Upholding the Australian Constitution Volume Seventeen

Proceedings of the Seventeenth Conference of The Samuel Griffith Society

Greenmount Beach Resort, Hill Street, Coolangatta

Table of Contents

Foreword
John Stone

Dinner Address
Hon Chief Justice Paul de Jersey, AC
Evolution of the Judicial Function: Undesirable Blurring?

Introductory Remarks
John Stone

Chapter One
Kevin Lindeberg
The Heiner Affair

Chapter Two
Professor Suri Ratnapala
Constitutional Vandalism under Green Cover

Chapter Three
Bruce Grundy
The Missing Constitutional Ingredient: An Upper House

Chapter Four
John Nethercote
Senate Vacancies: Casual or Contrived?

Chapter Five
Sir David Smith, KCVO, AO
The Governor-General is our Head of State

Chapter Six
Professor Andrew Fraser
Monarchs and Miracles

Chapter Seven
Dr John Forbes
Native Title Today

Chapter Eight
Bob Bottom, OAM
Frauding the Vote in Queensland

Chapter Nine
Bryan Pape
The Use and Abuse of the Commonwealth Finance Power

Chapter Ten
Dr Dominic Katter
Australia's International Legal Obligations: Maritime Zones and Christmas Island

Chapter Eleven
Professor Gregory Rose
The United Nations as a Source of International Legal Authority

Appendix I
John Stone
Tribute to the late Sir Harry Gibbs

Appendix II
Rt Hon Sir Harry Gibbs, GCMG, AC, KBE
Australia Day Messages, 2001-2005

Appendix III
Contributors

Foreword

John Stone

Important though the periodic Conferences of The Samuel Griffith Society are, the Proceedings of our 17th Conference, held at Coolangatta on 8-10 April last, which are recorded in this volume of our series *Upholding the Australian Constitution*, pale into insignificance compared with the subsequent death of our President, the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE.

I shall not repeat here what I have said in Appendix I, *Tribute to the late Sir Harry Gibbs*, other than to reiterate the respect and affection with which Sir Harry was regarded by all our members, and the sense of tragic loss with which his death has been greeted. *Requiescat in pace.*

As this Foreword is being written, the federal Parliament has just adjourned after the first fortnightly sitting of its Autumn Session. The new Senate, as from 1 July, has been sworn in, and the Canberra press gallery has been hard at work attempting to deprive the government of its Upper House majority by inducing one or other Coalition Senators to defect from key elements of the legislative program.

How successful the press gallery (which now clearly regards itself as, in effect, the Opposition – the other one having, so to speak, gone missing) will be in these endeavours, remains to be seen. In its first test (the sale of the government's remaining shareholding in Telstra), it seems to have been defeated – although even that still remains uncertain.

Be that as it may: Telstra is one thing, the government's proposed industrial relations legislation is another, and one which touches, in one major respect, upon the interests of this Society. I refer, of course, to the government's proclaimed intention to rest its new legislation upon the corporations power of the Constitution. That power (section 51(xx)) endows the federal Parliament with the power "to make laws for the peace, order and good government of the Commonwealth with respect to: (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

Some earlier High Court decisions notwithstanding, it is not clear to me (nor, I suggest, to any plain man's reading of them) how those words would authorise the federal Parliament to make laws purporting to "take over" the industrial relations functions of the States. Nor, as it happens, do I believe it is necessary for the government, in seeking to reform our industrial relations system, to do so.

Lest these comments be misunderstood, I should make it clear that I yield to none in my support for the government's reform objectives in this area. I was, after all, one of four people who, in 1986, founded the H R Nicholls Society to promote debate about our industrial relations system, with a view to its wholesale reform. I therefore fully endorse the government's underlying objectives. As it has argued, those objectives are central not only to furthering the cause of economic reform (and hence to raising national productivity and living standards), but also to ameliorating the position of those many Australians who, today, are locked out of employment by the operation of our present dysfunctional industrial relations system. Nevertheless, I question the government's proposed reliance on a further perversion of our federal

Constitution to achieve those aims. In short, its excellent ends do not justify these dubious means.

As remarked earlier, it is not, in my view, necessary in any case to "take over" the States' industrial relations powers in order to achieve the government's objectives. If, as it argues – and I agree – its proposed new industrial relations system will bring benefits to both employers and employees, then we might confidently expect that, over time, the States' benighted award systems, and their associated legalistic paraphernalia, will simply wither on the vine as a result of competitive forces. Nor can it be ruled out that, even before that happens, some at least of the State governments will follow the example of Victoria and cede their powers in this field to the Commonwealth under the provisions of section 51(xxxvii).

However that may be, there is a second and more important reason for questioning the legislative path on which the government appears to be embarked. That is because I greatly fear that, having laboured in the parliamentary vineyard to have its legislation passed (and having made various undesirable concessions to its opponents in the process), the government may then find that legislation, or large parts of it, overturned by a High Court which, at long last, shows signs of having regard to the *federal* nature of our Constitution.

As to all that, we shall see. What is clear from all this and other related developments is that, to quote Sir Harry Gibbs in his last message to the Society:

> "The cause of federalism needs defenders, since members of all the main political parties in Canberra seem determined to encroach on functions which were obviously intended to belong to the States. It may be true that not all State governments are models of efficiency, but they will not be improved by the Commonwealth's duplication [or, he might have added, usurpation] of their functions; on the contrary……..".

Those words were conveyed to the opening dinner of the Coolangatta Conference which, for health reasons, Sir Harry was unable to attend (see the Introductory Remarks on the following morning at page xxix). Barely had they been uttered on 8 April, and our Conference concluded on 10 April, before the Prime Minister himself, in a speech on 11 April, *Reflections on Australian Federalism*, underlined their truth.

In an address replete with outrageous claims (most blatantly, "with the GST, my government delivered the most important federalist breakthrough since the Commonwealth took over income taxing powers during World War II") and straw men ("I have never been one to genuflect uncritically at the altar of States' rights"), Mr Howard revealed the full extent to which Canberra now regards it as within its powers to control virtually everything within our nation. My personal regard for the Prime Minister notwithstanding, this was nothing short of deplorable (as, in *The Australian* on 18 April, I pointed out at greater length than would now be appropriate here).

Professor Dean Jaensch, of Flinders University, paid the Society a compliment last November in observing, when "launching" Volume 16 of our Proceedings in Adelaide, that our Conferences were nothing if not "eclectic" in both topics and speakers. The Coolangatta Conference fully lived up to Professor Jaensch's encomium.

It began with three papers, plus a dinner address on Saturday evening from

Bob Bottom, under the general rubric "The constitutional state of Queensland". To say that each of these papers cast Queensland in a deplorable constitutional light would be an understatement. That by Professor Suri Ratnapala, *Constitutional Vandalism under Green Cover*, is redolent of a (single Chamber) Parliament that has lost all touch with what most Australians would regard as the rule of law.

If anything, the paper by Mr Kevin Lindeberg, *The Heiner Affair*, goes even further. It tells the sorry story of that episode, beginning with the Goss Government's action in 1990, clearly committing an offence under the Criminal Code of Queensland (drawn up originally by Sir Samuel Griffith, incidentally) by ordering the destruction of official records which it had already been informed were likely to be required for the purpose of legal proceedings.

The list of miscreants in this affair is almost endless: the Cabinet Ministers of the Goss Government itself, Ministers (or at least the Premiers and their Attorneys-General) of all subsequent governments to this time, the Criminal Justice Commission, its latter-day successor the Crime and Misconduct Commission, the relevant public service personnel within the Justice Department – and the list goes on. Even the Crown, in the form of the State Governor, appears to have failed in its duty up to this time.

I defy any disinterested observer, reading this paper, to come away from doing so with anything but a sinking heart as concerns the rule of law in the conduct of affairs in a great State of the Commonwealth (and one for which, next to my own State of Western Australia, I retain the fondest regard).

Mr Lindeberg's paper, as I say, speaks for itself. However, perhaps I may add a footnote. After the Coolangatta Conference I sent Sir Harry Gibbs, at his request, copies of all the papers delivered there. After having read Mr Lindeberg's paper Sir Harry promptly wrote, on 15 April, 2005 a private letter to him. I have seen a copy of that letter, and in view of Sir Harry's subsequent death I now feel free (as, no doubt, will Mr Lindeberg) to reveal its contents so far as they relate to this matter. Sir Harry wrote:

> "I have read your paper with great interest. There can now be no doubt that the advice given to the Queensland Government and the view accepted by the Criminal Justice Commission, that s.129 of the Queensland Criminal Code, read in the light of the definition of "Judicial Proceedings" in s.119 of the Code, applies only when the Judicial Proceeding has actually commenced, was erroneous. That was authoritatively recognized in 2004 by the decision of the Queensland Court of Appeal in *R v. Ensbey*. It follows that if the evidence establishes beyond doubt that the Queensland Cabinet on the 5th March, 1990 knew that legal proceedings were likely, and that the material which it ordered to be shredded might be required in evidence in those proceedings, there is at least a *prima facie* case that those members of the Cabinet who ordered the shredding were in breach of the law".

And still the Queensland Government refuses to take any action in this matter.

While it always verges on the invidious to single out particular papers in the Foreword, I must nevertheless mention two others. First, I refer to Dr John Forbes's paper at Chapter Seven, *Native Title Today*, wherein is set out the doleful story of the Brennan-Deane title from its invention by the Mason High Court in 1992 until the present day. With characteristic wit, urbanity and above all command of his material, Dr Forbes has done any student of this shameful

episode yet another service.

My second reference is to the important paper, *The Use and Abuse of the Commonwealth Finance Power*, by Mr Brian Pape, which appears here as Chapter Nine. In his well-researched and hard-hitting exposé of the constitutional arrogance of federal governments up to and including the present one, Mr Pape not only questions the constitutional validity of a significant body of Commonwealth legislation over the years, but also raises the basic question of how (or even whether) a concerned Australian citizen can obtain standing to raise these issues by way of High Court challenge.

It is ironic, to say the least, that Coalition parties which deplore, quite rightly, the actions of the Whitlam Government, should in this regard prove to be sedulously emulating the constitutional impropriety of that administration. As a commentary upon all that, Mr Pape's paper cannot be too highly recommended.

Like its sixteen predecessors, Volume 17 in this series is once more offered in the hope that it will contribute to debate about our Constitution.

Dinner Address
Evolution of the Judicial Function: Undesirable Blurring?

Hon Chief Justice Paul de Jersey, AC

I am honoured to have the opportunity to deliver this address. Sir Harry asked me to speak on an aspect of the Commonwealth Constitution, and I will do so. That being my direction, I must at once say that I am relieved, on a relaxed Friday evening on the Gold Coast, to be addressing at Coolangatta the members of The Samuel Griffith Society, and not any *other* gathering!

I applaud your interest in the development and application of our constitutional law. That you will listen critically to my views is a challenge I accept. I hope however you may accept that, as Griffith's successor in office 14 down the line, notwithstanding my enduring respect for that great man of truly epic achievement, I will not this evening pretend to be, in the words of Alfred Deakin, "lean, ascetic, cold, clear, collected and acidulated". Well, at least I won't be ascetic, cold or acidulated: it is after all a balmy Gold Coast evening and we are enjoying a pleasant dinner.

I wish to speak of some evolution in the role of the courts of law in our democracy. My thesis is that there has over recent decades been departure from the assumption that courts exist for the sole purpose of the judicial determination of cases within the courtroom: a departure which has arisen through actions of the Executive, in requiring from courts what are essentially administrative rulings; and, more subtly, through various approaches of courts themselves and individual Judges, to which I will come. I will ultimately mention the issue whether the proliferation of tribunals, at the State level especially, may possibly be a consequence of some perceived blurring of the judicial function.

My theme has relevance to this conference because of the constraints imposed on State legislatures, by Chapter III of the Commonwealth Constitution, in relation to the structure and jurisdiction of State courts. A number of cases have emphasized the primacy of the strictly judicial function, in the context of legislative and Executive attempts to embellish it, for example by requiring a Judge to perform an administrative role. *Grollo v. Palmer* affirmed that no non-judicial function can be conferred which is incompatible with the performance of the judicial function.[1] The High Court spoke there of maintaining the "integrity" and "legitimacy" of the judicial arm. Two of the Justices adopted the United States Supreme Court's reference to courts' "reputation for impartiality and non-partisanship", warning that that reputation "may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action".[2]

On two comparatively recent occasions, the High Court has stopped governments from infringing in that way upon the institutional integrity of the courts. The first case was *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*.[3] The Minister had, under legislation, nominated a Federal Court Judge to enquire into whether certain land was a significant Aboriginal area deserving of protection, and to report to the Minister. The Court held that the function of reporting to the Minister was incompatible with the judicial

function under Chapter III: discharging that function would place the Judge into the echelons of administration, with the Judge effectively a ministerial adviser.

The second instance was the celebrated case of *Kable v. The Director of Public Prosecutions for the State of New South* Wales,[4] where the High Court struck down New South Wales legislation empowering the Supreme Court of that State to order the detention of a specific, named person, beyond the expiration of a previously imposed finite term of imprisonment, in order to protect the community. McHugh J described it as *ad hominem* legislation. The majority view was that the exercise of that jurisdiction would be incompatible with the integrity, independence and impartiality of the Supreme Court, as a court in which federal jurisdiction also had been invested under Part III. The vice of the legislation was that it was directed to Mr Kable alone, and contemplated the court's proceeding very differently from the way in which it would ordinarily proceed. It was the extreme nature of that legislation which led to its being invalidated. McHugh J said that it made the Supreme Court:

> ".....the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process far removed from the judicial process that is ordinarily involved when a court is asked to imprison a person".[5]

Chapter III leaves State legislatures with considerable scope in relation to the non-federal jurisdiction of their courts, although in other extreme cases, jurisdiction would be wanting. McHugh J went to the limit, and interestingly instanced legislation purporting to appoint the Chief Justice as a member of the Cabinet, or a law requiring the Supreme Court to determine how much of the State budget should be spent on child welfare. Let this be clear: I have no such pretension; and my court has no such inclination.

While at the Bar I appeared for the State of Queensland in the High Court, with I should concede but patchy success, over a phase in which Queensland saw itself as the victim of Commonwealth expansionism. It was deliciously ironic for me to witness the High Court in *Kable* interpreting the Constitution so as, in effect, to buttress the Supreme Courts of the *States* against legislative intrusion into their traditional jurisdictions.

Notwithstanding *Kable*, State legislatures plainly remain alive to the utility of invoking the reputations of their Supreme Courts to lend authority to what could be described broadly as administrative decisions in controversial areas. In recent decades, legislation has broadened the jurisdiction of State Judges to authorize covert police operations. *Grollo* confirms the legitimacy of such authority.

Politically, it is obviously attractive to have those potentially controversial decisions made by Supreme Court Judges, and in fairness, I note that governments have been ready to ensure that Judges, acting administratively, have the necessary immunity.[6] But as anti-terrorism legislation, especially, will increase the frequency of such interventions, one may fairly ask whether there is risk of eroding the "public confidence" in the judicial process, rightly and so often proclaimed as central to the legitimacy of the courts of law. One sees in W*ilson* and *Kable* frequent reference to the need for the courts to be seen to be "acting openly, impartially and in accordance with fair and proper procedures".[7] In issuing those warrants, Judges invariably act behind closed doors and *ex parte*, a process most Judges would not relish.

As every fair-minded observer would immediately acknowledge, the judiciary is absolutely the most accountable of any of the arms of government: almost invariably conducting its business in open court; regularly subjected to the glare of intense publicity, not always kind; and predictably moderate and most courteously restrained in any response.

I move from *Kable* to *Fardon v Attorney-General (Qld)*,[8] where the High Court last year upheld Queensland legislation which endows the Supreme Court with jurisdiction to order the indefinite detention of a prisoner, beyond the expiration of the finite term to which he has been sentenced, on the ground he is a serious danger to the community. That legislation was drafted carefully – in characteristically Queensland style, not in relation to any named person, and by contrast with the *Kable* legislation, so as to avoid incompatibility with Chapter III. It was held not substantially to impair the Supreme Court's "institutional integrity", or to jeopardize the court's role as a repository of federal jurisdiction. As put by McHugh J:

> "…..nothing in the Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law".[9]

The jurisdiction conferred by this legislation remains controversial, however. Undoubtedly it is exercised judicially. Equally, the Executive will be relieved of an area of necessary decision-making which it may otherwise find immensely troublesome.

My point this evening is not to criticize governments for casting these potentially controversial jurisdictions on to courts. Governments have power to do so, and courts have an undoubted reputation for the independent discharge of all of their jurisdictions. It is unsurprising governments see courts as attractive decision makers in those areas. My point is simply to urge the need for circumspection. Governments must be astute to the inherent fragility of public confidence, and also, to the pivotal importance to society of a judiciary considered "legitimate". Governments must be careful not to embellish the core judicial function in such a way as to blur it, and thereby erode the confidence on which its authority depends. I suggest Sir Samuel Griffith would have agreed. As Sir Harry Gibbs has observed:

> "Griffith was resolute in resisting any encroachment on the jurisdiction or power of the Court, whether from above or below".[10]

I make it clear that my reservation does not extend to the jurisdiction judicially to review administrative decision-making. If carried out within the strictures delineated by the legislation, which focuses on lawfulness not merit, the discharge of that jurisdiction should enhance, not diminish, perceptions of the authority of courts, in their role as custodians of legal rights as between citizen and State – and that remains so, I believe, notwithstanding the wounding suffered by the Federal Court through its own exercise of that jurisdiction. Fortunately we have not in this country experienced the antipathy between Parliament and courts such as, in post-revolution France, provoked the decree forbidding courts from exercising jurisdiction in administrative matters. The *Conseil d'État* is a highly effective and respected institution, but here we have no need for such a body.

I have spoken of the need for care as governments invest courts of law with administrative functions, albeit legitimately notwithstanding Chapter III. But contemporary courts and Judges must themselves be careful to avoid any blurring of that essentially judicial function, and some things have occurred in recent years which may warrant reflection.

This issue arose dramatically for me in 2000, when the then Chief Magistrate of this State, sitting with other Magistrates in a courtroom, formally apologized to indigenous people for what were said to be past injustices. I do not raise this to reopen old wounds, but as an effective illustration of my point. The "apology" involved the presentation of a "deed of apology and commitment" from the Magistrates Court. Having earlier informed the Chief Magistrate of my opposition to what she then proposed doing, and in the face of her determination nevertheless to proceed, I was constrained eventually to issue a media release, which was published, in which I made these observations:

> "The core judicial function is to determine cases in court. Expressing an apology for past treatment of Aborigines and Torres Strait Islander people, or any particular section of the community, falls outside that judicial function. The obligation of the courts and judicial officers is to render justice according to law to all people, in the inclusive sense. It is critical, to preserve the necessary perception of independence and impartiality, that judicial officers not be seen as acknowledging one section of the community more than others.
>
> "There is also the risk that such an initiative may be interpreted as an attempt to put pressure on the executive government, on a matter for which the executive, not the judiciary, carries the relevant public responsibility……..It is not part of the role of the courts to venture publicly into contentious policy areas. Doing so could imperil the precious heritage of absolute judicial neutrality in political controversy".

Though substantially criticized in some quarters, I remain of those views, expressed I should say with the substantial support of the then Judges of the Supreme Court. That was in my view an instance of a court, or a body of judicial officers, moving inappropriately and unhelpfully beyond the judicial charter. However one might *personally* share those sentiments, it was completely inappropriate they be presented as an expression of *judicial* view.

Individual Judges are sometimes criticized for their public statements on matters of essentially Executive concern, even sometimes in areas which have nothing at all to do with the workings of courts. It is not my intention to develop that this evening, or to enter generally into the debate about so-called "judicial activism". But obviously the public could find bewildering the concept of a Judge more widely published as social commentator than as courtroom adjudicator; or a Judge lapsing from applying the statute and common law into realms of social engineering. By experience and disposition, Judges are astute to those dangers.

There are two other particular avenues of departure from the strictly judicial core function which should, I suggest, be approached with care.

The first is involvement of Judges in Commissions of Inquiry. Generally speaking this will not create conflict with Chapter III, and so much was confirmed in *Wilson's Case*.[11] Nevertheless the issue can be of concern, in the general context I have been advancing. For many years – indeed since 1987 – the

Judges of the Supreme Court of Queensland have proceeded on the basis it would be inappropriate for a serving Judge to accept a position to head a Commission of Inquiry conducted under the auspices of executive government. The rationale for that view has been the recognition that the core function of the judiciary is the determination of matters in court, by the delivery of judgments enforceable by process of law; and the fundamental importance of preserving the confidence of the public in the judiciary's discharge of that function, which could be impaired were Judges to be unnecessarily involved in the political controversy which often surrounds such inquiries. A similar approach has for a long time been taken by the Supreme Court of Victoria.

