulting message which Mr Carr gave to the people of New South Wales.

The Premier also claimed that the changes would result in savings of about $2 million a year, but the following year the Auditor-General reported to Parliament that, far from saving money, the changes had meant that it was costing $600,000 more a year to run Government House since it had ceased to be the Governor's residence.[37]

In its editorial on the day after the Premier's announcement, *The Sydney Morning Herald* noted that:

> "There is an inconsistency in saying that the Office of the Governor should be 'more in tune with the character of the people' while reviewing, presumably with a view to cutting back, the number of ceremonial and social functions the Governor performs. If Mr Samuels withdraws, or is forced to withdraw, from such apparently mundane matters as opening country shows, or being patron of community organisations, it can hardly be said that he is bringing the office closer to the people".[38]

The editorial went on to point out that there are daily tours of the White House, in Washington, so it ought to be possible to give the public more access to Government House and its grounds without intruding greatly on the privacy of the Governor.

As the public is also able to visit the Queen's palaces and residences in the United Kingdom, Government House, Ottawa, and Government House, Canberra, the Premier's argument that the Governor needed to be evicted from Government House, Sydney in order to make it more accessible to the public is exposed for the falsehood that it really is. In fact, looking at the Governor's web pages on the New South Wales Government's web site, every use to which Government House and its grounds have been put over the past eight years could have been done with the Governor still living and working in Government House.

Needless to say, the State's longest serving Governor, Sir Roden Cutler, was not amused. He was reported as saying:

> "It's a political push to make way in New South Wales to lead the push for a republic. If they decide not to have a Governor and the public agrees with that, and Parliament agrees, and the Queen agrees to it, that is a different matter, but while there is a Governor you have got to give him some respectability and credibility, because he is the host for the whole of New South Wales. For the life of me I cannot understand the logic of having a Governor who is part-time and doesn't live at Government House. It is such a degrading of the office and of the Governor".[39]

If Sir Roden Cutler was not amused, neither were many of the citizens of New South Wales. Four weeks before the swearing-in of Gordon Samuels, a crowd of 15,000 protested outside Parliament House, blocking Macquarie Street in one of the biggest protests Sydney has seen,[40] and on the day before the swearing-in, a petition bearing 55,000 signatures was handed in, calling on the Premier to reconsider.[41]

Some sections of the media supported the downgrading of the office of Governor of New South Wales. Anything that angered monarchists and furthered the Keating push for a republic had to be a good thing, while the constitutional significance of the Premier's action seemed to elude them or be of no interest or consequence.[42] Yet three distinguished writers were able to see the wood for the trees.

Frank Devine wrote that:

> "Bob Carr, Premier of New South Wales, and Gordon Samuels, the State's new semi-governor, are acting too smart-arse for their own good – and, for that matter, the good of the republican movement".[43]

PP McGuinness wrote that:

> "To say that Paul Keating and Bob Carr do not love each other would be an understatement; they thoroughly detest each other, and if Keating loses the prime ministership at the next election he will certainly blame it on Carr's initiative in downgrading the status of the Governor of NSW".[44]

John Stone wrote that:

> "Mr Carr's breathtakingly arrogant move last week to downgrade and demean the role of the State Governor, thereby enhancing further his own far too powerful role of Premier, is all of a piece with Mr Keating's view (and Mr Carr's) of how government should be carried on".[45]

History records that seven weeks later Keating did indeed lose the prime ministership, and that

less than four years later the Australian people decisively rejected the Keating/Turnbull republic.

The Premier's agreement to the Governor-designate's request that he retain the chairmanship of the State's Law Reform Commission also came under fire. Not only did it raise questions of conflict of interest: it also raised questions of propriety. Could the Governor give the Royal Assent to legislation that he may have had a role in creating? Could the Governor hold another office of profit under the Crown? And even if he received no additional remuneration other than the vice-regal salary, could he preside over and take advice from the Executive Council and at the same time hold another statutory appointment that required the approval of the Governor-in-Council? Was there essential law reform work still to be done that required his particular expertise, or was it a device to fill in the days for a part-time Governor?

With the Opposition threatening to refer the dual appointment to the Independent Commission Against Corruption, and to recall the Upper House for a debate on the Samuels appointment, the Government closed down the Parliament by proroguing it, and announced that Mr Samuels would stand down as chairman of the Law Reform Commission.[46] At his swearing-in the new Governor declared that he would maintain the ceremonial functions the Premier had wanted shed, and the event was conducted with the traditional pomp and ceremony.[47] However, the Governor remained evicted from Government House and his office was established in downtown Macquarie Street, in rooms that had been used by Sir Henry Parkes as Colonial Secretary and Premier of New South Wales in the 1890s.

Climbing a flight of stairs in an old government building to call on the Governor may be all right for ordinary mortals, but when the Premier needed to have the Governor-in-Council sign the writs for the State elections that were to be held on 22 March, 2003, that was not good enough for Mr Carr. Accompanied by his wife and one of his women Ministers, the Premier provided a perfect photo opportunity for television and the press by "striding down the tree-lined avenue to Government House".[48] There the humbug was further compounded, again for the cameras, by holding the Executive Council meeting in what used to be the Governor's office but was no longer, and had not been for the past seven years.

Today, eight years on, New South Wales' Governor remains evicted from Government House; the second incumbent also lives in the suburbs and commutes to her down-town office; the promised cost savings and grandiose schemes for alternative uses of Government House have not eventuated; and it continues to be used, and the public has access to the house and grounds, in ways that would not preclude the Governor from living and working there, as indeed was the case in the past.

Has the office suffered from the downgrading? The answer has to be "yes". Is the damage permanent? The answer has to be "no", and nothing has occurred that would prevent a future government from returning the Governor to Government House. Furthermore, the damage which Premier Carr inflicted on the republican cause seems to have deterred any other State Premiers from trying to copy his example.

The vice-regal office is stronger and more resilient than the foolish whims of a mere politician, and it continues to be the constitutional umpire in the game of politics. The office of State Governor has been threatened, as it has been before and no doubt will be again, but it has not been endangered.

Endnotes:

1. For discussion of the vice-regal roles, see Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979; Richard E McGarvie, *Democracy: choosing Australia's republic*, Melbourne University Press, Carlton, 1999, pp. 16-75; and

Dr J Davis McCaughey, *The Crown at State Level*, being *The Eighth Hugo Wolfsohn Memorial Lecture*, La Trobe University, 12 October, 1993. See also Sir Guy Green, *Governors, Democracy and the Rule of Law*, being *The Sir Robert Menzies Oration*, The University of Melbourne, 29 October, 1999; and Sir David Smith, *The Role of the Governor-General*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 167-187.

2. McGarvie, *op. cit.*, p. 26.

3. Hasluck, *op. cit.*, pp. 21-2.

4. See Sir Zelman Cowen, *The Office of Governor-General*, in *Daedalus: Journal of the American Academy of Arts and Sciences*, Volume 114, Number 1 (Winter 1985), pp. 141-144; Sir Zelman Cowen, *The Crown and its Representative in the Commonwealth*, an address to the annual conference of the Law Society of Scotland, Glen Eagles, 21 April, 1985, *passim*; Sir Zelman Cowen, *Reflections*, being *The William Walker Memorial Oration*, Gold Coast, Queensland, 15 September, 1991, p. 9; and Sir Zelman Cowen, *Leadership in Australia: The Role of the Head of State*, being *The Williamson Community Leadership Lecture*, Melbourne, 31 May, 1995, p. 7.

5. McGarvie, *op. cit.*, p. 26.

6. George Winterton, Professor of Law, University of New South Wales, has criticised my use of the word "constitutional" in this context on the grounds that it does not encompass powers conferred by statute. On the other hand, Dr Davis McCaughey and Richard McGarvie, both former Governors of Victoria, and Sir Guy Green, a former Governor of Tasmania and a former Administrator of the Government of the Commonwealth of Australia, use the word "constitutional" and comprehend it as also encompassing powers conferred by statute, as do I. Paradoxically, Winterton then goes on to describe "constitutional" functions as including powers exercised both alone and through the Executive Council, and it is in the Executive Council that vice-regal powers conferred by statute are exercised.
   In similar vein, another academic, Professor Greg Craven, Professor of Law, University of Notre Dame, has recently said:
   > "Of course, so long as Australia remains a monarchy, the Governor-General can never be more than a surrogate …".

   Yet in 1988, the Hawke Government's Constitutional Commission reported otherwise. The Commission had included as members three constitutional lawyers and two former heads of government, former Prime Minister Gough Whitlam and former State Premier Sir Rupert Hamer, both of whom had worked with vice-regal office holders, and the Commission had been advised by a committee headed by former Governor-General Sir Zelman Cowen. The Commission concluded and reported that the Governor-General is the holder of an independent office and "is in no sense a delegate of the Queen".
   Australia is indeed fortunate that we now have a body of writing by former holders of vice-regal office, at Commonwealth and State levels, to correct the errors of academics who pronounce on matters of which they have no personal knowledge or experience.

7. McCaughey, *loc. cit.*, pp. 2 and 10.

8. McGarvie, *op. cit.*, p. 282, note 50.

9. Green, *loc. cit.*, p. 2.

10. Hasluck, *op. cit.*, pp. 38-9.

11. (1982) 151 CLR 342.

12. Green, *loc. cit.*, p. 5.

13. *Ibid*..
14. Quoted in McCaughey, *loc. cit.*, p. 8.
15. See for example Cowen, *The Williamson Community Leadership Lecture*, *op. cit*., at p. 10.
16. Peter Morley, *Governor wants details of Cabinet Decisions*, in *The Courier-Mail*, 5 June, 1986.
17. Editorial, *The Governor makes a point*, in *The Courier-Mail*, 6 June, 1986.
18. Greg Roberts, *Governor likely key to Qld poll deadlock*, in *The Sydney Morning Herald*, 8 September, 1986.
19. Sally Loane, *Qld poll may put Governor in hot seat*, in *The National Times*, 28 September, 1986.
20. Ean Higgins, *Experts: The Governor would be impartial*, in *The Australian Financial Review*, 29 October, 1986.
21. Hugh Lunn, *The man who could rule with a single vote*, in *The Australian*, 30 October, 1986.
22. Peter Bowers, *Kerr's ghost haunts the Queensland Handicap*, in *The Sydney Morning Herald*, 1 November, 1986.
23. *Ibid*..
24. See Greg Roberts, *Joh's fight to the death*, in *The Sydney Morning Herald*, 25 November, 1987; and Rowan Callick, *Qld Governor tosses up his options under the Constitution*, in *The Australian Financial Review*, 26 November, 1987.
25. See Paul Lynch, *Sir Walter has power to dismiss Premier*, in *The Australian*, 26 November, 1987; and John Schauble and Christobel Botten, *The Age*, 26 November, 1987.
26. Quoted in Sonya Voumard, *Governor thwarted Bjelke, letters show*, in *The Age*, 17 December, 1988.
27. Quoted by Peter Smark, *The general sorts it out*, in *The Sydney Morning Herald*, 30 June, 1989, and *Gray's resignation spared Governor a constitutional dilemma*, in *The Age*, 30 June, 1989.
28. See Tom Burton, *Gray's resignation spared Governor a constitutional dilemma*, in *The Age*, 30 June, 1989; editorial, *Mr Gray's elegy, not democracy's*, in *The Age*, 30 June, 1989; and Andrew Darby, *Field sworn in as Premier: Gray offers the Governor his resignation*, in *The Age*, 30 June, 1989.
29. See Paul Austin and Christine McGee, *Gray out, Field in: Labor-Greens alliance wins Governor's nod*, in *The Australian*, 30 June, 1989.
30. Mike Steketee, *Governors and the majority*, in *The Sydney Morning Herald*, 18 July, 1989.
31. See Smark, *loc.cit.*; also Steketee, *ibid*..
32. Quoted by Steketee, *ibid*..
33. In February, 1984 the Governor-designate of Western Australia, Professor Gordon Reid, announced that he would live in and work from his home in the suburb of Nedlands, while using Government House for meetings of the Executive Council; but eventually he and his wife moved back into Government House, quietly and without publicity.
34. Quoted in editorial, *A Governor on the side*, in *The Sydney Morning Herald*, 17 January, 1996.

35. David Humphries, *His Part-time Excellency*, in *The Sydney Morning Herald*, 17 January, 1996.
36. Tony Stephens, *No pomp, but happy to serve the Queen*, in *The Sydney Morning Herald*, 17 January, 1996.
37. David Humphries, *Blow-out in costs for "empty" residence*, in *The Sydney Morning Herald*, 13 November, 1997.
38. *A Governor on the side, loc.cit.*.
39. *Ibid.*.
40. George Richards, *Era ends as door closes on Governor's home*, in *The Sydney Morning Herald*, 1 March, 1996.
41. Stephen Lunn, *Monarchists decry Carr's "republic by stealth"*, in *The Australian*, 1 March, 1996.
42. See for example Mike Steketee, *A popular decision with powerful symbolism*, in *The Australian*, 17 January, 1996; also Bernard Lane, *Less pomp eases path towards a republic*, in *The Australian*, 17 January, 1996.
43. Frank Devine, *Premier's house of cards*, in *The Australian*, 18 January, 1996.
44. Padraic P McGuinness, *Carr's coup d'état may also prove a fatal blow to Keating*, in *The Sydney Morning Herald*, 20 January, 1996, and *Carr may have signed two death warrants*, in *The Age*, 20 January, 1996.
45. John Stone, *Doing battle State by State*, in *The Australian Financial Review*, 25 January, 1996.
46. David Humphries, *Governor to quit second job for now*, in *The Sydney Morning Herald*, 27 January, 1996.
47. David Humphries, *New Governor gets back his pomp*, in *The Sydney Morning Herald*, 2 March, 1996.
48. Paola Totaro, *Carr wastes no time on the hustings*, in *The Sydney Morning Herald*, 1 March, 2003.

Chapter Six
Federalism and the Crown – the Odd Couple?

Professor Gregory Melleuish

The Australian system of government at the federal level is an amalgamation of responsible government and federalism. Responsible government means what the British in the 19th Century called party government and is also referred to as the Westminster System. The government, and its officials, are responsible for their actions and expenditure to the Parliament and hence ultimately to the people who elected it. Federalism means that the power to make and administer laws is divided between a central government and provincial or State governments, with each competent within its own particular sphere.

Responsible government tends to concentrate power, federalism to separate and diffuse it. Responsible government stands for democratic accountability, federalism for the liberal idea of the separation of powers and the diffusion of power generally. On first inspection it might seem that responsible government would be more likely to be associated with the ideals of monarchy and federalism with those of republicanism. However, when we look more closely we can see that both federalism and responsible government are elements of the development of constitutional monarchy.

The early advocates of the idea of sovereignty, such as Jean Bodin in France and Robert Filmer in England, were opposed to the idea that sovereignty, and hence the power to make laws, could be shared by a number of bodies in a political entity.[1] Bodin insisted that sovereignty needed to rest with a single undivided entity, be it a Monarch, an aristocracy or a democracy. In practice both Bodin and Filmer were monarchists of the Absolute variety and they were opposed to the idea of mixed government. Mixed government is the theory that the most effective system of government, and the one least likely to decay and degenerate, is one in which power is shared between the one (monarch), the few (aristocracy) and the many (democracy).

Models of mixed government came from the ancient world. One such model was Sparta with its two kings, Ephors, Council of Elders and popular assembly. Another was Rome. The King was replaced by consuls who were elected every year, but the council of elders remained in the shape of the Senate, as did popular assemblies. In fact it appears to be the case that this tripartite division is extremely common, perhaps even universal, among early city states, with a similar set-up occurring in ancient Sumeria. Athens became a fully fledged democracy when, having rid itself of its kings and then its tyrants, it stripped the Areopagus or aristocratic council of its powers in 462 BC.[2]

In both the ancient and the modern world governments with a mixed Constitution were admired for their longevity and their stability. Hence one writer in colonial New South Wales could call attention to the fact that both Rome and Venice, along with England, had lasted because they possessed mixed Constitutions.[3] On the one hand it can be argued that mixed government worked because its three elements checked and balanced each other; on the other hand a strong case can be made that its real strength lay in the fact that mixed government required consultation, and hence its decisions embodied the consensus of the community.

The struggle of Parliament against the King in 17th Century England was not directed against monarchy as such. Rather it opposed the unified ideal of monarchy and sovereignty that concentrated power, in an unaccountable way, in the hands of the Monarch. It favoured a mixed system in which power was shared. Again, whatever mythology was tied up in the

idea of the "Ancient Constitution" that the advocates of the Parliamentary cause espoused,[4] it is nevertheless the case that power had been shared in the medieval period, and that kingdoms functioned on principles of community, consent and consensus.[5] In their rush to create viable states capable of fighting wars against other states, Monarchs across Europe attempted to undermine the "privileges" of the various corporations in their kingdoms, including the existing representative institutions derived from the medieval period.

The Princes of the 16th and 17th Centuries needed efficient armed forces if they were to survive in an extraordinarily competitive environment. The drive for efficiency meant that they sought to centralise power in their own hands rather than to resort to traditional practices involving consultation and consent. This meant over-riding traditional representative bodies, it meant creating standing armies and centralised bureaucracies. Only a few European countries were able to go through this process, that in effect created the modern state, without the destruction or emasculation of their traditional representative institutions. After decades of struggle England was one of those lucky few that managed to retain its traditional institutions while constructing an efficient modern state.[6]

In the wake of the Glorious Revolution of 1688 the English tended to understand the form of government that the Revolution had established as being mixed in nature. The key players were understood to be the Monarch, the aristocratic House of Lords and the democratic House of Commons. The English thought that they had restored the "Ancient Constitution" to its original condition, and they feared the prospect that forces would intervene to corrupt the balance, thereby destroying the delicate balance between its elements.

The French *philosophe* Montesquieu recognised that this was far from the truth of the matter. He considered that the British (as they had become after the *Act of Union*) had created a new type of political system. It was not a republic like Venice or ancient Rome, but neither was it a traditional monarchy like France.[7] It was a regime that combined the power of the new state structures that almost two hundred years of continual warfare had brought into being, with the principles of community and cooperation that had been characteristic of medieval practices of government.

Eighteenth Century England was a regime in which commerce flourished, in which people enjoyed a degree of freedom unknown in continental Europe but which nevertheless possessed a strong state structure. It was this combination of power and liberty that was most startling and innovative. Britain was more powerful than France despite its smaller population, and yet it could be powerful without resorting to tyranny and coercing its population. Many saw "mixed government" as the key to maintaining the balance between power and liberty. "Mixed government" is what we today would understand by the term "Constitutional Monarchy". In it the Crown operated as a unifying principle guaranteeing the Constitution and the rule of law that provided the basis of British power. The other elements of the Constitution ensured that the power of government did not over-reach itself and become despotic.

At another level, mixed government ensured that the actions of the British government were based on the consent of at least the most significant part of the British community. Investors were confident that the British government, unlike the French, would not default on loans, and hence lent money to the British at a lower rate of interest.[8]

The British Constitution was the product of slow, and sometimes painful, evolution in England and then Britain. The loss of the American colonies indicated that it was not perfect. Parliamentary sovereignty seemed to be at odds with the rights of British Americans. The British government was not being unreasonable in seeking to recover some of the costs that they had incurred against the French in America. But they broke the rules of mixed government by attempting to raise those funds without consultation or consent. The British government did behave despotically in America, and the fact that they resorted to such casuistical arguments as "virtual representation" did not help matters.

The war against the American colonies raised the real problem of what the British Constitution meant in British colonies that had not grown slowly and organically but had been created in a relatively short period of time, and how that Constitution was to be applied in such circumstances.

What did the British Constitution mean in a "new" British colony? How could it be transplanted so that it preserved the delicate balance between liberty and power? After they had become independent, the new United States of America gave one answer to that question.

The Americans looked at the workings of the 18th Century British Constitution and sought ways to avoid what they saw as its deficiencies. In particular they were concerned with the issue of corruption. They believed that the British Constitution had been corrupted so that power was snuffing out its liberty.[9] They could only escape that power and corruption by declaring themselves independent. They found a solution to the problem of power and corruption in the rigid separation of powers between the Executive, the Legislature and the Judiciary, and in the creation of a federal system of government. It should be noted that separation of powers is not the same thing as mixed government.

Corruption preyed on the mind of 18th Century political writers. They were concerned that the Executive could corrupt the legislature through such means as offering "places" to Members of Parliament. They were afraid that with Parliament and the people corrupted, a Monarch could introduce a "standing army" to impose his will. Fear of corruption shaped the American revolution; the American colonists only declared their independence when they had become convinced that not only the British politicians but also George III were conspiring against them. In other words, the American Constitution took on its particular shape because of the form that the British Constitution had taken during the course of the 18th Century.

By the time the Australian Colonies had reached the stage at which the British government was willing to grant them a degree of self-rule, the British Constitution had also moved on and evolved. Queen Victoria was much more of what we would today understand as a Constitutional Monarch than had been George III. William IV had been the last Monarch who had tried to interfere in the appointment of Ministers. By the 1850s Britain had a system of responsible government in which the Ministry of the day was responsible to Parliament for its existence.[10]

Corruption was no longer the issue that it had been in the previous century, particularly after the Reform Bill of 1832. It is most certainly the case that corruption did not figure in the minds of the Australian colonists at the time of the granting of Responsible Government, just as fear of corruption and conspiracy does not figure in Australian culture in any way comparable to the extent that it does in American culture.

Contrary to the views of recent republican writers, the majority of colonists at the time of the granting of responsible government to the Australian Colonies in the 1850s were not republicans.[11] They were men and women desirous of having a system of government as close to the British Constitution as possible. In fact the hero of our present day republicans, Dr Lang, was a sectarian bigot who wished to create a Calvinist utopia in Australia. His inspiration was Thomas Chalmers, whose experiments in creating such Calvinist communities had failed in Scotland.[12]

No, most colonists wanted the British Constitution, although they often did not agree as to what it was.[13] This is not surprising given the rapid process of evolution that the Constitution was undergoing. Hence there was, to our eyes, the almost bizarre attempt to create a colonial aristocracy by W C Wentworth. But to his eyes, and to those of many of his contemporaries, a mixed Constitution meant that you had to have "the few" to balance the many. To the eyes of many colonial conservatives, pure democracy meant anarchy.

Their problem was that they did not understand that one could apply the principles of the British Constitution to a new society, without being limited by the form of that Constitution.

What mattered was creating a structure that both consolidated and diffused power. And it was the British who supplied the solution in the shape of federalism.