The Fitzgerald Inquiry in this State illustrates this concern. As it turned out, the subject matter of the inquiry was highly contentious and controversial, and the findings undoubtedly contributed to a change of State government. I am relieved responsibility for that non-judicial exercise was not cast upon a serving Judge, for two reasons: the strictly judicial role was thereby not blurred or compromised, in the context of public perception; and the prospect of reasonable continuing relations between the Executive and judicial arms of government was not unnecessarily jeopardised.

By way of contrast, in the exercise of its strictly judicial function, the Supreme Court of Queensland in recent decades made rulings on the validity of electoral results – with substantial public ramification. Yet that did not erode public confidence in the courts, which the people accepted was simply doing what they were constitutionally charged to do.

When I speak of Executive/judicial relations, of course the separation of powers and the independence of the non-elected judiciary spawn tensions. But if relations can be comfortable, the public is the beneficiary, and I have found a substantial part of my role as Chief Justice is seeking responsibly to manage that interface.

Secondly, I mention the feature of Judges or courts assisting executive government with commentary on draft legislation which may affect the operation and jurisdiction of the court. In 1991, the *Supreme Court of Queensland Act* established a body called the Litigation Reform Commission, comprising the President and Judges of Appeal, and other appointees. That Commission was charged with making reports and recommendations with respect to the operation of the courts, which were directed to the Executive, and which inevitably involved consultation with the Executive as to various proposals. The body no longer exists, but it has been the practice of the government to provide the court with drafts of legislation which may have an impact on the workings and jurisdiction of the courts.

My practice has been to seek the assistance of other Judges prior to formulating any comment, and we are careful not to intrude into areas of Executive policy. The procedure has worked well, and the court has not been discomforted by having to pass on the validity or interpretation of legislation on which I have previously offered views. This is an area where some compromise has I believe been justified, in the public interest, though one must of course approach the matter with care.

In summary, executive governments, and courts and Judges themselves, must, in these times, be careful to ensure that the clear delineation of the judicial function not become blurred or distorted. I raised at the outset whether the proliferation of tribunals, especially in the States, might not reflect some

change in Executive regard for the courts of law, perhaps fed by the evolution of the judicial role of which I have spoken this evening. I turn to the issue raised at the start.

Is it really the case that sophisticated modern society, and the intricacy of the problems it spawns, have warranted the establishment of so many specialist tribunals? I am unconvinced that the capacity of courts and Judges, demonstrated over many decades, to embrace effectively a wide-range of decision-making, has waned; or that the public would be more confident in having contentious issues on sensitive subjects determined by tribunals rather than by courts. And it is moot whether other features presented as being the advantages of tribunals are really being achieved: relative informality, greater expedition and comparative lack of expense.

I am, I suppose not surprisingly, an advocate of the enormous benefit to be drawn by the public from their courts of law. But as I have suggested, and a number of times this evening, the courts themselves, and the governments of their jurisdictions, must be careful to preserve the integrity of that fundamental judicial process, and thereby maintain the public confidence on which the ultimate authority of the judicial determination depends.

I will stop there, lest I come to emulate one of Sir Samuel Griffith's very few, *less* than effective public performances – his loss of the motion to censure Queensland Premier Sir Thomas McIlwraith, following a parliamentary session in which he, Griffith, is said to have spoken continuously for ... 7 hours.[12]

Endnotes:

1. *Grollo v. Palmer* (1995) 184 CLR 348, 364-5.
2. *Mistretta v. US* (1989) 488 US 361, 407.
3. *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
4. *Kable v. The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51.
5. *Ibid.*, p. 122.
6. Cf. *Supreme Court of Queensland Act* 1991, s. 27AA.
7. E.g., *Wilson, loc. cit.*, p. 22.
8. *Fardon v. Attorney-General (Qld)* (2004) 78 ALJR 1519.
9. *Ibid.*, p. 1528.
10. White and Rahemtula (eds), *Queensland Judges on the High Court* (2003), note 23.
11. *Loc. cit.*, p. 17.
12. R B Joyce, *Australian Dictionary of Biography*, Melbourne University Press, Volume 9 (1891-1939), pp. 112-119.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the seventeenth Conference of The Samuel Griffith Society, and our third in Queensland, where we were honoured last night by the presence of the Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey. Not merely were we honoured by his presence, but those of you who attended last night's dinner were also privileged to hear His Honour's address to the Society, *Evolution of the Judicial Function: Undesirable Blurring*? Chief Justice de Jersey's remarks on that "undesirable blurring" will have struck many a chord in the minds of all those who heard him.

Having mentioned the presence of one Chief Justice at last night's dinner, I should also mention, for those who were not here then, the absence of another Chief Justice, our own greatly respected President, the Right Honourable Sir Harry Gibbs. Despite what was printed in the Conference program as originally sent to members, Sir Harry has been forced, on medical advice, to cancel his 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 from Sir Harry:

> "I am grateful to Sir Bruce Watson for delivering these remarks on my behalf.
>
> "I greatly regret that I am unable to be present with you during this Conference. My health unfortunately does not permit it.
>
> "Our Conferences are the central activity of the Society. They provide the occasion for the delivery of papers which, as you know, are subsequently published in our series *Upholding the Australian Constitution*. Articles once published provide a permanent source of knowledge and ideas and can have an enduring influence on opinion. One hopes that this will be the case with the papers delivered at our Conferences.
>
> "The cause of Federalism needs defenders, since members of all the main political parties in Canberra seem determined to encroach on functions which were obviously intended to belong to the States. It may be true that not all State governments are models of efficiency, but they will not be improved by the Commonwealth's duplication of their functions; on the contrary, the results of such duplication are likely to include more bureaucratic interference and less responsibility. In addition to questions involving Federalism, papers delivered, and to be delivered, at our Conferences deal with matters of public interest and deserve a wide circulation.
>
> "Also, the Conferences provide a valuable opportunity for members of the Society to renew their acquaintance with each other, or to make new acquaintances, particularly since members come from all States. I shall of course read the papers given at the Conference, but shall miss the opportunity to hear the discussion that the papers generate and to meet, in some cases for the first time, the speakers and those other members of the Society who are present.
>
> "There are two more personal reasons for my regret at not being at Greenmount this weekend. First, it is no reflection on any other State – they

all have charms – to say that I have an especially warm regard for Queensland, which was what now seems to be called my State of Origin, and where I spent many happy years. Also, as it happens, I knew Greenmount well, when it was very different from what it has now become. Secondly, and more importantly, I would very much have wished to be present to hear the address by the Chief Justice of Queensland, who honours us with his presence tonight.

"Please accept my apologies for my absence. I offer my best wishes for a successful Conference".

Sir Harry's remarks about Queensland remind me also to say what a pleasure it is for both Nancy and myself to return, if only briefly, to the State in which we were privileged, for a few years, to become "honorary Queenslanders". They were years on which we both look back with great fondness.

As Sir Harry truly remarked, today "the cause of Federalism needs defenders". Few things have been more dismaying during the six months since last year's federal election than the swelling tide of ignorant centralism rushing out of Canberra, whether it be in the field of health, education, infrastructure, rorts for rural roads, or whatever. Even the Prime Minister has not been immune from this disease, while the immature mouthings of the Ministers for Health and Education, Messrs Abbott and Nelson, have been nothing short of appalling. A friend of mine, a person high in Liberal Party circles, recently said to me that he believed that the only member of the Cabinet who had any genuine belief in federalism was the Minister for Finance, Senator the Honourable Nick Minchin. As it happens, Senator Minchin was with us last night, but has had to leave this morning. In any case, of course, I should not have embarrassed him by asking him to confirm or deny the veracity of that reportage.

Having mentioned last year's federal election, it may be opportune to note that, since the Society last met in Perth in March last year, the Coalition government has been returned to office in Canberra, and that, *mirabile dictu*, the outcome for the half-Senate election now means that it will have a Senate majority from 1 July next. So much, incidentally, for the view stated by the Prime Minister in his speech to the Liberal Party's National Convention in Adelaide on 8 June, 2003, when he said that "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". All I will say on that point is that, as Professor Malcolm Mackerras pointed out in his paper to our last Conference in Perth, any Government which is so reckless as to go to an election promising (threatening) a new Goods and Services Tax, as this Government did in 1998, should not be surprised if the voters punish it severely through their Senate votes for doing so. In short, the Government has always had itself to blame, not wholly but principally, for its difficulties in the Senate during 1999-2005.

That, of course, is now (almost) in the past, and the Government is looking forward to a much brighter Senate situation. In turn, however, that makes that outbreak of centralist political rabies to which I referred earlier all the more dangerous. We live in interesting – and potentially threatening – times. One of our papers tomorrow, by Mr Bryan Pape, on *The Use and Abuse of the Commonwealth Finance Power*, will spell out in some detail the ravages which Canberra has already wrought in our federal constitutional defences.

Today, however, we are to begin with some papers bearing on the constitutional state of affairs here in Queensland. The arrogance of politicians

generally is, of course, legendary; but the Government of this State seems to have carried that arrogance to extremes. We shall hear shortly two papers, from Mr Kevin Lindeberg and Professor Suri Ratnapala, which in their very different ways go to the heart of that issue, while Mr Bruce Grundy will consider the noticeable absence in this State of one of the institutions (an Upper House) which in other States does provide *some* check upon the dictatorship of the Executive. And tonight, of course, Bob Bottom will address us on *Frauding the Vote in Queensland*.

However, as Professor Dean Jaensch remarked last November in "launching" in Adelaide Volume 16 of our Proceedings, our Conference programs are remarkably "eclectic". This one is no exception. Apart from the issues I have already mentioned, we are looking forward to papers on such varied topics as Section 15 (the filling of casual Senate vacancies); the Head of State question; the nationally dispiriting joke which Native Title (or Brennan-Deane title) has become today; and the issue of Australian sovereignty and the United Nations. What could be more "eclectic" than that?

Before I hand over to our Chairman for the opening Session, Mr Bernard Ponting, I wish to record two acknowledgements. The first is to Bernard Ponting himself, to whom, as an old friend, I appealed after the Board had decided to hold this Conference on the Gold Coast. It was he who undertook the not insubstantial work involved in locating a venue appropriate to our modest budget, and I hope you will join me in thanking him for a job well done.

My second acknowledgment relates to that aforementioned book "launch" in Adelaide, organized by our indefatigable South Australian Board member, Bob Day. It is to Bob's generosity that the Society also owes the banner which you see on yonder wall, and it is also to his generosity that we owe those neatly and well printed programs which graced all your places at dinner last night – and which have similarly graced the Opening Dinners of all sixteen of our previous Conferences. It is high time that Bob Day was thanked (publicly, that is) for that, and I hope you will all now join me in doing so.

I now have great pleasure in asking Bernard Ponting to take the chair, and call upon our first speaker, Mr Kevin Lindeberg.

Chapter One
The Heiner Affair

Kevin Lindeberg

In this paper I shall invite you to consider the Heiner affair, which has persisted for the last 15 years in "post-Fitzgerald" Queensland, its era of so-called open and accountable government. This affair is the long-running Hydra of Queensland's public administration. It grew out of a decision by the Goss Government, within weeks of taking control in 1990, which now gives rise to the most serious questions about the constitutional state of affairs in Queensland.

Heiner affair's epicentre

The decision to which I refer was the order by the Queensland Cabinet to deliberately destroy the Heiner Inquiry documents to prevent their known use as evidence in an anticipated judicial proceeding, and to prevent the contents of the gathered public records being used against the careers of the public servants involved. These public records were gathered during the course of a lawful inquiry[1] into the management of the John Oxley Youth Detention Centre conducted by retired Stipendiary Magistrate Noel Heiner, from whom the affair's name is derived.

The Heiner Inquiry was established in the final days of the Cooper National Party Government; within weeks of the Goss Government coming to power, the Inquiry was shut down, and all the gathered material secretly destroyed. At the time the Cabinet ordered the records be destroyed, the Queensland Government was aware that they were likely to be required in evidence in a judicial proceeding.

Let me present some key Heiner facts as they affect the rule of law and Queensland's governance.

Due process commenced

In January and February, 1990 my union member, the manager of the Detention Centre, sought to access the Heiner Inquiry documents, insofar as they were about him, under a public service "access" regulation, namely *Public Service Management and Employment Regulation 65*. He also indicated that he might take defamation action. As his union organizer, I was required to protect his industrial interests.

His solicitors and two trade unions placed the Government on notice of foreshadowed court proceedings. That was done by letter, phone call and meeting. The Queensland Government was told not to destroy the evidence, and that if access was not granted "out of court", then the matter would be settled "in court". Unbeknown to us, the Families Department had meanwhile transferred the documents to the Office of Cabinet in a desire to gain access exemption under "Cabinet confidentiality" or "Crown privilege".

The relevant February/March, 1990 Cabinet submissions, copies of which we now hold, divulge that all Cabinet members in attendance were aware that the documents were likely to be required as evidence in a foreshadowed judicial proceeding. Crown Law advice, which we also now hold, reveals that the Cabinet,

and Crown Law, knew that the records would be discoverable upon the serving of the anticipated writ. By other evidence spoken in the media, we know that at least one Minister, if not all, were aware that those public records contained evidence about the known or suspected abuse of children at the Centre.[2]

As each layer of cover-up has been peeled away, the presence of child abuse at the Centre surfaced after being concealed for years. It was primarily through the investigative skills of Mr Bruce Grundy that the horrible truth became known. The abuse went from physical, psychological abuse to the offence of criminal paedophilia,[3] involving the sexual assault of a 14-year-old female indigenous minor in the lead up to the Heiner Inquiry. Worse, those working within government knew of such things at all relevant times, and did nothing about it, and some are still working in government.

The gravest legal and constitutional ramifications flow from the shredding of the evidence and the assault against the female minor in State care as handled by our law-enforcement authorities. It is clear that those authorities, including the Cabinet and the legislature, could not face the horrendous political, legal, and constitutional prospect that perhaps all members of the Queensland Cabinet of 5 March, 1990 might be in serious breach of the Criminal Code of Queensland.

In a nutshell, instead of upholding the law, all relevant law-enforcement and accountability arms of government collapsed in around the Cabinet's shredding desire by declaring it perfectly legal[4] when the law, properly applied, suggested otherwise.

Foreshadowed judicial proceedings known

It was known and acknowledged by the Government that court proceedings had been foreshadowed by a firm of solicitors (officers of the court) and two trade unions,[5] and that the Heiner Inquiry records were the central item of evidence. We were told by the Queensland Government that Crown Law was considering our access request, and once its advice was received, we would be informed.

Unbeknown to us, the Queensland Government meanwhile had secretly sought urgent approval from the State Archivist on 23 February, 1990 to have the records destroyed pursuant to the *Libraries and Archives Act* 1988, and secured her approval on the same day.

However, in Cabinet's letter to the State Archivist, it failed to inform her of the known evidentiary value of the records for the foreshadowed judicial proceeding. She was told that the records were, in the Cabinet's view, "no longer required or pertinent to the public record". At this very time the Queensland Cabinet, Department of Families and Crown Law knew that (a) the records were critically relevant evidence for the anticipated judicial proceeding; (b) they would be discoverable pursuant to the discovery/disclosure rules of the Supreme Court of Queensland; and (c) any claim of "Crown privilege/Cabinet confidentiality"[6] would fail once the expected writ arrived and discovery procedures commenced, because the records were not created for a Cabinet purpose.[7]

So while we were waiting patiently for the Crown Solicitor's final advice regarding access or non-access, on the assurance that we were dealing with "the Crown" – the so-called "model litigant" – and that the records were safe, on 5 March, 1990 the Queensland Cabinet ordered the destruction of the evidence. The order was secretly carried out on 23 March, 1990. Official notification on the

"access issue" – the issue to be litigated – did not come from the Government until 22 May, 1990, weeks *after* all the sought-after records had been destroyed. We were given no opportunity to seek injunctive relief from the courts.

In this early March, 1990 period, when discussing the matter with the Family Services Minister's Private Secretary, I was inadvertently told of the shredding plans or act-of-shredding. I immediately challenged the proposed action, only to be told the next day that the Minister would no longer deal with me. The Minister insisted on my union's General Secretary and/or his Assistant taking over the case, which happened, and then several weeks later, I was summarily dismissed. My handling of this case was used as one of the excuses to dismiss me.

Before I was finally dismissed, I informed my union's Executive that the shredding of the records represented a potential serious breach of the criminal law which could involve the entire Cabinet. It did not move them, other than to remove me.

The Criminal Justice Commission: administration of justice

In December, 1990 I took my dismissal to the new Criminal Justice Commission (CJC). It indicated that it could look into the matter because it involved a unit of public administration.

This journey went into the very bowels of Queensland's criminal justice system and public administration. Both were found wanting. I was confronted with dissembling, delay, double standards, misleading of Parliament, conflicts of interest, errors and omissions, lost documents, failure to refer, tampered tapes, intimidation, threats, misquoting and misinterpreting the law.

The alleged offence, which I put to the CJC as fitting the destruction-of-evidence conduct by the Queensland Cabinet, was s. 129 of the *Criminal Code Act* 1899 (hereinafter "the Criminal Code").

The Griffith Criminal Code

Over 100 years ago, Sir Samuel Griffith wisely drafted, and the Queensland Parliament accepted into law, his Criminal Code. It still stands. Section 129 – destruction of evidence – provides that:

> "Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years".[8]

Section 119 of the Criminal Code, dealing with the definition of "judicial proceeding", reads as follows:

> "In this chapter – 'judicial proceeding' includes any proceeding had or taken in or before any tribunal, or person, in which the evidence may be taken on oath".

The CJC held that because the words "had or taken in or before" were in the present tense, they excluded a judicial proceeding in contemplation or anticipated. It held that s. 129 could only be triggered once a judicial proceeding was on foot, even though it was within the knowledge of the doer that the relevant judicial proceeding was foreknown, contemplated, or anticipated. Even in the wake of *R v. Rogerson*, the CJC considered it was a

perfectly reasonable view for competent lawyers to hold.

I challenged the CJC's view from the outset, suggesting that it was legal nonsense. I also suggested that the alternatives of attempting to obstruct justice, or a conspiracy to pervert the course of justice, may be available on the facts.

Under elementary statutory interpretation rules, the operative word in s. 119 is "includes". In other words, the term "judicial proceeding" was "unfettered" – but more of that later.

In 1993 the Senate established the Senate Select Committee on *Public Interest Whistleblowing*[9] as part of a federal government move to establish national whistleblower protection legislation. I presented a submission, using the Heiner affair as the vehicle to address its terms of reference. In its August, 1994 report, the Committee unanimously recommended that the Goss Government review this case, and eight other "unresolved" Queensland cases.[10] The Goss Government declined to do so.

In reaction to the Goss Government's refusal, in December, 1994 the Senate established the Senate Select Committee on *Unresolved Whistleblower Cases*, in which the Heiner affair was a specific term of reference. This Committee, chaired by (then) ALP Tasmanian Senator Shayne Murphy, took evidence throughout 1995.

In evidence before this Senate Select Committee, the CJC official and lawyer who had had prime carriage of my complaint made this so-called "legal declaration" concerning due process touching on the protection of evidence:

> "What you do with your own property before litigation is commenced, I suggest, is quite different from what you do with it after it is commenced".[11]

The Queensland Government and CJC claimed that the Queensland Government acted on legal advice when ordering the destruction of the evidence, and pointed to advice of 23 January, 1990 which relevantly said:

> "...this advice is predicated on the fact that no legal action has been commenced which requires the production of those files...".[12]

The CJC claimed that so long as the Queensland Government acted on legal advice, it could not be established that it was acting dishonestly; which, in turn, could not enliven the necessary official misconduct provisions of the *Criminal Justice Act* 1989 or, for that matter, the Criminal Code.

The CJC said that its duty was not to adjudicate between competing advices on the same legal point – that is, s. 129 – but rather, so long as advice existed and had been acted upon – in effect any advice, including wrong advice[13] – that was sufficient to give the government clearance to those involved in the shredding.

In dealing with the CJC's understanding of the law, I point to *Ostrowski*,[14] wherein Callinan and Heydon JJ, in finding a guilty verdict against Mr Palmer, a crayfisherman from Western Australia who obtained Crown advice which happened to be erroneous before acting on it, said:

> "A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it...".

The role of the State Archivist in the administration of justice

The Queensland Government has also claimed that it acted under the authority of the *Libraries and Archives Act* 1988. If this were the end of the matter, it would permit the power under that Act – now the *Public Records Act* 2002 – to intervene unilaterally in the administration of justice and override s. 129 of the Criminal Code or the discovery/disclosure Rules of the Supreme Court.

Of course, the correct position is that no archivist would ever authorize,[15] or may legally authorize, the destruction of public records when knowing that they were likely to be evidence for a judicial proceeding. Yet the CJC claimed that the "legal value" of public records did not fall within the archivist's statutory discretion when appraising them for destruction/retention, as her sole concern was their "historical" value. Out of this affair, I have suggested that State/federal archivists should be made, by law, officers of the Parliament, just as Auditors-General are, to afford them greater independence and protection from Executive power when protecting public records in the public interest.[16]

I reiterate, openness and transparency were not present at this vital period of February-March, 1990. When we were waiting for the "final" advice from Crown Law at that time, the Queensland Government had already received it on 23 January, 1990. We were not officially told of this advice, or what the government intended to do, in a matter which unquestionably concerned judicial proceedings in which the Heiner Inquiry documents were known to be the central item of evidence. Moreover, we were misled into believing that the final advice was *still* coming, when the Government already had it, and had decided to destroy the evidence. Official notice only came after everything had been destroyed.

Inviting a world without evidence

The CJC's position on "due process" gave rise to very serious concern. In effect, it invited open slather on the administration of justice by the Executive in terms of destroying evidence, with its full backing as the so-called independent watchdog against government corruption.

It was suggesting that all evidence in the possession or control of a party, including the Queensland Government, could be legally and proactively destroyed up to the moment of the expected writ being filed and/or served. The shredding could be done for the specific purpose of preventing the known evidence being used in those anticipated proceedings. If this were correct at law, it would simply invite a "world without evidence"[17] – and dare I say, one of Australia's greatest jurists, Sir Samuel Griffith, was not that silly when drafting s. 129!

This position has not been recanted by the CJC's successor body, the Crime and Misconduct Commission (CMC), or the Queensland government.

In his oral submission to the Senate Select Committee on *Unresolved Whistleblower Cases* on 23 February, 1995 in Brisbane, my senior counsel, Mr Ian Callinan, QC[18] said this on the point of destroying known evidence which is or may be required in judicial proceedings:

> "The real point about the matter is that it does not matter when, in technical terms, justice begins to run. What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them. That is unthinkable. If one had commercial litigation between two corporations and it emerged that one of the corporations knowing or

believing that there was even a chance that it might be sued, took a decision to destroy evidence, that would be regarded as conduct of the greatest seriousness – and much more serious, might I suggest, if done by a government".[19]

In August, 1995, after certain inculpatory admissions were made by a CJC official to the Senate[20] concerning the state of knowledge of the members of Queensland Cabinet before the shredding, and the purpose for ordering the destruction of the records, Mr Callinan, QC advised the Senate Select Committee that the CJC's strict, narrow interpretation of judicial proceedings was "too significant to ignore".[21] He went on to advise that s. 129 may have been breached, or s. 132 of the Criminal Code – conspiracy to pervert the course of justice – in the alternative for the sake of completeness. He cited *R v. Rogerson*[22] as the leading authority.

In its October, 1995 report the Senate Select Committee described the shredding as "an exercise in poor judgement",[23] and failed to address Mr Callinan's advice.

The Morris/Howard report

In May, 1996, the Borbidge Queensland Government appointed two independent barristers, Messrs Anthony Morris, QC and Edward Howard to investigate my allegations "on the papers" and to recommend to Government whether or not an open inquiry should be held. Their report was tabled in October, 1996 with considerable fanfare.

Messrs Morris, QC and Howard found that it was open to conclude that numerous criminal offences[24] may have been committed – that is, breaches of ss. 129, 132 and/or 140, 192 and 204, including official misconduct. They recommended the immediate establishment of a public inquiry, stating that it was warranted because the potential offences, carrying penalties ranging from one to seven years imprisonment, were far more serious than those which brought the Fitzgerald Inquiry into being in 1987.

Messrs Morris, QC and Howard suggested that s. 129 had been breached. They cogently argued that it did not require a judicial proceeding to be on foot to trigger it, and that the Form of the Indictment Schedule (No. 83) could not dictate the meaning of the Code.[25] They roundly criticized the conduct of the CJC, suggesting that its investigation was not thorough or independent.

The Borbidge Government, instead of establishing a public inquiry, sent the report to the Office of the Director of Public Prosecutions (DPP) to be advised (a) as to the correct interpretation of s. 129; (b) of whether charges could be brought against those named; and (c) of whether a public inquiry should be held.

After a 6-month delay, the Borbidge Government made an announcement that the DPP had advised (a) that it was not in the public interest to hold an inquiry; (b) that certain officials could be charged, but it was not in the public interest to do so. There was, however, no announcement about the proper interpretation of s. 129.

I now want to introduce the contents of a "highly protected internal CJC memorandum"[26] dated 11 November, 1996, written by then CJC Chief Complaints Officer Mr Michael Barnes, to his superiors (i.e., Messrs Frank Clair and Mark Le Grand) in response to the findings of the Morris/Howard Report. It says this at page 4:

"Nor do the authors refer to section 119 of the Criminal Code which defines 'judicial proceeding' for the purposes of the offences under consideration. That definition is framed entirely in the present tense which, in my view, supports the contention that proceedings must have commenced for an offence under section 129 to be made out.[27]

"While the authors refrain from making any findings of guilt in relation to Cabinet on the basis that they were unaware of the state of knowledge of the ministers concerned, memoranda from Matchett and Warner strongly suggest that the knowledge which Messrs Morris and Howard deem sufficient to inculpate the Departmental officers involved was shared by the politicians who gave the order to shred the Heiner documents".

The smoking gun – the January, 1997 DPP's advice

Now let me return to the DPP's advice to the Borbidge Government on the findings and recommendations of the Morris/Howard report.

That advice currently remains hidden from public scrutiny. I, however, have the advantage of having read it. On 23 September, 2003 I was given access to this 6 January, 1997, 23-page advice by the Leader of the Queensland Opposition, in whose possession it rests. I can say with certainty that it erroneously interprets s. 129. It claims that a judicial proceeding must be on foot before it can be triggered.[28] It is therefore open to conclude that this erroneous interpretation had the effect of preventing serious criminal charges being laid against those involved in the shredding of the Heiner Inquiry documents.

I now turn to two further events which ran almost parallel in time.

Federal government intervention

The first event was the reference given to the federal government's House of Representatives Standing Committee on Legal and Constitutional Affairs by the Justice Minister, Senator the Hon Chris Ellison in May, 2002. It was commissioned to hold a national inquiry into *Crime in the community: victims, offenders and fear of crime*. This Committee was chaired by the Hon Bronwyn Bishop, MP, and Mr Grundy and I placed the Heiner affair before it during 2003 and 2004.

In August, 2004 the Committee handed down its report into the Heiner affair, but not before all ALP members of the Committee resigned *en masse*. In an unprecedented landmark report in the history of Australian political life, a federal parliamentary Committee recommended criminal charges be laid against the entire Cabinet of a State jurisdiction. This is what was recommended:

Recommendation 1: "That the Queensland Government publicly release the 1997 advice on the Morris/Howard Report provided by the Director of Public Prosecutions to the then Borbidge Government".

Recommendation 2: "Given that:

- it is beyond doubt that the Cabinet was fully aware that the documents were likely to be required in judicial proceedings and thereby knowingly removed the rights of at least one prospective litigant;
- previous interpretations of the applicability of section 129 as not applying to the shredding have been proven erroneous in the light of the conviction of Pastor Douglas Ensbey [as to which see later]; and

- acting on legal advice such as that provided by the then Queensland Crown Solicitor does not negate responsibility for taking the action in question,

the Committee has no choice but to recommend that members of the Queensland Cabinet at the time that the decision was made to shred the documents gathered by the Heiner Inquiry be charged for an offence pursuant to section 129 of the Queensland *Criminal Code Act* 1899. Charges pursuant to sections 132 and 140 of the Queensland *Criminal Code Act* 1899 may also arise".

Recommendation 3: "That a special prosecutor be appointed to investigate all aspects of the Heiner Affair, as well as allegations of abuse at John Oxley Youth Centre that may not have been aired as part of the Heiner inquiry and may not have been considered by the Forde or other inquiries.

"That this special prosecutor be empowered to call all relevant persons with information as to the content of the Heiner inquiry documents, including but not necessarily limited to:

- Public servants at the time, including staff of the then Department of Family Services, the Criminal Justice Commission, Queensland police, and the John Oxley Youth Centre
- Relevant union officials.

"That the special prosecutor be furnished with all available documentation, including all Cabinet documents, advices tendered to Government, records from the John Oxley Youth Centre and records held by the Department of Family Services, the Criminal Justice Commission and the Queensland Police".

Double standards on public display

The second event was the charging of a Queensland citizen, a Pastor Douglas Ensbey, by the police and DPP with the offence of destroying evidence required for a judicial proceeding. The guillotined diary of the girl involved in the case contained evidence about her being abused by a parishioner. The pastor was committed and ordered to stand trial on 13 March, 2003 pursuant to s. 129, or in the alternate, s. 140 (attempting to obstruct justice) of the Criminal Code. The relevance of this to the Heiner affair was that the destruction-of-evidence conduct occurred some five to six years *before* the relevant judicial proceeding commenced. Yet, according to the same law-enforcement authorities, such action could not apply in Heiner because the anticipated proceedings had not commenced.

I witnessed this shredding trial throughout, accompanied for much of the time by Mr Grundy. Within five minutes of the District Court trial commencing, the court ruled that s. 129 *did not require* a judicial proceeding to be on foot to trigger the provision. We saw the criminal law being applied by the State by self-serving double standards. On 11 March, 2004, Pastor Ensbey was found guilty of breaching s. 129. And then, on 25 March, 2004, Queensland's Chief Law Officer, the Attorney-General and Minister for Justice, appealed the leniency of sentence to the Queensland Court of Appeal because of the seriousness of the crime, in doing so using my interpretation of s. 129. On 17 September, 2004 the Court of Appeal upheld that interpretation of s. 129, and the conviction, but rejected any increase in sentence.

Unarguable criminal provision

The central structure for confirming the conviction in *Ensbey*[29] by their Honours Davies, Williams and Jerrard JJA in respect of s. 129 was put in these terms:

> "It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose".

Their Honours confirmed the legal correctness of Judge Samios' direction to the District Court jury, which was as follows:

> "Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence".

It is highly relevant to note Jerrard JA's reasoning in *Ensbey* on the definition of "judicial proceeding". He demonstrated its unfettered meaning by its plain reading and application to the offence of perjury (i.e., s. 123). In short, it could not be plainly "unfettered" in perjury, but "fettered" when dealing with the destruction of evidence. Consistency and predictability must apply under statutory interpretative principles.

I may add that in April/May, 2003, well before *Ensbey* was settled, retired former Appeal and Supreme Court of Queensland Justice the Hon James Thomas advised *The Independent Monthly* on s. 129. He advised that while many laws were indeed arguable, s. 129 was not. It plainly included a proceeding not yet on foot but one within contemplation of the doer. He suggested that those involved in any breach may still be open to charges.

In short, it is my contention that the erroneous interpretation of s. 129 used to thwart my pursuit of justice, was one which should never have been involved.

Put simply, this rule by Executive decree is totally unacceptable if the rule of law matters in Queensland.

Some germane considerations

Former United States Supreme Court Justice Felix Frankfurter is credited with having said:

> "...if one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process".

Welding together all the elements which make up a liberal democratic society governed by the rule of law, by which respect for and the upholding of legal process and legal constitutional rights *should guarantee* the democratic timeless value of equality before the law, are the words of Mason C J, Deane and Dawson J J in *Ridgeway*, which reinforce Justice Frankfurter's words:

> "The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty".

Courts need evidence to do justice in adjudicating disputes.[30] This is commonly known and accepted. Proper public record keeping also plays an essential role in the administration of justice.

Concerning the protection of evidence, its admissibility and discovery/disclosure, it is ultimately for the courts, in a democracy, to decide what is and what is not admissible in evidence in a judicial proceeding.[31] It does not fall on the parties to decide unilaterally for themselves to advantage themselves.

More especially, it does not fall on the executive arm of government to decide for itself what is or is not required, and be permitted to embark on a reckless or deliberate unilateral destruction-of-evidence exercise when party to litigation. To do so would be to seriously and unacceptably breach the doctrine of the separation of powers. It would see the Executive capable of thrusting a dagger into the heart of the independence of the judiciary for self-serving purposes, by denying the judicial arm of government its constitutional right to fact-find, truth-seek, decision-make and to do justice according to law without fear or favour, based on all available evidence relevant to a pending or anticipated judicial proceeding.

Another foundation stone on which this paper is based are the words of Gibbs C J in *FAI Ltd v. Winneke*,[32] namely:

> "I can see no reason in principle why the rules of natural justice should not apply to an exercise of power by the Governor in Council, who is of course not above the law…".

I am also fortified by Deane J in *A v. Hayden*,[33] wherein he said:

> "…neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality".

Chief Justice Gleeson, in his speech to the Family Court Conference in Sydney in 2001, said:

> "The importance of the administration of criminal justice, not only to public safety and security, but also to the decency of a society, and its respect for human dignity and rights, is too obvious to require elaboration".[34]

While I agree with Chief Justice Gleeson, from my experience in the Heiner affair with Queensland's criminal justice system and its public administration, I suggest that its importance needs a dose of elaboration from north of the Tweed, where our unicameral system of government reigns supreme.

Power corrupts, absolute power corrupts absolutely. I believe that there must be limits placed on power and its exercise through checks and balances.

The great contract of trust

Our system of government works on the great contract of trust between the Crown – on behalf of the people – and/or the Crown's representative, its Ministers of State and the people's elected representatives that in all things, at

all times, for all parties, the law and Constitution shall be respected and upheld. Before power can be exercised over the people, the governed and the law demand that the governors and/or administrators seal this great contract by a sworn Oath of Office.[35]

Under this great contract, all are publicly committed to the rule of law because the law binds us all, accepting that we are all equal before the law.

However, when and if the Crown's Ministers place themselves beyond the law and constitutional custom, the ultimate guardian is the Crown itself. In Australia's constitutional monarchy system, the role of the Governor-General or State Governor must be, in the last resort, to invoke the Crown's discretionary reserve powers in order to ensure compliance with the general law and the effective working of parliamentary democracy.

In my opinion, we may have such an extraordinary circumstance now in the shape of the Heiner affair.

It is well settled that neither Sovereign, Head of State, President nor executive government should be above the law in societies which claim to be governed by the rule of law, any more than you or I are above the law.[36] This democratic principle engenders public confidence and trust in government. At another level in our system, our Constitution provides the power and authority to an independent judiciary to act as a bulwark against abuse by the executive government, and requires the judiciary to do justice without fear or favour according to law. When necessary, if the Executive and legislature exceed their constitutional limits, as in *Communist Party Dissolution Act* 1951,[37] our High Court may strike down laws or actions by the Executive and the legislature which are found to be unconstitutional or illegal, even in the face of the popularity of those laws or those actions.

I am also reminded of the warning issued by Thomas Jefferson:

> "The two enemies of the people are criminals and government, so let us tie the second down with the chains of the Constitution so the second will not become the legalized version of the first".

Non-negotiable values

Even after 14 years struggling for justice in respect of the Heiner affair, I hold firm to the notion of equality before the law for all, especially expecting government to act lawfully in all things and at all times. It is a non-negotiable value of this nation. It sustains our freedom.

Notwithstanding Voltaire's warning that it is dangerous to be right when the government is wrong, if freedom matters, oppression and abuse of power simply must be resisted because one person's stand can make a difference. There is a need to ensure that this generation leaves the next with the undamaged legacy of a decent free society, and to see that what applies to the lowest in society applies to the highest at law, especially the criminal law.

I put the test in these terms to the House of Representatives Standing Committee on Legal and Constitutional Affairs during its investigation of the Heiner affair as part of its national inquiry into crime in the community. In my opening statement on 16 March, 2004 in Brisbane, I said :

> "...the resignation or jailing of a Minister, and perhaps even, the jailing of an entire Cabinet and senior public officials involved in a serious cover-up, although painful to see, will better secure our democratic future and stability in the long run than turning a blind eye to high level corruption in

the short run because it sends the message to all that no one is above the law".

If and when the law is breached by government, it has the capacity to wreak untold havoc on the peace, order and good government of any nation or State.

Invoking the State Governor's discretionary reserve powers

On 13 October, 2003 and again on 20 September, 2004 I placed these matters before Her Excellency the State Governor, because I believed that her government was placing itself beyond the reach of the criminal law by abuse of power. I held that such a circumstance may give rise to the need for her to invoke her discretionary reserve powers wherein, if satisfied that the allegation be well made, and it is not being properly addressed because of abuse of power, Her Excellency could "encourage" her government to appoint a Special Prosecutor to finally resolve the matter, or take other necessary measures within her legal discretion,[38] in order to restore public confidence in government.

In his 1999 Sir Robert Menzies Oration entitled *Governors, Democracy and the Rule of Law*,[39] former Tasmanian Chief Justice and Tasmanian Governor the Hon Sir Guy Green said this:

> "The principle of responsible government is not the sole or even the main principle upon which our system is founded. An even more important principle is the rule of law".

He went on:

> "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 power or acts which are within power but are being exercised irregularly as was the case for example in *FAI v. Winneke*".

In my view, pursuant to the sworn duty of her Ministers of the Crown to uphold Queensland law, which includes the *Crime and Misconduct Act* 2002, in which exists a body of conduct described as "suspected official misconduct", Her Excellency need only satisfy herself that suspected official misconduct exists which is not being addressed equally and properly by her government, thereby placing itself beyond the reach of the law by self-serving abuse of office, and that may trigger her discretionary reserve powers.

After receiving my first letter of 13 October, 2003, Her Excellency requested a report from the Premier on the Heiner affair on 21 October, 2003. As of 29 March, 2005, almost 18 months later, Her Excellency was still waiting for the report, which had been purportedly delayed by the Queensland Government wanting to wait until the *Ensbey* case was settled.[40] That case was settled on 17 September, 2004 by the Queensland Court of Appeal. No appeal was taken on its verdict. I simply ask, why the delay still?

I also put these legal/constitutional issues to the Queensland Premier by letters dated 15 October and 22 November, 2004. I requested that a Special

Prosecutor be appointed because the CMC and police were tainted and not free of real or apprehended bias.[41] Premier Beattie refused. He claimed that my allegations had been "exhaustively investigated" – a claim which is simply untrue, and arguably self-serving.

On 23 March, 2005, in a further letter to Her Excellency, I put the significance of the Heiner affair in these terms:

> "The criminal law only carries a moral and constitutional basis of authority and respect in a democracy if it is applied equally by government against all citizens who transgress it. That is government by the rule of law. If, however, the law becomes an instrument of sectional application by government for government, such conduct is unfair and oppressive and sets government in conflict with democracy itself and the rule of law. That is tyranny".

In my last letter of 3 April, 2005 to Her Excellency I suggested that her government's only weapon of defence now was delay in providing the requested report.

On 6 April, 2005 I gained access to a submission faxed to the Queensland Director of Public Prosecutions on 13 September, 2003 from Pastor Ensbey's legal team. They cited the former DPP's interpretation of s. 129 as applied in the Heiner affair as reason not to proceed with the charge under s. 129 against their client in the District Court. The submission was handed to me by Mr Ensbey. He had been sacked as a pastor of the Baptist Church in the wake of his conviction and was earning a living as a truck driver. He also made available the response, dated 6 November, 2003, from the current DPP, Ms Leanne Clare, in which she rejected the earlier interpretation and advised that the prosecution against Pastor Ensbey was in the public interest and would proceed.[42]

Consequently it may be said with certainty that when the State of Queensland prosecuted one of its citizens, namely Pastor Douglas Ensbey, the State knew that its Ministers of the Crown and senior bureaucrats escaped the same fate for the same destruction-of-evidence conduct by the same criminal provision (i.e., s. 129) being interpreted differently.

No statute of limitations applies in regard to these alleged offences under the Criminal Code, and they may therefore still be addressed.