As J M Ward has demonstrated, the granting of responsible government, the "decolonisation" of the Australian Colonies, was meant to be complemented by federalism.[14] The British knew by experience that small self-governing Colonies could adopt selfish and obnoxious policies, such as the protection of industry and laws harmful to the indigenous inhabitants. They saw federalism as a means of encouraging free trade and of overcoming the possible excesses of which small political units are capable. They understood that the principle of democracy all too easily allied itself with that of unlimited power, much to the detriment of those who stood outside the magic circle of power. This is illustrated in Thucydides, where the democratic empire of Athens ceased to be a *hegemon* and became an *arche*, exercising power in a ruthless fashion and in defiance of the accepted values of the Greek world.[15]

Federation did not happen in the 1850s. The new political élites of the various Colonies were more interested in consolidating responsible government within their own Colonies than in joining together with the other Colonies. Nevertheless, advocates of federalism such as John West were able to put forward solid arguments in favour of federation that made it seem to be the "natural" next step for the Colonies to take. West argued that a federal system was the form that the British Constitution necessarily took outside of Britain. West believed that the local institutions that favoured liberty and the expression of individual responsibility were weaker in the Colonies than in the Mother country. Given that, at the time of responsible government in New South Wales, local municipal government hardly existed, he did have a point. Federalism was meant to recreate through its institutional forms the balance between power and liberty that had evolved slowly in Britain.[16]

Responsible government in the Colonies was quite different from the system of the separation of powers that the Americans had devised to limit corruption. Instead it tended to concentrate power in the hands of the popularly elected politicians. Did it lead to democratic excess in the manner described by Thucydides?

The first point that can be made is that the various Upper Houses of the various Colonies, either nominated as in the case of New South Wales, or elected on a restricted franchise, proved incapable of resisting the democratic power of the Lower Houses. Responsible government, without the federal principle, did combine democracy and power in ways that were worrying. It is no accident that several of the State governments of Australia were subject to crises in the 1980s and 1990s relating to corruption, whereas the Commonwealth government was not. I think this reflects the fact that government at the State level in Australia still lacks adequate checks and balances.

Examples of the excesses of democratic power can be seen in the Robertson *Land Acts* in New South Wales, the introduction of protectionist economic policies in Victoria and the various actions of colonial governments against the Chinese. At another level, democratic excess can be seen in the introduction of bureaucratised State education systems rather than subsidising schools run by churches and other voluntary agencies.[17] The 45 years between the granting of responsible government and Federation allowed the development of political structures and a political culture in Australia that favoured the consolidation of power under democratic auspices because responsible government failed to act as a form of mixed government. This has led to democracy coming to be confused with bureaucratic centralism in Australia.

The Federal movement of the 1890s was able to bring the long engagement between responsible government and federalism to an end and finally to allow their marriage in the new Australian Commonwealth. This union can be described as an innovation, and as an attempt to marry the American and British systems of government, the so-called "Washminister

system". Such descriptions are misleading. They tend to equate responsible government with the British Constitution and hence the Crown, and the American system and federalism with republicanism. Hence Alan Atkinson developed what to me is a wrong-headed theory that the Crown in Australia is only to be associated with a centralised interfering state.[18]

I believe that the nature of the Australian system of government is best understood as the creation of a polity embodying the essential principles of the British Constitution, of Constitutional Monarchy, for Australian conditions. Whether by design or otherwise, it recreated a mixed system of government such as had been lacking in the colonial regimes.

The crucial principle, as mentioned earlier, is establishing a balance between liberty and power. This balance was lacking under a political system that was based on responsible government alone, just as it is still lacking in the Australian States. By finally introducing the federal principle into the Australian political system, it restored the balance between the two. And it did so not by grafting a "foreign" principle onto the British Constitution, but by melding together two different versions of that Constitution to create a new version, an Australian version, appropriate for Australian conditions.

John West was right; under Australian conditions the British Constitution needed federalism. Both responsible government and federalism are compatible with the Crown, and both were needed to re-create mixed government in Australia.

Australian Constitutional Monarchy, then, is about creating a strong system of government that can protect the interests of its citizens while at the same time enabling those citizens to enjoy the maximum amount of liberty.

Responsible government is the major means through which a strong system of government is created in Australia, because it allows for a concentration of authority that can be exercised by the government. Federalism is one of the checks and balances that ensure that this concentration of authority does not become excessive and hence turn into a form of despotism. The others are the separation of powers as set out in the Commonwealth Constitution, and the establishment of the Senate as a States' House with powers almost equal to the House of Representatives.

Responsible government, with its obvious tendency to concentrate power if left unchecked, has long been associated with "democracy" in Australia. For a long time the Labor Party allied itself with the cause of abolishing the States and the Senate, leaving only a single House of Parliament to rule the country. If that had happened we would no longer possess a constitutional state, but a sort of elective dictatorship free to do as it pleases. One has only to look at the example of Queensland in its glory days to imagine what Australia could have been like.

It is perhaps instructive that Australia has never swung to the extremes of either welfare state or libertarianism, unlike our trans-Tasman cousins who also only possess one House in a centralised structure. As we have already noted, democracy combined with power, if left unchecked, can do terrible things. One has only to read the pages of Thucydides and encounter the demagogue Cleon, goading the democratic Athenians on to what we today would call genocide, to see that.[19] The genius of the Australian variety of Constitutional Monarchy is that it does not let that power go unchecked.

That does not mean that federalism and responsible government are in harmony, or that one does not seek to dominate the other. One could object to my argument by citing the obnoxious legislation that the early Commonwealth Parliaments introduced, from immigration restriction to industry protection. In response one can only respond that, when democratic prejudice is rampant, there is only so much that even a mixed Constitution can do. All it can do is to provide some mechanism through which the worst of that excess can be tamed.

I think also that the habits learnt prior to 1901, in the period of colonial responsible government, continued to infect the operations of the new Commonwealth government.

Australians had come to associate democracy and government action, and came to expect the Commonwealth government to do things for them, as opposed to doing things for themselves. It was almost as if, having created a federal system, they preferred to act as if what they had created was a "national" government.

For most of the 20th Century it was federalism that was on the defensive as the Commonwealth government claimed more and more power. This was done with the active connivance of the High Court after 1922, and through the acquisition of financial power, particularly of income tax. The States became mendicants forced to take their begging bowls annually to Canberra. Moreover the Senate early ceased to be effectively a States' House and was for a long time dominated by the major parties. It appeared for a long time as if the "checks and balances" were not doing a lot of checking, let alone balancing.

In some ways the balance has moved back a little the other way in recent times. The High Court became more active in the 1980s and early 1990s, although its activism was hardly beneficial to the States. It was the ruling of that Court on the meaning of excise that created the crisis that has only really been resolved by the decision of the current government to give the proceeds of the GST to the States. The States are still the financial dependants of the Commonwealth, and perhaps are in danger of developing the political equivalent of welfare dependency. Rather than whingeing about the way in which the Commonwealth Grants Commission divides up the cake they should be working to resurrect a more active federalism.

The major development of the past twenty years in Australian politics has been the growing power of the Senate. No government has controlled the Senate since 1980, and none is likely to in the foreseeable future. This is a consequence both of the mathematics of the method of election and of the fact that Australians are increasingly voting for candidates from minor parties to be their Senators. The minor parties in the Senate have flexed their muscles, and sought to use their power to make that House more powerful and the government of the day more accountable.

The result has been that governments of both persuasions have found themselves unable to get legislation passed, and have complained in the name of "democracy" and what I believe to be the indefensible idea of the "mandate". The idea of the mandate is as spurious as that of "virtual representation", and is used in a similar way to justify governments wielding power without resorting to consultation. As we have seen, under responsible government, "democracy" is closely allied to power, and those who speak most loudly about democracy often seek the greatest power. What governments really object to is the fact that their power is being curbed and checked. At least some of the Australian people understand this and "perversely" continue to vote for these minor parties.

The advocates of the power of the Senate claim that its power means greater accountability and better legislation. The critics claim that its power frustrates the passage of necessary legislation and hence is the enemy of good government, by which they invariably mean efficient government. Perhaps the real consequence of the power of the Senate is that, in true British (and, I should add, Austro-Hungarian) tradition, we muddle through rather than being decisive. In other words, as noted before, we avoid extremes. We make a trade-off between decisive government and the need that legislation be good legislation. The level of popular support for the Senate indicates to me that Australians now recognise the value of checks and balances and are no longer so addicted to the old democratic/bureaucratic culture.

In any case, it will have to be left to the Australian people to decide ultimately if they wish to emasculate the power of the Senate should any such measure ever be put to a referendum. Nevertheless, I think that we should be extremely wary of the claims of efficiency in deciding to take such a radical step with regard to our system of government.

The system of government that has evolved in Australia out of the British Constitution,

that is to say our unique form of Constitutional Monarchy, has, like that Constitution, sought to bring together power and liberty through the marriage of responsible government and federalism. In that marriage, responsible government has long been the dominant party, and it has only been in recent times that Australians have come to appreciate the value of checks and balances. It is time that they also came to appreciate the importance of federalism. It is not time to increase the centralist powers of the government and to upset the balance of the Constitution.

We should never forget that power has a tendency to devour liberty. The current state of Australian federalism illustrates that point all too starkly. We should seek to preserve as many of those checks and balances as possible in our system of government. Democracy and efficiency are fine words, but too often in practice they mean riding roughshod over the concerns of those who do not share the majority view. "Muddling through" may sound unattractive, but in practice it reflects the reality of the world. That reality is about compromise, it is about avoiding foolish decisions, and most importantly it is about preserving liberty. In this sense, "muddling through" is in line with the original ideals of mixed government and its practice of not only checking and balancing but also consultation and consensus.

And it strikes me that "muddling through" are good words for a Constitutional Monarchist to use. We have inherited a system of government that has evolved out of the British Constitution and that, like the British Constitution, seeks to combine liberty and power. We need strong government, and we need to be free. We need responsible government, combined with federalism and a system of checks and balances. This means avoiding extremes, it means keeping to the "golden mean". It may mean at times muddling through, rather than adopting radical means that appear to be superficially attractive, but in the end have as their major consequence the destruction of the balance of our Constitution.

Endnotes:

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2. On Sparta, see A Andrewes, *The Government of Classical Sparta*, in Michael Whitby (ed) *Sparta*, Edinburgh University Press, Edinburgh, 2002, pp. 49–68; on Rome, Andrew Lintott, *The Constitution of the Roman Republic*, Clarendon Press, Oxford, 1999; on Sumeria, Charles Keith Maissels, *Early Civilizations of the Old World*, Routledge, London, 1999, p. 170; and on Athens, C Hignett, *A History of the Athenian Constitution to the End of the Fifth Century BC*, Clarendon Press, Oxford, 1952, pp. 192–213.
3. *Elective Principle No. 6*, in *The Sydney Morning Herald*, 7 May, 1857.
4. See J G A Pocock, *The Ancient Constitution and The Feudal Law*, Cambridge University Press, Cambridge, 1957.
5. Susan Reynolds, *Kingdoms and Communities in Western Europe, 900 –1300*, Clarendon Press, Oxford, 1997.
6. On the military revolution see Geoffrey Parker, *The Military Revolution: military innovation and the rise of the West 1500–1800*, Cambridge University Press, Cambridge, 1988. Also B M Downing, *The Military Revolution and Political Change: Origins of Democracy and Autocracy in Early Modern Europe*, Princeton University Press, Princeton, 1992; T Ertman, *Birth of the Leviathan: Building States and Regimes in Early Modern Europe*, Cambridge University Press, Cambridge, 1997; Jan Glete, *War and the*

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7. On this point see Pierre Manent, *The City of Man*, trans Marc LePain, Princeton University Press, Princeton, 1998, pp. 11–17.
8. See Ertman, *op. cit.*, Chapter 4.
9. See B Bailyn, *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge, Mass, 1967.
10. See J M Ward, *Colonial Self-Government: The British Experience 1759–1856*, MacMillan, 1976, Chapter 6.
11. Mark Mackenna, *The Captive Republic: A History of Republicanism in Australia 1788–1996* , Cambridge University Press, Cambridge, 1996, Chapters 3 & 4.
12. See Stewart Brown, *Thomas Chalmers and the Godly Commonwealth*, Oxford University Press, Oxford, 1982, Chapter 3.
13. See for example Pickering, Paul, *The Oak of English Liberty: Popular Constitutionalism in New South Wales, 1848–1856*, in *Journal of Australian Colonial History* , Volume 3, No. 1, 2001.
14. J M Ward, *Earl Grey and the Australian Colonies 1846–1857: a study of self-government and self-interest*, Melbourne University Press, Melbourne, 1958.
15. See Richard Ned Lebow, *The Tragic Vision of Politics*, Cambridge University Press, Cambridge, 2003, pp. 122–6.
16. John West, *Union Among the Colonies*, ed Gregory Melleuish, Australian Scholarly Publishing, Melbourne, 2001.
17. On this see in particular John Hirst, *The Strange Birth of Colonial Democracy*, Allen & Unwin, Sydney, 1988, Chapters 9, 10, pp. 263–4.
18. Alan Atkinson, *The Muddle Headed Republic*, Oxford University Press, Melbourne, 1993, Chapter 2.
19. Thucydides, III, 37–40.

Chapter Seven
Judicial Activism: The Beginning of the End of the Beginning

Professor Greg Craven

There is something of a tendency today to regard Australian judicial activism as an extinct species from the mid-nineties, like Sir Anthony Mason or Jeff Kennett. Certainly, the present Gleeson Court has come to stand for a tasteful judicial conservatism to much the same extent that Edna Everage stands for gladioli. In these times of bucolic constitutional jurisprudence, therefore, one might think that a paper on judicial activism is as relevant as a step-by-step guide to thatching. Yet as the title of this piece suggests, such a view is not well founded. Like King Arthur, Australian judicial activism is not dead, but uneasily sleeping. It will arise when the times are propitious, and this may be a good deal earlier than many imagine.

With this prognosis in mind, the paper approaches the issue of judicial activism in a slightly different manner than is usual. Its first section will undertake the standard survey, defining the phenomenon, considering its forms and deficiencies, identifying the reasons behind it and so forth. The second section, however, will cover rather less familiar ground in trying to predict the future course of judicial activism in Australia, partly through locating it within a particular body of constitutional theory, as well as by trying to draw out its wider implications in the field of constitutional politics.

Judicial activism – the beast

"Judicial activism" traditionally is a poorly delineated phenomenon. Too often, it stands for little more than my reaction to a curial decision that I seriously dislike. Sir Humphrey Appleby might have observed that it is a classically irregular form of speech: "I am judicially creative, you are judicially close to the line, he is a judicially active constitutional bandit". The true definition of judicial activism, however, is relatively straightforward, describing the process under which a judge takes a decision which involves the conscious moulding of the law by reference to the judge's own perception of the relevant policy imperatives.

It needs to be understood at the outset that courts can be active in very different circumstances, and with widely varying degrees of legitimacy. To take the simplest example, a court clearly can be judicially active in re-shaping the common law. At the next level, a court may pursue an activist path in so "interpreting" a statute that its meaning is fundamentally different from that intended by Parliament. Finally, a Court may seek to shape the Constitution itself, either by ascribing a particular meaning to a portion of text, or by discerning the existence of some "implied" constitutional doctrine. Constitutions are in fact particularly vulnerable to this type of activism, because of the width of expression they necessarily employ.

Clearly, these three different forms of judicial activism have three, different degrees of legitimacy. In the case of the common law, such law is made by the courts, and there can be no great objection in principle to their re-making it, particularly as any such action can be promptly over-ruled by Parliament. This is why the criticism of the High Court's decision in *Mabo* substantially was misplaced. Of course, it still may be possible to criticize such decisions on the grounds not of principle, but competence: that the Court lacks the expertise and practical insight necessary to direct large shifts of policy, a much more arguable critical perspective in relation to *Mabo*. It is for precisely such reasons that the traditional methodology of the common law is highly conservative, based on precedent, authority and policy reticence.

Judicial activism in a statutory context is considerably more sinister. The courts have no capacity to make or amend statutes: these are made by Parliaments elected directly by the people. Their judicial sabotage thus raises not merely issues of institutional incompetence, but profound democratic and legal illegitimacy.

Even worse is constitutional activism. Almost uniquely among the older Constitutions of the world, the Australian Constitution was drafted by delegates elected by the relevant populations; directly endorsed by the people at two federal referenda; and remains changeable only by the people at a referendum conducted under s.128. Australia thus has a democratically derived and democratically alterable Constitution, and it is difficult to imagine a context in which judicial activism could be more illegitimate.

Nor is such constitutional activism much more plausible when plotted on an axis of competence. When the High Court engages in constitutional activism – often called progressivism – it essentially is involved in the taking of macro-policy decisions of the first order. For example, when the Mason Court in cases like *Australian Capital Television* created an implied freedom of political communication, it was involved in setting the mutual limits of privacy and speech in a political context, by reference to norms of political, media and corporate behaviour. Yet the Court is a body of legal distinction only, and has no obvious insight into any of these matters.

None of this, of course, suggests that there is not room for the Court to make choices in the interpretation of the Constitution: constitutional language can be highly ambiguous. What the Court cannot legitimately do, however, is consciously to mould the Constitution against the grain of its intention, text and historical scheme. For the remainder of this paper, it will be this vexed issue of constitutional judicial activism – progressivism – that will be considered.

That the High Court has been a serial and recidivist constitutional activist no informed person seriously could doubt. Australia's constitutional jurisprudence is littered with major judicial interpolations on the grounds of policy, and if the Mason Court of the '90s is remembered as a progressivist's Elysium, this essentially is because the activities of that Court were rather more self-conscious and self-congratulatory than has been the norm with Australian constitutional activism, rather than because our judicial copy-book hitherto had been unblotted.

Undeniably, the Mason Court's creation of an implied freedom of political communication represented a high-point in Australian judicial creativity in a constitutional context. This was, after all, a right with no plausible constitutional text to support it, and one utterly opposed to verifiable historical intent. Similar exercises in constitutional implausibility by members of the Mason Court are to be found in the extension of a watered-down version of separation of powers to the States in *Kable*, and the desperate efforts of Sir William Deane to create a free-wheeling right of equality in *Leeth.*

It would be quite wrong, however, to pretend that these admittedly bumptious instances comprise the most significant examples of Australian constitutional activism. Far and away more important, both conceptually and in terms of effect, was the 1920 decision of the Court in *Engineers* to interpret the Constitution according to a rule of ruthless literalism, so deflating its underlying federal principle, and beginning an on-going process for the centralisation of Commonwealth power via judicial sponsorship. Moreover, *Engineers* underlines the status of constitutional activism as a phenomenon of long lineage and, sadly, strong conservative affiliations. In many ways, *Engineers* literalism has received the ultimate accolade achievable by any piece of judicial activism: it has been so accepted for so long, that it no longer looks like activism, even to many of those most prone to decry such a course.

As to the reasons underlying Australian constitutional activism, quite different explanations are proffered by its apologists and critics. To those inclined to defend it, constitutional activism is firmly based in principle. Fundamentally, it reflects the notion –

almost universally accepted in Australia – of a balanced Constitution, under which powers and institutions mutually check one another.

On this analysis, judicial activism is not inconsistent with democracy, but an intrinsic part thereof, refining it from crude majoritarianism into an internally regulating system in which the fickle will of Parliament and people is tempered by judicial discretion. Such a view of judicial activism has received a significant fillip in days when the ravages of an arrogant Executive and an uncaring Parliament have become the staple of university lecture rooms and broadsheet newspapers. It also has been reinforced by the current fad for post-modern literary theory in a constitutional context. If one sincerely believes that constitutional language has little or no determinate meaning, what is wrong with the Courts giving it a life of its own?

Critics of constitutional activism ordinarily view it in terms not of principle, but power. Their position is that constitutionally active judges are not engaged in saving democracy from itself, but in quite cynically imposing a policy vision of their own – heavily based on a particular vision of rights – that would prove quite impossible to implement through a democratic referendum. Even more crudely, they suspect such judges of intense constitutional hubris, wallowing in their purloined status as philosopher kings of the Constitution. Finally, they look on the excesses of post-modernist legal theory with scorn, arguing that the Constitution has meaning and to spare for all those who care to look for it.

Whatever view one takes of constitutional activism, the general opinion is that it has been much cowed in recent times, after the bullish years of the Mason Court. Two central pieces of evidence are offered in support of this conviction, and each is persuasive enough, so far as it goes. The first is that the High Court now displays only a limited enthusiasm for the implied rights jurisprudence developed during the Mason years. The implied freedom of political communication was suffered to live in *Lange*, but it has not been substantially extended. Predicted new rights based, like it, on the concept of representative democracy have not been forthcoming.

Second, the numerical dominance of "conservatives" on the Gleeson Court is much bruited about. Of the seven present Justices, Chief Justice Gleeson, and Justices McHugh, Gummow, Hayne, Callinan and Heydon routinely are described as being constitutionally conservative. Only Justice Kirby continues to fly the flag of quirky constitutional radicalism. So complete is this conservative dominance perceived as being that, at a recent conference at the Australian National University, no institutional friend of constitutional conservatism, speaker after speaker bemoaned the triumph of "legalism".

Increasingly, on both the constitutional right and left, the Mason years thus are being seen as a highly unusual, not easily repeated period of constitutional innovation. The assumption is that, in the unlikely event that such a bench ever were to emerge again, this would be an eventuality far in the future, and to be achieved only as a result of a prolonged and not particularly likely series of judicial appointments. The remainder of this paper is devoted to arguing that this perception of constitutional activism as a monster confined to the past and the remotely foreseeable future, like a Geelong premiership, is quite wrong.

Judicial activism – the future

The first point here is to understand, as few Australian critics of judicial activism do, that it is not an isolated, aberrant constitutional virus. In fact, constitutional activism represents only one strand of an inter-connected body of views that together form one of two quite distinct philosophies that presently are battling for the constitutional high-ground in Australia. These may for convenience be termed "the old constitutionalism" and "the new constitutionalism". Most serious contemporary controversies over the Australian Constitution are battles between these philosophies, and the nature and potential of constitutional activism only can be understood in their context.

The old constitutionalism, unsurprisingly, represents the "traditional" approach to Australia's constitutional order. It displays a basic belief in democratically elected Parliaments as the ultimate arbiters of day-to-day policy. It has a corresponding belief in the people themselves, at referendum, as arbiters of constitutional policy. It is sceptical of the notion of entrenched rights, believing that it is up to Parliament to mutually accommodate rights on an ongoing basis. It evinces a broad adherence to a functional version of the separation of powers, holding that Parliaments make laws, Executives implement them, and courts merely interpret legislation. As a matter of style, the old constitutionalism is deeply suspicious of abstract constitutional values and concepts: its *métier* is rules and language. Obviously, constitutional activism runs foul of every tenet of the old constitutionalism.