Issues of concern

In regard to the administration of the criminal law in Queensland, its governance and the conduct of certain legal practitioners, it is now reasonably open to conclude that:

1. Certain Queensland public officials (i.e., Ministers of the Crown, MLAs and public servants) collectively have themselves misinterpreted and/or know that the criminal law (i.e., s. 129 of the Criminal Code) has been erroneously interpreted in the Heiner affair, which has had the effect of preventing serious criminal and/or disciplinary charges being brought against certain of them for their destruction-of-evidence conduct. Yet, in the case of a private citizen (i.e., Pastor Ensbey), some of those same public officials have knowingly applied and/or now know that the same provision was applied correctly to the full extent of the law for the citizen's similar destruction-of-evidence conduct and seen him found guilty.
2. Certain Queensland public officials (i.e., Ministers of the Crown, MLAs and public servants) in respect of Point 1 have abused and continue to

knowingly abuse their power and place themselves beyond the reach of the law by not applying the criminal law equally and consistently in a materially similar circumstance.

3. The Executive and legislative arms of government in the State of Queensland have confirmed, by the Cabinet's own destruction-of-evidence action in the Heiner affair and its preparedness to continue to defend such obstructionist conduct, that both will interfere with the judicial arm of government to prevent evidence in the Executive's possession and/or control being used in known or reasonably anticipated proceedings by deliberately destroying it. This is despite knowing that in those records is suspected and/or known evidence concerning the abuse of children in State care, and that such conduct scandalizes the disclosure/discovery Rules of the Supreme Court, and breaches the doctrine of the separation of powers so fundamental to any civil society governed by the rule of law.

A Crown Prosecutor's duty

The law says that a Crown Prosecutor's duty is to act "fairly and impartially, and to assist the court to arrive at the truth", and in respect of any decision to prosecute or not to prosecute, it must be based upon the evidence, the law and prosecuting guidelines, and must never be influenced by:

"(a) race, religion, sex, national origin or political views;
(b) personal feelings of the prosecutor concerning the offender or the victim;
(c) possible political advantage or disadvantage to the government or any political group or party; or
(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution".[43]

I submit that prosecuting duty in Queensland is in doubt in respect of the Heiner affair.

Conclusion

The rule of law requires respect for due process over expediency, political or otherwise.

Those with a sworn duty to uphold the law and our Constitution ought not allow this matter to remain unresolved. To do so imperils our democratic heritage.

The law must not be brought into derision by government, or anyone, particularly the criminal law and our Constitution. This matter must be properly addressed to restore public confidence and trust in Queensland's impartial administration of justice and public administration.

Endnotes:

1. Section 13 of the *Public Service Management and Employment Act* 1988. See Crown Law advice dated 19 January, 1990 to Ms Ruth Matchett, Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs – Volume 1, Queensland Government – *Submissions, Supplementary Submissions and Other Written Material Authorised to be Published* – 1995 Senate Select Committee on *Unresolved Whistleblower Cases*.

2. See pp. 66-67, *The Heiner Affair – The Destruction of Evidence*, August, 2004 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Goss Cabinet awareness of child abuse at JOYC* [John Oxley Youth Centre].

3. *Crime Commission Act* 1997**:** Section 6 (1) states:

> "'Criminal paedophilia' means activities involving (a) offences of a sexual nature committed in relation to children; or (b) offences relating to obscene material depicting children".

4. See pp. 45-46, points 2.179–2.180, *The Heiner Affair – The Destruction of Evidence, op. cit.*.

5. Queensland Professional Officers' Association and Queensland Teachers' Union.

6. See *Sankey v. Whitlam* (1978) 142 CLR 1, at 38-45, 68-69.

7. This opens up interesting *McCabe*-related questions of deliberate "warehousing" of discoverable records "off shore", that is, transferring the records from the Families Department into the hoped-for security of the Cabinet room to avoid discovery/disclosure. Also, certain of those parties knew that the records contained probative contemporaneous evidence concerning the known or suspected abuse of children in care, which on any reasonable view ought to have been referred to the police or Criminal Justice Commission as a matter of legal obligation to be independently investigated.

8. Criminal Code, Part 3, *Offences Against the Administration of Law and Justice and Against Public Authority*, Chapter 16, *Offences Relating to the Administration of Justice.*

9. Established on 2 September, 1993 and chaired by Tasmanian Senator Jocelyn Newman.

10. See Point 1.13, *In The Public Interest*, Report of the Senate Select Committee on *Public Interest Whistleblowing*, August, 1994.

11. CJC Chief Complaints Officer Mr Michael Barnes, Senate *Hansard*, 23 February, 1995, pp. 104-105.

12. See Volume 1, Queensland Government – *Submissions, Supplementary Submissions and Other Written Material Authorised to be Published*, 1995 – Senate Select Committee on *Unresolved Whistleblower Cases.*.

13. In *R v. Cunliffe* [2004] QCA 293, McMurdo P, McPherson JA, Mackenzie J state this:

> "Misinterpretation of the law equates to ignorance of the law and is not an excuse: See *Ostrowski v. Palmer* and see also *Olsen & Anor v. The Grain Sorghum Marketing Board*; *ex parte Olsen & Anor*".

14. *Ostrowski v. Palmer*[2004] HCA 30.

15. http://www.mybestdocs.com/hurley-c-lucas-reprise-0408.htm; also see http://www.mybestdocs.com/hurley-c-rk-des-law-0309.htm.

16. See United States archives academic book *Archives and the Public Good: Accountability and Records in Modern Society*, Quorum Books, Westport, Connecticut & London, July, 2002, edited by Professor Richard Cox of the University of Pittsburgh and Assistant Professor David Wallace of the

University of Michigan archives schools. It cites 14 of the 20th Century's greatest shredding/recordkeeping scandals and places the Heiner Affair alongside the Iran/ContraGate affair *et al.* Heiner's chapter is by renowned Australian archivist Mr Chris Hurley.
See also July/September, 2003 edition of *Image and Data Manager* magazine cover story, *When Proof Goes Missing*, and September/October, 2004 edition (p. 36), *Heiner Revisited – the battle goes on*.
See also May, 2003 edition of Australian Society of Archivists' academic journal *Archives & Manuscripts, The Rule of` Law: Model Archival Legislation in the Wake of the Heiner Affair*, by Kevin Lindeberg in conjunction with Dr Terry Cook of the University of Manitoba, Canada.

17. See *Melbourne University Law Review*, Volume 27, *Destruction of Documents Before Proceedings Commence: What is a Court to do?*, by University of Melbourne Law Faculty Associate Professor Camille Cameron and solicitor Mr Jonathan Liberman. This paper was written in the wake of *British American Tobacco Australia Services Ltd v. Cowell (as Representing the Estate of Rolah Ann McCabe, Deceased)* [2002] VSCA 197.
18. Now Justice of the High Court of Australia.
19. Senate *Hansard*, 23 February, 1995, p. 3 – Senate Select Committee on *Unresolved Whistleblower Cases*.
20. See Senate *Hansard*, 29 May, 1995 – Senate Select Committee on *Unresolved Whistleblower Cases*, pp. 663,665, 682, 685 and 696. For example, Mr Barnes for the CJC at p. 685 said:
> "I do not see that the delay is either here or there. There is no doubt that the documents were destroyed at a time when the Cabinet well knew that Coyne wanted access to them. There is no doubt about that at all".
21. See Point 2.100, *The Heiner Affair – The Destruction of Evidence, op. cit.*.
22. *R v. Rogerson and Ors* (1992) 66 ALJR 500. Mason C J at p.502 says:
> "...it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may *possibly* be implemented...".
23. See Point 5.39, p. 60, *The Public Interest Revisited*, October, 1995 Report of Senate Select Committee on *Unresolved Whistleblower Cases*.
24. Morris/Howard Report to Hon The Premier of Queensland and Queensland Cabinet, *An Investigation into the Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds*, pp. 203-5.
25. Also see *R v. His Honour Judge Morley and Mellifont* [1990] 1 Qd R 54 at 56.
26. This document was lawfully accessed by the author at the Connolly/Ryan *Inquiry into the Effectiveness of the CJC* in July, 1997, when the Heiner affair came under review. At the Inquiry, the author was provided with access to his CJC file.
27. See Point 2.99, *The Heiner Affair – The Destruction of Evidence, op. cit.*, on the statutory interpretation of the word "includes" (as mentioned in s. 119) by QUT senior law lecturer Mr Alastair MacAdam.
28. See Point 2.171, *The Heiner Affair – The Destruction of Evidence, op. cit.*, and Recommendation 1, Point 2.174.

29. *R v. Ensbey; ex parte A-G (Qld)* [2004] QCA 335.

30. *Huddart, Parker & Co Pty Ltd v. Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

31. *Davies v. Eli Lilly & Co* [1987] 1 All ER 801. Lord Donaldson MR gave what has become one of the most oft-quoted descriptions of the modern common law process of civil discovery. He said:

> "The right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object".

32. *FAI Ltd v. Winneke* (1982) 151 CLR 342 at 4.

33. *A v. Hayden* (1984) CLR 532.

34. http://www.australianpolitics.com/news/2001/01-07-27.shtml

35. Sections 31 (1) (b) and 43 (6) of the *Constitution of Queensland* 2001 regarding Her Excellency and Ministers of the Crown respectively.

36. Mason C J in *Walker v. New South Wales* (1994) 182 CLR 45, at 49-50:

> "It is a basic principle that all people should stand equal before the law ... the general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters ... And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose".

37. *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

38. Section 33 of the *Constitution of Queensland* 2001 – General Power of Governor.

39. http://www.unimelb.edu.au/speeches/sirguygreen 99oct29.html.

40. See Answer by Queensland Premier, the Hon Peter Beattie, MLA to Question on Notice (No. 47), 29 March, 2005 from Mrs Liz Cunningham, MLA, Queensland Legislative Assembly.

41. *Livesey v. New South Wales Bar Association* [1983] 151 CLR 288 at 294; *Metropolitan Properties Co (FGC) Ltd v. Lannon* (1969) 1 QB 577 at 599; *Stollery v. The Greyhound Racing Control Board* (1972) 128 CLR 509, where Menzies J stated:

> "Authority (i.e., *Dickason v. Edwards* (1910) 10 CLR 243; *Allinson v. General Council of Medical Education* [1894] 1 QB 750; and *R v. London County Council ex parte Akkersdyk* [1892] 1 QB 190) further establishes that a person who has an interest adverse to, or in such proceedings, has been opposed to, the person on trial, is within the category of persons who in fairness ought not to be present at the deliberations of the tribunal".

See also: *Carruthers v. Connolly, Ryan & A-G* [1997] QSC 132; *R v. Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, Gibbs, Stephen, Mason, Aickin and Wilson J J at 55 is relevant:

"If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted".

42. See April, 2005 edition of *The Independent Monthly*.

43. 14 November, 2003, Guidelines of the Office of the Director of Public Prosecutions under s. 11(1)(a)(i) of the *Director of Public Prosecutions Act* 1984. Also see: http://www.justice. qld.gov.au/odpp/home.htm.

Chapter Two
Constitutional Vandalism under Green Cover

Professor Suri Ratnapala

Australia is called the Lucky Country, but luck has played only a small part in the country's success. The conversion of resources into wealth requires capital, technology, enterprise and hard work. People do not invest in wealth creating activity when the risks are too high and the returns too low. Risks increase when the law is unpredictable and property rights are insecure.

The success of Australia's primary industry sector owes much to the relative stability of property rights and contractual certainty secured by what the great Scottish philosopher David Hume called the "three fundamental laws concerning the stability of possessions, translation by consent and the performance of promises".[1] These laws are maintained by the strength of the Constitution and the eternal vigilance of the people.

This essay discusses a new threat to constitutional government and property rights in Australia that has arisen out of what is in principle a worthy and necessary program in public policy, namely environmental protection. The threat arises not from the aim itself, but from the flawed processes by which environmental policies and laws are determined and implemented. These processes not only subvert constitutional principles but also admit bad science.

It is impossible to survey within a brief essay the complex and ever growing environmental regulatory regime in Australia. Hence I will focus my attention on one piece of legislation that typifies all that is wrong and dangerous about recent trends in environmental protection law in this country. The legislation I examine is Queensland's *Vegetation Management Act* 1999 (*VMA*) which applies to all freehold and non-freehold lands in Queensland. This law reflects a regulatory model that is becoming the standard in Australia. In searching for an illustrative case of a statute that comprehensively defeats the values of constitutional government, in particular the rule of law, democratic principle and the basic requirements of natural justice, one need look no further than this Act. I will consider the constitutionality of some aspects of this legislation and the prospects for a successful challenge to its provisions.

Before I discuss the impact of this Act on constitutional government, it is necessary to make some explanatory observations about this form of government and its vulnerabilities.

What is a Constitution and what is constitutional government?

Constitutional government, or government under law, is a remarkable achievement of modern civilization, but it has been gained at a great price. Constitutional government enthrones the rule of law in the sense of the supremacy of known, general and impersonal laws over rulers and subjects alike. Millions of people around the world have died in the establishment and defence of constitutional government. This is not an exaggeration when the human cost of the 17th Century constitutional struggles in England, the American Revolution, the Civil War, the two World Wars, the uprisings against Fascist and

Communist rule, and present day democracy movements are accounted. Constitutional government is hard to win but not so hard to lose. It is always under pressure from seen and unseen opponents.

The term "constitution" once was synonymous with constitutional government that meant a particular type of political order in which the authority of rulers, including their legislative power, was limited through appropriate institutional devices, and both rulers and citizens were subject to the general law of the land. However, the term is now so debased that the most widely read encyclopaedia, the *Encyclopaedia Britannica* informs its readers that in its simplest and most neutral sense, every country has a Constitution no matter how badly or erratically it may be governed.[2] A Constitution in this simple sense refers to the official description of the Constitution or the paper Constitution.

There is another, more realistic sense in which the word "constitution" is used. It refers to the constitution as it actually operates. This is the constitution that lives in the experience of the people, that which economists call the "economic constitution". The constitution in this sense deviates from the paper Constitution, sometimes for the better but often for the worse. The *Constitution Act* of New Zealand reposes absolute power in a single chamber Parliament. Yet New Zealand enjoys a much greater degree of constitutional government than most countries with elaborate written safeguards. The United Kingdom has a robust democracy and an outstanding record on human rights without a scrap of paper that can be called a Constitution. As against these shining examples, we find many countries failing to secure a semblance of the constitutional order proclaimed in their official constitutional instruments.

There is a third, philosophical, sense in which the term "constitution" is used. It is the classical idea of a constitution, which F A Hayek termed the "constitution of liberty" in his famous work bearing that name.[3] In *The Constitution of Liberty* Hayek set out to present a restatement of the principles of a free society. This restatement was completed in the three volumes that constitute the monumental intellectual defence of the rule of law and individual freedom, *Law Legislation and Liberty*.[4] These treatises together explain the logic and the institutional framework of the political order that sustains human freedom.

At the heart of the constitution of liberty is the supremacy of general laws over all authority, public or private. Its modalities include the rejection of sovereign authority, even of elected assemblies, the effective separation of the executive, judicial and law making powers, and the geographical dispersal of power through federal arrangements. The constitution in this classical sense is a response to a perennial problem in human existence – that of creating power to coordinate collective action to secure essential public goods, while restraining the repositories of power from abusing it.

The bedrock of the classical idea of a constitution is a particular conception of the rule of law, namely the subordination of all public and private power to general norms of conduct. It is said that the rule of law is a necessary condition of freedom, but not a sufficient one. This proposition sounds logical, inasmuch as certain laws may diminish the liberty of all while ostensibly remaining faithful to the rule of law ideal. For example, prohibition of alcohol consumption in some countries limits the choice of everyone. But on reflection it is evident that such laws eventually defeat the rule of law. Unreasonably

restrictive laws are likely to be kept in place only by derogations from the rule of law in other respects. Typically, prohibition laws are maintained by privileging certain religious or moral opinions as against others.

It is also claimed that abhorrent institutions such as apartheid and slavery can be implemented consistently with the rule of law, provided that the disabilities they impose are not the result of arbitrary discretions of authorities. This claim is much more problematic. In such cases, the legislators themselves are acting arbitrarily in both establishing and maintaining the institutions.

The rule of law's prescription against arbitrary determinations applies equally to the legislature and to constituent bodies. Such laws are general only in a very perverse sense. Thus in countries where there is cultural diversity, the constitutional privileging of particular religions or languages creates serious problems for the rule of law. It is true that people's lives are more predictable where discrimination results from pre-announced rules rather than from the momentary will of officials. Much depends on the extent to which the discrimination diminishes the life chances of the selected group. The rule of law is maintained in the longer term not by coercive power but by the people's fidelity to the law. Hence constitutions and laws that pre-ordain selected groups to lasting deprivation are inherently unstable owing to the loss of fidelity of the disadvantaged groups, and can be maintained only by increasingly arbitrary projections of coercive power. Hence these laws are as subversive of the rule of law, as laws that confer unfettered powers on rulers.

Endogenous threats to constitutional government

In countries where constitutional government lacks deep roots, liberty is fragile, and vulnerable to the ambitions of individuals and groups who seek by violent means the rewards of absolute power. In established liberal democracies such as Australia, the prospect of forcible overthrow of the constitutional order is remote. However, the freedoms that liberal democracy provides have a tendency to generate endogenous anti-liberal forces. Freedom allows all manner of ideas, projects and movements to grow, including those inimical to freedom. Unless resisted, they can gradually debilitate constitutional government to the point of irreversible decline. The paradox of free societies is that they cannot defend themselves by denying basic freedom to its enemies.

Liberal democracies face two common kinds of internal threat to constitutional government. The first arises from welfare politics. Under current electoral systems, special interest groups seek, and political aspirants offer, benefits that very often can be delivered only at some cost to constitutional government. Apart from direct wealth transfers through the tax system, governments pursue distributional goals through various forms of regulation, such as fair trading and consumer protection laws, competition laws, wage and price fixing, and the myriad licensing schemes. These regulatory devices confer wide discretionary power on officials that seriously derogate from the ideal of government under known and general law that lies at the heart of constitutionalism. This kind of threat, though serious, is manageable, as it is possible to convince people that the short term gains they seek cause more harm than good in the longer term. The worldwide trend to economic liberalization started by Margaret Thatcher, Ronald Reagan and Roger Douglas, and now

driven also by the forces unleashed by liberalized world markets, is evidence of this reversal.

The more serious threat to constitutional government arises from fundamentalism of various kinds. I do not mean, by fundamentalism, deep conviction about a particular worldview, philosophy or faith, whether that be Christian, Islamic, Buddhist or secularist. I employ the term "fundamentalist" to describe a person who not only has an unshakeable conviction in the rightness of his position, but also thinks that his view is so compelling and uncontestable that any competing view must be silenced, if not by persuasion, then by subtle coercion or brute force.

I learnt liberalism and the value of the rule of law very early in my life from a man who had not read any of the great liberal philosophers. He dedicated a major part of his life to the study and practice of the Buddhist doctrine that he embraced without reservation. He devoted another part of his life to politics, in defence of the rule of law and fundamental freedoms for all persons, particularly the freedom to practice other faiths and cultures. He was not a fundamentalist in my lexicon. The 13th Century churchmen who ordered and carried out the Inquisition were fundamentalists. The Marxists who pursued the goal of the Communist utopia at the cost of lives and liberties of many millions were fundamentalists. The Fascists who, following Hegel, deified the state as the ultimate good, were fundamentalists. The Al Qaeda terrorist group, and similar groups who wage holy war against infidels, are fundamentalists.

There is a new fundamentalism that threatens the liberal constitutional order. It is Green fundamentalism. I do not mean by Green fundamentalism, genuine concern about the environment, and the desire to seek rational, balanced and scientifically sound solutions to environmental problems. Rather I refer to the growing intellectual movement that espouses a particular vision of the natural world, and relentlessly pursues the realization of that vision by legal and illegal means, where necessary by overriding the most fundamental rights and liberties of the citizen. It is vocal in the advocacy of its point of view and insensible to other views. It has been spectacularly successful in elevating its message to the position of a faith that others may not question without being branded anti-social. It has skewed public discussions in a way that has stifled opposing views.

I am not suggesting that the issues that environmentalists raise are trivial. This debate is not about the need to protect the environment, but about rational responses to the problems. It is estimated, for example, that the total cost of global warming could be as much as US$ 5 trillion. Yet, as Bjorn Lomborg in his much reviled but unrebutted book, *The Skeptical Environmentalist*, points out, some of the solutions suggested could cost the world trillions, and even tens of trillions, of dollars over and above the global warming cost.[5] This is money that, in the form of investment, could raise billions of people out of poverty and drive their societies to levels of prosperity that make environmental improvements affordable.

Lomborg is no libertarian capitalist ideologue. He is a left leaning statistician whose thesis is uncompromisingly grounded in data that even WWF, Greenpeace and the Worldwatch Institute largely accept. When he speaks of the bias in the environmental debate, it is worth listening. He asks why global warming is not discussed with an open attitude but with a fervor befitting preachers. He thinks that the answer is "that global warming is not just a

question of choosing the optimal economic path for humanity, but has much deeper, political roots as to the kind of future society we would like".[6] I cannot but agree.

The main concerns

Environmental law is one of the fastest growing areas of the legal system. It comprises a vast body of statute law that includes Acts of Commonwealth and State Parliaments, subordinate legislation in the form of regulations, orders and decrees, and case law interpreting these provisions. There are rising concerns within primary and manufacturing industries, as well as scientific and legal communities, that the processes of environmental policy formulation and implementation are leading to outcomes having seriously negative impacts on individual producers, industries, local and national economies, civil liberties, the rule of law and on sustainable environmental protection.

In its August, 2004 Report on *The Impacts of Vegetation Management and Biodiversity Regulations*, the Productivity Commission acknowledged the validity of many of these concerns, and made recommendations that in effect require the radical re-evaluation of the philosophy and processes of environmental regulation in Australia. The Commission's report highlighted the following serious defects in the current regulatory system:

- Lack of cost-benefit assessments before regulations are made, and the absence of on-going monitoring and independent reviews of costs and benefits once the regulations are in operation.
- The poor quality of data and science on which native vegetation and biodiversity policy decisions are based.
- Inadequate use of the extensive knowledge of landholders and local communities in the formulation of policy and regulations.
- The failure to take account of regional environmental characteristics and agricultural practices in imposing across-the-board rules, particularly in relation to native vegetation regrowth.
- Serious impediments to private conservation measures, including tax distortions and regulatory barriers to efficient farm management.
- The imposition on landowners of the cost of wider conservation goals demanded by society.

The Productivity Commission's report deals only with native vegetation and biodiversity issues. However, many of its findings are relevant to environmental law and policy generally. There are also other fundamental issues that call for investigation.

Utopian, apocalyptic and evolutionary theories of conservation

Environmental policy at Commonwealth and State levels does not reveal a coherent theory or philosophy of conservation in Australia. Instead, the field has become a battleground for radical environmentalists and other interest groups affected by conservation policies. While this kind of contest is both natural and desirable in a democracy, it can and often does overlook the fundamental questions that need to be addressed.

Nature is dynamic, not static. Ecosystems, the organic world, human societies and culture itself are emergent complex systems. They are adaptive, and it is arguable that they have no teleological or pre-ordained ideal states. The planet itself, according to this view, has no ideal state. If there is an ideal

state, it is important to know what that is and why that state is ideal. In such a world, the following questions, among others, become fundamental:

- What things should be preserved?
- Why should they be preserved as against other things?
- What things can be preserved?
- In what form should things be preserved?
- In what ways should we seek to preserve what we must preserve?

Environmental fundamentalists tend to apply two inter-related and complementary theses to these questions. One is inspired by the utopian vision of the world as an idyllic Garden of Eden that is an end in itself. Alternatively, it regards Earth in all its physical and biological complexity as a super-organism called Gaia.

The Gaia Hypothesis, formulated by James Lovelock in the mid-1960s, proposes that our planet functions as a single organism that maintains conditions necessary for its survival. This hypothesis is by no means substantiated, but has become the inspiration of the romantic and radical elements within the environmental movement. As a hypothesis about the nature of the complex system that is Earth, it cannot do much harm. However, there is a tendency among Gaia believers to deify the concept, and to subordinate the interests of all beings to the wellbeing of Gaia, about which they claim to have superior knowledge. The Gaia thesis leads believers to the apocalyptic thesis. According to this view, human societies have acquired the technological capability of destroying the balance that sustains Gaia, and unless this capability is controlled, Gaia and all that lives within are doomed.

There are highly respected scientific opinions that challenge environmental fundamentalism. The dearth of dispassionate and objective discussion of these questions is unfortunate, and may prove catastrophic to humanity and the very environment that we seek to protect.

A problem with the vegetation management legislation in Australia is that it is designed on the assumption that ecosystems are static. The overwhelming goal of these laws is the protection of “remnant” vegetation and other ecosystems thought to be necessary for biodiversity. They take no account of the fact that trees regrow and forests thicken. They do not acknowledge that ecosystems will change in the short term depending on how areas are managed (for example, with or without fire, with or without grazing), and that in the longer term ecosystems change and adapt to climate change.

Since natural systems are dynamic, prohibiting land management and tree clearing will result in forest encroachment and woodland thickening that will impact on biodiversity and surface water runoff. It will not be a case of holding the landscape in some sort of precautionary stasis. The full implementation of the vegetation management laws of Queensland is likely to be general woodland thickening across approximately 50 million hectares of Queensland.[7]

Bill Burrows, a highly respected environmental scientist who has spent a professional lifetime investigating these questions, is worth quoting on these matters:

> “It is obvious that some organisms will be either threatened or favoured by tree clearing bans. Yet the proponents of bans clearly imply that this will be good for *all* the State’s biodiversity. Permanently setting in train bans that will unarguably change the structure and composition of 70 per cent of the State’s forests and woodland vegetation (30 per cent of Queensland’s total

land area!) is a preposterous impost on our present fauna and flora. The dense woody plant communities that will result will be *resistant* to natural disturbances such as fire. We will take from them the one widely accepted element in the distinctive evolution of our flora and fauna[8] – except for rare and grossly destructive holocaust fires! This is not precautionary – it is challenging nature. Our greenies are figuratively putting out the flames with napalm!".[9]

There is another way of looking at nature which is informed by evolutionary theory and the science of emergent complexity. This approach does not condone wilful or negligent environmental harm, and recognises the need to prevent harm that is preventable. The critical difference is that, according to the evolutionary viewpoint, there is no pre-ordained ideal state of nature. The environment is a dynamic process that is unfolding in consequence of endogenous forces, including the endeavours of human beings to better their lives. Jennifer Marohasy observes that it is now widely accepted that there was no original pristine state, and that "competition, adaptation and natural selection, sometimes against a backdrop of catastrophic climate change, have driven the evolution of life on earth".[10]

Even if we assume for argument's sake that Earth is Gaia the super-organism, there is no way that we can know her mind, or what drives her, and what her ideal state is if there is one. All of this does not mean that we cannot or must not prevent harm that is preventable. What it means is that we should be aiming to have a healthy environment, as against the pursuit of an imaginary, unachievable pristine state at the cost of all other interests. The removal of technological civilisation from the ecological equation, as the fundamentalists demand, will produce dramatic reactions throughout the world that are hard to predict and impossible to control.

These opinions are not without their critics, and certainly they need rigorous examination and testing. The complaint of this essay is that they are not given the serious consideration they deserve in policy making.

Spuriousness of the precautionary principle

Environmentalists have a powerful weapon against science. It is called the precautionary principle. The precautionary principle is that "where there are threats of a serious or irreversible environmental damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".

The principle is in fact almost an oxymoron. Even as a stranger to science I find it hard to think that scientists always search for scientific certainty before acting. Most scientists will agree that where there is a threat of serious or irreversible environmental damage, preventive measures should not be postponed provided that (a) the threat is real or at least probable; (b) preventive measures are possible; and (c) the likely damage warrants the cost of prevention. The first premise of the precautionary principle cannot be reached without dispassionate scientific investigation. Hence the principle is practically useless as a basis for rationally responding to environmental problems.

In practice, though, the principle allows subjective doomsday alarmism to trump evidence. In the arena of public opinion, dispassionate and reasoned argument is hardly a match for doomsday rhetoric. The irony is that doomsday may be hastened more by blinkered green fundamentalism than by objective and

balanced scientific investigation that takes account of the dynamic and evolving nature of the world, and the limits of our capacities to design the physical and cultural aspects of life as we wish.

Science, policy and due process

It is said that science and politics do not mix well. No science is perfectly objective or exact, but historically the natural sciences have insulated their methodologies from emotive debate better than other disciplines, although not without their own struggles. However, politics tend to intrude on science when political decisions depend heavily on scientific theories and findings, and environmental law and policy is no exception.

The integrity of science can be compromised at two levels. Firstly it can be compromised by bias at the level of investigation. Secondly, and more commonly, science can be compromised by policy makers through misunderstandings or misuse of scientific findings.

If good science is critical to good environmental law and policy, then it is essential that the processes of environmental policy making, legislation and adjudication are subject to appropriate standards of substantive and procedural due process. It requires, in the minimum, that views of all stakeholders and experts, including government agencies, property owners, traditional users, producers, environmentalists, relevant scientists and economists are heard in objective inquiry. The process should not privilege special interests, whether they are those of proprietors or of environmentalists. Decisions should be taken by independent tribunals, and not by bodies structurally biased to particular policy positions. The decisions should be judicially reviewable, and where appropriate subject to parliamentary review.

Environmentalism and civil liberties

There are growing concerns that aspects of environmental law and policy have unacceptably high costs in terms of their impact on civil liberties. Among the concerns are the following features of environmental legislation:

- Regulatory decisions affecting rights being taken in breach of natural justice by structurally biased tribunals, that deny rights holders reasonable opportunities to present their cases.
- Uncertainty of laws defining environmental offences that make compliance difficult and costly.
- Investigatory powers that are intrusive and compromise due process.
- Negation of traditional procedural and evidentiary safeguards in prosecutions for environmental offences, including the reversal of evidentiary burdens usually borne by prosecutors.
- Denial of compensation to property owners for the loss of property rights and diminution of property values.

Given that certain environmental objectives are worth achieving, the question arises as to who should bear the costs involved in their achievement. The common law principle is that those who cause damage to others must pay for reparation, but beyond that, if individuals are asked to sacrifice property for the benefit of all society, the cost of that sacrifice must be borne by society as a whole. This is an important principle that lies at the heart of constitutional government, and the case for conservation laws that depart from this principle needs to be rigorously tested.

The *Vegetation Management Act* 1999 of Queensland – a case of constitutional vandalism

The *Vegetation Management Act* (*VMA*) violates almost all of the basic principles of constitutionalism and good government. The *VMA* is not an accident or isolated instance, but a dangerous regulatory model that is spreading across the economy and society. The Queensland Electoral and Administrative Review Commission (EARC), following an extensive investigation, published its *Report on the Review of the Office of Parliamentary Counsel* in 1991. The Queensland Parliament enacted the *Legislative Standards Act* 1992 to implement EARC's recommendations.

The impressive Act lays down a series of "fundamental legislative principles" to be observed by lawmakers in Queensland. These salutary principles proclaim Parliament's commitment to constitutional government. They require that legislation has regard to the rights and liberties of individuals and the institution of Parliament, and set out a series of standards that condemn the grant of ill-defined administrative powers, inconsistency with the principles of natural justice, the reversal of the onus of proof in criminal cases, entry into private premises and search and seizure of private property without judicial warrant, retrospective imposition of deprivations or punishments, compulsory acquisition of property without paying compensation, grant of immunity to officials from prosecution or civil actions, inappropriate delegation of legislative power, the enactment of "Henry VIII clauses" that allow the amendment of Acts by delegated legislation, and the removal of delegated legislation from the scrutiny of Parliament.[11]

The *VMA* violates almost all of these standards, raising serious questions about the authorship of the legislation and the level of scrutiny that the Queensland Parliament gives to its laws.

Undemocratic lawmaking

The *VMA* establishes an utterly undemocratic form of law making affecting property rights in the State. In fact the Act does not make the law, but leaves legislative power in the hands of the Minister and executive officers, to be exercised outside the parliamentary process.

The Act requires the Minister to prepare, and the Governor-in-Council to Gazette, a vegetation management policy for the State. This is not policy in the ordinary sense, but is a legislative instrument that controls the other powers under the Act, in particular the preparation of regional vegetation management codes.[12] Despite its binding effect, it is deemed not to be subordinate legislation.[13] Similarly, declarations (and interim declarations) of holdings as areas of "high nature conservation value" or areas "vulnerable to land degradation", and the codes governing vegetation clearing in those areas, are deemed not to be subordinate legislation.[14] Since subordinate legislation requires parliamentary approval, the sole purpose of these exclusions is to remove these instruments from parliamentary scrutiny and hence public debate.[15]

Given their legislative nature these instruments are not generally subject to judicial review. Instead of the usual legislative practice, the Act establishes a consultative process, including review by the Minister's own advisory committee. While land owners and the public may present their views, the law ultimately is what the Minister wills. This is the classic instance of the process open to

capture by those who engineer it, in this instance the Green lobby. The process is structurally biased and insulated from the glare of public debate. There is no appeal from these Executive laws to Parliament or to the courts.

Retrospectivity, impossibility and the cost of compliance

The effects of these instruments are far reaching and costly to property owners. Freehold and leasehold occupiers of land that becomes the subject of area declarations cannot manage or use their properties as they judge, but must do so in conformity with the "declared area code". Owners require the authority of clearing permits even to maintain the productivity of their lands. At the very least, the declaration increases the landowner's transaction costs in managing the property. It may reduce the productivity of the land, resulting in loss of income. It is more than likely that a declaration will diminish the market value of the property. I will return to the important question of compensation presently, but first the compliance cost deserves a closer look.

A property owner will be required to read and construe the legal effect of the "declared area code". This may seem straightforward but, as owners have discovered, it is often not. The tree clearing limitations are fixed in relation to Regional Ecosystem Maps (REM), which are binding on land holders unless they are able, at much cost, to show that the maps are wrong. There are occasions where an REM may change an area of land from a non-remnant vegetation area to a remnant vegetation area, thereby retrospectively abrogating the landholders' rights to clear, unbeknownst to the landholder. Since such clearing attracts criminal punishments, the effect is to impose punishment retrospectively for innocent acts.

In making such retrospective punishment possible, the *VMA* violates a principle accepted by all civilised nations and declared by Article 15(1) of the United Nations *Covenant on Civil and Political Rights*, that innocent acts must not be made crimes with retrospective effect (*nullum crimen sine lege*). A lawyer brought to my attention the case of her client, who cleared some land on the verbal assurance from the Department of Natural Resources and Mines that the vegetation was not remnant, and later found that the REM had designated the area as remnant. It took several years for her client to have himself cleared of the alleged offence, during which time the department refused to assess his other clearing applications, causing serious economic loss.

Tree clearance permits, once issued, may give rise to similar problems, particularly when the terms of a permit prove impractical or even impossible to comply with. A permit that allows some species to be cleared, but not others, may be a virtual prohibition if selective clearance may not be practical or possible given the nature of the forest. It is a basic principle of all civilized legal systems, and a rule of common law, that the law must not ask the impossible (*lex non cogit ad impossibilia*). An enactment that requires the impossible is not a law but a directly punitive act.

Negation of the separation of powers and natural justice

The enforcement provisions of the *VMA* violate the most fundamental requirements of criminal justice and should concern every civil libertarian. The intrusive investigatory powers, the coercive extraction of evidence, the conferment of judicial powers on executive officers, the reversal of the burden of proof, the various presumptions favouring prosecutors, and the use of criminal

history, combine to create a regime more reminiscent of a police state than of a liberal democracy. A detailed analysis is not possible, hence I will discuss the most pernicious provisions.

The guilt of a person accused of a vegetation clearing offence under the *VMA* need not be determined by a court but may be conclusively established by an authorized officer, a functionary under the command and control of the Minister and his department. (The judicial trials mandated by Division 3 of Part 4 of the Act have no application to vegetation clearing offences under the *VMA*). If an authorised officer issues a compliance notice, a failure to comply without a reasonable excuse results in an automatic penalty.[16] If the accused is a corporation the penalty increases five-fold.[17]

The innocuous term "compliance notice" masks two startling facts. Given the uncertainties of the law discussed previously, the authorized officer's compliance notice becomes a legislative act. It states what the law is with respect to the property in question. As one landholder remarked at a recent conference I attended, the law is declared at the point when the authorized officer alights from his Toyota! The second extraordinary fact is that the issue of the compliance notice is simultaneously a straightforward conviction and sentence without trial. The compliance notice is both the charge and the conviction, collapsed into one.

Moreover, the authorized officer does not have to come to an objective determination on facts or law. He or she need only "reasonably believe" that the landholder is committing a vegetation clearing offence or has committed a vegetation clearing offence.[18]

This is not the end of this incredible scheme. The authorised officer not only makes a summary conviction but is also empowered to enforce that conviction. Under s. 55(5) the authorized officer may "use reasonable force and take any other reasonable action to stop the contravention"; and to make matters worse for the landholder, the cost or expense of this enforcement may be recovered as a debt owing to the State.

The Act allows a limited appeal to the Magistrates' Court within 20 days against the decision to issue the compliance notice, but not on the existence of a reasonable excuse or on the penalty.[19] Contrast this with infringement notices under other laws. A speeding ticket or parking ticket is not a judgment of my guilt. If I ignore it, the police must charge me and have me convicted by a court after a fair trial. Not so the authorized officer, who may proceed to physically enforce his own order (compliance notice) without having to seek a judicial determination.

The *VMA* installs a process far more objectionable than the procedure that the High Court in *Brandy's Case*[20] condemned for offending the separation of powers in the Commonwealth Constitution. The fact that State Constitutions have no explicit separation of powers does not make this scheme any less reprehensible.

The powers of the authorized officer recall the authority of the infamous Star Chamber. They combine legislative, judicial and executive powers in the one person. If this does not alarm our learned judges, lawyers, politicians and civil society leaders, Australian constitutionalism is in serious trouble.

Section 55 and the rule in *Kable's Case*

It is possible that, despite the absence of separation of powers in the

Queensland Constitution, the enforcement procedure of s.55 may not survive a constitutional challenge. I like to think that the High Court will regard this assault on the rule of law as at least equally dangerous to representative government as State free speech limitations it has condemned in cases such as *Theophanous v. Herald & Weekly Times Ltd*,[21] *Stephens v. West Australian Newspapers Ltd*,[22] and *Lange v. Australian Broadcasting Corporation*.[23] These rulings were based on the importance of the freedom of communication on public matters to representative democracy. Is not representative democracy similarly undermined when legislative, judicial and executive powers are combined in the hands of unelected officials who may abrogate the rights and liberties of citizens in ways that leave them with little recourse to the courts or Parliament?

As much as I hope that the High Court would recognise an implied separation of powers in the State Constitutions, I do not expect that to happen, given the position that the Court has historically held on the powers of State Parliaments. However, I have little doubt that the High Court has good grounds to invalidate the s. 55 procedure on the narrower principle established in *Kable v. Director of Public Prosecutions*.[24]

In brief, the principle in *Kable* declares that a State court must not be given non-judicial powers of a kind that are incompatible with that court's exercise of the judicial powers of the Commonwealth. In that case, the power to order the continued detention of a named prisoner after the end of his term of imprisonment was held to be inconsistent with the exercise of federal judicial power. Justices Gaudron, McHugh and Gummow emphasised the fact that State courts were parts of an integrated system of courts established by the Commonwealth Constitution, such that measures undermining public confidence in State courts would offend the Commonwealth Constitution's separation of powers. Gaudron J observed that the Act directed at Kable makes a mockery of the judicial process, and hence "weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the Constitution".[25]

The question then is whether the enforcement provisions of s. 55 of the *VMA* involve the Queensland courts in a function that weakens public confidence in those courts in a way that is incompatible with their exercise of federal judicial power.

An appeal lies to the Magistrates' Court against a compliance notice. However, as previously mentioned, it is clear from a reading of s. 62 that the only question before the Magistrates' Court is whether the authorized officer "reasonably believed" that a vegetation clearing offence is being committed or has been committed. Whether or not the person had a reasonable excuse for non-compliance is not within the purview of the Magistrates' Court as the law is cast. The most liberal interpretation that we can give s.62 would only mean that the Magistrates' Court may consider whether the authorized officer had sufficient evidence to reasonably believe that a "vegetation offence is being committed or has been committed".

What is that evidence? It is evidence that the authorized officer or the department has gathered, but which has not been tested by impartial inquiry. Since the charge and the conviction are one and the same, the Magistrates' Court can only decide whether the authorized officer had reasonable cause to bring the charge. The decision that the Magistrate makes is not whether the

charge is proved, but whether the charge should have been made. This is not an exercise of judicial power. The appeal in effect is an appeal against the decision to charge.