The new constitutionalism thoroughly dislikes Parliament as a nest of political hacks and fixers. It loathes the Executive as a body almost programmed for the violation of human rights. Indeed, it regards the Constitution generally with deep suspicion, regarding it as dated, partial and inadequate. Its principal obsession is with human rights: they are (or should be) the Constitution, and a Constitution is to be judged principally according to its status as a shrine for such rights. The people themselves are viewed ambivalently, with favour as the potential recipients of rights, suspiciously as willing despoilers of the rights of minorities. Crucially, the judiciary is much loved, as a vehicle by which the savage instincts of populace and Parliament alike may be restrained through the wielding of a Constitution whose meaning is almost infinitely malleable. Consistently with this conception, new constitutionalists are deeply attracted to abstract constitutional values and concepts, which give content and significance to the Constitution's uninspiring words.

The crucial point to understand about the new constitutionalism in the present context is that constitutional activism is one of its very core components. Not only does constitutional activism fit neatly with all the key suppositions of the new constitutionalism – that Parliaments are untrustworthy, Executives nasty and the people unreliable – but also, without a judiciary prepared to interpret the Constitution in a radical manner, new constitutionalists realise perfectly well that they will never be able to achieve the nirvana of constitutional rights they so desire: referendum, after all, is not an option.

Thus understood, constitutional activism is not a vulnerable, isolated phenomenon, but an intrinsic part of a constitutional platform subscribed to by a great many lawyers and others, and which indeed represents orthodoxy in most Australian law schools. It is not simply going to disappear, so long as its hosts survive, and those hosts show no signs of succumbing.

What this means is that conservative constitutionalists must appreciate that they are in the midst of an ideological struggle for the Constitution's soul, or at least its larynx. An immediate consequence of this is that they need to accept the importance of being able to articulate a consistent constitutional theory; for without such an acceptance, it will be very difficult for them to wage ideological warfare in a constitutional context.

One problem here is that Australian lawyers, and especially conservative lawyers, traditionally despise theory, preferring the case-by-case logic of the common law. Indeed, until the early '90s there virtually was no constitutional theory in Australia, and anyone interested in the topic was regarded as profoundly eccentric. Conservative constitutionalists were particularly slow to enter the field, and really only did so when the Mason Court's flirtation with naked progressivism became so intense that the construction of some negating theoretical discourse became unavoidable. Even now, Australian conservative constitutional theory is a sparse field, but if one accepts the proposition that constitutional activism is a deeply unresolved issue in Australia, it is one that will have to be assiduously tended.

One difficulty here is that conservatives have tended to take an extremely unsophisticated view of constitutional interpretation. If asked what they do when engaged in the process, they tend to respond that they are reading the words. If further asked what is

involved in reading the words, or whether words can have more than one meaning, or whether Constitutions contain more than just words, they generally are irritated, covered with confusion or both. Yet what is required in any theoretical contest are sophisticated theoretical apologists, and these tend not to arise in large numbers on the conservative side of Australian constitutional debate.

A particular issue here is that of judicial appointment, particularly to the High Court. Conservative governments are naturally predisposed to appoint to the Court eminent advocates from the commercial bar. While such appointees have many merits, a typical one is not going to be sophistication in terms of constitutional theory, if indeed they ever have encountered such a concept. Judges of this type are no match in terms of rhetoric or sophistication for colleagues such as Justice Michael Kirby, who possesses a deep (if highly uncongenial) grasp on constitutional theory. If the High Court does in the future again become a battleground of contending constitutional theories – as it will – an Australian Scalia is unlikely to emerge from commercial chambers. A wider net will need to be cast to secure a potent conservative constitutionalism on the Court.

This leads naturally into one of the few realistic discussions of what governments – and particularly conservative governments – should be doing when they make High Court appointments. It often is asked, usually by students and journalists, whether High Court appointments are or should be "political". If what is meant by this is whether the High Court should be stacked with legal party hacks, the answer obviously is "no". On the other hand, given that every government (like every judge) should have a vision of what the Constitution is and how it is to be interpreted, it is the bounden duty of a government to appoint to the Court those lawyers who it believes will give effect to that vision.

It follows from this that, to take the proximate illustration, a conservative government not only should appoint old constitutionalists to the Court, but that it would be foolish (and downright derelict in its duty) to do anything else. On this basis, the criticism of the recent appointment of Justice Heydon on the grounds that he had flagged his constitutional politics not only was misconceived, but silly: accepting always his obvious legal competence, there could be no better grounds for having appointed him. Similar criticism of the appointment of Justice Gareth Evans, had it ever occurred, would have been equally wide of the mark. The appointment itself would have been unimpeachable: the real objection would have been to the method of interpretation to which he (presumably) would have been committed.

There is another point here, closely related to the capacity of judges intelligently to articulate their positions in terms of plausible constitutional theory. If a judge is going to construe the Constitution according to a particular interpretative theory, then his or her least intellectual obligation is to explicitly articulate that theory. Only by such means can the Court intelligently be held publicly accountable for its decisions and positions.

Yet one of the most regrettable historical features of the High Court's constitutional jurisprudence has been the willingness of many of its Justices to couch their reasons in terms that give no real guide to the motive reasoning that underlies them. The classic genre here is *Engineers* literalism, under which Justices of the Court were able to justify innumerable instances of policy-driven, centralising literalism as nothing more than a neutral, dictionary-propelled construction of the Constitution. Less far reaching in the long-term, but equally galling, was the willingness of some members of the Mason Court to justify their interpolation of rights into the Constitution not by reference to the actual policy preference that determined their position, but through deeply spurious textual construction, constitutional history and legal theory.

The point here is one of basic constitutional ethics. A Justice of Australia's highest constitutional Court should be prepared openly to declare the constitutional theory he or she employs, the justifications for that theory, and its application in the instant case. Anything less

constitutes grave intellectual dishonesty, in much the same class as the actions of the academic lawyer who, after long research, determines that he does not like the conclusions to which the evidence has driven him, and will patch together a superficially plausible raft of reasons to support the opposite position. It is greatly to the credit of Justice Kirby that, however much one may disagree with his progressivist method, he espouses and applies it openly. Traditionally, constitutional activism in Australia is as ashamed to speak its name as bed-wetting.

Turning from questions of high ethics to the brutal practicalities of constitutional activism, it is worth noting that the characterisation of the Gleeson Court as a profoundly conservative bench can be grossly overdone. This issue can be considered both in terms of personnel, and as a matter of intellectual opportunity. On the question of personnel, the Gleeson Court does not neatly divide into the "six conservatives, one radical" judicial playground so commonly discerned by commentators. The reality is that the Court is not as monolithic as it might at first glance seem, with the position of some Justices being decidedly fractured: conservative on some issues, more radical on others.

We have already seen that a superficial analysis identifies six out of seven of the Justices as being "judicial conservatives". In fact, only three of these six – Chief Justice Gleeson and Justices Callinan and Heydon – may be regarded as intrinsically conservative. The other three – Justices McHugh, Hayne and Gummow – all are capable of more rambunctious flights of judicial fancy, particularly in the context of their beloved Chapter III, dealing as it does with the sacred subject of judicial power. The true balance on the Court thus is not a conservative landslide of six to one, but a scrambly slope comprising three conservatives, three variables, and one radical.

Moreover, this balance could change quite quickly. In the lifetime of two Latham governments – hardly an impossibility – there will be at least four High Court retirements: those of Chief Justice Gleeson, and Justices McHugh, Kirby and Callinan. This represents the departure of two conservatives, a variable and a radical. Replacement of these four retirees by constitutional activists would, in less than a decade, produce a Court composed of four radicals, two variables and a single conservative. As a point of reference, a decade backwards rather than forwards, the Mason Court was in full swing.

To take the matter further, curial climate can be changed as much by leadership and strength of character as by numbers. The replacement of a conservative Chief Justice by a radically dynamic successor could affect the entire direction of the Court, particularly so long as a significant number of its members belong temperamentally to neither hard-line conservative nor hard-line radical camps.

In terms of intellectual opportunity, the question is whether there remain potential hotspots of constitutional activism that are attractive to the Court. The obvious answer is that the Court already is displaying an unhealthy interest in the expansive potential of Chapter III of the Constitution, which deals with judicial power. Chapter III combines the potentially deadly characteristics of being endlessly fascinating to the Court, because it concerns the Court itself, and being soaked in implied rights potential. This rights potential arises because, if Chapter III is regarded as safeguarding the judicial process, then all that is required for the creation of some novel right is its characterization as an indispensable part of that process. Significantly, the "variables" on the Gleeson Court all share some degree of enthusiasm for Chapter III cabalism.

Over time, the potential of Chapter III as a source of rights is enormous. Prominent examples might include the creation of a right to due process, extending not only into the courts but also into law enforcement procedures, and the ultimate vindication of Sir William Deane's mooted right of equality. Both would have far greater practical repercussions than the present implied freedom of political communication.

Already, there are straws in the wind blown by the Court's enthusiasm for the concept of judicial power. Perhaps the most noted was *Wakim*, where the Court was prepared to pull down a vital co-operative regulatory scheme essentially because it found it repugnant to its own philosophy of judicial power. Another was the Court's recent decision (in the context of the Commonwealth *Migration Act*) concerning the legislative ousting of judicial review. The actual decision is unimpeachable, but some of its undertones sound a disturbing note of judicial supremacism. There is every chance that Chapter III will, in the ripeness of time, become the second front of constitutional activism.

Nor is this the only possible course of advance. Justice Kirby has been working industriously for some time on his own project, which might be termed "constitutional internationalism". According to this theory, expressed in such decisions as *Newcrest Mining*, the common law, statutes and the Constitution itself all are to be interpreted so far as possible consistently with Australia's international obligations, and especially with its international obligations in relation to human rights. At first blush, this seems harmless enough, until it is recalled that the necessarily more general nature of the Constitution's language will make it exceptionally easy for an appropriately-minded judge to discern an ambiguity or lacuna into which the contents of some international instrument might slip. In this way, the Constitution gradually could be internationalized from within, and a much desired rights agenda achieved without the troubling of the electorate at referendum.

Justice Kirby's theory is open to attack on a number of grounds, but in the absence of any sustained rebuttal he is patiently developing it, much in the manner of the early Sir Owen Dixon dropping constitutional bricks for later use. The theory is immensely popular in the law schools, and with many barristers, and is persuasively expressed. It offers a flawed but superficially plausible basis for a judicial activism far more principled and logically constructed than the dubious "implications" of the Mason Court. Nothing is more predictable than that it will have many future outings.

While properly decrying these various progressivist advances, conservative governments have to accept at least some of the blame for their popularity, in at least one respect. As mentioned above, most Australians accept the idea of a Constitution of balanced powers, and they will be most susceptible to the attractions of constitutional activism if they consider such balances to be in peril: if federalism, bicameralism and parliamentarianism cannot safeguard our liberties, perhaps judicial activism will.

When conservative governments trample on the principle of balanced government through such proposals as that to seriously compromise the Senate, both as a House of review and of federal diversity, is it any wonder that people look to the courts to provide an alternative check? It is the same sentiment that underlies much of the misguided support for a directly elected President, the man on horseback to keep the politicians in their place.

The ultimate question is how far constitutional activism could go in Australia. Is it merely an irritating pest that nibbles around the edges of the Constitution, or could it become a locust? The uncomfortable reality is that Australian constitutional activism has the potential to transform the Australian Constitution. The starting point here must be to remember that the Constitution already is light-years distant from its framers' intentions, largely through the centralising activities of the High Court. They scarcely would recognize, in the haggard spectre of Australian federalism, the coordinate government of States and Commonwealth that they envisaged.

Beyond this, we have had for decades a doctrine of the separation of Commonwealth judicial power that is at best historically contestable, and for a decade an implied freedom of political speech that is historically risible. Future dramatic judicial development of the Constitution would not be novel, but an extrapolation from an established pattern.

For all that it is routinely said, for example, that the High Court never could develop an

unwritten Bill of Rights out of the Constitution, this almost certainly is an under-estimation of the Court's potential. Given the willingness to extrapolate such sweeping themes as "representative democracy" and "equality" out of the document; a corresponding determination to wring every ounce out of the concepts of judicial power and judicial process; and a predilection for constitutional internationalism, there is no reason why the Court could not, over time, marshal a body of doctrine equivalent to most constitutional Bills of Rights.

There is a certain irony here. The conclusion reached above involves accepting that the Court is capable of making substantial thematic change to the Constitution, through vaguely plausible interpolations and the exploitation of constitutional silence. Yet it will find it harder to make even comparatively small changes where these would conflict with specific language of the Constitution. Thus, the obsolete and unimportant but specific power of disallowance contained in s.59 cannot easily be deleted from the Constitution by the High Court, whereas the creation of a hugely significant constitutional right to an interpreter in criminal cases would, for the right Court, be a relatively simple matter. Whether the Court could interpretatively transform Australia into an effective republic is an interesting question, but one difficult to answer.

Finally, within these predictions of constitutional activism, it needs to be recalled that the process will not be without cost for the Court itself. A constitutionally active Court is a politically active Court, and politicians can scent rivals over long distances. If the High Court again embarks on a course of studied constitutional activism, it inevitably will come under sustained political assault. That assault will be both deeply unpleasant for the Court, and deeply troubling in terms of the preservation of its prestige and independence.

Conclusion

The essential theme of this paper is a straightforward one. Instead of simply hunting for judicial activism and decrying it when we find it, we need to understand its origins, its attractions and its likely course. Only then can serious thought be given to debating and combating it, in the certain knowledge that its day will come again, and soon.

Chapter Eight
The Constitutional Centre of Western Australia

Rob O'Connor, QC

In October, 1993, after the defeat in Western Australia of the Labor Party government and the election to office of the Liberal Party - National Party Coalition government, the then Premier, Richard Court, announced the establishment of the Western Australian Constitutional Committee. This followed the activities of the previous government which were encapsulated by the description "WA Inc". The Committee had the task of examining a wide range of issues relating to the Western Australian State Constitution. The Committee conducted its investigations by using a variety of methods, including written and oral submissions, State-wide public seminars, and consultations.

The Committee delivered its report in January, 1995. It emphasised that political and civic education is even more important in Australia than in almost all other countries, because of the highly democratic nature of the Australian Constitution, which can only be altered by popular vote under the referendum provisions in s.128 of that Constitution.

The Committee was of the view that all adult Australians should have at least a basic understanding of the following matters:

- The Commonwealth Constitution and the State Constitutions;
- The Australian federal system;
- The roles of Parliament and the Executive, including the features of responsible parliamentary government;
- The parties system;
- Electoral laws;
- The assumptions and values on which Australia's system of government is based;
- How to participate in government; and
- The limits of government.

A 1992 survey undertaken by researchers from two Western Australian universities found that, while the levels of interest in political matters revealed in the survey were surprisingly high, an overwhelming majority of respondents admitted that their personal understanding of politics was only fair, poor, or very poor. Around 80 per cent of the respondents were not even aware that Western Australia had its own Constitution. I suspect that a similar situation would exist in other States.

In June, 1994 the then Prime Minister, Paul Keating, appointed the Civics Expert Group to develop a plan for a program of public education and information on Australian government, citizenship and the Constitution.

The Group's report was released in December, 1994 and stated:

> "..... that a major survey conducted on its behalf had revealed widespread public ignorance about many aspects of Government and the Constitution. Most Australians, it appears, are not aware that the Parliaments of Australia have a legislative role, nor do they understand the federal system and its history".

The Group determined that there was a need to provide balanced, non-partisan, high quality civic education that is readily available and suitable for people of all ages and backgrounds, including people who have come from a different political culture.

The foregoing information led to the formulation of Recommendation 33 of the *Report of the Western Australian Constitutional Committee*, namely:

"That the State Government support the establishment of a Constitutional Centre incorporating a museum and with community education functions, ideally to be situated near Parliament House".

This recommendation became a reality in October, 1997.

The Western Australian Constitutional Centre ("the Centre") is unique, being the only one of its kind in Australia. It is not a museum in the true sense of the word, despite the wording of the recommendation of the Committee which led to its creation. It does not have appropriate facilities to hold and conserve collections. Instead, the Centre works with State Archives, the Public Records Office, the Battye Library and the Western Australian Museum to ensure that appropriate documents and artefacts are held under suitable conditions at their premises.

Two important aspects of the Centre which need to be emphasised are:

- The Centre was set up with bi-partisan support and, seven years on and with a change in government, still enjoys that privilege. It works very hard to remain neutral on all issues and to provide resources to allow all sides of any issue to be discussed.
- It has an Advisory Board, which is balanced in its political composition, as well as having some very good academics and committed community members amongst its membership. This ensures that the Centre always presents a balanced viewpoint on issues, and does not become an advocate beyond objective and academically sound research outcomes.

Advisory Board

By way of illustration, the present Advisory Board consists of the following:

- The Chairman is Malcolm McCusker, QC, the Leader of the Bar in Western Australia, who was the chairman of the above-mentioned Western Australian Constitutional Committee.
- The Hon Bill Hassell, a former Liberal Party Leader of the Opposition in Western Australia.
- Five persons with academic backgrounds, namely Associate Professor David Black, Professor Greg Craven, Janice Dudley, Dr Kanishka Jayasuriya, and Associate Professor Harry Phillips.
- Diana Warnock, a former ALP Member of the State Parliament and a former current affairs journalist and broadcaster. Ms Warnock succeeded the Hon Ian Taylor, a former Deputy Premier of the State in an earlier ALP government.
- Anne Conti, a former Channel 2 and former Channel 9 newsreader, who has a high level of interest in civic matters.
- Irene Stainton, representing the Aboriginal communities.
- I also am a member of the Board, a Queen's Counsel with a keen interest in Parliament, government, current affairs and the Constitution.

The Advisory Board meets every two months for about 1 to 1_ hours. Its role is to provide:

- overall strategic policy advice to the Premier about the Centre's activities;
- advice on appropriate subject matter for exhibitions and educational activities for the Centre; and
- an avenue for community consultation on the effectiveness and appropriateness of the Centre's programs.

Objectives

The objectives of the Centre are as follows:

- To promote public awareness of the federal system of government, with particular

emphasis on its constitutional basis;

- To encourage balanced debate about the development of our system of government;
- To educate the public about our electoral and parliamentary systems;
- To foster a sense of ownership and to encourage participation in the political process.

The Centre provides the opportunity for everyone to participate in programs and to examine their political inheritance. People are encouraged to explore ways to contribute to the State's democratic development. The Centre goes about achieving its aims by various means, such as schools education, adult education, exhibitions, public talks, seminars and lectures, publications, its website, interactive display units and public forums.

The busiest time for the Centre is during September and October each year when, through its various displays, exhibitions, lectures, and courses, it sees around 20,000 people.

Schools education (primary and secondary)

The Centre runs education programs for both primary and secondary school students, both at the Centre and in an outreach form to more distant metropolitan schools and regional areas. This regional outreach is done in partnership with the Electoral Education Centre and Parliament.

All of the programs of the Centre for schools are interactive. The students become involved; they do not just sit and listen. They take away an understanding of how things happen and how they work.

In primary school programs, innovation is important. This is reflected by one program which has had a huge amount of success, namely Larfalot's Letter. This program was designed for students aged 6 to 8 years and is an introduction to rules and Constitutions. Through a large storybook approach, and using puppets, the program explores the concepts of democracy and rules forming a Constitution in an imaginary town. The program has been highly successful in developing understandings and appropriate language in students. It shows that "you really cannot start too early".

Other more traditional programs include subjects such as Federation; the Western Australian and Commonwealth Constitutions; female suffrage; and rights and the Constitution.

Secondary school programs are aimed at the curriculum and provide particular support for political and legal studies students. The programs include:

- Creating a new Constitution for Western Australia – examining the elements of the State Constitution and discussing its relevance to current issues;
- Changing the Constitution – how to change both the Commonwealth Constitution and the Western Australian Constitution;
- High Court of Australia;
- Concerns and crises – examining issues which have divided the nation; and
- Understanding the Constitution – looking at the sections of the Commonwealth Constitution and becoming conversant with their intended purpose.

Networks

In some matters the Centre works with other civic education providers. In Western Australia, several bodies provide educational programs and materials, namely the Centre; the Western Australian Parliament; the Electoral Education Centre in Subiaco; and the Francis Burt Law Education Centre, a body sponsored by the Law Society of Western Australia.

The Centre was instrumental in setting up the Civics Education Reference Group, involving all of the organisations above plus university lecturers, the Education Department, curriculum writers, classroom teachers and representatives from the major professional organisations involved in this field. Together, they undertake professional development, develop materials, and co-ordinate the programs which will assist teachers in this field.

The Centre also encourages professional organisations, such as historians and political educators, to see it as a resource and a home. This has led to increased visits and the provision of access to the latest research and directions for future programs.

Special schools programs

In addition to special programs for schools, the Centre undertakes special targeted programs. For example, the Schools Conventions were established by the Constitutional Centenary Foundation in 1994. The Centre has been responsible for this program in Western Australia since September, 2000. The first such Schools Convention was held at Parliament House in September, 1994 and involved 93 students, mostly from the metropolitan area. The latest one was held on 23 September, 2003 and involved 200 students from as far north as Karratha and as far south as Esperance.

Adult education

Schools programs make up about only one-third of the Centre's visitors and programs. The Centre also provides a large number of programs for adult learners. To facilitate this, it maintains:

- An ongoing exhibition program;
- A regular program of changing exhibitions, such as the annual exhibition of political cartoons from the National Museum under the titles "Bringing the House Down" and "Behind the Lines";
- A program of public talks, lectures and seminars;
- Publications;
- A website; and
- Interactive display units.

The Centre runs regular seasons of 10-week courses for adult learners, a recent one being *The Workings of the Western Australian Government* which featured the Governor as well as leading politicians and heads of major government departments. It receives superb support from the public service, often from the Chief Executive Officer level. The Centre has no lack of people willing to give talks, provide information, or review materials.

Tertiary education

The Centre's position as a provider of quality information is well-established with tertiary education facilities. It joins with politics and education lecturers from the major universities and provides specialist sessions for tertiary students. This is particularly useful for politics students, as the Centre often brings together a diverse range of speakers and takes then outside the views of their own "home" institution and lecturers. Teacher education groups are a particular target, as Civics is often not taught in schools because of a lack of familiarity and confidence on the part of the teachers. The Centre tries to give such groups a starting point, information and materials to support their programs.

Public forums

The Centre provides the opportunity for public debate on topical issues. Because it is seen as being non-partisan, it is able to provide a forum for frank and open discussion, exploring all points of view. An example of this was the announcement in 1997 by the Commonwealth government that it would hold a Constitutional Convention early in 1998. The Centre conducted a series of people's constitutional forums right throughout the State. The forums gave Western Australians the opportunity to debate the range of constitutional changes, both State and national, which would affect them. They covered three themes, namely the Republic implications; the State Constitution; and Federation issues.