In asking the Magistrate to decide whether the charge is warranted, the statute co-opts the Magistrate to an executive function – that of deciding whether a person should have been charged. It asks the Magistrate to step into the shoes of the authorised officer, and decide whether a compliance notice is justified on the untested evidence available to the officer. The procedure makes the Magistrates' Court an agent of the executive branch.

In sum, the statutory scheme uses the Magistrates' Court as an instrument or appendage of the executive arm of government, simply to provide respectability to a process that, at its best, is a projection of arbitrary power with no regard to natural justice or procedural fairness. It taints the Magistrates' Court and seriously undermines public confidence in the judicial system.

Under s. 77(iii) of the Commonwealth Constitution, the Parliament may invest federal jurisdiction in any State court. Parliament has vested federal jurisdiction in the Queensland Magistrates' Court by virtue of s. 39 of the *Judiciary Act* 1903. Hence the Queensland Magistrates' Court is part of the integrated federal judicial system as found in *Kable*. The provisions that taint it also taint the federal judicial system in a way that offends the principle in *Kable*.

Reversing the burden of proof

Division 2 of the *VMA*, dealing with evidence, effects a total reversal of the burden of proof in trials concerning tree clearance. Section 65 makes it unnecessary to prove that official acts are done within the authority of the Act. A certificate issued under s. 66B is deemed sufficient evidence of the accuracy of remotely sensed images and the official conclusions drawn from them.

The key issues in a tree clearing offence are:

- Whether a stated area is, or is likely to be, an area of remnant vegetation; and
- Whether in fact vegetation in a stated area has been cleared.

A certificate under s. 66B constitutes evidence of the above two matters. In short, the certificate makes it unnecessary for the prosecution to prove its case but necessary for the landowner to disprove it. This is a negation of due process in criminal and civil matters that is fundamental to civil liberty. Not content with this arsenal of prosecutorial weapons, the perpetrators of the *VMA* have even removed from land owners the defence of mistake of fact.[26] These provisions cumulatively deny landowners the basic safeguards of procedural justice available even to persons accused of the most heinous crimes.

Taking property without compensation

The *VMA* and other related legislation fail to provide compensation for the loss of property value that results from the imposition of land use restrictions. Under the *VMA* the State is not intervening to prevent private or public nuisances, in which event no compensation is owed. On the contrary, property values diminish because the State is limiting the property's use and enjoyment to serve what it considers to be the public interest in conservation. The State thus converts private property to public use and hence should compensate the

owner. The duty to compensate owners for property taken for public purposes is a principle of justice. The cost of public benefit must be met by the public, and not by individual owners whose property is taken.

If the Commonwealth limited land use for conservation purposes, it would amount to an acquisition of property for which just compensation must be paid under section 51(xxxi) of the Commonwealth Constitution. When the question arose in *Commonwealth v. Tasmania (The Tasmanian Dam Case)*,[27] only four of the seven Justices addressed the issue, the other three finding it unnecessary, having decided the case on other issues. Justices Mason, Murphy and Brennan thought that the restriction of land use, though limiting Tasmania's ownership rights, did not result in the Commonwealth acquiring any property. Justice Deane on the contrary found that the absence of a material benefit for the Commonwealth did not prevent the conclusion that there was an acquisition, holding that the property acquired was the benefit of the prohibition.[28]

In the later case of *Commonwealth v. Western Australia*,[29] the High Court considered whether the issue of a Commonwealth authority to carry out defence practice on land within the State amounted to an acquisition of property in the minerals reserved for the State. The majority held that frequent or prolonged authorizations could conceivably amount to an acquisition of property in the minerals, but dismissed the appeal on the ground that there was no evidence of the frequency of the authorizations. Justices Callinan and Kirby, on the contrary, considered the extent of authorization to be irrelevant, and held that there was an acquisition of property. In so deciding, Justice Callinan stated that:

> "The Declaration [made in this case] may be compared to a restrictive covenant; if one person (for his or her own reasons) wishes to sterilize or restrict the usages of another person's land, the latter, in a free market place, would demand recompense and the former would be expected to pay it".[30]

Despite the lack of clear judicial authority on this issue, there is a strong argument that the restriction of land use for conservation purposes is an acquisition. The government is taking away a property right to achieve one of its purposes. The purpose need not be direct material use of the property. In sequestering the trees, the government is sequestering carbon that offsets the carbon emissions by other groups of industrialists and consumers. The government acquires the carbon rights to the trees that are saved by its prohibition, that it then tacitly passes on to others.

Section 51(xxxi) of the Commonwealth Constitution is not binding on the States. However, if a State in acquiring property is acting as the agent of the Commonwealth to execute a Commonwealth purpose (such as observing the Kyoto targets as a matter of foreign policy), it is conceivable that the just terms requirement will apply, particularly if the Commonwealth is granting funds for this purpose under s. 96 of the Constitution.[31]

Apart from constitutional principle and the demands of justice, the denial of compensation is damaging to good governance. The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to "get it right" than a government that must. The uncoupling of power and financial responsibility allows governments to seek short term political dividends. It promotes politics and ideology over facts and science.

Conclusion

The *VMA* was supposed to combat environmental vandalism, but its provisions have vandalized Australia's cherished constitutional principles. The principles that have been sacrificed are not merely principles of constitutionalism and justice, but also of good governance. Parliamentary scrutiny and public discussion of delegated legislation, natural justice and procedural fairness, evidentiary safeguards, and compensation for government takings militate against arbitrary and erratic government. All these precautions are subverted by the *VMA*.

The *VMA* epitomizes the current philosophy and methodology of environmental regulation in Australia. It is a model that is replicated at State and federal levels. It is not clear at all that these extraordinary regulatory schemes are benefiting Australian society. As discussed in this paper, there is a strong body of scientific opinion that challenges the utopian aspirations and the efficacy of this model to promote the health of the environment.

The reason why these dissenting voices are largely disregarded by governments, media and academia is not easy to fathom. It is possible that environmental fundamentalism has become endemic in these key sectors as a result of several decades of unchallenged proselytizing. It is also the fact that sober reflection is no match for apocalyptic alarmism in the contest for public opinion. Politicians follow the currents of opinion. Until public opinion is swayed to the cause of a more open and objective debate about conservation, we are unlikely to see a change in political will, and constitutional government in this country, and the well-being of Australian society, will remain in serious jeopardy.[32]

Endnotes:

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11. *Legislative Standards Act* 1992, s. 4(2) and (3).
12. *Vegetation Management Act* 1999, s. 11(2).
13. *Ibid*., s. 10(7).
14. *Ibid*., ss. 17(6) and 18(4).
15. Under s.49 of the *Statutory Instruments Act* 1992, subordinate legislation must be tabled in Parliament, and under s. 50 may be disallowed.
16. Maximum penalty 1,665 penalty units ($124,875): s. 55 of the Act.
17. Section 118B of the *Penalties and Sentences Act* 1992.
18. *Vegetation Management Act* 1999, s. 55(1).
19. *Ibid*., s. 62.
20. (1995) 183 CLR 245.
21. *Theophanous v. Herald & Weekly Times Ltd* (1994) 182 CLR 104.
22. *Stephens v. West Australian Newspapers Ltd* (1994) 184 CLR 211.
23. *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.
24. *Kable v. Director of Public Prosecutions* (1995-1996) 189 CLR 51.
25. *Ibid*., at 108.
26. *Vegetation Management Act* 1999, s. 67B.
27. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
28. *Ibid*., at 286-7.
29. *Commonwealth v. Western Australia* (1999) 196 CLR 392.
30. *Ibid*., at 488.
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32. The author gratefully acknowledges the comments of Dr Jennifer Marohasy, Director of the Environment Unit of the Institute of Public Affairs.

Chapter Three
The Missing Constitutional Ingredient: An Upper House

Bruce Grundy

Much of the argument that follows flows from the experiences and observations of the author in reporting and investigating a serious offence and its associated cover-up.

That offence was committed by members of the Cabinet of one of the States of the Australian federation. What they did has gone unpunished. What a citizen of that State subsequently did (which involved the same point of law but was much less serious) attracted the full force of the law. The law had not been changed in the interval between the two events.

The State concerned, Queensland, is the only member of the Australian federation to operate a unicameral parliamentary system – the Upper House having been abolished over three-quarters of a century ago. For much of that time, the State has been notable for poor public administration, dubious regard for democratic values, and corruption.[1]

This paper notes, on the basis of the evidence it contains, that political reform attempted a decade ago following a tumultuous Royal Commission has failed to produce the good government and strong democratic society hoped for at that time. It therefore contends that a new attempt should be made to bring that about – based on the reintroduction of a House of Review into the State Parliament.

Background

Following the efforts of two journalists, Phil Dickie of *The Courier-Mail*[2] and the Australian Broadcasting Corporation's Chris Masters,[3] which revealed the existence of extensive corruption associated with police-franchised and protected brothels, illegal casinos and other strange things, a Royal Commission[4] was established to look into the matters raised. The inquiry was conducted by a returned-to-the-Bar former judge, Mr GE (Tony) Fitzgerald, QC. As a result of his investigations, more than 200 people eventually faced the courts,[5] including the Premier of the day (no verdict, a hung jury) and several Ministers (who went to jail).

In his report in July, 1989, Mr Fitzgerald made a variety of recommendations designed to provide better and more accountable government in his home State.

The State Premier who accepted his report, Mike Ahern, said, even before they were delivered, that Mr Fitzgerald's recommendations would be implemented "lock, stock and barrel".[6] He did not, however, get the chance to implement them. In the first place, dwindling opinion poll results in the wake of the Fitzgerald Inquiry's revelations saw Mr Ahern replaced by his party colleague, Russell Cooper. In the second place, the Nationals were thrashed at the elections in December, 1989, and the government fell to Labor, led by an energetic young lawyer, Wayne Goss.

Goss was supported by the king-making industrial trade union, the Australian Workers Union, from which the Labor Party had sprung toward the

end of the previous century, and which dominated Labor politics in Queensland thereafter.

Within days of coming to power (Labor had been out of office for almost a generation), the Goss Government demonstrated that, despite the Fitzgerald process and its fallout, a government in unicameral Queensland could do what it liked, ignoring both good government and proper public administration.

It shut down an inquiry (the Heiner Inquiry, set up during the last days of the Cooper Government) into the running of the John Oxley Detention Centre, a Brisbane youth detention centre; and shortly after, with the knowledge that the material collected by that inquiry was being sought, properly and legally, by a firm of lawyers, it ordered the destruction of all the material involved.[7]

The author, via sustained coverage in the newspapers produced by University of Queensland's Journalism school, *The Weekend Independent* and *The Independent Monthly*, and some articles in *The Courier-Mail*, has reported on the matter for over a decade.

These efforts, and those of Mr Kevin Lindeberg detailed in Chapter One in this volume, have led us to the point where it is beyond question that:

- the shredding of the Heiner Inquiry documents was a criminal offence;
- the shredding covered up the serious abuse of children in the care of the State;
- the shredding allowed a climate to persist that permitted further serious such abuses of children (not to mention public administration!) to occur; and finally, and most seriously,
- two standards of law operate in the State of Queensland – one for the ordinary citizen, against whom the full force of the law is applied, and one for the powerful, against whom the law is not applied at all.

Since the efforts of a decade cannot be compressed into the space available for this paper, in what follows the argument will be based principally on the last matter raised above, i.e., an all-powerful government in a unicameral Parliament, clearly with no satisfactory checks and balances in place, allows a system of "one law for us and one for them" to operate.

In approaching the matter, recall at the outset the expectations that arose in the community from the Fitzgerald process at the end of the 1980s and from the reforms he recommended. The following quotes provide a snapshot:

> "I well remember the excitement with which so many of us greeted the election in 1989. There was dancing in the streets! A new age was dawning. The Parliament and the government were to become accountable. Civil liberties were to be assured and there would be broad community consultation about proposed reforms.
>
> "No longer would the Parliament and the government be dominated by one conservative and omnipotent man. The days of the personality cult were over.
>
> "Political appointments would disappear from the Public Service and citizens who openly disagreed with the government in power would not be disadvantaged.
>
> "There would be effective Freedom of Information legislation which would render MLAs, Ministers and the Executive truly accountable".[8]

The writer then went on to analyse what had happened in the intervening years. She concluded her appraisal thus:

> "So, nothing much has changed. There are politicians of the ruling party behaving in much the same way as those who were previously in power. Lip service is given to parliamentary and criminal justice reforms, but in many ways we seem to be going backwards. This was not what the Fitzgerald process was meant to achieve".

That piece was written almost exactly ten years ago and only five years after the Goss Government came to power. Imagine what the writer, Dr Janet Irwin (former Director of Health Services at the University of Queensland, and one-time part-time Criminal Justice Commissioner), would say today. I suspect she would be absolutely lost for words.

And just in case readers should think Dr Irwin bitter and twisted, one of those who organised an all-too-short series of seminars on post-Fitzgerald reform in the early 1990s[9] wrote this:

> "The ... government has initiated many changes proposed by Fitzgerald, but as is evidenced by the continued lack of genuine parliamentary reform, lack of resources to the Opposition, the hypersensitivity to criticism, the subtle politicisation of the public service, one must really question whether the spirit of real, open, democratic government has really come to Queensland".[10]

That too was written ten years ago. It is a pity that its author, Dr Scott Prasser, hadn't continued to run his conferences. But people probably wouldn't come. What would be the point? After all, it has all got much worse since those pieces were written.

The unicameral Parliament – a brief history

March 23 is a fateful date in the history of Queensland. That was the day in 1990 when the government of the day broke the law, and set in train the events that have brought the law in this State, and our respect for it, and our respect for our institutions of government from the Governor down, into disrepute. Strange that this presentation should also be predicated on the actions of another Labor government on March 23, which also profoundly affected the kind of government we get in Queensland ... not to mention our respect for it.

March 23 was the date on which legislation was proclaimed that abolished the State's Legislative Council in 1922.[11] It is conceded at the outset that the composition of the Legislative Council at the time had but a passing acquaintance with any notion of democracy at work. The members of the Council were all appointed by the government, through the Governor, for life. Little wonder a frustrated government facing a non-elected "slaughterhouse", as the then Upper House has been called,[12] would want it gone. And it was eventually done, against the express wish of the people, a referendum only four years before (in 1917) to abolish the Legislative Council having been soundly defeated.

Later the *Constitution Amendment Bill* of 1934 was passed. It established that an Upper House in Queensland may only be introduced by a referendum of the people. It was not abolished by a referendum of the people, but can only be re-created by such a vote – a vote the Labor Party has made clear it would oppose, regardless of the proposed composition and role of a resurrected Upper House.

The case for an Upper House

During the days that eventually saw the return of a Coalition government in

Queensland in the mid-'90s, both the Nationals and Liberals agreed that there should be such a referendum. During the 1995 election campaign, Opposition leader Borbidge was reported as saying:

> "At present the Parliament is a joke. It is not working properly. The committee system is not working properly and accountability is a charade. It might not be this way if there was a House of Review".[13]

He pledged that if elected there would be a referendum. Money was set aside in the budget for it.

The Greens and the Democrats were in favour. But the idea was stillborn. It was clear the Labor Opposition would not support such a move, and without bipartisan support, a referendum was unlikely to succeed. The proposal did not even get to the stage of the Borbidge Government setting out a model, although some suggestions were considered. These included:

- Reduce the numbers in the Assembly to accommodate the number of Legislative Councillors that would be elected (to counter the suggestion that no one would buy an Upper House that would mean more politicians);
- Some form of proportional representation to elect them; and
- Perhaps the creation of three provinces or districts, Northern, Central and Southern, to provide for representation across the state.[14]

But there was never any serious work done on the proposal, and the Coalition proceeded to implode. That was the end of that.

The Labor view

In a TJ Ryan Memorial Lecture (honouring the man who held the failed 1917 referendum) at the University of Queensland in 1996, Opposition Leader Peter Beattie said $6 million had been set aside in the State budget for "re-establishing this 19th Century relic".[15] He opposed the move on two grounds. First, the Criminal Justice Commission (a creature of the Fitzgerald reform recommendations) would do a better job of ensuring accountability of government; and secondly, the number of politicians that would be needed. In reply, Premier Borbidge said Mr Beattie did not "even know that the roles of an Upper House and the CJC are as different as chalk and cheese".[16]

Nevertheless, Mr Beattie has continued to present such an argument. On 26 October, 2003 he was interviewed by Helen Dalley of the *Sunday* program on Channel 9, who reported thus:

> "Premier Beattie argues the accountability mechanisms set up after the Fitzgerald corruption inquiry, such as the Crime and Misconduct Commission [the successor to the Criminal Justice Commission], have now taken over the review function of an Upper House".
>
> Helen Dalley: "So do you reckon you benefit as much as Joh did, from no Upper House?"
>
> Beattie: "No, because Fitzgerald changed all that. The Fitzgerald Inquiry has given us accountability mechanisms that don't exist anywhere else in Australia. The Joh days are gone, they're dead, finished, over, buried".

The suggestion that the Criminal Justice Commission, or Crime and Misconduct Commission, was or could be an alternative to an Upper House is one that will be examined in more detail later in this paper.

Queensland vis-a-vis the other States

The federal Parliament and every other State in Australia each has an Upper House. Despite complaints from governments, and despite changes in representation in some of those Houses from non-aligned individuals to party adherents (in most cases), none of those Chambers has yet been abolished – although some States, including Tasmania, with a population less than that of Brisbane, have thought about it.

It is said by opponents of the idea that the Northern Territory and the Australian Capital Territory do not have Upper Houses, which is true. And that means that Queensland places itself in the company of the Territories rather than the States. And even the Territories have a House of Review. It is called the federal Parliament. No better example exists than Dr Nitschke's attempts to have legislation legalising euthanasia introduced in the Northern Territory. It was introduced, but it was overridden by the federal Parliament.

And remember too, it is expected that the State without an Upper House will be the second most populous State in the Commonwealth in another decade or so.

The "Yes" and "No" cases

The arguments for and against reintroducing an Upper House in Queensland are well known, and are only summarised here, as it is the *performance* of the unicameral Queensland system on which I wish to concentrate.

The usual arguments against an Upper House (together with brief rejoinders to them) are:

- No one wants more politicians. (The size of the Legislative Assembly could be reduced to accommodate the number in the Upper House. The overall numbers would not need to change much.)
- But that would mean a reduction in each citizen's access to his/her local Lower House member. (But he/she could have two avenues of representation – depending on the role chosen for the Upper House.)
- The cost (last estimated at $25 million) is too high. (It's a small price to pay to get better, or even half-decent, government.)
- The Upper House would just be an "echo chamber" of, or alternatively an obstruction to the will of, the Assembly. (A House of Review does not necessarily mean either of those things. It can just as easily be a valuable steadying hand on the operations of the Lower House, and a significant contributor in determining the content of legislation.)
- A referendum to get the people's view would be too expensive. (Getting the people's view on how they might be better governed, once in 88 years, does not seem a great burden.)
- Independents or minority groups could hold the Lower House to ransom or frustrate it. (True. It does happen. Compromise is not always an evil.)
- Party politics makes such a Chamber redundant – Councillors would vote along party lines as happens in the Lower House. (That would likely depend on the voting system used. And we are all aware that Senators in the federal Parliament take themselves and their role very seriously.)
- A committee system operating within the Lower House makes an Upper House redundant. (Not so. The government has a majority on the committees, and the performance of such committees mirrors the

actions and views of the government on the floor of the unicameral Parliament. More on the committees later.)

In favour of the proposal, an Upper House could offer additional advantages, apart from providing the obvious – an opportunity for more debate, consultation, consideration, analysis, and so on:

- An Upper House could only be a vast improvement on the current Lower House committee system. Upper Houses are bound to have more influence than committees.
- Overall, the past 80 years have consistently shown that there are great dangers and shortcomings in unfettered government (of whatever complexion) in a unicameral environment.
- Councillors are normally elected for longer terms, providing an overlap with the terms of MLAs in the Lower House. This can assist the consideration and consultation processes of the Lower House.

The Courier-Mail in its editorial of 6 December, 1994 said:

" ... provided an upper house is representative, popularly elected, strictly limited in what it can do to obstruct a government, but equipped with extensive powers to review procedures and monitor executive performance, the people are likely to be better served than in a system where *Cabinet rule effectively has overcome opposition*". (emphasis added)

The unicameral Parliament – a performance review

I acknowledge that the chance of an Upper House being reintroduced in Queensland is probably somewhere between nil and negligible.