Another recent example is the forum held to discuss the Prime Minister's suggestions for addressing Senate deadlocks. The Committee consisting of Neil Brown, QC, Michael Lavarch (former Attorney-General) and the inaugural Commonwealth Ombudsman Professor Jack Richardson addressed a public audience and took comments and questions from the floor.

Last year the Premier, the Hon Geoff Gallop presented an inaugural John Forrest Oration, his topic being Lord Forrest himself. Future orations will be on some aspect of Western Australian politics and/or history.

Public talks under consideration for 2004 are:

- Western Australia in the Federation;
- The history of Western Australian women in politics;
- Legislation relating to civil liberties and security;
- The role of the independent;
- The role of the Upper House of the State Parliament;
- Constitutional reform in Western Australia after 175 years of European settlement; and
- Paid political advertising and public funding.

Research and publications

Research and publications are central to the Centre's role in informing the public. The Centre offers annual research grants to both new and established researchers through the Proclamation Day Grants (October 21). The resulting research is published and made available free of charge to the public. Topics have included:

- The role of the contemporary Governor.
- Preparing teachers for a civil society.
- Review of the State Constitution.
- The forms of governance in Aboriginal Western Australia at the time of European settlement.
- The structure and operation of proportional representation in the Legislative Council of the Western Australian Parliament.
- Has the GST financial system strengthened or weakened the federal compact, in particular the financial independence of Western Australia?
- "I've been appointed a Minister! Where do I start?".
- The history and implications of the Braddon Clause.

In addition, the Centre participates in supplementing the funding of external applications, such as:

- A biography of the first Governor of Western Australia, titled *James Stirling – Admiral and Founding Governor of Western Australia,* by Dr Pamela Statham-Drew.
- An *Encyclopaedia of Western Australian History*, which will be published this year to commemorate the 175th anniversary of European settlement in Western Australia.

The Centre has also undertaken internal publications such as:

- Guide to the workings of the Western Australian government.
- Changing Constitutions.
- Premiers and Governors of Western Australia.
- Proclamation Day guide.
- Female suffrage – "A Vote of Her Own".
- Implications of a Republic for Western Australia.
- Federation issues.
- Western Australia's *Constitution Acts.*
- Secession.

In 2003, three conferences were held. One, on the Commonwealth Constitutions, was held jointly with the Association for Australian Constitutional Law. The second was on

Proclamation Day, with an emphasis on constitutional topics. The third was on the Centenary of the High Court of Australia with particular reference to Western Australia. Publications containing all papers presented are in the course of being printed and will be made available free of charge to members of the public.

Exhibitions

The Centre has a changing exhibition program. Topics have included changing Constitutions; female suffrage; the Western Australian Constitution; Federation; the Queen's Golden Jubilee, and what happened in Western Australia during those 50 years; Cabinet records; the Australian Honours system; and democracy and you.

Accommodation and staff

The Centre is housed in one of Perth's finest heritage buildings, the old Hale School in Havelock Street, West Perth, only 150 metres from Parliament House. In 1858 the then Anglican Archbishop of Perth, Dr Matthew Blagden Hale, was concerned that there was no secondary school available to boys in the fledging Colony. He established what was known as the High School in St George's Terrace, as the first boys' secondary education facility in Western Australia. In 1914 the school moved to the West Perth location and in 1929 became known as Hale School. It remained there until 1961, when the urgent need for large classrooms, administration buildings, chapel and playing fields led to Hale School moving to much larger premises at Wembley Downs. The old Hale School building of limestone and bricks has been extensively and beautifully restored and refurbished and now houses the Centre, where the first-class facilities are once again being directed to excellence in education.

The Centre is available at no cost as a prime venue for functions, meetings, lectures, exhibitions, and so on which have a connection with the fields of government, Parliament, politics, the courts and citizenship. It is frequently used for these purposes. The well-appointed Board Room is available for private hire for board meetings.

The Centre has a full time Director and 4.5 full-time other staff. It has an annual budget of $779,000.

Website

The website is one of the Centre's major success stories. From 13,000 pages of information downloaded in the first year, the Centre had over 100,000 pages downloaded in 2002-03. Indications are that this figure continues to increase. Contents on the website include:

- Text and images from every exhibition which the Centre has curated;
- Education materials for students and teachers;
- Quizzes;
- Research and seminar papers;
- Links to other significant sites;
- Events diary; and
- A Civic Educators' Network.

The website is constantly being added to and upgraded. Several schools use it to teach research skills in the Political and Legal Education subject.

Conclusion

As a measure of the Centre's success, attendances have increased from around 20,000 in the first year of operation to 60,000 in 2002/03. Figures for the current financial year indicate that this demand will continue to grow.

Only time will tell if the Centre has been successful in encouraging people to engage with our political systems. The Centre is slowly making inroads into the consciousness of that

body of people who confessed little or no understanding of our systems of government.

I hope that this outline of what we have set up, sought to achieve and have achieved in Western Australia will encourage other States to set up similar Centres to further the cause of civics education and informed debate throughout Australia.

Endnote:

In the preparation of this paper, the author acknowledges the assistance he has had from the Director of the Western Australian Constitutional Centre, Ms Betty O'Rourke. More information is available from the Centre's website at www.ccentre.wa.gov.au.

Chapter Nine
Musings on *Marquet* [1]

Alex Gardner[2]

The distribution of public wealth and political power

The current Western Australian government is on a mission to bring natural resources and political votes to the city. Like most States of Australia, the economic, social and political development of Western Australia since Federation has seen an increasing concentration of wealth and power in the metropolitan capital city, and a corresponding decline in relative wealth and power of the rural areas. Certain non-metropolitan areas have done relatively well, but they tend to be the ones frequented by metropolitan people for retirement and recreational purposes – the ultimate expression of their wealth and power. As a "boy from the bush", this concerns me.

The reasons for this apparently inexorable trend are no doubt many and varied, and are no doubt repeated in numerous countries around the world. My purpose here is not to outline or analyse them. Some people may contest my assertion, or contend with my concern. Nevertheless, I want to assume some validity for my assertion and concern as the basis for exploring a constitutional aspect to this problem of metropolitan distension and rural demise.

My argument is that a contributing factor to this problem in Australia is the colonial legacy of centralized State government control of public wealth to be reaped from the exploitation of our natural resources. I perceive that a disproportionate share of public natural resources revenues is expended on the development of the metropolitan centres, rather than being expended to develop the public wealth of the people in regions where the resources are worked.

I hasten to add that I have no economic analysis of Treasury papers to support this perception. Such a study would be valuable, but I do not really need it for the purposes of this paper because I believe my perception is generally accepted outside the metropolitan areas. The aggrandisement of the metropolitan centres naturally attracts people looking for economic and social opportunities and this, in turn, generates the understandable demand for a redistribution of political power in our society; in legal terms, the redistribution of electoral districts from rural to metropolitan areas to overcome problems of unequal electoral districts.

Let me illustrate my hypothesis by reference to three articles that appeared in *The West Australian* newspaper in early 2003, a significant year for the consideration of the distribution of natural resources and electoral districts in this State. Two articles concerning the supply of water to Perth appeared in the paper on 29 March, 2003. The first (p. 53) noted the declining levels of groundwater on the Gnangara Mound, a major source of supply on the northern outskirts of Perth. The second article, *Hands off our water: councils* (p. 17) described opposition from local councils in the south-west of Western Australia to the Government's investigation of a proposal to take 45 gigalitres of groundwater from the south-west to Perth.

The clear concern of the local councils is that the growth of Perth will be at the expense of environment and economic opportunities in the south-west. Despite the promises reported in the article that water will not be taken beyond the sustainable yield, any honest water resources manager will tell you that the environment needs every drop of water that it can get. There should be no doubt that any inter-basin transfers of water adversely impact the environment and economy of the area from which the resource is taken. Even so, there is a general sense of foreboding in the south-west that the weight of political influence in the

Perth metropolitan area will create irresistible pressure on the State government to authorise this very large inter-basin transfer of public natural resources. In my opinion, the State government should not authorise the metropolitan community to take the south-west water without paying at least the economic rent (a royalty) to the relevant local government authorities in the south-west. The current law does not make any provision for such payments to occur.

The third article, *Secret plan aims for vote overhaul* (1 March, 2003), revealed that political discussions were being held between the government and the Greens to consider a suite of constitutional reforms dear to the Greens, in return for the Greens support of the Government's electoral reforms aimed at removing electoral vote weighting and transferring country seats to the city. The article noted that four of the five Green Members of the Legislative Council (MLCs) were believed to support the Government's one vote / one value reforms. As I understand it, the fifth Green MLC, who represents the Agricultural region, originally supported the Government's reforms but has since changed her mind. The most significant point from this article is that the electoral reforms were the subject of political bargaining that could have seen them adopted if a mutually satisfactory basis could have been found.

By November, 2003 the State government had lost the court battle over the validity of its 2001 electoral reform legislation: *Attorney-General (WA) v. Marquet*[3] ("*Marquet*"). Although the reform legislation was passed in the Legislative Council in accordance with the standard legislative process that would have seen ordinary legislation validly enacted, the High Court held that this particular constitutional legislation should have been passed by absolute majorities in both Houses of Parliament, in compliance with a special procedure (a "manner and form") for the amendment of the *Electoral Distribution Act* 1947 (WA).

By that time, the Government also appears to have given up negotiations with the Greens, and was looking to the Commonwealth Parliament to exercise its external affairs power under s.51(xxix) of the Commonwealth Constitution to establish a requirement for equal electoral districts in State legislative Chambers. This proposal was the subject of a recent inquiry by the Senate Legal and Constitutional References Committee, which gave it qualified support.[4] There are constitutional problems with the course of action proposed, which I will point out. Furthermore, it would be a better solution for Western Australians to resolve the issues with their own political deal.

In my opinion, a parallel reform to the resolution of electoral equality should be the constitutional entrenchment of the distribution of a fair share of the public natural resources wealth to the regions that generate that natural resources wealth. There will be arguments about what is a fair share, but I would start the bidding with a figure of 50 per cent of the natural resources revenues that accrue to the State government from royalties and fees on authorisations to exploit the public natural resources vested in the State. These sums should be paid to the local government authorities in the region and be spent according to the local political will. The development of public wealth in the non-metropolitan regions should help foster the growth of those communities and, in the long run, relieve the pressures for electoral redistributions.

Even if you do not agree with my hypothesis and proposed constitutional reform, I hope I have created enough of a scenario in which to discuss a number of important constitutional issues that arise out of the High Court's decision in the *Marquet Case* and the Senate inquiry. I want to explore my hypothesis and those issues by addressing:

1. The historical-constitutional context of the State Parliament's legislative sovereignty and the distribution of electoral districts and the public wealth from natural resources;
2. The High Court's reasoning in *Marquet* on why a State Parliament is bound to comply

with special manner and form for the enactment of certain constitutional legislation;

3. The problems with the proposal that the Common-wealth Parliament legislate to mandate State legislation achieving the one vote / one value reforms; and
4. The feasibility of entrenching in the State's Constitution a requirement that a certain share of the governmental revenues from exploitation of public natural resources be vested in the local governments of the regions from which the natural resources are taken.

1. The historical-constitutional context

When responsible self-government was established in the Colony of Western Australia in 1890, our "Constitution" shared a number of prominent features with those of other Australian Colonies that had already established self-government in the preceding decades:

1. Western Australians regarded the *Constitution Act* 1889 (WA), enacted by the previous colonial Legislative Council, as having acquired its legal authority by virtue of it having been enacted by the UK Parliament as a Schedule to the *Western Australian Constitution Act* 1890 (UK, 53 & 54 Vict c.26).
2. The bicameral Parliament established by the *Constitution Act* was to be "sovereign" in domestic matters, within certain constitutional limits. One of the important limits related to legislative procedures for the amendment of the Constitution. The Parliament, although empowered by s.5 of the *Western Australian Constitution Act* (UK) to alter the *Constitution Act* by normal legislative process for the most part, was bound to follow special legislative procedures for the alteration of "certain particulars until and unless those conditions are repealed or altered" by the same Parliament.[5] In other words, certain aspects of the Constitution could only be altered by Parliament legislating in accordance with a prescribed *manner and form* that was more difficult to achieve than the simple majority resolutions of the standard legislative process.
3. By s.3 of the *Western Australian Constitution Act* 1890 (UK), "[t]he entire management and control of the waste lands of the Crown in the colony … and of the proceeds of sale, letting, and disposal thereof, including all royalties, mines, and minerals" were vested in the colonial legislature. The significance of this provision was that the Colony, acting through its locally elected legislature, wrested control of the un-alienated natural resources of the Crown from the Governor acting on the instructions of the Imperial Government in London and, thereby, gained control of the revenues that were to be earned from the disposition of those natural resources.
4. The majority of the Colony's population lived outside the metropolitan area of the capital city. Interpolating from the figures provided recently by the Western Australian Attorney-General,[6] in 1890 approximately 25-30 per cent of the Colony's population lived in the Perth metropolitan area, whilst approximately 70-75 per cent of the population lived outside the metropolitan area, with a particular concentration around the Kalgoorlie goldfields. The early pattern of colonial development saw many migrants moving out to exploit natural resources under authority from the colonial government. The first Legislative Assembly was to have 6 Members elected from the Perth area, and 24 Members elected from across the rest of Western Australia. The electoral system was democratically contentious, not only for its restricted franchise, but also for the distribution of the electoral districts, which did not adequately reflect the concentration of population in the goldfields.

We jump now to the year 2003 and make a brief comparison with the equivalent prominent constitutional features:

1. The UK Parliament no longer has legislative authority in respect of Australia: s.1 *Australia Acts* 1986 (State, Cth & UK). So, what is it now that gives our State

Constitution its binding legal authority? The High Court has declared recently in *Marquet*[7] that "constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources". The High Court went on to locate the authority of the WA Constitution very much in fact of Federation and the adoption of State Constitutions under s.106 of the Commonwealth Constitution, which provides that "[t]he Constitution of each State … shall, subject to this Constitution, continue as at the establishment of the Commonwealth … until altered in accordance with the Constitution of the State".

2. The State Parliament still enjoys a limited domestic sovereignty; it must comply with specially prescribed manner and form when legislating with respect to certain nominated matters affecting the State Constitution. In *Marquet*, the Western Australian Supreme Court[8] and the High Court held that the State government's electoral reform bills of 2001[9] were invalid because they were not passed in the Legislative Council by the absolute majority required under s.13 of the *Electoral Distribution Act* 1947 (WA). What is of further potential interest is the High Court's reason for holding the manner and form requirement to be binding on the State Parliament by virtue of s.6 of the *Australia Act* . I will explore this issue more below.
3. Over the past century or so, the Western Australian Parliament, like other State Parliaments, has exercised its legislative control over the Crown lands to vest large amounts of the State's natural resources in the Crown in the right of the State. The underlying premise of natural resources management in Australia is the public ownership of much of the country's natural resources: minerals, petroleum, publicly owned forests and conservation lands, vast expanses of rangelands, living natural resources, including flora and fauna, and water, all vested in the States. The States authorise the exploitation of these natural resources under various statutory authorisations such as leases, licences and permits, for which they can charge fees and royalties that reap not only the cost of administration, but also part of the "economic rent"[10] from the exploitation of the natural resources. Interestingly, at the moment, there are neither significant fees nor royalties attached to the exploitation of water. Nevertheless, it is obvious to even the casual observer that a significant amount of public wealth has been generated by the exploitation of natural resources in this State and that much, if not most, of the benefit of that public wealth is delivered to the people of metropolitan Perth.
4. The majority of the State's population now lives in the Perth metropolitan area. On the Attorney-General's figures, 74 per cent of the voting public live in the metropolitan area and 26 per cent live in the rest of the State. The distribution of electoral divisions is a serious political issue that has been much legislated and litigated in the past twenty-five years. The very heavy vote weighting in favour of the non-metropolitan area of the 1970s was substantially lessened in the 1987 reforms of the then Labor government,[11] which saw the enactment of the current law.

   Under this law, the State is divided into two areas: metropolitan and non-metropolitan. The metropolitan area is allocated 34 of the 57 Legislative Assembly single member electoral districts, and 17 of the 34 Legislative Council seats, chosen from three regions. The non-metropolitan area has the remaining 23 Legislative Assembly electoral districts, and the equivalent 17 Legislative Council seats, chosen from three regions. The Legislative Assembly districts were to be devised with a permissible + or – 15 per cent variation from the quotient for each of the two areas.[12]

   When the current Attorney-General and Premier challenged the constitutional validity of this legislation in the High Court in 1996,[13] the current law had the effect of making the largest metropolitan Legislative Assembly district nearly three times as large as the

smallest non-metropolitan electorate in voter enrolments. The number of voters (per member) enrolled in the largest metropolitan Legislative Council region was nearly four times the number of voters (per member) of the smallest non-metropolitan Legislative Council region.

The potential for large discrepancies in the voter enrolments is also exacerbated by the requirement to undertake a re-distribution after only every second election. However, under the 2003 re-distribution completed by the Western Australian Electoral Commission under the current (1987) law, the differences in voter enrolments on the 2002 enrolments, and on the projected 2007 enrolments, would be a little under two and a half times the number of voters in the largest metropolitan electorate compared to the smallest non-metropolitan electorate. (The differences in voter enrolments in the Legislative Council could be expected to be higher, but I have not done the calculations).

The 2003 redistribution will apply to the next State election, due within the next 12 months. What is interesting is that the quotient (average number of voters per electoral district) for the metropolitan electorates has, since 1998, remained at a little under double the quotient for the non-metropolitan electorates. The two chambers of the Western Australian Parliament remain the only two legislative chambers in Australia (besides the Senate) that are not constituted on the basis of a formula that aims to achieve an approximately equal number of voters per member in each electoral district or region.

All of this brings me to the current State Government's 2001 electoral reform proposals. The broad aims of the reforms were to achieve one vote / one value in the Legislative Assembly and to affirm the Legislative Council's role as a regional House.[14] The proposal for the Legislative Assembly would have:

- abandoned the division of the State into metropolitan and non-metropolitan regions;
- adopted a single quotient for all electorates across the State; and
- restricted the variation from the quotient to + or – 10 per cent, except for districts with very large geographical areas – 100,000 square kilometres or more – where a variation of + or – 20 per cent would have been permissible and supplemented with a formula for deeming notional voter enrolments on the basis of land area.

The constitution of the Legislative Council was to be modified a little to provide for equal representation by six MLCs for each of the six regions of the State, three in metropolitan Perth and three outside Perth. The reforms would have achieved an acceptable level of equal suffrage in the Legislative Assembly, the House where government is formed. The Legislative Council would have continued to be the only State Upper House constituted on the basis of non-metropolitan vote weighting, but in that it would have shared the good company of the Senate.

This legislation could, and should, have been validly enacted in 2001, in accordance with the absolute majority requirement of s.13 of the *Electoral Distribution Act* 1947. In the current Legislative Council, there are 13 Labor and 5 Green MLCs, which together constitute a potential absolute majority of 18 of the 34 members. However, because of a mistaken view taken that the President of the Legislative Council, a Labor MLC, was not entitled to vote unless the votes were equal, the legislation was passed in the Legislative Council by simple majority only, the standard legislative process.[15]

I have elsewhere explained that this view was a mistaken interpretation of the provision governing the standard legislative procedures in the Council, which did not apply where an absolute majority requirement was applicable.[16] In the absence of an applicable statutory provision, the common law proposition that the chairperson of a meeting has an original deliberative vote should have been applicable, and the President should have voted. This

view was not appreciated at the time; indeed, some may disagree with it now. The Legislative Council passed the legislation by a simple majority only and the legislation was held invalid in *Marquet*. To exacerbate the Government's dilemma, one of the Green MLCs who voted for the legislation in 2001 no longer supports it.

2. Why is a State Parliament bound to comply with a special manner and form?

The Supreme Court and High Court had to deal with a number of issues in *Marquet*, including whether s.13 of the *Electoral Distribution Act* was applicable to the Government's legislative package. Both Courts held that it was, and then addressed the question of whether one Parliament can bind a successor Parliament to comply with a special manner and form that is more difficult to achieve than a simple majority of the standard legislative process. I will address this aspect of the High Court's decision, which deals with two propositions.

The Court's first proposition is that s.6 of the *Australia Act* (Cth) is a superior law that binds the Western Australian Parliament to comply with manner and form applicable to the enactment of legislation respecting the "constitution, powers or procedure of the Parliament". The second proposition was that the electoral reform bills were bills with respect to the "constitution" of Parliament, and so could only be enacted in compliance with the absolute majority requirement of manner and form. Let me explore each of these propositions a little more.

2.1 Section 6 of the *Australia Act* is a superior law

The Court said that the *Australia Act* 1986 (Cth) is the operable version of that Act in Australia. It is an enactment of the Commonwealth Parliament under s.51(xxxviii) of the Commonwealth Constitution, which confers on the Commonwealth Parliament, with the request and consent of the Parliaments of the States directly concerned, the power to make a law that could, at the establishment of the Commonwealth, be made only by the UK Parliament.

The Court gave no analysis of whether a State Parliament could, alone, at Federation have made a law that would bind itself or its successors to follow a special manner and form. Not only does this fail to address a fundamental question of the law of manner and form, it arguably also fails to address the question of whether the enactment of s.6 of the *Australia Act* fell within the realm of s.51(xxxviii).[17]

Instead, the Court relied on the reasoning established in *Attorney-General (NSW) v.* Trethowan,[18] that a State Parliament was bound by manner and form to the extent applicable under s.5 of the *Colonial Laws Validity Act* 1865 (UK), the direct predecessor to s.6 of the *Australia Act*, because the State legislature was subordinate to paramount imperial law of the UK Parliament. Section 6 of the *Australia Act* has effectively replaced the superior UK law. As the Court explained:[19]

> "The *Australia Act* takes its force and effect from the reference of power to the federal Parliament, made under s.51(xxxviii), and the operation that the Act is to be given as a law of the Commonwealth in relation to State law by s 109 of the Constitution. Although the phrase 'subject to this Constitution' appears both in ss 51 and 106, it was decided in *Port MacDonnell Professional Fishermen's Association Inc v. South Australia* that 'the dilemma … must be resolved in favour of the grant of power in par (xxxviii)' ".

Effectively, the Commonwealth Parliament has legislated to change State Constitutions, albeit with State parliamentary consent. We will confront below the question whether other heads of Commonwealth legislative power can be used to alter the State Constitutions, perhaps without their consent.

I also want to address further the question of whether a State legislature, like any legislature, can alone bind its successors to follow a particular manner and form in the future; for example, by itself enacting the manner and form requirement by the same process that is

henceforth to apply to legislation on that topic.[20]

The Australian courts have never explored the question whether such a procedure should be essential or adequate for the valid entrenchment of any legislation, whether or not it is covered by the scope of s.6 of the *Australia Act*. There are examples of Australian manner and form that were not enacted by the same procedure to which successor Parliaments are believed to be bound on the authority of *Trethowan*. Section 73(2) of the Western Australian Constitution is a provision of this sort, as was s.7A of the *Constitution Act* 1902 (NSW), the provision in question in *Trethowan*. Section 73(2) requires that a bill to amend certain aspects of the WA Constitution must be passed by absolute majorities and a referendum of the people before being presented for the Crown's assent. That provision was itself only enacted by absolute majorities, so it is arguable that the referendum requirement is invalid. In *Marquet*, s.13 of the *Electoral Distribution Act* had itself been enacted by absolute majorities, so there was no need to address this question, although that is not the way the Court explained itself.

The Dixonian solution in *Trethowan* was to say that a manner and form is binding on the authority of the paramount UK law, but only if it is valid.[21] To be valid, a manner and form can prescribe only a mode of legislating and cannot be a restraint of power. A manner and form that prescribes a procedure that is so demanding that it cannot realistically be met by future legislatures (e.g., a 75 per cent majority vote) would be invalid.

It is suggested that this requirement of validity should be maintained and supplemented by the requirement that a valid manner and form for a restrictive procedure must itself have been employed in its enactment – so-called symmetric entrenchment. Thus, only a successful referendum could introduce a valid referendum manner and form. However, the symmetric entrenchment would have to be "democracy affirming"; it would not be acceptable to have Parliaments entrenching legislation by the opportunistic exploitation of a large swing in political opinion at one election to set super-majorities that cannot be achieved by subsequent legislatures elected with narrow political majorities.[22] In this regard, a requirement of an absolute majority should be unobjectionable because, if the correct view is taken of the vote of the presiding officer, it should not be seen as undemocratic to require a majority of the whole membership of a chamber for a vote on an important issue. Nothing in *Marquet's Case* should prevent the High Court from adopting this view, should it ever seek to re-visit *Trethowan*.

2.2 The scope of laws respecting the "constitution, powers or procedure of Parliament"

The second proposition, that the electoral reform bills were laws with respect to the "constitution, powers or procedure of Parliament", was more straightforward. The Court focused on the word "constitution" and refused to take a narrow view of what it might mean. It should come as no surprise that the Court held that bills purporting to alter the system for the distribution of electoral districts and regions, and the number of members of the Legislative Council, were with respect to the "constitution" of Parliament.

What is a little surprising is this comment by the Court:[23]

> " … it is not necessary or appropriate to explore what is encompassed by the reference in s 6 *Australia Act* to 'powers or procedure' of a legislature, whether in relation to the ability of a legislature to entrench legislation about any subject or otherwise".

Conventional academic thought on this question has tended to conclude that passing a law about a topic that is subject to the requirements of a manner and form does not, of itself, give that law the characterisation of a law with respect to the powers or procedure of Parliament.[24] For example, the fact that a law about the Supreme Court may be protected by a manner and form does not give a future law amending the Supreme Court law the character that brings it within the scope of s.6 of the *Australia Act*. Such a law is a law about the Court,

not Parliament, and some other source will need to be found to make the manner and form in respect of such legislation binding on successor Parliaments. If no source can be found to make binding a manner and form entrenching such laws, then Parliament may simply ignore the manner and form.

3. The proposal for Commonwealth legislation for "one vote, one value" in State Parliaments

The Senate Legal and Constitutional References Committee ("the Committee") reported in early March, 2004 on its inquiry into the *State Elections (One Vote, One Value) Bill* 2001 [2002],[25] proposed by Senator Andrew Murray of Western Australia. In the words of the Committee:[26]

> "The Bill applies to both houses of State Parliaments in those States that have bicameral legislatures. A quota of voters is calculated by dividing the total State enrolment, projected four years in advance, by the number of electorates. The Bill provides that a House of Parliament of a State must be directly chosen by the people of that State, voting in electorates as nearly equal in size as possible but not varying by more than 15 per cent from the quota of voters.
>
> "A plus or minus variation from the quota must have regard to a variety of factors. The overriding factor for the allocation of voters to electorates is the community of interest in the area. Other factors include the means of communication with, and its distance from, the capital city of the State, the geographical features of the area and any existing boundaries, including local government boundaries.
>
> "… The Bill also provides for certain people with standing to seek judicial review. Standing extends, but is not limited to, registered political parties and a member of the House of Parliament to which the action relates".

The Bill purports to be an exercise of the Commonwealth Parliament's power to legislate with respect to external affairs under s.51(xxix) of the Commonwealth Constitution by implementing the terms of Article 25 of the *International Covenant on Civil and Political Rights* , which obliges a state party, including Australia, to ensure to all individuals within its territory "the right and the opportunity …(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage …". The Bill has the purpose of compelling a reform of the Western Australian electoral distribution system, as well as preventing other jurisdictions from departing from the one vote, one value principle with any future legislation.

I made a submission to the Committee's public hearing, including the following points:[27]

> "[O]ne might see the bill as exercising the external affairs power to implement the terms of an international treaty, but it is probably susceptible to challenge on the basis of prohibitions implied by the High Court from the federal nature of our Constitution, that the Commonwealth Parliament cannot make laws that discriminate against the States or interfere with the essential functioning of the core constitutional organs of the States. … There is nothing really more central to the Constitution of a State than the constitution of its Parliament, and it seems to me as though the bill would amount to the Commonwealth Parliament endeavouring to determine how the State should constitute its Parliament. I think that is likely to be invalid.
>
> "… it seems to me as though the bill lacks a remedy. I am not quite sure what the benefit of a challenge would be. I think this is borne out by the High Court decision in the *McGinty Case*.[28] In that case it was argued that there was an implied requirement of representative government to have one vote, one value. The majority of the Court rejected the challenge on the basis that there was no such implication to be found in either the Commonwealth or State Constitutions.
>
> "But, reading between the lines, and considering that case in the light of the Court's later decision in *Lange v. Australian Broadcasting Corporation*,[29] I think the judges were worried on two counts. There is no common law foundation for the right to vote and

there is no common law foundation for the distribution of electoral districts. So, if someone were successfully to challenge … the State electoral distribution law, then what remains? There is no common law to fall back on as to what should occur in the constitution of the Parliament. The existing legislation would be invalidated and there would be nothing left except the former, probably less democratic legislation.[30] The question arises: does that leave it to the Commonwealth Parliament to legislate to fill that gap? That would seem to take it further into the implied prohibition".

Professor George Williams made more detailed submissions that canvassed similar points, and advocated a more generally expressed obligation of one vote, one value as a means of endeavouring to avoid the implied prohibition. He suggested the following solution:[31]

"[M]y first preference for this legislation would be to simply embody the international obligation and leave it at that, and implement it in a way that does not operate through federal judicial bodies but simply operates by virtue of section 109 of the Constitution, which overrides inconsistent State legislation, and leaves it to the State Parliament to come up with an appropriate electoral model – and it would need to do so because of its own constitutional system requiring that there be elections and other matters".

Since making my submission to the Senate Committee, I have discussed the question of a judicial remedy with my UWA colleague Peter Johnston and with Professor Williams. A remedy of prospective invalidity, giving time to a legislature to amend its legislation, has been considered and rejected by the High Court.[32] The judges cannot compel a Parliament to enact laws of a particular content. Would the High Court then be compelled to supervise recalcitrant Parliaments by serial pronouncements on their successive enactments? Judicial pronouncements of invalidity may have a political impact with the electorate, but it would also risk embroiling the Court in the political debate. The Court might seek refuge in a pronouncement that a general obligation of this sort is non-justiciable. Suitable remedies may be found from a comparative study of human rights legislation in other countries, but I cannot see a suitable remedy presently available under the Commonwealth Constitution. In the end, it is better that these democratic reforms be achieved by State legislation.

4. Constitutional entrenchment of the fair distribution of the public wealth from natural resources

Let me conclude where I started: a political trade-off for electoral distribution reform that entrenches a fair distribution to regional local governments of the public revenues from the exploitation of public natural resources. If such a proposal could be enacted by legislation passed on the basis of symmetric entrenchment, and requiring a democratically acceptable vote for its amendment, would it be binding on future Parliaments? Subject to the High Court *obiter dicta* in *Marquet* (discussed in section 2.2 above) that left open the scope of subjects that could be entrenched by force of s.6 of the *Australia Act*, it is questionable whether legislation relating to the distribution of natural resources revenues would be characterised as respecting the "constitution, powers or procedures of Parliament". If such legislation is not characterised as within the scope of s.6, then the Parliament may simply ignore the manner and form unless there is some other source of authority that would make the manner and form binding on this type of topic.

The prospect of finding an alternative source of making manner and form binding must now face the following *obiter dicta* of the High Court in *Marquet*:[33]

"The conclusions reached about the operation of s 6 of the *Australia Act* make it unnecessary to decide whether, separately from and in addition to the provisions of that section, there is some other source for a requirement to comply with s 13 of the *Electoral Distribution Act*. It is enough to notice two matters. First, as indicated earlier in

these reasons, the continuance of the Constitution of a State pursuant to s 106 of the federal Constitution is subject to the *Australia Act* . … Secondly, the express provisions of s 6 can leave no room for the operation of some other principle, at the very least in the field in which s 6 operates, if such a principle can be derived from considerations of the kind which informed the Privy Council's decision in *Bribery Commissioner v. Ranasinghe* and can then be applied in a federation".

The principle in Ranasinghe is usually stated as:[34]

"… a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".

In effect, the *Ranasinghe* principle elevates a Constitution to the status of a superior law that cannot be ignored by the legislature that is established under it. The principle was enunciated in a constitutional context that contained no equivalent of s.6 of the *Australia Act* . The significant point about the scope of the principle is that, although one must find the manner and form in the "Constitution" (or at least some quasi-constitutional instrument), it is not limited to operating in respect of laws respecting the "constitution, powers or procedures of Parliament". Neither would it be necessary for the legislation in question to be purporting to amend the text of the Constitution in order to attract the operation of the principle.[35] In fact, one could expect that almost any subject matter could be protected by a constitutional manner and form, if the people and the legislature thought it important enough to install the proposition in the Constitution.

The Victorian Parliament last year amended the *Constitution Act* 1975 (Vic) to entrench a new Part VII, providing for the continued "responsibility of public authorities for ensuring the delivery of water services and their accountability to responsible Ministers for ensuring that delivery".[36] It may be that the Victorian Parliament has confidence in the binding authority of manner and form inserted in its Constitution. There have been a number of decisions in the Victorian Supreme Court upholding the requirements of the manner and form protecting the jurisdiction of the Supreme Court, but without referring to either s.6 of the *Australia Act* or any other source of binding authority for the manner and form.[37] There is ample authority for the operation of the *Ranasinghe* principle in Australia; there is just a lack of judicial reasoning explaining it.

The High Court in *Marquet* did provide its own escape for permitting some operation to the *Ranasinghe* principle by stating that there was no room for the operation of some other principle "at the very least in the field in which s 6 operates". In my opinion, even this comment is not all that helpful. The present learning on s.6 is that the manner and form may be found in any law; it does not have to be found in a constitutional instrument. The *Ranasinghe* principle could be a useful source of reasoning to read down some of the breadth of s.6, by giving binding effect only to manner and form in a constitutional instrument. If we are to accept manner and form constraints on the sovereign legislative powers of our Parliaments, we want a simple way of recognizing their binding authority. Those matters that are to constrain future Parliaments should be seen as part of the constituent political bargain and expressed in our Constitutions.

I hope that one day our State Constitutions will more fully express vital aspects of our communities' aspirations for a fair and sustainable use of natural resources, including the fair distribution of the public revenues from the use of our public natural resources.

Endnotes:

1. The full title of this paper is *Musings on* Marquet*: The Distribution of Electoral Districts and Natural Resources Rent.*

2. The contributions of Dr James Edelman to Sections 2 and 3 of this paper are gratefully acknowledged.

3. [2003] HCA 67; 78 ALJR 105.

4. Commonwealth of Australia, Senate Legal and Constitutional References Committee, *State Elections (One Vote, One Value) Bill*2001 [2002], March, 2004.

5. This proposition was also to be found in s.5 of the *Colonial Laws Validity Act* 1865 (UK).

6. Commonwealth of Australia, Senate Legal and Constitutional References Committee, Inquiry into *State Elections (One Vote, One Value) Bill*,2001 [2002], transcript of public hearings held on Friday, 13 February, 2004, evidence of Mr McGinty, the Attorney-General of Western Australia.

7. [2003] HCA 67 at para. 66; 78 ALJR 105 at 116. In this paper, references to the decision of the "Court" are to the majority judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ.

8. [2002] WASCA 277.

9. *Electoral Distribution Repeal Bill* 2001 and *Electoral Amendment Bill* 2001 (WA).

10. The economic rent is the surplus value from the exploitation of the natural resource above that required to induce the exploitation of the resource.

11. *Acts Amendment (Electoral Reform) Act* 1987 (WA).

12. The quotient is calculated by dividing the number of enrolled voters by the number of electorates for the area. The electoral distribution system is set out in the *Constitution Acts Amendment Act* 1899 ss. 6 & 19, and the *Electoral Distribution Act* 1947 (WA).

13. *McGinty v. Western Australia* (1996) 186 CLR 140.

14. Second reading speech of the Minister on the electoral reform legislation, Legislative Assembly of Western Australia, *Hansard* , 1 August, 2001, pp. 1850-1855.

15. A simple majority requires that there be present at least a quorum of one third of the members and that a resolution be passed with the majority support of those members present and voting. An absolute majority requires that the resolution be supported by a majority of the whole membership of the chamber. The standard legislative process for the Legislative Council of Western Australia is defined in *Constitution Acts Amendment Act* 1899 (WA), s.14.

16. A Gardner, *Marquet v. Attorney-General of Western Australia: 'All this may not have been necessary'*, (2003) 5 *Constitutional Law and Policy Review*, 78-80.

17. The Court was comforted by the fact that none of the parties challenged the validity of the *Australia Act* : [2003] HCA 67 at para 69; 78 ALJR 105 at 117.

18. (1931) 44 CLR 394.

19. [2003] HCA 67 at para 67; 78 ALJR 105 at 116.

20. Indeed, the legitimacy of a manner and form created otherwise than in this manner is a "conceptual difficulty" suggested by Gummow J in *McGinty v. WA* (1996) 186 CLR 140 at 297.

21. (1931) 44 CLR 394 at 431.

22. Martin Squires, *In a bind: entrenching a bill of rights in Western Australia* , LLB Honours thesis, 2003, The University of Western Australia Law Library.

23. [2003] HCA 67 at para 74; 78 ALJR 105 at 117.

24. G Carney, *An Overview of Manner and Form in Australia* (1989) 5 *QUT Law Journal* 69

at 78-79.

25. A copy of the Bill is available from the Australian Parliamentary website at: http://www.aph.gov.au/senate/ committee/legcon_ctte/ one vote one value/index.htm.

26. Paragraphs 2.3, 2.4 and 2.6 of the report of the Committee, which is available from the Australian Parliamentary website at: http://www.aph.gov.au/senate/committee/legcon ctte/index.htm.

27. The transcripts of the Senate Committee's hearing on 13 February, 2004 are available from the Australian Parliamentary website: http://www.parlinfoweb.aph.gov.au /piweb/browse.aspx?NodeID=16. My explanation of the points is slightly supplemented here.

28. (1996) 186 CLR 140.

29. (1997) 189 CLR 520.

30. Of course, were the Justices to be confronting an enactment that proposed a departure from previously acceptable legislation, the Court may be prepared to invalidate the new legislation and fall back on the older acceptable legislation, as pointed out by McHugh J in *Levy v. Victoria* (1997) 189 CLR 579. This may make the judicial process look very political.

31. Report of the Senate Legal and Constitutional References Committee, *supra*, note 19, at paragraph 3.54.

32. *Ha v. New South Wales*(1997) 189 CLR 465 at 503-504.

33. [2003] HCA 67 at para [80]; 78 ALJR 105 at 118-119. The comments here mirror those made by Gummow J in *McGinty v. WA* (1996) 186 CLR 140 at 297.

34. [1965] AC 172 at 197.

35. *Victoria v. Commonwealth* (the *PMA Case*) (1975) 134 CLR 81 at 163-4, per Gibbs J.

36. *Constitution (Water Authorities) Act* 2003 (Vic).

37. *City of Collingwood v. Victoria (No 1)*[1993] 2 VR 66; *City of Collingwood v. Victoria (No 2)* [1994] 1 VR 652; *BHP v. Dagi* [1996] 2 VR 117.

Chapter Ten
The Northern Territory: Seventh State or Internal Colony?

Professor Bob Catley

The Constitutional Background

The Australian Constitution allows for the entry of new States. It was and has been assumed that such entrants would be at a similar level of economic, social and political development as the original States and would have been British Colonies.

In June, 2003 the Northern Territory ("NT") Labor government announced that it would pursue statehood for the Northern Territory, which is a dependent Territory of the Commonwealth government. The previous Country Liberal Party (CLP) NT government had made a similar effort, but was rejected by NT voters in a referendum in 1998. The Prime Minister, John Howard, was in mid-2003 reported to be supporting this revived objective. Whether this was merely out of a residual, partisan commitment to the failed CLP attempt of 1998, or from conviction based on other considerations, has not been publicly canvassed.

The Australian Constitution clearly permits such action (s.121) and also anticipates this situation (s.124). The exact procedure has not been determined since it has never happened. It may be assumed that the process would involve: a referendum of the relevant and applying electorate; a formal application from its Parliament; a response from the Commonwealth Parliament establishing the terms of entry; and, probably, a referendum of the Commonwealth electorate to amend the Constitution.

This paper argues against admitting the NT as a State because:

- It is too heavily dependent on the Commonwealth;
- It has too little independent economic development; and
- Its society is too welfare dependent.

The development of the Northern Territory

The NT comprises about 200,000 people, 60,000 of them Indigenous, on a landmass stretching from the tropical Top End peninsula to the arid desert of Central Australia. Its economy is heavily subsidised by the rest of Australia, to an extent unique even in Commonwealth-State financial arrangements.[1]

In the mid-19th Century the Northern Territory became part of South Australia, which passed it to the new Commonwealth government in 1911. This meant that, unlike the major external Territory of Papua-New Guinea ("P-NG"), it was embraced by Australian nationalism: a nation for a continent and a continent for a nation.

For the next forty years the NT enjoyed slow economic development. In February, 1942 the Japanese fleet attacked Darwin and killed about 250 people in one day. The ensuing battle lasted for eighteen months and only ended when Japanese military power was pushed further north in late 1943. After the Second World War, an Australian military presence was retained in the Top End.

Until 1975 both P-NG – Australia's largest external colony – and the NT – its largest internal colony – were administered by the Commonwealth Department of Territories. In September, 1975 Papua-New Guinea became an independent state and there was no serious suggestion that it become a state of Australia, clearly because its level of development and culture were so different.

The NT, however, remained a Territory of the Commonwealth, subject to the authority of

the Commonwealth government and Parliament. Many of the officers of the colonial state apparatus (Department of Territories) transferred from P-NG to the NT after 1975. The NT had had a partly elected, partly appointed Advisory Council from the 1940s. After 1969 this became wholly elected. During the late 1970s the gradual transition towards self-government commenced, and elections to a NT Parliament began in 1978. This evolution accelerated after 1983.

Until 2001 the CLP ruled the Territory, but its laws could be over-ruled by Canberra. In 1998, the CLP referendum to the NT electorate, that could have led to the NT becoming a State, narrowly failed, partly because Indigenous Territorians and their supporters opposed it, fearing that in the longer term a local CLP government would be less sympathetic to Indigenous claims, than would a Commonwealth government less dependent on the "redneck" vote. The Chief Minister, Shane Stone, resigned and was replaced by the former Army officer, Dennis Burke, who then lost the 2001 election.

In the late 1980s the primary strategic mission of the Australian Defence Force (ADF) was re-defined to be the defence of continental Australia itself. The naval stations at Darwin were augmented, the RAAF base at Katherine was expanded, and the Army's presence in the NT was considerably increased by the creation of Robertson barracks in Palmerston, a large Darwin suburb.

In December, 1974 Cyclone Tracey flattened Darwin. The Commonwealth government decided to rebuild the city, and it was re-populated with its economy substantially underwritten by Commonwealth expenditure. Population growth was augmented in the 1990s by the movement of part of the ADF to the NT. This produced a spurt of growth in population in the mid-1990s, which ended in the years 1999-2001. By the onset of the 21st Century the NT was actually experiencing a minor decline in population. Between the 1996 and 2001 Censuses about 104,000 persons left the NT and about 99,000 arrived.

The NT's private economy has been unable to generate sufficient economic growth to attract either interstate or international migrants in substantial numbers. New industries have become, if anything, more difficult to create. Some improvement in the tourism industry occurred in the 1990s, but the combined impacts of the war on terror, the collapse of Ansett and the SARS epidemic in 2001-03 produced a considerable downturn.

The development of the mining industry has also been problematic. The *Native Land Title Act* of 1976, passed by the Fraser Coalition Commonwealth government, provided for extensive Indigenous ownership of NT land, which now includes 55 per cent of the total and 80 per cent of the coastline. This contributed to the slow development of the mining industry, compared to the geologically similar regions of Western Australia and Queensland. The exception was off-shore gas (where native title has not applied), but its continuing work force would likely number only in the hundreds.

In 2001 the CLP government announced, jointly with South Australia and the Commonwealth, that the railway from Alice Springs to Darwin would be built by a private consortium underpinned by a considerable public subvention of over half a billion dollars. This project was completed in 2004, but even optimistic observers believed the railway would probably not make a clear commercial profit for two decades.[2] Critics described it as:

> "..... the Great White Elephant Railway ... planning to run five trains a week.... on a piece of track that is costing close to $2 billion ... the return on capital employed will be smaller than a tick's testicles".[3]

The NT now has a considerable economic infrastructure, much of which has been provided by Commonwealth subsidy during the last half century. This includes three tiers of government, including two MHRs – to be cut to one by redistribution after the 2001 population decline – and two Senators; a unicameral Parliament with the smallest electorates in the country, of about 4,500; and several well funded city councils, notably Darwin, Alice

Springs and Palmerston.