Nevertheless, in 1992 the Electoral and Administrative Review Commission (the establishment of which was recommended by Commissioner Fitzgerald), in carrying out a review of parliamentary committees, said that the absence of an Upper House in Queensland had had:

".....a profound effect on the ability of the Queensland Parliament to carry out its functions under the Constitution and conventions which require it to *act responsibly and review the activities of the executive arm of government*".[17] (emphasis added)

It is trite, but necessary, to point out that a modern democracy is not defined by the mere existence of a Parliament (be it one House or two) and elections for such a Parliament every so often (three years or four or whatever). A modern democracy is much more than that, including, not in priority order:

- an understanding by *all* of, and an adherence by *all* (particularly the government) to, the notion of the rule of law;
- an independent and arms-length bureaucracy;
- independent, arms-length, watchdog agencies;
- vigilant, forthright professional bodies;
- vigilant, forthright academics and commentators;
- a vibrant fourth estate;
- a Parliament, including parliamentarians and a parliamentary committee system, that work/s.

In Queensland much/most of the above is found to be wanting.

And the single most significant reason for Queensland's poor performance against the check list above, the one that creates and then pervades the rest, is the brute force, the power, the authority, the control, of a government operating in a single Chamber environment.

So I admit that, while there is no guarantee that an appropriately elected Upper House in this State would make the rivers run with milk and honey and pave the streets with gold, it would be a welcome addition to what we have at present.

An example

Early in 2003, after a Baptist minister was committed to stand trial under s. 129 of the Criminal Code (destroying evidence) or alternatively s. 140 (attempting to pervert the course of justice), a group of students with whom I was working under the umbrella of The Justice Project[18] (whose activities are reported on the internet), sent a letter to each of the State's 89 MLAs.

The letter pointed out that a former Director of Public Prosecutions and the Criminal Justice Commission had said (many times in the case of the CJC) that a charge under s. 129 could only be sustained if a court action had been under way at the time of the alleged offence; and that no such action was under way in the case of the Baptist minister. We included quotes from High Court Chief Justice Murray Gleeson and New South Wales Chief Justice James Spigelman that the rule of law required the "governors as well as the governed" to be treated equally before the law, and asked four questions. Summarised, they were:

- Do you have any comment on the situation in which a court action does not have to have been under way in one case (the Baptist minister), but does have to have been in another (the shredding of the Heiner documents)?;
- Do you support the view that the law should be applied equally to all?;
- Do you support the view that the law should be applied consistently and not arbitrarily?;
- What, if anything, do you intend to do about the matter?

In many cases the fax, email and postal services between St Lucia and the far end of George Street collapsed. The Members never got our letters. We sent more. Some never got them. In all only 30-odd responded. Only one answered all the questions.

Some said they were not legally qualified and could not offer any comment on our questions; some said such matters were the responsibility of the Attorney; some said they could not give legal advice. Most chose not to say anything – not to commit themselves on whether they believed in the rule of law!

The Attorney's response said, in essence, that the DPP was an independent statutory authority and the government did not interfere with its decisions. He went on to say:

> "The Heiner Inquiry was instituted with inadequate powers to take protected evidence, and the Labor government which inherited the flawed arrangements acted in good faith and on legal advice".[19]

Any reading of the documents Kevin Lindeberg has uncovered from that time reveals an absence of good faith. For example, the government had been advised not to shred the documents. It shredded them. People were told their access to those documents was still being considered, when the documents had in fact already been destroyed! And acting on bad legal advice may be convenient, but it does not absolve a person who acts on it from any responsibility in the eyes of the law.

That latter is not a new concept. If it were otherwise there would be no need for courts. We would all seek bad advice and that would be the end of the matter. A West Australian crayfisherman took the advice he was given by a government department. It was wrong. The High Court said it might be a shame, but he broke the law.[20] End of story.

The response from the Opposition was extraordinary. They said there was no credible evidence to support the laying of charges in the Heiner matter _ despite the fact that the offence had been admitted for over a decade! And Cabinet records reveal that those involved knew the documents were required by a firm of lawyers for potential legal action. In addition, the Morris and Howard report[21] into the shredding said there was *prima facie* evidence of numerous breaches of the criminal law!

We had occasion to write to the Premier separately on the matter a little while later. His Chief of Staff, Rob Whiddon, replied. The response included the following:

> "... problems arising as a result of the way the Heiner Inquiry was initially established by the National Party government of the day, were subject of Crown Law advice and canvassed in the Morris/Howard report to which you refer. The information is not new and has been well documented".[22]

The writer neglected to say that Morris and Howard absolutely rejected the basis of the Crown Law advice involved (and what the advice was is of no consequence anyway). He also failed to mention that Morris and Howard said there was *prima facie* evidence that the shredding matter involved numerous breaches of the criminal law.[23]

The Premier's Chief of Staff also pointed out the independent nature of the operation of the Office of DPP, and then concluded thus:

> "Finally, I must object to the suggestion in your letter that there is some sort of cover up of child abuse in relation to the Heiner documents. This matter has been the subject of review and report on numerous occasions. The Morris/Howard report, to which you refer, was provided to the Coalition government of the day, who decided to take no further action. This Government has made every effort to be open about this matter, to the extent that in July, 1998, the Premier took the unprecedented step of tabling all relevant documents and other correspondence in Parliament. This is consistent with the Government's action in tabling the Anglican Church's report".[24]

The government has not, however, tabled the DPP's advice that resulted in the Coalition taking no further action on the Morris/Howard report, despite a recommendation that it do so by the House of Representatives Committee of Inquiry into *Crime in the Community* report into the shredding matter last year.[25]

We know, however, what that advice said, at least according to Kevin Lindeberg who has seen it, and what it said was a rehash of the discredited view that a court action had to be under way before the offence of destroying evidence could be sustained.[26] That issue is covered at length on the front page of the April, 2005 edition of the newspaper I now edit, *The Independent Monthly*. The current DPP (in the context of the case against the Baptist minister) completely rejected her predecessor's (and the CJC's) view.

The unicameral Parliament's procedures

***Questions*:** On two occasions in recent months quite serious matters going to the very heart of responsible and accountable government were the subject of Questions on Notice in the Queensland Parliament. One concerned some questions *The Independent Monthly* had been asking the government regularly for six months, and which it simply would not answer. The questions had to do with the accuracy of a statement made by a former Minister to *The Courier-Mail* newspaper in 1989, about the identity of a girl pack-raped on an excursion from the John Oxley Youth Detention Centre a year before the infamous shredding took place.

The second related to a matter of the Governor seeking a response from the government about a citizen being charged with a serious offence while politicians and bureaucrats were not.

The Members who asked those questions had to wait 28 days for answers, the contents of which could have been provided within a matter of hours in the latter case and perhaps a day in the former case.

(For the record, the answer to the first question revealed, finally, that what a Minister of the Crown had told the public of Queensland through the pages of *The Courier-Mail* in 1989 was untrue. The victim of a pack rape was not 17 years of age, as the Minister had claimed, but 14, and her identity meant that what else the Minister had said about her in the newspaper was also not true.

The answer to the second question revealed that, despite the passage of 18 months, the State government had not yet responded to a request for information on this issue from the Governor.)

In relation to the issue of accountability, prior to 1995 Questions on Notice had to be answered within 24 hours. That period was extended by the then Labor government to 28 days – in the interests of good government, the Speaker of the day told the paper I edited at the time.[27]

If there were another Chamber where such important questions could be raised, it wouldn't matter quite so much.

Sitting days: Between 1970 and 1981 (in the dark days of Premier Johannes Bjelke-Petersen, when all manner of commentators and academics complained of a lack of government accountability and a lack of democracy in Queensland), the Parliament sat for 50 days or more each year – some years more than 60, some more than 70.[28] This year it will sit for 44. (In days long gone it sat for many more. During the years of the seventh Parliament, the Assembly managed a total of 339 days and the Council, 198).[29]

The committee system: The parliamentary committee system, which Fitzgerald said had to be invigorated, is often touted as a Lower House substitute for an Upper House. It is not.

Former Nationals leader Rob Borbidge said in 1995:

> "The committee system is a farce and accountability is a myth ... a House of Review would be a good check on Parliament".[30]

Now let me move forward ten years to January 1, 2005. Stephen Wardill, writing about the parliamentary committees in *The Courier-Mail*, said in part:

> "... despite their supposed status as pillars of the Queensland democracy, since this State has no upper house, what did they achieve? Did any make

sweeping reform recommendations that eventually will make Queensland a better place? Or did at least one group have a controversial proposal adopted because it convinced the Government it was the right thing to do? Of course not ...".

Wardill concluded:

"Until the committee system is reformed and given more teeth, the 'open and accountable' mantra this Government likes to tout can only be met with derision".

The "alternative Upper House"

Mr Beattie has claimed Queensland has no need of an Upper House because it has the Criminal Justice Commission or, now, the Crime and Misconduct Commission.

At the outset one can but point out the obvious, namely that such a body is not a substitute for an Upper House. It does not provide an opportunity for debate; it does not provide a conduit for community reaction to issues of the day; it has no say in what a government decides or does not decide to do; it does not ask questions, initiate Matters of Public Importance or Grievance Debates; and it does not do a host of other things.

But since the Premier thinks the CJC (and presumably the CMC) provides such an alternative, let us look at how well we have been served by those bodies.

When we wrote to our State MLAs about the rule of law, and a citizen being charged with a criminal offence while others who did much worse were excused, we subsequently sought the views of the then Chair of the CMC on these matters. We also sought the views of the Police Commissioner. We faxed our letters to both. Two years later the Police Commissioner has yet to respond. But then, when you think about it, what could he possibly say? So he says nothing.

Mr Butler, the Chairman of the CMC, however, did respond. He said:

"I refer to your letter in which you request a response ... in regard to the interpretation of section 129 of the Criminal Code.

"I wish to advise that the CMC is not prepared to proffer an opinion on the interpretation of section 129 of the Criminal Code in a vacuum. Whether a particular complaint requires the CMC to consider the interpretation of a statute, the CMC will do so insofar as it is necessary for it to fulfil its statutory requirements with respect to the facts of the complaint.

"In the past, in order to satisfy its statutory obligations, the CJC may have had an opinion as to the interpretation of section 129 of the Criminal Code. However, I would expect that any such opinion would have been provided in the context of a particular fact situation. It may well be that in the future a different fact situation arises and the CMC will be required to consider the application of section 129 in respect of those new facts.

"I hope this helps you understand the CMC's position in relation to this matter".[31]

Well, it didn't. The law is the law. If the facts fit, you have an offence.

What else did we get from the "alternative Upper House"? We got, consistently from the CJC, in the face of *R v Rogerson*,[32] that a court action had to be under way before s. 129 of the Criminal Code could be triggered – a view which Kevin Lindeberg and I and others, including Ian (now Mr Justice) Callinan, QC, Bob Greenwood, QC and Alastair MacAdam, Senior Lecturer in Law at Queensland University of Technology, have said all along was simply not so.

This nonsense view has been provided, supported, or never repudiated by no less than three Chairs of the CJC/CMC, by its one-time Senior Complaints Officer, now State Coroner, and by a former consultant, now a serving magistrate. It was never questioned, as far as we know, by its parliamentary committee, one chair of which described the efforts of those exposing the shredding matter as "a looney tune conspiracy".[33]

The "alternative Upper House" also got the facts of the shredding case wrong and misled its parliamentary committee.[34]

A tape in the safekeeping of the "alternative Upper House" mysteriously erased itself – a 2500 to 1 eventuality according to one expert.[35] I have heard the tape and can say, after long years working in radio, that it was erased by human hands.

The "alternative Upper House" rewrote the wording of the law (Regulation 65 of the *Public Service Management and Employment Act*) and were then able to interpret that regulation to get it to say what it did not say.[36]

The "alternative Upper House" said the shredding matter had been investigated to "the nth degree",[37] when it had never been investigated at all.

The "alternative Upper House" objected strenuously that the setting up of an investigation into the paper trail involved in the shredding matter (the Morris/Howard Inquiry) was a "waste of resources".[38] Given that the two barristers involved found what the "alternative Upper House" could not find, i.e., *prima facie* evidence of serious breaches of the criminal law, it is, perhaps, little wonder that the "alternative Upper House" should object so vociferously to the establishment of that inquiry.

Much more could be said about the suggestion that a CJC/CMC is a substitute for an Upper House, but that may be enough for present purposes.

The "independent" bureaucracy

Throughout the last fifteen years the entire relevant bureaucracy, in all manner of manifestations, has participated in the covering-up of the circumstances of the shredding of the Heiner Inquiry papers, including blatantly lying to Kevin Lindeberg and to me. That is demonstrable. We have the documents.

The lies and cover-up do not just involve public servants in the department at the centre of this scandal. They extend even into the administration of our courts. In simply seeking access to court records I have been lied to and misled by court officials. I have the correspondence. When I complained to the Director-General of the Department of Justice at the time, he said he didn't think any good purpose would be served by pursuing the matter. I happen to disagree.

Access to records has been improperly (read illegally) denied to us (and at least one other person) by Freedom of Information officers. As well, material that should not have been blanked out on pages has been blanked out, in clear contravention of the rules. Note that the improper blanking-out assisted in covering-up the circumstances surrounding the pack-rape of a girl in the custody of the State!

Every public servant in the Queensland bureaucracy knows where their bread is buttered when it comes to anything that might remotely touch the Heiner matter. It's the culture, the same one Fitzgerald spoke about in relation to the police brotherhood[39] when he conducted his inquiry. You protect, or you had better protect, anyone involved in this matter. The brotherhood and sisterhood are alive in Queensland today.

The Fitzgerald process did not change the bureaucracy. Its capacity to indulge in blatant dishonesty and deceit, not to mention the disingenuous, has not been, and is not today, diminished by any of the Fitzgerald "reforms" (despite the existence of the CJC/CMC and, in earlier days, the Electoral and Administrative Review Commission). For details see the Morris and Howard report,[40] and The Justice Project.[41]

Freedom of Information

Fitzgerald specifically recommended the introduction of Freedom of Information legislation. It was introduced and since that time has been whittled away, to the point where it is now derided and scorned as a joke by all.

Former FOI Commissioner Fred Albeitz said in one of his annual reports to Parliament:

> "My primary concern is that the *FOI Act* is in danger of dying the death of a thousand cuts unless the recent trend towards more and more exclusions of particular bodies, or particular functions or classes of documents in respect of particular bodies, is not arrested and, preferably, reversed".[42]

That was written ten years ago, just three years after the legislation was introduced; and it has all been downhill since then. Have you seen anything in the news media lately about a successor to the position Mr Albeitz held?

It has now reached the stage where everyone quite openly describes FOI in Queensland as a joke. For example, Malcolm Cole, reporting for *The Courier-Mail* earlier this year, said in part:

> "So as they sat around the Cabinet table, the men and women who occupy offices of great privilege in this state, laughed about their secrecy, their lack of accountability. Because they know the murky and confusing world of freedom of information will not change votes they can afford to laugh.
>
> "Because the power of this government is virtually unlimited, and because it has no fear of losing office any time soon, the people in charge can make jokes about their contempt for basic democratic principles.
>
> "In a previous era the same sentiment would have been expressed as: 'Accountability? Don't you worry about that!' ".[43]

At the same time I have to acknowledge that, while FOI has been slow and sometimes improperly handled by those responsible (to the point where material that legally should have been released was withheld), we did get access to some documents that have advanced the battle against the Heiner affair cover-up.

Other matters

There are other ingredients in a vibrant democracy that have been missing in action throughout the course of this matter. The deliberations of an Upper House, if we had had one, might, just might, have given some of those concerned some courage.

The professional bodies and the academy: With some exceptions, the performance of the professional bodies, the legal community and those involved in relevant disciplines in our institutions, in the face of this blatant abuse of power, has been disgraceful. I particularly *exclude* Alastair MacAdam of QUT and David Field of Bond University.

And I would suggest, if the boot were on the other foot, if it were Johannes Bjelke-Petersen who had been in charge during the travesties of the last 15 years,

the people referred to above would have been howling in the streets. But we get silence, thunderous silence.

Last year *The Independent Monthly* canvassed the views of some of the professional bodies and academics involved in relation to the unfortunate citizen who had to face the music that others had escaped. What we were told is a very sad tale. The story said in part:

> "The Queensland legal fraternity has declined to comment on the double standards involved in a case to come before the District Court in March. Last month an international authority on archives practice, Professor Terry Cook told *The Independent Monthly* the case exposed 'the two-faced hypocrisy' of Queensland authorities. This was because a citizen was facing trial for destroying records that could reasonably have been expected to be used as evidence in court proceedings, but politicians and senior public servants who did the same thing (in connection with the destruction of the Heiner Inquiry documents) were officially excused. When *TIM* invited numerous legal and civil liberties bodies to respond to the situation facing the citizen, all declined to comment".[44]

The watchdog media: Despite the revelations of numerous rapes, death threats, lies, cheating and deceit, and even connections to shotgun deaths in the streets, a House of Representatives Inquiry into the matter, the Morris and Howard report, the Governor being required to wait 18 months for a reply from the government, the DPP rejecting the stance of her predecessor and the CJC, the story has either never, or almost never, been covered by ABC News, the *7.30 Report*, *Stateline*, *AM*, *PM* or *The World Today*. It did make *Australian Story*, and the *Conversation Hour* on ABC Radio (but note that you cannot access a transcript of that interview, unlike others conducted for that program).

The Courier-Mail (which has twice criticised my coverage of this story in its feature pages in recent years) covered the Baptist pastor's trial and its outcome, but has never made any connection between what happened to him and what happened (more precisely, did not happen) to those who destroyed the Heiner documents. The failure of the media generally to apply normal standards in relation to this case is a matter of serious concern. It is the exact same circumstance that existed in the days when Bjelke-Petersen "fed the chooks".

The Courier-Mail can do its own thing. That is the reality with a private commercial enterprise. But the problem with the ABC is serious. The ABC is not funded by the Queensland taxpayer; it is funded by the Australian taxpayer, and its failure in this matter ought to be investigated.

Conclusion

Queensland today is as feeble a democracy as it ever was. The extent to which an Upper House would fix it, would depend on how it was elected, the quality of those elected, and the role it was given or allowed. It could not make things any worse. It would almost certainly make things better. But will it be allowed to happen?

In the meantime, we go on lapping up our Fourex and our sunshine and not giving a damn. Good old Queensland.

Endnotes:

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3. *The Moonlight State* (1987), ABC, *Four Corners.*
4. *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (The Fitzgerald Inquiry). See report: Fitzgerald, Gerald Edward (1989), Brisbane, Queensland Government Printer.
5. Whitton, E, *The Hillbilly Dictator*, *op. cit.*, p. 180.
6. Reynolds, Paul (2002), *Lock, Stock and Barrel,* St Lucia, University of Queensland Press, p. 183.
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17. Fact Sheet 39, *op. cit.*.
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35. Report compiled by Queensland University of Technology Professor Miles Moody, 27 March, 1995, provided in evidence to the Senate Select Committee on *Unresolved Whistleblower Cases*.
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Chapter Four
Senate Vacancies: Casual or Contrived?

John Nethercote

In December, 2001, barely one month after the general elections of November, 2001, it was reported that Duncan Kerr, member for Denison in the House of Representatives since 1987, and Minister for Justice in the Keating Government (1993–96), was thinking of resigning to contest a seat in the Tasmanian House of Assembly. He had recently lost his place on the Labor Party front bench and claimed to be disheartened by Opposition. He apparently had hopes of appointment to a ministry in the State Labor government should it be returned.

There was a brief controversy, in the course of which Kerr decided not to proceed. One reason was a concern that Labor would lose the seat in a by-election held so soon after an election. There were some grounds for fearing an electorate's wrath at a by-election not seen as justifiable in public interest terms. Such had been the fate of the Liberal Party in the Queensland seat of Ryan after former Defence minister, John Moore, resigned in February, 2001 after losing his portfolio in January, 2001. Later, in 2002 Labor lost the New South Wales seat of Cunningham when Defence spokesman and former Speaker of the House of Representatives (1993–96), Stephen Martin, resigned in August.[1]

These instances notwithstanding, it is relatively rare for House of Representatives seats to change hands at by-elections. Since May, 1977 this has occurred on eight occasions out of 39. In one of these, the Liberal Party claimed a seat previously held by the National Party (Groom, Qld, 1988). In another two cases the victors were, respectively, a local independent (Wills, Victoria, 1992) and a Green (Cunningham, NSW, 2002). In these two instances, and two others, the seat was eventually reclaimed by the by-election loser.