Darwin has a splendid Parliament House, built at a cost of $200 million for 180,000 people compared with $1 billion for the Commonwealth Parliament for then 17 million; substantial public service offices, continually being updated to capital city standard; a major hospital modelled closely on the Woden Valley hospital in Canberra; a major shopping mall, in part funded by a public car park which doubles as a community cyclone shelter; the now Charles Darwin University, funded at about 130 per cent per capita of the national average; an extensive CSIRO presence; a quite extensive telecommunications structure; a splendid highway system; and two substantial airports.

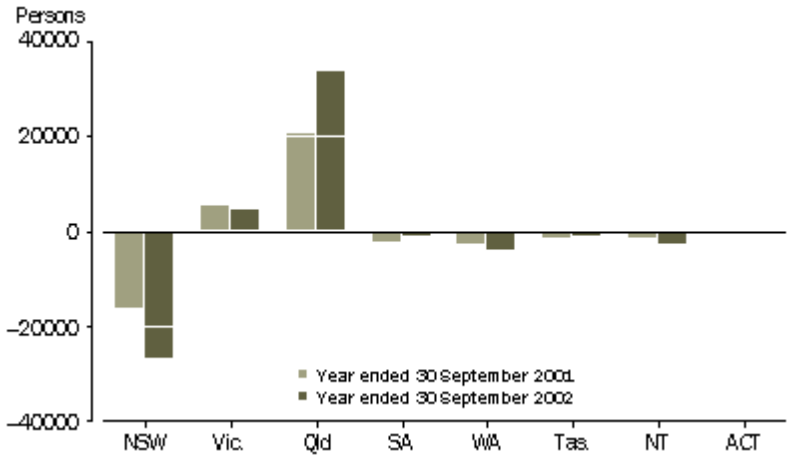
The NT also has several unique characteristics which mark it apart from the other jurisdictions of Australia: a static population; the highest proportion of Indigenous people; the least developed private economy; and the largest state sector. It is like an internal colony.

The NT population

At the June, 2001 Census in the NT about 30 per cent of the total population, or about 57,000 people, were Indigenous. This group had grown by about 12 per cent since 1996, an annual growth rate of just over two per cent. This growth occurred at a time when there was an increase in the total NT population for two years and then a decline for four. The increase was closely associated with the movement of some of the ADF to the NT, and the decline with outflows in net interstate migration between 1998 and 2002.

Thus, within a recently static and sometimes declining total NT population, the Indigenous population is growing strongly while the non-Indigenous population is declining. The Indigenous population is generally geographically stable and concentrated in the often remote Indigenous communities. The non-Indigenous population is very mobile and contains a substantial transient proportion. The NT does not attract substantial international migration, gaining about half (0.5 per cent) of its proportion (1 per cent) of the existing Australian population. The non-Indigenous population has a relatively high average income level compared to both the Indigenous population and the Australian average.

Net interstate migration, States and Territories



The reasons for the NT's population outflow were identified in a 1999 government survey of departing former NT residents, who nominated:

- *Lack of opportunities:* Specialist/higher level workers find professional opportunities limited. Limited choices in higher education.
- *Costs:* Cost of living – groceries, power, housing, etc. The high costs prevent people from retiring here. The high cost of (interstate) airfares.
- *Social/lifestyle issues:*Crime – personal safety, breaking and entering, gang violence.

Keeping drunks off the streets. Lack of activities for youth; parents finding it hard to cope with 14 to 17 year olds.

- *Services/facilities:* Standard of education perceived as being lower than in other States/Territories. Standard of health care perceived as being inadequate.
- *Environment (natural and built):* Feeling of loss of control over the urban environment and heritage. Parking and traffic difficulties in Darwin. Too much of the bush being accessed by tourists. Reduction of fish stocks.
- *Isolation:* Limits access to family networks and quality shopping.
- *Governance:* Over-legislation and over-regulation. Need for Freedom of Information or similar legislation.

Many of these factors involve the increasing impact of the growing Indigenous population on the life style of the non-Indigenous.

The Indigenous population is concentrated in the Indigenous communities. Some of these may have existed as settled populations before European conquest, but most were the result of colonial period primary industry and religious missions. They were further consolidated under Commonwealth policy in the 1970s, first by the Whitlam government and then the Fraser government, which passed the *Native Title (NT) Act* in 1976. This provided the basis of the policy of "self-determination".

Under the influence of one of the most powerful bureaucrats of that era, H C ("Nugget") Coombs, the previous rather half-hearted policy of assimilation for Indigenous Australians, adopted during the Hasluck era,[4] was replaced by one of encouraging separate development and the preservation of Indigenous cultural practices, including land holding usually in common. The centrepiece of this policy was the consolidation of the Indigenous population into established Communities.

A large Indigenous population

Indigenous people now comprise a larger proportion (30 per cent) of NT population than in any other State or Territory (none exceeding 4 per cent).

At about the time NT Chief Minister, Clare Martin, announced the new campaign for statehood, *The Australian* reported: *Black child abuse 'at crisis point'*.[5] It added:

> "Violence in indigenous communities is endemic and getting worse, with 'extreme action' required to stop brutality against women and children, respected Aboriginal leader Mick Dodson has said. Slamming indigenous leaders for their failure to make headway on the problem, Professor Dodson also made a plea for Prime Minister John Howard to help. He said the level of violence against children was particularly 'devastating' and 'beyond comprehension' – including abuse of babies too gruesome for him to describe.
>
> 'Our children are experiencing horrific levels of violence and sexual abuse', the head of the Australian National University's Institute for Indigenous Australia told the National Press Club in Canberra yesterday. The problem was 'at crisis point', as children suffered neglect, incest, pedophilia and assault, and babies fell prey to rapists, while women were 'crying out for help'. … [T]he Queensland Domestic Violence Taskforce has estimated 90 per cent of Aboriginal families are affected by violence. … Aboriginal women were 45 times more likely than other women to be victims of violence. Another recent federal government study, by researcher Paul Memmot, found the rates and types of violence were getting worse in many areas.
>
> "Professor Dodson said violence was spread by poverty and social exclusion, 'which combine into a volatile cocktail of despair, anger, powerlessness and hopelessness'. Professor Dodson stressed such violence was not part of traditional culture. 'But it is occurring principally because of the marginalisation of Aboriginal people, economic

and welfare dependency, high levels of unemployment . . . and the breakdown of community values' ".

There had recently been a number of similar analyses of the conditions in which Indigenous Australians live, especially in the northern part of this country in designated communities. Among the best publicised were those of the academic, Peter Sutton;[6] of the first Australian Indigenous Cabinet Minister, John Ah Kit;[7] of one of the few Indigenous Professors in the country, Mick Dodson;[8] of the articulate and well respected leader of Cape York Indigenous people, Noel Pearson;[9] and, by implication, of the recent review of ATSIC.[10]

These reports revealed that Indigenous Australians, particularly those living in separate communities, experience what can only be described as acute, Third World-style poverty. The indicators of this include: incomes are very low; unemployment rates are very high; average life expectancy is lower than for other Australians by up to 20 years; literacy rates, and participation in the formal education system, are much lower than for other Australians; and law and order are poorly enforced. Other symptoms of social dysfunction include high rates of physical assault, child molestation, rape and murder, the widespread usage of drugs – including glue and petrol sniffing – and other harmful substances, and the physical abuse of women at ten times or more than the incidence in the wider community.

This is seldom seen or reported, especially by video, to the wider national community, because Aboriginal communities generally occupy communal land, which is treated as private property to which access is therefore restricted.

Poverty eradication for Indigenous Australians would involve entry into the wider market and society. In the case of Indigenous peoples in NT, policy makers have chosen to impose regimes which develop exactly the opposite structure of incentives and development to those required for poverty elimination. These have included geographic immobility, welfare dependency, reliance on state generated employment like the Community Development Employment Projects Scheme,[11] and rent-seeking, political activism as a primary means for accessing income. The result is to make the eradication of poverty that much more difficult.

The development of settled Indigenous Communities, particularly in remote areas – "outback ghettoes"[12] – has made integration into the wider economy and society *more* difficult. Whereas the application of a lands rights policy may have granted over half the land of the NT to Indigenous ownership, it is not fostering integration into the wider, wealth generating market, nor development. This is only accentuated by the provision of non-portable welfare payments directly to remote communities, and the operation of the CDEPS that creates a disincentive to labour mobility. Commonwealth programs like CDEPS are in fact creating substantial disincentives for Indigenous people to pursue economic opportunities by locking them onto Communities.[13]

By allowing the breakdown of functional social conditions in communities which exist outside the scrutiny of the media's reporting, and sometimes effectively outside the reach of the law of the land, policy makers are encouraging alienation from economic development.

While the evidence is fragmentary, it would seem that much of the recent gains made in terms of education, incomes and general welfare by Indigenous Australians has occurred among those who have entered the modern Australian economy and live in its capital cities or even regional towns. Those who have remained within the remote communities have enjoyed little improvement in circumstance and may even, as suggested by the reports cited earlier, have experienced some deterioration in their conditions of life.

The policy of self-determination even took policy makers seriously in the direction of canvassing a Treaty between Indigenous people and, presumably, the Commonwealth. This excited some Left support in the mid-1980s, but it was replaced during the Hawke Labor government by the Aboriginal and Torres Strait Islander Commission (ATSIC) system in the late 1980s. A Treaty may now be revived, as a predominantly Indigenous State – the projected

"State of the Northern Territory" – emerges within the Australian Constitution, itself a Treaty of sorts.

There are officially over 600 Indigenous Communities in the NT, but only about 300 have a stable, regular population. Most are remote, but there are also Indigenous communities within the major NT towns, including several in Darwin, a dozen or so "town camps" in Alice Springs, and in other communities in Tennant Creek and Katherine. Port Keats, or Wadeye, is among the largest of Indigenous settlements, and attracted adverse publicity in 2002 and again last month.

These are dysfunctional communities in which health is poor, educational attainments declining, economic independence rarely achieved, and assault and substance abuse are rampant. Peter Sutton, previously an advocate for such Communities, has recently documented these appalling conditions and suggested some reasons for their extensive failure in terms of social outcomes.[14] Many other critics then go on to advocate the re-adoption of the solution of the Hasluck period – progressive assimilation of most Indigenous peoples on terms akin to other ethnic minorities within the predominantly Anglo-Celtic nation and state. In the main it is, indeed, those Indigenous people who live in the large southern cities that have performed best in terms of life expectancy, income, and educational outcomes. Another contributing factor may be increased willingness to identify as Indigenous among urban people more likely to be economically successful.

The Indigenous Communities may have been intended to provide the seeds of the revival of Indigenous culture and society within a self-governing system, where property is held in common and the community governed democratically through elected councils and the extended Land Councils. But these conditions are only sustained by considerable Commonwealth government subvention and a legal title that excludes independent observers from reporting conditions within the Communities.

The debate about Indigenous Australians in the NT often looks like a Left versus Right debate involving the ideas, policies and legacies of Coombs and Hasluck.[15] But in the north, real tangible interests are also deeply involved. The political Left pursues self-determination for ideological reasons, and is deeply enmeshed and often employed in the system thereby created; and the Right supported the CLP, and was quite happy to keep the natives "on the reserves" and away from its suburbs.

The future of the NT is inextricably bound up with the future of the rapidly growing Indigenous population.

Indigenous communities, including some within or adjacent to the major urban settlements, are heavily supported by and usually dependent on Commonwealth programs, like the CDEPS, the Community Housing and Infrastructure Program (CHIP) and the Aboriginal and Torres Strait Islander Commission (ATSIC), occasionally supplemented by royalties from productive economic activities like mining (alumina at Nhulunbuy in Arnhemland), some tourism ventures (Katherine Gorge and Uluru), Indigenous art production, and some pastoral activities.

A low growth economy

Economic growth in the NT was rather quicker than that of Australia as a whole after 1945 – almost all of it induced by Commonwealth state expenditure – but it has recently slowed.

Most of central and arid Australia is like a part of the Third World. Its economic basis is in primary industry – pastoral and mining, with some tourism – and its population is increasingly Indigenous with Third World living standards, life expectancy and social indicators. The level of economic development is probably declining as non-Indigenous people are leaving. The Top End is dominated by Darwin, which has the appearance and much of the reality of a modern, prosperous Australian city. This too is underpinned by very

large financial subsidies from the Commonwealth taxpayer. Without this large Commonwealth monetary subsidy, all of the NT would be a Third World economy with a garrison town at Darwin.

One of the great paradoxes of the NT economy is that, while almost all projections for future growth have it the best or among the best performing region in Australia, it has not done well, particularly during the last three years. Growth has been sluggish, population stagnant and real property values may even have fallen, even during a period of considerable state-induced infrastructure development in gas and the railway.

The NT is an immature economy in which big, often state-induced projects, employing itinerant labour, assume a high consequence. This produces growth in bursts, or what is popularly known as a boom-bust economy. This is quite typical of a colonial economy dependent on primary production and lacking the stability provided by large secondary and tertiary sectors. Only the large state sector, subsidised by the Commonwealth, stops the oscillations being even greater. Indeed, it might be argued that NT is only behaving in the manner that the original six Australian Colonies behaved before Federation.

The growth of 2002-2003 was stimulated by the substantial injection of public funds into the construction sector. The two major recent projects have been the Alice Springs to Darwin railway and the offshore gas development. This probably means that, when they are completed, the projections for rapid economic growth in the next five year period will again prove over-optimistic.

An Indigenous dominated future is more likely. As social life becomes consequently more difficult, it will become harder to attract non-Indigenous people to the NT. In the longer term this would imply a Port Moresby future for Darwin, in which political management shifts away from development, modernisation and growth. But while Australia could walk away from its external Territory, P-NG, the NT is an internal Territory and will have to be developed to standards thought appropriate in the rest of Australia. It is a long way from accomplishing this task.

A large state sector

The state sector is much larger in NT than elsewhere in Australia. The 2002 Budget papers held that the gross NT product was about $6.5 billion. The Commonwealth direct subsidy to the NT Treasury that year was about $1.8 billion. The ATSIC budget was around $1.1 billion for programs. Since about 60,000 Indigenous people live in the NT, and so comprise about 15 per cent of the national total, if they receive a similar percentage of ATSIC funding – a reasonable assumption – this would involve a subsidy of around $180 million. The armed forces claim they generate 15 per cent of the NT economy, or $1.2 billion.

If we ignore extra per capita spending on institutions like the Charles Darwin University, and the Commonwealth subsidy to the Alice Springs to Darwin rail link and the Darwin airport, total Commonwealth expenditure in the NT was therefore around $3 billion a year. Nearly a third of workers in the NT are employed in the public sector. Further, within those aggregates the size of the NT state is proportionately the largest of any State or Commonwealth government.

Assuming a multiplier effect of between 1.5 and 2, Commonwealth spending generates about two-thirds of the NT economy. A hugely disproportionately large slice of NT economic activity results from Commonwealth spending, at a rate much higher than in the six States.

In the 1980s Australia adopted the new orthodoxy of economics and successfully pursued a market driven economy. But 20 years ago Australia was a mature economy with an extensive secondary and tertiary sector whose further, efficient development was being arrested by the continuation of statist and protectionist policies.

The NT economy, in contrast, is not mature and developed. On the contrary, the NT

economy resembles a colonial economy in the size of the state sector, the proportion of poor Indigenous people, the dominance of primary industries and the small size of a competitive secondary and tertiary sector. Precipitate liberalisation of such a structure would not lead to maturity but decline. It may be wholly appropriate that the state be substantially proportionately larger in NT than elsewhere *and* that it be subsidised by the rest of the country.

An immature economy

In the 1960s W W Rostow introduced the idea of a "take off point" to economic development theory, that a colonial economy would grow in its dependent statist trajectory until large enough to undertake independent self-generating and market oriented growth. Australia reached that point 30 years ago and deregulated about a decade later.

The NT is a long way off it. The route being followed by the NT is, in fact, quite similar to that pursued by the other States of Australia. The steps have been:

- an initial period of state-subsidised conquest and military consolidation until the mid 19th Century;
- followed by a period of state-induced economic development with the attraction of (mostly British) labour and capital, based on primary industry, until Federation;
- leading to further state subsidised and protected domestic economic development within a now national market, with encouragement given to local corporations to get involved in secondary industry;
- until the 1970s produced the crisis of stagflation;
- enabling, in the 1980s, the liberalisation of economic activity;
- and, after the shake out of the 1990-91 recession;
- the successful globalisation of activity, with a greatly expanded and very competitive tertiary (services) sector.

This route has been followed by the six States of Australia (and by New Zealand) with varying degrees of success during globalisation.

The most successful regions have been: at first, Queensland and Western Australia, based chiefly on mineral wealth in the 1980s; then the Sydney region, as the deregulated Australian economy emerged as one of the most successful in the world, with Sydney as its commercial epicentre; then Melbourne in the late 1990s- early 2000s, as it recovered from the shock to its protected manufacturing sector and the financial disasters of the early 1990s; and, last, South Australia and Tasmania, as they struggle to find appropriate, low cost roles in the deregulated Australian environment. In New Zealand the Auckland region has, rather like Sydney, grown quickest, although the old agricultural sector has been revamped and, with tourism, has benefited from the low cost, low Kiwi dollar economy and economic integration with Australia.

The NT is not like any of these other regions. It now has a larger state sector, a smaller population, a higher Indigenous proportion, and less developed and competitive secondary and tertiary industry sectors than other States. It cannot afford to deregulate or to shrink the role of the state. It is a long way from the take off point that led to the successful liberalisation of the rest of Australia during the last 20 years. The state will need to continue its dominant role in the NT until an appropriate take off point is reached and the efficiency of the market may be turned to.

An internal colony

The NT has many of the attributes of a classic colony. But because it is *within* the physical boundaries of a modern nation state, Australia, it is not generally perceived as such.

Its economy is heavily dependent on the metropolitan economy. Its productive and

exporting sector comprises largely primary produce. It has a "conquered" native population which is considerably poorer, has not been integrated into the modern economy and society, and which is growing more quickly. At present rates, within two decades the Indigenes will be a majority. Somewhere before that time, the political structure of the NT will be dominated by Indigenous interests.

These Indigenous interests are presently being formed by a combination of Indigenous ideas and practices, supplemented by other ideas imported from the larger metropolitan society and from overseas. The Indigenous interests lie mostly now in the acquisition of land rights; access to royalties and other payments; and in the maintenance and expansion of existing welfare programs. In addition, other ideas have been presented to Indigenous people in terms of the rights they should acquire within the Australian state. These include the right to self-determination within indigenous, self-managed communities. These are almost exclusively rent seeking activities.

For the most part, the Indigenous Communities of the NT have social and economic records which would be totally unacceptable if applied to other Australians. It is a tribute to the power of ideology that they have, none the less, remained acceptable to and have been supported by the political Left for over three decades. But they have also remained unchallenged by those who might otherwise provide criticism of such conditions – broadly, the pragmatists and the political Right – were it not clear that a major consequence of reforming these communities and loosening their hold on Indigenous Territorians would be a more rapid migration to the urban settlements.

This is the implicit pact of Left and Right in northern Australia.

But as the Indigenous population becomes a larger proportion of the total NT population, so will the outflow of the non-Indigenous population from the NT accelerate. The reasons for this are made clear in the survey cited earlier. The implicit pact between Right and Left will expire as all issues receive consideration from an Indigenous perspective.

In a more typical colonial situation, such demands would eventually include sovereign political independence and would be supported by the United Nations, as happened to Papua-New Guinea. In the case of an internal colony, this is usually unacceptable to the metropolitan power for strategic reasons. Political independence may also be unacceptable to the majority of the Indigenous population, who would be deprived thereby of their principal source of income – Australian subsidisation.

Conclusion: Statehood for the Northern Territory?

The central policy objective for the NT should be, therefore, to maximize the rate of absorption of the Indigenous population into the modern sector of the NT economy and society.

In order to achieve this, more attention will need to be paid to the social, cultural and educational attainments of the Indigenous population. This is not occurring as rapidly in the NT as in the major southern cities of Australia, where the outcomes are more promising. Had the same resources been devoted to integrating Indigenous people during the last 30 years as has been spent on self-determination, the results may have been more positive.

This issue of demographic change and its attendant impact is accumulating quickly. It is beyond the capability of the NT governing regime to deal with. In part, the victory of the Labor Party in the 2001 election was the result of the increased numerical importance of the Indigenous vote. It was followed by a reversal of the mandatory sentencing regime, more relaxed policing of vandalism, and a widely held belief that crime was again increasing. The demographic and the political interest structure transition had begun.

The Commonwealth government will need to address its consequences seriously or it may face the prospect of a Papua-New Guinea *within* the Commonwealth of Australia.

The Commonwealth Constitution allows for the accession of new States, but clearly had/has in mind States and societies at a similar level of development to the original six Colonies. The NT is the least developed, most statist, and most heavily subsided jurisdiction in the Commonwealth. It is also the most culturally distinct. Even if statehood were to be granted, it would continue to require heavy subsidisation. It would also quickly develop a political structure dominated by Indigenous interests. Labor is already moving in this direction; and the CLP's recent despatch of Burke was, in some measure, a recognition that the *ancien régime*, based on a good old boys network, was no longer functional.

At present, the Commonwealth subvention is mostly used to underwrite southern Australian income levels for the majority of non-Indigenous Territorians. Some is also used to underwrite – arguably enforce – Third World living standards on most of the 30 per cent of the population that is Indigenous.

But in the central power structure of the Northern Territory, Indigenous people have until recently been almost totally unrepresented. Even today they have, for 30 per cent of the population, only two recently appointed junior Cabinet Ministers, a few backbenchers and almost no senior public servants. Indigenous businesses are important only in some areas of successful rent seeking; much land, much of little worth, is held; modest mining royalties are collected; and the distribution of welfare is an important Indigenous activity (although in most Communities the manager is non-Indigenous). The police, the courts, the prisons, the public service, the education system, the media and the private sector are staffed and controlled, and their processes determined, almost entirely by non-Indigenous people and their practices.

When the Indigenous population of the NT was less than a fifth of the total and modernist ideas about progress, including Hasluck's policy of assimilation, were dominant, this situation may have been acceptable and, more to the point, sustainable. But this situation no longer prevails. Modernist ideas that privilege some cultures above others are now difficult to sustain.

There will be a progressive increase in the power of Indigenous people within the NT state apparatus. As they form a larger proportion of the voters, so they will become a larger proportion of the politicians, and then officials, at all levels of government. As these persons increase in numbers and influence, so the interests of Indigenous people will get precedence in the distribution of resources and the structure of legal, political and social processes.

This may well include the adoption of customary law, the loosening of criminal law enforcement where it is deemed racist, and the modification of educational and social practices enforced by the state. These developments will generally make the NT more attractive to Indigenous people, who will go there, and less attractive to non-Indigenous people, who will leave. The more the NT has the powers of a State, as laid out in the Constitution, the more likely and more quickly will these developments occur, unfettered by Commonwealth intervention.

The next stage in this process of the formation of an Indigenous interest dominated state, is usually, in the post-colonial world, the demand for political independence. It is extremely unlikely that any Indigenous NT government would seek this option in the near future. If the present GST arrangements are maintained, financial transfers to the NT would at least match the growth rate for the national economy. None the less, demands for independence will be voiced – as they have been already – and financial disadvantage is not certain to be, forever, a determining factor. From the viewpoint of the rest of Australia, a heavily subsidised Northern *Territory* is preferable to a State potentially seeking political independence with the likely support of the relevant UN agencies and rival states.

The most obvious alternative to these developments is the adoption of a policy framework which seriously integrates Australia's Indigenous population into the national social, economic and political fabric. Were the condition of Indigenous people more like that

of the rest of prosperous Australia, there would be less cause to be concerned about their gaining a political jurisdiction of their own. Indeed, while their living conditions remain so appalling, there may be some *moral* case for improving their capacity to successfully pursue rent seeking activities. None the less, delaying statehood for the NT is the appropriate *political* response.

The Left has generated the appalling policy structure of self-determination, and has sustained it through the general deterioration of living conditions for that Indigenous population that has had to live with the consequences. The majority non-Indigenous population of the NT under the previous CLP regime, in fact, accepted those appalling conditions on Aboriginal communities as a better outcome than having to confront the consequences of Aboriginal movement into the urban settlements. The existing power structure of the NT is now seeking the considerable constitutional autonomy of statehood, in the unspoken belief that the political identity and aspirations of the Territory will remain the same – southern sourced, middle class led, Darwin centred – despite the demographic wave which is about to run over it.

Darwin may either be the next Brisbane – or the next Port Moresby. A successful Territory would be better than a failed seventh State. For this reason, the admission of the NT to statehood within the Australian Constitution should be delayed until its level of development corresponds more closely to that of the other six States. This was the intention, if not the text, of the Constitution.

Endnotes:

1. The situation of the ACT is sometimes taken to be analogous. See, for example, John Stone, *Why Canberra?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997) and *Canberra – An Overmighty Territory*, in *Policy*, Centre for Independent Studies, Summer 2003-04.
2. Neil Conn, *Commitment aplenty rolling down the line*, in *The Australian*, 15 January, 2004.
3. Chris Corrigan, *Scrapbook: What a waste of tax dollars*, in *The Australian*, 16 January, 2004.
4. See Paul Hasluck, *Shades of Darkness*, 1988, for a clear expression of his attitudes.
5. Schubert and Toohey, *The Australian*, 12 June, 2003.
6. Peter Sutton, *The Politics of Suffering; Indigenous Policy in Australia Since the 1970s*, Inaugural Berndt Foundation Biennial Lecture, September, 2000, published in various places.
7. Speech to the Northern Territory Legislative Assembly, 7 March, 2002.
8. As reported in *The Australian*, 20 July, 2003.
9. In *Quadrant*, December, 2001.
10. See *The Australian*, 21 July, 2002.
11. See Don Fuller and Myles Howard, *The Community Development Employment Projects Scheme: A Critical Review*, School of Economics, Flinders University, April, 2000.
12. Peggy Brock, *Outback Ghettoes, A History of Aboriginal Institutionalisation and Survival*, Cambridge, 1993.
13. Former Commonwealth Minister, Gary Johns, *Integration gives head start to life chances*, in *The Australian*, 2 February, 2004, believes that:

"Since 1967, the Commonwealth … has squandered too much of its power on symbolism, rhetoric and ideology. It has invested too much taxpayers' money on building remote slums".

14. Peter Sutton, *The Politics of Suffering*, in *Australian Anthropologist*, December, 2001.
15. Geoffrey Partington, *Hasluck Versus Coombs: White Politics and Australia's Aborigines*, Quakers Hill, Sydney, 1996.

Appendix I
Australia Day Messages, 1993-2000

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Editor's Note

On the occasion of each Australia Day since the Society's inception, our President, the Rt Hon Sir Harry Gibbs, has forwarded an Australia Day message to all members of the Society.

Over the years, those brief messages have conveyed, in Sir Harry's characteristically limpid prose, a wealth of wisdom distilled from the mind of one of Australia's finest and most honourable public servants (employing that phrase in its time-honoured, and best, sense). Moderate, judicial (naturally), logical, incisive and pithily expressed, these messages have been warmly welcomed by our members – as well as, on a few occasions, by a wider audience when one of our national newspapers has picked up, and given some prominence to, selected passages from them.

It would be tedious to quote at length when, after all, the full texts of the messages in question are set out in the following pages, but three examples may suffice to demonstrate the truth of the preceding paragraph.

First, at a time when we were being perpetually lectured to by so-called professional historians about our "shameful" past, how refreshing it was to read the following:

> "During this century, in almost every continent there has been mass murder, inhuman torture and a total denial of basic human rights on a scale rarely seen before in history. At the same time Australia has enjoyed internal peace, order and stability – a bright beacon in a dark world". (Australia Day, 1993).

Or again, two years before Australians were given a voice on such matters via the unlikely agency of Mrs Pauline Hanson and her One Nation party, how prophetically reads the final sentence in the following:

> "No person of good will would fail to recognise that Aboriginal people who suffer special disadvantages should be treated with justice and generosity. It is another question whether any class of persons should be granted special privileges, not to remedy their particular disadvantages, but simply because their ancestors suffered injustices. There is a danger that, if the benefits which are given to a minority are perceived by the majority to be unfair, the result will be resentment rather than reconciliation". (Australia Day, 1994).

And finally, in what can only be construed as a warning against the imperial proclivities of (a growing segment of) Sir Harry's own legal profession, consider the following:

> "If it is impossible for governments to resist the fashionable clamour for a Bill of Rights, at least it is to be hoped that no attempt is made to entrench constitutionally a Bill of Rights, thus giving to the judiciary a power greater than that of Parliament to decide matters of policy and in consequence politicising the judiciary". (Australia Day, 2000).

As explained in the Foreword to this volume, the opportunity is now being taken to record these messages in the Society's Proceedings. For reasons of space, Sir Harry's messages covering the years 1993 through 2000 are contained in this volume; his messages for the years 2001 through (by that time) 2005 will appear in Volume 17.

Australia Day Message, 26 January, 1993

Australia Day is one of our two great national days, and it marks the beginning of this nation. It seems appropriate, on such an occasion, to reflect on the achievements of the past, and the needs and dangers of the future – in the case of the Society, from the constitutional point of view.

During this century, in almost every continent there has been mass murder, inhuman torture and a total denial of basic human rights on a scale rarely seen before in history. At the same time Australia has enjoyed internal peace, order and stability – a bright beacon in a dark world. In this respect we have cause to be proud of our past history. We have not been so successful in achieving the strong economy that our natural advantages would seem to make possible, and it may be argued that some of the constitutional developments that have occurred since Federation have contributed to that failure.

Now that there is a debate as to the future nature of our Constitution, I should like to refer briefly to the constitutional reform that in my opinion would be most likely to benefit Australia, and that most likely to cause us harm. Of course, other reforms, harmful and beneficial, might be mentioned; in this message I have sought to mention only the most significant.

Ours is a federal system. Some would prefer a unitary system, but it is quite unrealistic to suppose that a referendum seeking to abolish the States will be carried in the foreseeable future. The federal system should therefore be made to work. Opinions may differ as to the powers that should be accorded to the Commonwealth, and those that should remain with the States. Surely, however, it ought to be obvious that the same powers should not reside in both authorities, with the potential for an overlapping and duplication of administrative and bureaucratic effort and expense.

Of course it is highly desirable that the Constitution should permit, as it does, complete cooperation between Commonwealth and States in almost every respect, but cooperative action is a very different thing from a coercive intrusion by one authority into another's proper field. Unfortunately, under the Constitution, as it has been interpreted, the Commonwealth has been able to exercise power in respect of many important matters already the subject of State control, and the potential for conflict, waste and maladministration has been amply realised.

Two provisions of the Constitution in particular are responsible for this irrational and undesirable state of affairs. The first is section 96, under which the Commonwealth can impose conditions, without limit, on the grants of financial assistance to the States. The second is the power of the Commonwealth Parliament to legislate with regard to external affairs – a power which enables the Commonwealth to seize on any international agreement as a pretext to intrude into any area of State activity.

The former provision has robbed the States of responsibility and caused a harmful fiscal imbalance, as well as contributing to the duplication of activity to which I have referred.

The latter may prove to be the more harmful provision. We have seen its effect recently in the first *Mabo* decision, which held State legislation, regarding the title to lands within the State, invalid because it was seen to be inconsistent with a Commonwealth law aimed at racial discrimination.

It cannot be doubted that if, during the first 200 years of white settlement, it had been held that the Aboriginal people had rights to land of a kind formerly unrecognised, the legislatures of the colonies or States would have enacted legislation to deal appropriately with this novel situation, to settle titles and resolve doubts. Now the exercise of the external affairs power has limited the ability of the States to resolve the serious uncertainty that exists as to the interests in use of lands within their borders. That is only one example of the extraordinary

operation of the external affairs power.

The amendment of those two constitutional provisions, to limit the ability of the Commonwealth to determine policy in matters outside its defined powers, might do much to restore the efficiency of government in Australia.

The most dangerous change that could be made would be to include in the Constitution a provision giving special rights to the Aboriginal people. One proposal seems to be to include in the Constitution a provision recognising the Aboriginal people as the indigenous inhabitants of Australia, or providing for a treaty with them; but anyone who has seen how constitutional courts appear to be able to conjure great constitutional principles from thin air will know that even simple and innocuous words, intended to do no more than improve the relations between the Aboriginal people and other Australians, could be held to be the basis of substantial rights and liabilities – as perhaps some of the advocates of a change of this kind are well aware.

Nothing could do more to divide the Australian nation than a constitutional change that gave the Aboriginal people special rights and privileges based solely on race. The Aboriginal people, like all other peoples in Australia, are not a uniform group. Some have successfully integrated into 20th Century society; others are successfully living a traditional mode of life, albeit a modified one; others unfortunately are greatly in need of help, which various governments have tried without much success to give them. Those in need should be succoured, but that does not mean that all those who are of Aboriginal race should be given special constitutional rights which would not be enjoyed by other Australians, even by those in equal need.

The constitutional debate in Australia is only beginning. Our aim should be to ensure that any change that is made benefits Australia, and that arguments based on self-interest, political expediency, mere fashion or sentimentality are exposed and rejected.

Australia Day Message, 26 January, 1994

Again, I am writing on Australia Day – a day which celebrates the courage and enterprise of generations of men and women who built Australia into a free, tolerant and humane nation.

During the last year there have been two events which seem to me to be indicative of some of the great issues that will confront Australia during the next few years. The first was the decision in the *Capital Duplicators Case*, in which the High Court was asked to reconsider the authorities which have established the meaning of the words "duties of excise" in section 90 of the Constitution. Section 90 gives the Commonwealth exclusive power to impose duties of excise, and the wide meaning given in the past by the High Court to that expression has created a major difficulty for the functioning of federalism in Australia. It has had the practical consequence that the States have been forced to impose taxes which have rightly been described as regressive, distorting and costly either to administer or to comply with, simply because no other sources of sufficient revenue are available to them.

In the *Capital Duplicators Case* the majority of Justices understandably refused to reconsider the authorities which, for over 40 years, had extended the meaning of excises to include any tax on the taking of a step in the process of production or distribution of goods before they reached the consumer, although they added that it was unnecessary in that case to consider consumption. It had been feared by some that the Court might reopen the decisions that had held that licensing fees imposed on sales of alcohol and tobacco, calculated by reference to sales made in periods other than the licensing period, were not excises, but although the majority Justices saw the theoretical force of taking that course, they fortunately refrained from doing so. At least those revenues remain available to the States.

The fact that section 90 deprives the States of the power to impose duties of excise is not the greatest impediment to the successful working of federalism in Australia, but it is one that could most easily be remedied, if the will to do so existed.

There is simply no good reason why the power of the Commonwealth to impose duties of excise should be exclusive. In the United States, most States impose sales taxes. The inability of the Australian States to impose sales taxes and other "excises" has had a crippling effect on their finances. The capricious operation of section 90 is illustrated by the *Capital Duplicators Case* itself, for what public benefit resulted from that decision invalidating a tax imposed by the Government of the ACT on X-rated videos? It would be consistent with the efficient working of the federal system if the Constitution were amended to remove the reference to "duties of excise" from section 90.

It cannot be too often repeated that the division of power effected by a federal system is a valuable check on excesses of governmental power. Governments which seek to weaken federalism sometimes do so because they chafe under its restrictions. For various reasons federalism has been weakened in Australia, and the question whether the federal system will suffer further erosion is likely to increase in practical significance in the future.

A straw in the wind is the recent recommendation by the federal government's Regional Task Force that a new system of regional economic development organisations should be set up, to co-ordinate projects in various regions in Australia. Whatever may be said in favour of regional development, there seems no reason why that should be effected by establishing a new tier of government, with its attendant bureaucracy, and the result of doing so would necessarily be to detract from the powers and functions of the States.

The second of the significant events which I have mentioned was the passing of the *Native Title Act* 1993 – the so called *Mabo* legislation. That also raises federal issues, but in addition it obviously concerns what has become a question of great significance in Australia, namely, what should be done to remedy the present disadvantages, and to rectify the past injustices, suffered by Aboriginal people, and to recognise their position as the indigenous

inhabitants of Australia? Unfortunately, the debate on these questions has been bitter and divisive, and is potentially corrosive to Australian unity.

No person of good will would fail to recognise that Aboriginal people who suffer special disadvantages should be treated with justice and generosity. It is another question whether any class of persons should be granted special privileges, not to remedy their particular disadvantages, but simply because their ancestors suffered injustices. There is a danger that, if the benefits which are given to a minority are perceived by the majority to be unfair, the result will be resentment rather than reconciliation. I do not attempt to provide answers to these questions, but I do suggest that they are of such importance that the Society might consider them in depth at a future conference.

The Society might also wish to discuss the merits and demerits of the *Native Title Act*. The Act is not a model of simplicity. Although the preamble recognises the necessity for certainty, the Act itself does not validate past acts attributable to States and Territories, which of course are the acts which affect most land in Australia; it provides that State and Territory laws may do so, but only if they comply with the detailed requirements which the Act contains. According to the explanatory memorandum, the Act neither prevents States and Territories from attempting validation on their own terms, at their own risk regarding legality, nor indicates that past acts by States or Territories are necessarily invalid. It may be doubted whether certainty is achieved by provisions of this kind. In any case, the validation which the Act permits does not have the effect of extinguishing native title in respect of some leases, including mining leases.

It would not be useful to attempt to discuss the Act in any detail, but I may make brief mention of a few of the questions to which its provisions give rise.

From the point of view of constitutional principle, objection might be taken to the provisions which dictate the form that certain State laws should take. From a practical point of view, there is the question whether the right given to the holders of native title, and to claimants to such title, to negotiate and seek a determination by an arbitral body before a mining lease is granted or native title is compulsorily acquired, will unduly hamper desirable development in future. There is the further question as to the extent of the financial burden likely to be imposed on the nation by the payment of compensation. In some cases, compensation might be payable in respect of the validation of an act done at a time when the very existence of native title was unknown, and when there was little or no reason to believe that what was done would contravene the *Racial Discrimination Act* .

On quite a different issue, the tide of public opinion seems to have turned against the supporters of a republic, although that controversy is by no means finished.

I offer my best wishes to all members of the Society on this Australia Day.

Australia Day Message, 26 January, 1995

During the past year it has been announced that steps are being taken by the Government to attempt to remedy the public ignorance that has been found to exist as to the nature of the Australian Constitution.

Any genuine attempt to give Australians an opportunity to become better informed about our Constitution is of course to be commended, even if its principal motive is to prepare the public to accept changes to the system which is being explained to them. However, it would not be enough to inform the public of the details of the provisions of the Constitution, without at the same time explaining the reasons for the adoption of those provisions and the purposes which they are intended to serve.

In particular, it is important that it should be recognised that our federal system, by dividing the powers of government between the Commonwealth and the States, plays an important part in maintaining Australia as a free society.

Most governments resent the existence of restrictions on their powers, and claim that their ability to act for the good of the people is limited unless their power is unfettered. On the other hand, as Sir Karl Popper has pointed out, institutions need to be designed "for preventing even bad rulers from doing too much damage".

One does not have to seek hard to find proof of the fact that liberty is at risk where a government has undisputed power to exercise censorship, to disseminate propaganda, to dispense patronage and to control the police. To divide power lessens the possibility of its abuse.

Some persons see only the disadvantages of federalism, such as the fact that different States have different regulatory or educational requirements. Disadvantages of that kind can be, and often are, avoided by sensible co-operation between governments. Those disadvantages are, however, insignificant compared with the role which is played by the federal system in the preservation of Australia as a free society.

In a society such as Australia a reasonable degree of freedom is taken for granted. It tends to be forgotten that, in the history of the world, there have been few free societies, and that even today there are comparatively few countries that can truly be described as free. It is dangerous to be complacent and to take the continuance of freedom for granted.

It is true that the traditions and sentiments of a people are very important in ensuring that a society maintains its freedom, and that Australia has been notable for its freedom and tolerance. However, during recent decades the composition of the Australian population has greatly changed, and so has the proportion of the population which is dependent on the Government for financial assistance. There are divisions in society which did not previously exist.

It is a mere matter of speculation whether, and to what extent, circumstances such as these will diminish the determination of the Australian people to resist attempts to erode their civil liberties. In any case, public sentiment is not in itself enough to resist encroachments by a government whose power is unrestricted. Indeed, even under our present system, our liberties have been suffering a gradual erosion.

There are no doubt many reasons for this, but two may be mentioned. One is that legislative supremacy is often a mere fiction, and a Parliament, when dominated by one political party, cannot always be relied on to scrutinise with care the vast volume of legislation that the Executive wishes to place on to the statute books or to have the will to curb excesses in that legislation.

A second is that various sections of society, pressing to advance interests of their own, are able to procure legislation whose effect is to infringe the liberties of others.

Obviously some detraction from freedom is necessary in an ordered society, but not all

measures taken, for purposes themselves legitimate, are reasonably justifiable. Think, for example, of the many inroads on the freedom of individuals committed for the purpose of combating discrimination of various kinds.

Some who do understand the effect of federalism in limiting power, attempt to denigrate the system by mis-describing it. They refer to federalism as the doctrine of State rights, and say that human rights are more important than State rights.

What they mean is that the particular course that they wish to pursue is made less easy because of the constitutional division of power – an impediment that will be entirely desirable if the proposed course is extreme or ill-advised, but which may usually be overcome if the course proposed is moderate and sensible.

However, no informed person nowadays supports the federal system on the basis that States have rights. The States have functions of government which the Constitution has entrusted to them, and the fact that they have these functions is a check on the abuse of central power.

More than 200 years ago John Madison wrote:

> "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions".

Our Constitution provides for a number of such auxiliary precautions – "institutional controls of power", as Karl Popper would call them – but federalism is the most effective. All are under threat.

Australia Day is an appropriate time to remind ourselves of the need to preserve and strengthen federalism in Australia.

Australia Day Message, 26 January, 1996

It has been rather encouraging that, during the past year, informed commentators have shown an increasing recognition of the need to correct the vertical fiscal imbalance that has resulted from the circumstances that the taxing power of the States is limited , but they are not guaranteed any fixed share of Commonwealth revenue, and must depend on Commonwealth grants, many of which are made on conditions which determine policy on matters concerning which the Commonwealth has no power to legislate.

A significant fetter on the taxing power of the States is imposed by s.90 of the Constitution, which denies them the power to impose "duties of excise", particularly since the High Court has held that a tax on any step on the production, manufacture, sale or distribution of goods is an excise.

However, two of the four members of the High Court who have adhered to that view have now retired, and there is accordingly a prospect that the Court may adopt the views of the three members who were previously in dissent. That would be a considerable improvement, although ideally s.90 should be amended to remove the restriction altogether.

There has also been a welcome recognition of the need to place limits on the power of the Executive to enter into treaties, or at least to make the Executive more accountable for the exercise of that power. However, the question whether s.51(xxix) of the Constitution ("external affairs") should be amended, and if so in what manner, remain matters of controversy.

The reliance on the external affairs power to give effect to treaty obligations, and the use of conditional grants, have had the result that large Commonwealth bureaucracies have been created to deal with matters which could equally well have been left to the States, and even the State bureaucracies have swollen in consequence. The members of the Commonwealth bureaucracies have an interest to oppose any change.

There seems to be support for the enactment of a Bill of Rights, which of course is superficially attractive. It may not be generally understood that a Bill of Rights, if enacted by the Commonwealth in general terms, would operate as a further impediment to the exercise of State power, since State legislation inconsistent with the Commonwealth Act would be inoperative. The effect on the States would be likely to be substantial.

The past year has provided abundant examples of the truth of the observation made by Ursula Hicks, in her work on Federation published in 1978, that "The three most obviously (potentially) divisive forces [in a federation] are ethnic (race, language and culture), religion and political ideology".

We have witnessed the break up of federations which seemed to be notable for their stability – the USSR and Yugoslavia – and that has been accompanied (particularly in the latter case) by horrifying violence.

It is not only in federations that divisions of this kind may fragment national unity – witness what has happened in Sri Lanka. If we are complacent enough to think that conditions in those countries are so remote from our own that they do not provide us with a cautionary example, we can hardly ignore the fact that the cultural and linguistic divide between Quebec and the other Canadian provinces has brought the Dominion of Canada to the verge of dissolution.

Racial origin, in itself, may not be significant, but it becomes a potent source of division when joined with differences in culture, language or religion which cause the members of a racial group to regard themselves as alien to the other members of society, particularly if they perceive themselves to be the victims of discrimination.

In Australia there has been persistent advocacy for the grant of self-government to indigenous communities in the Torres Strait Islands and in a large area of northern Australia. If this advocacy proved successful there would be a threat to the stability of Australia, and

that threat would be the more serious because the areas over which self-government is sought are of vital strategic importance.

Ursula Hicks went on to point out that what is necessary to render a nation secure against internal disruption is that all members of society, despite the differences between them, should be proud of their national citizenship. It is important that all Australian citizens, whatever their origin, should be proud to be Australians. Diversity should not mean divisiveness.

Australia Day is an appropriate occasion to celebrate the achievements of which our nation is entitled to be proud.

Australia Day Message, 26 January, 1997

During this year it is expected that the Government will convene a People's Convention to consider possible constitutional change. The primary purpose of the Convention will be to consider the question of a republic. In substance Australia is already a republic, in that the supreme power is vested in the people, and we have what many countries whose Constitutions are republican in form lack, namely a stable, democratic form of government, and political and individual liberty.

I shall not discuss here the many issues of policy that would need to be resolved before Australia could abandon the system of constitutional monarchy, for I intend to give a paper on that subject at the Conference of the Society which will be held in Canberra from 7 to 9 March. The proposal that a preliminary plebiscite should be held has, I hope, been rejected – to ask the electors to say whether or not they are in favour of making the Australian Constitution republican in form, without first deciding what that form should be, would be like asking the proprietor of a piggery to buy a pig in a poke.

Putting aside the issue of a republic, have we anything to hope for or to fear from the People's Convention? If experience is any guide, the answer is, "not much". The Constitutional Convention that laboured from 1973 to 1985 resulted only in three amendments to the Constitution, which can hardly be said to have been of major significance. However, it is possible that the People's Convention will reach consensus, and secure political and public support for significant amendments to the Constitution where its predecessors have failed.

Members of the Society are unlikely to be surprised to learn that the amendments that I would most like to see made to the Constitution are those that would strengthen – or perhaps it is more accurate to say restore – the federal nature of the Constitution. Two areas of reform are particularly necessary.

The first is to redefine the powers given to the Commonwealth so that they shall no longer be capable of indefinite expansion into areas which should more properly be left to the States. The external affairs power, as now construed, is one which most obviously offends against the principles of federalism, but it is not the sole offender.

Secondly, it should be ensured that the States are empowered to raise the revenues that they need to perform their functions, and are freed from dependence on Commonwealth grants, which are often intrusively conditional. One measure that would help to some extent to redress the imbalance that presently exists between revenue and expenditure on the part of both the Commonwealth and the States – the amendment of section 90 of the Constitution to enable the States to impose duties of excise – seems so obviously beneficial that it might have been thought that even the staunchest of centralists would support it, but experience suggests otherwise.

Federalism would be further assisted if the States were given an effective say in High Court appointments, and if Senators were appointed by State Parliaments (as was originally proposed) rather than elected, but to think that the latter suggestion is likely to be accepted is to strain optimism to its limits. There are of course other amendments to the Constitution that might beneficially be made that do not affect the federal balance – increasing the term of the House of Representatives would be an important reform. We may hope to see changes of these kinds, but there is a great gulf between hope and expectation.

On the other hand, there are grounds for apprehension that some unpalatable suggestions for change may receive support. Although the changes to which I am about to refer have no necessary relation to a republican Constitution, they are frequently advocated when the question of a republic is debated, and one wonders whether some people see a republic as a Trojan horse designed to open the door to unrelated constitutional changes.

One suggestion is that a republican Constitution should have incorporated in it a Bill of

Rights. A discussion of the advantages and disadvantages of a Bill of Rights would be out of place here, but my especial concern is with some of the suggested provisions, particularly one which would entrench the right to be free from discrimination on account of race, gender and other grounds.

If one accepts the current orthodoxy (recent though it is) that discrimination on these grounds is always immoral, and if one takes the further large step of agreeing that the States should give legislative sanction to these moral principles, it does not follow that the principles should be constitutionally entrenched. A constitutional provision of that kind would have an unpredictable effect, not only on government action in relation to such matters as immigration, health, education, defence and employment, but also in restricting individual liberty.

Some of those who urge that such a provision should be included in the Constitution would go further, and add to it the proviso that discriminatory action, although otherwise unlawful, would be permissible if it operated in favour of indigenous peoples or ethnic groups. To draw a constitutional distinction between citizens on the grounds of race would be completely unacceptable, and would be likely to have the same serious consequences that have been seen in other countries where a difference in status has been based on racial grounds.

There is a similar objection to the proposal that the Constitution should include a recital recognising the special position of the Aboriginal people and the Torres Strait Islanders. Some may think that such a recital would be an appropriate act of recognition or reconciliation, but as decided cases have shown, the courts can give significant effect to a mere recital, and the effects that might be given to such provision could be unpredictable, but would be likely to be potentially divisive.

Even more likely to cause constitutional difficulties would be a provision entitling the indigenous peoples to compensation for past wrongs, or conferring on them some sort of separate sovereignty. The purpose of a Constitution is to prescribe the structure and functions of the organ of government. It is a mistake to use a Constitution to attempt to enshrine community values or to dictate social policy, since values change, and any policy, although in favour today, may be varied or abandoned in the future; the mistake is the graver, if the policy sought to be imposed is one that gives preference to one social group over another.

A suggestion of a quite different kind is that the Constitution should include a recognition of local government. In Australia local government has successfully endured without constitutional recognition. To recognise its existence in the national Constitution might boost the self-esteem of some local councillors, but it would be likely to reduce the power of the States, for example, in dealing effectively with the corruption and inefficiency that sometimes occur in local government.

I have touched only on a few of the issues that may be raised when the People's Convention is held. My aim has been to suggest how significant the Constitution may possibly be for Australia's future, and how vigilant we should be to ensure that contemporary notions are not converted into binding constitutional rules.

I send best wishes to all members of the Society on this Australia Day.

Australia Day Message, 26 January, 1998

Perhaps the greatest challenge for Australia this year will be to bring about true reconciliation between the Aboriginal people and other Australians, and to prevent our society from being divided on racial issues.

No one of goodwill doubts that it is necessary to act justly to the Aboriginal people, as to all Australians, but one difficulty in meeting the demands which those who speak on behalf of the Aboriginal cause seem to make a condition of reconciliation is that, in many instances, those demands are not based on need or merit, but simply on race. This century has provided, and continues to provide, cautionary examples of the great evils that can result from racial conflict. To confer rights and privileges solely on the ground of race is to sow the seeds of conflict.

At present, two issues attract particular attention, but if these issues are resolved we may be sure that others will arise. The first, which concerns the so-called "stolen children", shows how emotion rather than reason dominates the debate. If it were not for the fact that it seems to be the fashion to demand apologies for iniquities long past, it would be almost beyond belief that the question, whether the Prime Minister of the Commonwealth should apologise for policies which neither his government nor its predecessors instituted, or had constitutional power to prevent, should be a serious political issue. And with all respect to those who genuinely think an apology is necessary, surely the discussion of this matter shows a lack of proportion.

No doubt the policy under which children of part-Aboriginal blood were removed from their parents was insensitive, and sometimes brutally administered, although it should be added that the policy was well-intentioned according to the standards of the times, and that some of the children taken into foster care owe their present success, and perhaps their lives, to that fact. During the time when this policy was in force, people of almost every race and colour were subjected throughout the world to the vilest of atrocities, and we cannot be sure that even today in Australia official brutalities do not occur. If an apology were appropriate, it would be an apology for the darker side of human nature.

The second current issue concerns the attempt to amend the *Native Title Act* – an ill conceived and defective statute which cries out for amendment. I do not attempt to consider whether the amendments proposed by the Government would, if passed, result in a reasonable compromise between the conflicting interests of all concerned, but there are some general observations I would venture to make.

It is argued that the race power, given by section 51 (xxvi) of the Constitution, can be exercised only to enact laws which are beneficial to the race concerned, at least to the Aboriginal race. I cannot understand how any political party which hopes to form a government could support such an interpretation. Not only would such a construction require the High Court to depart from its traditional roles, but it would also have the result that a law which had mistakenly conferred an inappropriate benefit on the Aboriginal people, and which was universally regarded as harmful and unsustainable, could never be repealed, unless perhaps some other benefit were conferred in its place.

The "right to negotiate", upon which the supporters of the Aboriginal cause place so much value is, of course, not a traditional right. It is difficult to discover any valid reason for its continuance. In general, if the rights of an individual are adversely affected, that person may be entitled to compensation or legal redress, but will have no right to negotiate before the adverse action is taken. Of course, the power to compel a miner or land-holder to negotiate before taking action that is perfectly lawful provides a means of extracting a price – sometimes a very high price – for the exercise of a legal right.

The oppression that may result is enhanced when the Aboriginal claimant need not

prove the existence of any interest before requiring negotiation, and need not have had any physical connection with the land in question.

Two statements, which if not hypocritical are at least misleading, are often made in support of the present position. It is argued that the pastoralist has no problem, since the High Court has said that his (or her) rights prevail if there is a conflict with native title. The problem is that no one knows what the rights of the pastoral lessee are until the Court has declared them. Also, it is said that the Aboriginal people want nothing more than the right to go on their traditional lands for the purposes of hunting, gathering and visiting sacred sights. In fact, some want money, and a lot of it.

It is a defect in the law that the question who is an Aboriginal is undefined. If a person with one Aboriginal grandmother and no other Aboriginal ancestors wishes to claim cultural affinity with the Aboriginal people, he or she is perfectly entitled to do so, but it does not follow that such a person should be entitled to the special benefits that are made available only to persons of Aboriginal race.

It may be too much to hope that the public in general, and the media in particular, will accept that Aboriginals, who undoubtedly have special needs, should have those needs met simply because they are Australians; and that two sections of society cannot be reconciled, that is, brought into friendly and harmonious relations one with the other, when one of those sections demands a special place and special privileges unrelated to need.

May I mention briefly another matter. The proponents of a republic now are facing the difficult questions that have to be resolved before a republican Constitution could be drawn – particularly, how should a President be appointed and dismissed, what powers should a President have, and whether those powers should be codified or justiciable, and what should be the position of the States.

The Honourable Richard McGarvie, QC, who recognised more clearly than most the disadvantages of the selection of a President either by popular election or by parliamentary choice, would place appointment and dismissal in the hands of a committee of eminent retirees. This proposal raises further questions, particularly in relation to dismissal. Is the committee to have a discretion? Must it afford natural justice to a President faced with dismissal? Must it act immediately, or within a reasonable time, or when it thinks fit? Can it act by a majority, and if so is the minority view to be made public? The answers to these questions would have to be made clear in the Constitution if this proposal were accepted.

1998 should be an interesting year. Best wishes to you all.

Australia Day Message, 26 January, 1999

The approach of the end of a millennium, and also of the hundred years during which Australia has been a federation, gives me the excuse to make some observations regarding some principles of government which seem to me basic, but which are not always appreciated or applied in practice.

The efficiency of any government depends of course, in part, on the capability of the officials performing public duties, but there are two principles which, it seems to me, must be observed if any system of government is to be truly efficient. These are, first, that those entrusted with power should be responsible for its exercise, and second, that the boundaries between the areas in which power is exercised should be clearly defined.

It is not only in a federation that these principles apply. They do, however, have particular importance in a federation. That is because experience has shown that federations tend to be unstable; they sometimes become converted into purely centralised states, but more often disintegrate into their component parts, particularly if the population of one of the states in a federation differs from that of the others in race, colour, religion, or ideology, as was the case in Central Africa and the Caribbean, and more recently in the USSR, Yugoslavia and Czechoslovakia. Even a developed nation like Canada trembles constantly on the verge of dissolution because of the Quebec situation.

The importance of these two principles is little understood in Australia. The power to levy taxes is increasingly divorced from the responsibility for applying the moneys raised by the taxes. The boundaries between State and Commonwealth legislative and executive power are so blurred that it may be said with truth that they are impossible to discern. The result is that in many fields – health and education are only two examples – a division of responsibility has resulted in increasing inefficiency. The risk to Australia is that it may become a federation only in name; the prospect of disintegration would be likely to arise only if separate sovereignty over part of the continent were granted to the Aboriginal or Islander people.

Efficiency of government has no necessary relation to the liberty of the individual, and to secure that liberty another condition seems essential – namely, that governmental power should be divided, or at least that no power should be free from checks that ensure that it is balanced in its exercise.

Checks of those kinds may be informal and may have no constitutional protection – the influence of apolitical public servants was in the past an important restraint on ill-advised governmental action, and the scrutiny of an independent media provides something of a check today.

However, a division of power which is constitutionally imposed is obviously of greater efficacy, and in this regard the Australian Constitution, like that of the United States of America, is well provided – the States, the Senate (in spite of the inconvenience the nature of its present composition sometimes causes), and the reserve powers of the Governor-General (although rarely exercised) all serve this end.

The existence of a federal system, and of a bicameral legislature, often seem to be regarded as a nuisance rather than as a benefit in Australia. One aim of some of those who wish to convert Australia to a republic is to weaken some of these restraints on centralised power.

A Bill of Rights is no substitute for a division of power in imposing restraints on the ill-advised exercise of power. Whereas a society that values moderation (as Australia has traditionally done) seeks to balance the rights of one individual against those of another, under a Bill of Rights supremacy is given to the particular rights favoured by prevailing ideology, causing in some cases absurdity and injustice.

I extend my best wishes to all on this Australia Day.

Australia Day Message, 26 January, 2000

Our Constitution has now endured for a century – not many others have lasted so long – and Australia remains a constitutional monarchy. The system of constitutional monarchy has served us well and I can see no reason to change it, but even those who think that Australia should become a republic should be grateful that the referendum was defeated. The proposed amendments were ill-considered and defective, even though some distinguished commentators, who initially pronounced the republican model to be flawed, ultimately supported it.

Unfortunately the campaign leading to the referendum has deepened divisions on this issue. It was surprising to read, soon after the result of the referendum, that the Leader of the Opposition in Western Australia was working on a new republican model. If the Constitution is to be changed to a republican form, the necessary amendments should not be framed privately by a cabal, but should be considered carefully by a conference whose members are chosen, not for their populist appeal, but for their knowledge and experience of politics, the law and public affairs.

Although the unnecessary division caused by the referendum is behind us, familiar constitutional problems remain. We are likely to see an increase in the use of the external affairs power, which is one of the causes of the gross imbalance in our federal system. The large number of treaty obligations which have been entered into in the past – many of them unnecessarily – not only gives a wide scope for the use of the external affairs power, but also enables the organisations of the United Nations to interfere inappropriately in our domestic affairs. This latter question will be the subject of discussion in a special meeting of the Society to be held in Sydney on 26 February (preceded by a dinner on 25 February). I hope that many of you can attend.

A matter that is fundamental to any system of representative democracy is the manner in which the candidates for election are selected. Unfortunately it appears that on both sides of politics the selection of a candidate is likely to be affected by branch stacking and factional deals, thus tainting the process at its source. The political parties can themselves put an end to these practices but seem unable to do so. It might be thought that a system of primaries such as are held in the United States would provide more balance, although the cost might outweigh the benefits. The question warrants consideration by the legislatures.

Some States appear to be considering the prospect of constitutional reform. Unfortunately, this is likely to mean that there will be advocacy for the abolition of Upper Houses and for the introduction of a Bill of Rights. The past experience of Queensland, and the lengths to which New Zealand has gone to attempt to provide balance in the electoral system in the absence of an Upper House, should show that a second chamber provides a necessary check on the despotic power which a unicameral legislature can experience at times. If it is impossible for governments to resist the fashionable clamour for a Bill of Rights, at least it is to be hoped that no attempt is made to entrench constitutionally a Bill of Rights, thus giving to the judiciary a power greater than that of Parliament to decide matters of policy and in consequence politicising the judiciary.

The relationship between the Aboriginal people and other members of society remains a seriously unsettling issue. No person of goodwill could doubt that every effort should be made to improve the situation of those indigenous persons who are in a position of grave disadvantage. Why, as a matter of policy, we should give considerable benefits to persons, not because they are disadvantaged, but simply because they are (or even claim to be) of Aboriginal descent, is a question which future generations may dismiss as one of the inexplicable vagaries of the past. Reconciliation between people of Aboriginal descent and the rest of Australian society will have been achieved only when the members of each group treat

members of the other as they would treat their own, without consciousness of differences because of race and uninfluenced by old grievances and animosities.

I offer my best wishes to you all on this Australia Day.

Appendix II
Contributors

1. Addresses

The Hon Bill HASSELL, AM was educated at a number of state schools in Western Australia, at Hale School, and at the Universities of WA and Reading (UK). While practising in Perth as a barrister and solicitor (1968-80), he became in 1977 the Liberal Member for Cottesloe in the WA Legislative Assembly, from which he retired in 1990. Having served as Minister for Police, Traffic and Community Welfare (1980-82), Minister for Police and Prisons (1982-83) and Minister for Employment (1983), he was Leader of the Opposition during 1984-86. During 1994-97 he was Agent-General for Western Australia in Britain and Europe. He is now the proprietor of the consultancy firm Hassell Advisory Services, serves on a number of advisory bodies and is Honorary Consul for the Federal Republic of Germany.

Robert O'CONNOR, QC was educated at Aquinas College, Perth and the Australian National University, Canberra (LLB, 1974). After careers in Perth and Canberra in the Australian Tax Office (1962-1977) and as a solicitor and partner with Malleson Stephen Jaques in Perth (1977-1984), he has been at the Perth Bar for the last 20 years (QC, 1989). He is a member of the Board of the Constitutional Centre of W.A.

2. Conference Contributors

Professor Bob CATLEY was educated at The Cooper's Company School, London, the London School of Economics (BScEcon, 1964), and the Australian National University (PhD, 1968). After teaching International Politics at Adelaide University (1968-1990), he became, in 1990, the Labor Member for Adelaide in the House of Representatives. After his defeat in 1993, he returned to academic life, first at the University of South Australia and then at Adelaide University (1994-98), before being appointed to the Chair of Political Studies at the University of Otago, New Zealand. After occupying the new Chair of Governance in the School of Business at the University of the Northern Territory, Darwin in 2002, he has recently taken up duty as Head of School at the Central Coast School of Business of the University of Newcastle. Among numerous other publications is his book, *Waltzing with Matilda: Should New Zealand Join Australia?* (2001).

Dr Michael CONNOR was educated at Queenscliff and Geelong High Schools and began work in bookselling before going overseas, where he worked in Sadler's Wells Theatre, London and as Director of Studies for an English language teaching school in Algeria. Returning to Australia in 1981, he again worked in bookselling before resuming his education, first at James Cook University, Townsville (BA Hons, 1997) and then, on an Australian Government Graduate Scholarship, at the University of Tasmania (PhD, 2002). A student of Australian colonial history, he has recently edited (2003) a collection of stories, *Pig Bites Baby!* from Australia's first newspaper, *The Sydney Gazette*.

Professor Greg CRAVEN was educated at St Kevin's College, Toorak and the University of Melbourne (BA, 1980; LLB, 1981; LLM, 1984). He taught at Monash University (1982-84) and was Director of Research for the Legal and Constitutional Committee of the Victorian Parliament (1985-87). After serving for three years (1992-95) as Crown Counsel to the then Attorney-General for Victoria, he returned to his previous post of Associate Professor and

Reader in Law at the University of Melbourne, before being appointed (1996) as Professor of Law at Notre Dame University, Fremantle. He specialises in constitutional law, and has written and edited a number of books in that area, including *Secession: The Ultimate States' Right* (1986) and *Australian Federation: Towards the Second Century* (ed.) (1991). As from the beginning of 2004 he has taken up a new Chair of Government and Constitutional Law at Curtin University.

Harry EVANS was educated at Lithgow High School and the University of Sydney (BA Hons, 1967). After a brief period in the Parliamentary Library, he has served on the staff of the Senate since 1968. This has included serving as Secretary to a number of major Senate Committees, such as the Regulations and Ordinances Committee and the Select Committees on the Conduct of a Judge and Allegations Concerning a Judge. After periods as Clerk Assistant (1983-87) and Deputy Clerk (1987-88), he has been Clerk of the Senate since 1988. He is the author of numerous articles on parliamentary and constitutional matters, as well as editing the 7th edition of Odgers' *Australian Senate Practice* .

Ray EVANS was educated at Melbourne High School and the University of Melbourne (B Eng Sc, 1960; M Eng Sc, 1975). He worked as an engineer with the State Electricity Commission of Victoria (1961-68) and then lectured in Engineering, first at the Gordon Institute of Technology and then at Deakin University (1976-82), becoming Deputy Dean of its School of Engineering. In 1982 he joined Western Mining Corporation (now WMC), and worked there until 2002 as executive assistant to its Chief Executive Officer, Mr Hugh Morgan. In 1971 he was a founding sponsor of the Australian Council for Educational Standards, and foundation editor (1973-75) of its journal. He was one of the founders of The H R Nicholls Society in 1985 (President since 1989), and also one of the founders more recently of the Lavoisier Group. He is currently Treasurer of The Samuel Griffith Society.

Alex GARDNER was educated at Guildford Grammar School, at the Australian National University (BA Hons, 1980; LLB Hons, 1983) and the University of British Columbia, Vancouver (LLM, 1987). After briefly practising law in Melbourne he was appointed in 1988 as a lecturer in the Law School of the University of Western Australia, where he is now a senior lecturer teaching constitutional law and resources law. He has been actively engaged in environmental legal matters as a consultant to community groups, Government agencies and private firms. He is the author of numerous articles in professional journals and a contributor to several books.

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 has been Chairman of the Australian Tax Research Foundation. In 1992 he became, and remains, the founding President of The Samuel Griffith Society.

Associate Professor Malcolm MACKERRAS was educated at St Aloysius College, Milson's Point and Sydney Grammar School. While employed by BHP (1957-60) he studied at night for his B Ec (1962) at the University of Sydney. After periods as research officer for the federal secretariat of the Liberal Party (1960-67), ministerial assistant (1967) and economist with the

Chamber of Manufactures (1968-70), he moved into academia, initially at the Australian National University (1970-73), then at the Royal Military College, Duntroon (1974-86). Since 1987 he has taught in the school of politics at the Australian Defence Force Academy. Australia's leading psephologist, he is the author of numerous books and articles both in professional journals and the daily press.

Associate Professor Gregory MELLEUISH was educated at Woy Woy High School and at the University of Sydney (BA Hons, 1975; MA Hons, 1981) and Macquarie University (PhD, 1992). He has taught at the Universities of Melbourne and Queensland and is currently Head of the School of History and Politics at the University of Wollongong. A specialist in Australian political ideas and intellectual history, he is the author of *Cultural Liberalism in Australia* (1995), *The Packaging of Australia* (1998), and *A Short History of Australian Liberalism* (2001). He also edited *John West's Union Among the Colonies* (2001).

Sir David SMITH, KCVO, AO was educated at Scotch College, Melbourne and at Melbourne and the Australian National Universities (BA, 1967). After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. He is now a visiting Scholar in the Faculty of Law of the Australian National University. In February, 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Referendum.

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, DC (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. In 1996-97 he served as a member of the Defence Efficiency Review, and in 1999 he was a member of the Victorian Committee for the No Republic Campaign. A principal founder of The Samuel Griffith Society, he has served on its Board of Management since its inception in 1992.