While it may be relatively rare for a House of Representatives seat to change hands at a by-election, it is something which, since 1977, can never occur when a casual vacancy arises in the Senate for reasons either of death or resignation. Had Mr Kerr been Senator Kerr, it is doubtful, though not impossible, that the controversy of early 2002 would have occurred. Indeed, some of the ambitious in the ALP might well have encouraged him to take his chances in the House of Assembly stakes whilst one of them settled smoothly onto the pinkish benches of the Senate chamber in Parliament House, Canberra, without any of the indignities entailed in having to seek the support of the electors for a place in the national legislature.

Filling casual vacancies: the 1977 referendum

The reason for this situation lies in one of three alterations to the Constitution approved at referendum in May, 1977 by majorities in all six States and with a national majority of nearly three and a half million votes. A new section 15 provided that henceforth a State Parliament, in filling a casual vacancy, should be limited in its choice to the nominee of the party (or the successor party where there had been organisational change) from which the former Senator had come. Moreover, the new Senator would inherit the entire balance of the term of the predecessor.

New s. 15 replaced an original provision whereby a State Parliament was not restricted in its choice of a new Senator to fill a vacancy. A Parliament's choice then held office until the next House and/or Senate elections, when the vacancy would be the subject of contest.

Casual vacancies since the 1977 referendum

The new s. 15 (and comparable provision for Territory Senators) has been anything but dormant. Indeed, it has had a major impact on the composition of the Senate — an impact which reflects adversely on the vital role which it plays in the Parliament of Australia. In the present Senate, prior to changeover on 1 July, 2005, there are no fewer than 31 of the 76 Senators who have entered under the auspices of the new s. 15 (or its Territory equivalent).

A small number of these entered to complete the remaining few months of a retiring Senator's term before commencing a term for which they had been elected. Most, however, arrived without the blessing of the electors of the State or Territory which they represent at either a periodical or, less likely, a general election of Senators following a simultaneous dissolution of both Houses under s. 57. (By contrast, only 18 of the 150 members – 12 per cent – of the House of Representatives dissolved in 2004 entered by way of by-election: the cases are not comparable because, by definition, these members could only take their seats after facing the electors.)

In the Senate's entire history there have been 126 casual vacancies; 59 of these have occurred since the 1977 change to the Constitution. Of these 59, only four were occasioned by death. In the previous 77 years there were 67 casual vacancies; 46 of these were the consequence of death. To some extent these figures may be explained by successive expansions of the Senate taking effect at the 1949, 1975 and 1984 elections respectively. But the scale and character of the change has been mainly the consequence of the 1977 alteration to the Constitution, combined with the generosity of the superannuation scheme introduced by the Whitlam Government and operating until 2004.[2]

In the House of Representatives, there have been 135 by-elections occasioned by death or resignation. Only 39 of these have occurred since 1977. Of these 39, only five have been a consequence of death. Previously most by-elections were the result of death (62 deaths; 34 resignations).

On a pro-rata basis, resignations from the Senate now run at almost three times the rate of those from the House. Included in this number are some cases of clear manipulation of the 1977 scheme. Senator Kay Denman (ALP, Tas), who leaves the Senate on 30 June, 2005, has had virtually twelve years in the chamber although she faced the electors of Tasmania but once, in 1998. Her good fortune stemmed from the decision of Senator the Honourable Michael Tate (now Father the Honourable Dr Michael Tate) to resign, after only five days into a new term in 1993, in order to take appointments as Ambassador to both the Netherlands and the Holy See. Former South Australian Liberal leader John Olsen came and went from the Senate during the early 1990s without ever meeting the electors. Belinda Neal (ALP, NSW) is another whose time in the Senate was unsullied by any visit to the polls. She was, however, defeated in attempting to win a House of Representatives seat.

The Senate's elective character vital to its legitimacy

Why should this situation be a matter of concern? The reasons fall into two categories. The first, and immediate, category relates to the integrity and legitimacy of the Parliament and, in particular, the Senate. Any dilution of the Senate's elective quality casts a shadow upon the authority with which it performs its extensive and comprehensive responsibilities in legislative and other parliamentary processes. The second set of reasons is what this course of events demonstrates about not only the dangers of tinkering with the Constitution, but also the capacity to do so effectively.

In general, it is a fundamental principle in Australia that membership of a House of Parliament or a legislative body should be accomplished through popular (democratic) election. This principle has had especial significance for the Australian Senate. The United States counterpart aside, few other second Chambers can rival the Senate's powers.

These powers have been validated, legitimised and reinforced by the fact that the Senate has always been, from its inception, an elected House. It is, in fact, the first second Chamber in the world to be elected on the same franchise as the other Chamber (in this case, the House of Representatives); since 1903 it has, like the House, been elected on the basis of a full adult franchise. From its earliest days the Senate has played an important role in the Parliament, and that role has grown and developed since introduction at the 1949 elections of proportional representation. To a great extent, when it is said that national governments in Australia are responsible to Parliament, it is to the Senate's contribution and achievement to which the observer must look for evidence to sustain the proposition.

The Senate's authority to fulfil its role under the Constitution thus has two foundations. The first is that it is an elected House. The second is that, because of proportional representation, its composition closely reflects electoral opinion (indeed, more so than the House of Representatives) and thereby enhances the representivity of the Parliament as a whole.[3]

It follows that anything which weakens the elective foundations of the Senate potentially weakens the Parliament and its authority to hold governments in Australia to account. This is the defining deficiency of the new s. 15 as it has operated in practice. The deficiency is aggravated not just because casual vacancies are filled by selection rather than election, as has always been the case, essentially for practical reasons, but because nomination is totally controlled by political parties. There is virtually no avenue of escape. The previous system at least ensured that the filling of a vacancy was remitted to the electors at the earliest subsequent opportunity.

A second, subsidiary deficiency in the new s. 15 is that it often augments the advantage of incumbency (recognising that incumbency is not invariably an advantage). This advantage is seen very clearly among the cross-bench parties. It is perhaps most visible, ironically, in the case of the Australian Democrats, who hardly wince when it comes to turnover of parliamentary representation by means of party selection rather than popular election. Of the 26 Australian Democrat Senators in the Senate since 1977, no fewer than eight have first entered via s. 15, seven before winning the support of electors at the polls. This number includes former party leaders Janine Haines, Janet Powell, Meg Lees, Natasha Stott-Despoja and Andrew Bartlett.

New section 15: the Constitution's "most prolix, legalistic and confusing section"

The second group of reasons for interest in the fate of the new s. 15 is what it tells us about altering the Constitution. The most eminent student of the Australian Parliament, Professor Gordon Reid, later Governor of Western Australia (1984–89), said it all when he wrote that the "seemingly simple change" in 1977:

> ".....replaced the original and succinct s. 15 with the Constitution's most prolix, legalistic and confusing provision. Ironically, the one-and-a-half pages of the new s. 15 lacked clarity, as was demonstrated when first it was needed".

The new s. 15 was first activated when the Parliament of South Australia had to replace former Liberal Movement Senator (and former State Liberal Premier) Steele Hall. Senator Hall had resigned to contest a seat in the House of Representatives for the Liberal Party, to which he had returned. The Liberal Movement had been dissolved, some of its remnants rejoining the Liberal Party, others heading for the newly-formed Australian Democrats founded by Liberal renegade Don Chipp. The latter was deemed to be the successor organisation, and the Senate place went to Janine Haines, who had been on the Liberal Movement ticket at the time of Steele Hall's election in 1975, rather than to the nominee of the Liberal Party.

Reid pointed out that the new s. 15 has "the effect of limiting the discretion of State Parliaments and State Governments in filling casual vacancies". This observation raises an important but unresolved question about the new s. 15 — namely, is a State Parliament necessarily compelled to endorse the nominee of the political party to which the previous Senator belonged?

In 1987, when the ALP in Tasmania proposed J G Devereux as successor to Senator Don Grimes on his appointment as Ambassador to the Netherlands, the Tasmanian Parliament, at the behest of Liberal Premier Robin Gray, voted down the nomination on the ground that the nominee would not represent Tasmania properly because of his views on environmental and conservation questions. Regrettably, the 1987 double dissolution elections intervened before events had run their full course, and Devereux went to the Senate with the blessing of the electors. He subsequently left the ALP and sat as an Independent, eventually resigning to contest a seat in the House of Representatives.

Did the Constitution need a new section 15?

The short history of the 1977 change: The impoverished draftsmanship of new s. 15 is only one side of the constitutional aspect. The other side is how necessary was amendment in the first place? Were the grounds which motivated its conception and presentation to the electors a sufficient justification?

The immediate cause of the change was the controversies over casual vacancies in 1975, the last year of the Whitlam Government. The first centred on replacement of Senator Lionel Murphy, following his appointment to the High Court, by Cleaver Bunton, a leading local government figure in New South Wales. Bunton was nominated by new New South Wales Premier, Tom Lewis. Shortly afterwards the Queensland Legislative Assembly (the only House in that State's unicameral Parliament), at the instance of National Party Premier Joh Bjelke-Petersen, and in the face of opposition from Liberal Party ministers in his government, selected Pat Field to replace the deceased Senator Bert Milliner in preference to Dr Mal Colston, the nominee of the ALP.

In this context the Bunton nomination is of more interest for it was, in some considerable measure, a self-inflicted wound with some relevant antecedent events. There had been several occasions previously when parliamentarians had gone to the bench of the High Court. In all but two such cases the appointment was followed by a by-election, which thus places a measure of discipline on governments making such appointments.

The first exception was O'Connor, a Senator. He was replaced by another protectionist from New South Wales, who served a few days before the vacancy came before the electors at the 1903 federal elections. The interim Senator was not a candidate at those elections, and in fact returned to the Legislative Council of New South Wales once his Senate membership lapsed. The other exception was John Latham, who left the House of Representatives at the 1934 elections in the expectation of appointment as Chief Justice when a vacancy in that office came to pass, as it eventually did after some delay the following year.

When a vacancy arose in the Court in 1972 there was reportedly a general inclination that it should be filled by another former Attorney-General, the Minister for Foreign Affairs, Nigel Bowen. The times were not, however, propitious. Bowen stayed in the House of Representatives and the place on the Court went to Anthony Mason, a member of the Court of Appeal in New South Wales and a former Commonwealth Solicitor-General. The rest, as they say, is history. (Bowen himself eventually went to the NSW Court of Appeal in 1973, and later became the first Chief Judge of the Federal Court; he was succeeded as member for Parramatta by Phillip Ruddock.)[4]

The circumspection of the McMahon Government might well have been emulated by the Whitlam Government in 1975. According to Tom Uren, the Murphy appointment:

> "…. came completely out of the blue …….. I could immediately see problems: Lionel had been elected to the Senate for six years but had served only eighteen months. I saw that if he were to be appointed to the High Court, six New South Wales Senators would have to retire at the time of the next half-Senate election and the ALP could gain only three of those places. Under normal circumstances five New South Wales Senators would have retired and we would have gained three out of five. Therefore, when Murphy went to the High Court, we stood to lose a seat and possibly fail to gain control of the Senate. We were literally giving the conservative forces at least one extra Senate position, which might have been the vital vote to give us a majority in the Senate at the next half-Senate elections".[5]
>
> Uren continued:
>
> "In Cabinet I argued strongly on this point, but also questioned what Premier Lewis would do concerning the casual vacancy: 'Who is to say that Lewis will appoint a Labor man to fill Murphy's vacancy?' ".[6]

Uren frankly admits that part of his concern was motivated by internal Labor politics, his fear that Murphy would probably be replaced by:

> "….. a right-wing Tammany Hall machine appointment, not a left-wing candidate. I was also worried that the position of the Left would then be weakened in the ALP caucus. Murphy's appointment created an imbalance in the caucus and on the federal executive".[7]

Lewis, for his part, would not have had much experience of filling Senate casual vacancies. In his time few vacancies came to the NSW Parliament, and

those that did so were a consequence of death or terminal illness. What he did have experience of was vacancies in the New South Wales Legislative Council, where there was no convention or practice about selection of someone from the party of the member who had died or resigned. In the words of Neville Wran's biographers, "[w]here single vacancies were caused by death or retirement, they were filled by the majority Party".[8] Only recently two vacancies had been engineered to expedite Wran's transfer from the Council to the Assembly without disadvantaging Labor. This manoeuvre was facilitated by appointment of a Liberal MLC to the Federal Bankruptcy Court bench, thus ensuring that, including Wran's resignation, there were two vacancies. The Commonwealth Attorney-General involved in the stratagem was Senator Lionel Murphy.

It is not surprising that Lewis was unmoved by Prime Minister Whitlam's invocations of conventions in an effort to have the Murphy vacancy in the Senate filled by a Labor nominee. What is surprising, given Whitlam's general disregard of conventions in so many fields of government, is that he should have based his case on so transparently infirm a foundation.

The two incidents in 1975 were not the first attempts to manipulate casual vacancies in party interest during the Whitlam period. The Coalition had its own grievances stemming from the previous year, when the Government sought to engineer an advantage for itself in the up-coming periodical elections of Senators by appointing long-term Senator Vince Gair, former Leader of the Democratic Labor Party, as Ambassador to Ireland, at his own suggestion as former Prime Minister Whitlam has lately disclosed.

With six rather than five vacancies to be contested in Queensland, Labor thought it had a chance of securing three seats, instead of two in the event that only five seats were at issue. Had the Whitlam tactic succeeded, it would inevitably have had the effect of changing voter preference as it had been expressed at the periodical election of Senators in 1970. But the manoeuvre was bungled, and instead of periodical elections for half the Senate, Australians went to the polls at double dissolution elections for the third time in their history.

Ironically, the advantage which Whitlam sought to secure for his own party with the Gair appointment was, as Uren pointed out, the same advantage he proposed to give to his opponents should a periodical election of Senators have taken place on 13 December, 1975, as would have occurred had the Governor-General accepted the advice which Whitlam unsuccessfully sought to submit to him on 11 November, 1975.

Did the Constitution need a new section 15?

The long history of the 1977 change: The events of 1974–75 brought the problem of filling casual vacancies in the Senate to a head. They manifested rather than created a long-standing, unresolved issue in the composition of the Senate, arising from the twin features of direct election by all eligible electors in a State, and the multi-member character of representation essential to capture the main streams of electoral opinion. Valuable as proportional representation is in reflecting a diversity of electoral opinion, it has a major defect in handling casual vacancies. None of the proponents of proportional representation has yet come up with a satisfactorily workable formula.

In the initial draft of the Constitution, Senators were to be chosen by State Parliaments, following the method then used in the United States. Under such a procedure the issue of filling a casual vacancy by a State Parliament would have

been simpler to the extent that there was no change in the selecting body. But when it was decided that Senators would be directly chosen by the people of the State, problems arose in filling a vacancy because, as explained by Quick and Garran:

> "[I]t was desired to have the vacancy filled by direct election as soon as possible; but the expense of holding a special election throughout the State was an obstacle".[9]

The actual convention debate does not contain much guidance on the matter, except some comment about perceived dangers of interim selection by the Governor, implicitly because it would be a party or faction decision, rather than by the Parliament as a whole. Characteristically, it was Alfred Deakin who put the view that there was no real difference between an appointment by the Executive and one by the Parliament as a whole![10]

It was also originally proposed that a new appointee would hold office for the "unexpired portion of the term". This was subsequently changed to provide for an election to fill a vacancy at the next election for the House of Representatives or of Senators, whichever was the earlier.

Quick and Garran explain at some length that under the original casual vacancy provision, the procedure:

> "..... is not regarded by the Constitution as the election of a successor . . . it is merely an *ad interim* appointment, in order to save the State from being short of a Senator, on the one hand, and to save the State the cost of a special election, on the other; the legislative appointee is not a successor of the deceased, disqualified, or resigned, Senator, but merely a temporary holder of the office, pending the election of a successor by the people of the State".[11]

In the 48 years from the inception of the Commonwealth to introduction of proportional representation for election of Senators, various practices prevailed in filling casual vacancies, and from time to time it was asserted that replacements should come from the same party as the deceased or resigned Senator. There was no convention, and sometimes parties with majorities in a State Parliament felt no inhibition about choosing one of their own to fill a place previously occupied by an opponent. The Peden Royal Commission on the Constitution observed, in 1929, that:

> "In some instances a candidate has been elected of the same party as the Senator whose place is vacant, although he has not belonged to the same party as the majority of the members of the State Parliament, but this system has not been generally followed".[12]

One attitude of interest in this period was that of Labor leader in New South Wales during the 1920s and early 1930s, Jack Lang. He took the view that casual vacancies should not be filled by anyone proposing to contest a forthcoming Senate election. In short, a Senator chosen under s. 15 should not be able to contest a periodical (or, indeed, a general) election of Senators with the advantage of incumbency.[13]

A foretaste of future manipulations occurred in 1917. The Prime Minister, W M Hughes, tried to build a majority in the Senate by securing the resignation of an anti-conscriptionist Senator and his replacement with one favourable to Hughes' situation – in particular, his desire for a resolution asking the Imperial Parliament to authorise an extension of the life of the Commonwealth Parliament, elected in 1914, and due to face elections before the end of 1917 in

the case of the House, and before 30 June, 1917 in the case of the Senate. As with the Whitlam Government's ploy with Senator Gair in 1974, the plan back-fired, and normal elections proceeded on 5 May, 1917.[14]

A major reason why any controversy about casual vacancies in this era was short-lived lies in the very lop-sided majorities mainly enjoyed by governments under the first two methods of electing Senators. "Control" of the Senate, or even party advantage, was practically never at stake, no matter how a casual vacancy was filled.

The proportional representation system introduced at the 1949 elections had the effect of ensuring that party representation in the Senate would closely reflect party voting strength in the electorate. In time this representative quality of the Senate voting system came to embrace not only the two major competitors for power nationally, but also various minor parties and interests.

Because of the closeness of voting in Australia, and the fact that this feature is to be found in all States as well as Australia-wide, the consequence has been a diametrical change from the situation in the first half-century of the Commonwealth. Majorities are no longer lop-sided. Even when they exist, they are usually paper thin (the largest margin of government over all others has been six, from 1975 to 30 June, 1981). Casual vacancies shifted from being largely peripheral contests about placemanship to matters of major import potentially affecting "control" of the Chamber.

Menzies was the first to be conscious of the impact of the new voting system on the Parliament as a whole, and the workings of s. 57 (the double dissolution provision) in particular. He understood the essential effect of the new method of choosing Senators: deadlocks would be more likely but, with proportional representation, it would be well nigh impossible to resolve them by resort to a double dissolution under s. 57. Australia's parliamentary system was now one of adversarial bicameralism, as would become increasingly clear in the next half-century.[15]

On 4 May, 1950 Menzies introduced the *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* 1950.[16] It included several measures which, it was hoped, would ameliorate the problems he believed were created by the combination of the Senate's virtually co-equal powers with the House, and the proportional method of electing Senators. Once passed by the House of Representatives, it went to the Labor-controlled Senate, which established a select committee to examine the proposed amendments to the Constitution. As the Government decided not to participate in the inquiry, it was an all-Labor body headed by former Chifley Government minister, Senator Nick McKenna of Tasmania.

The select committee's main preoccupation was the general measures being proposed to reduce the likelihood of deadlocks between the two Houses, but the Committee's review inevitably embraced the casual vacancy implications. It reported as follows:

> "Because of the added importance of casual vacancies as a result of proportional representation ensuring fairly evenly divided Senates, it is recommended that the constitutional provision for filling of casual vacancies be reviewed. . . . [T]he law should be amended to make it as nearly certain as possible that casual vacancies will always be filled by a new Senator of the same political complexion as his predecessor. The most satisfactory way to ensure this . . . is by a provision in the law that in the

event of a Senator ceasing to hold office for the expiration of his term any votes credited to him be transferred to the next in line, according to his ballot papers, and the candidate elected by a continuation of the count to serve until the expiration of the term, or until the election of a successor at the next election of Senators for the State, whichever first happens".[17]

While the Committee's message that a vacancy should be filled by someone of the "same political complexion" was heard, the other ideas it raised fell by the wayside. So also did its recommendation that s. 15 be amended "so as to empower the Parliament to determine by legislation how casual vacancies shall be filled".[18]

The Select Committee recommended no further action on the proposed changes to the Constitution. Menzies himself was content for the matter to be laid aside following the 1951 double dissolution elections, which yielded a small working majority for the Coalition in the Senate.

The Committee's ideas about handling casual vacancies were however kept alive by its secretary, J R Odgers, subsequently Clerk of the Senate (1964-79), in successive editions of *Australian Senate Practice*.[19]

The next episode in this long history arose on 12 December, 1951 when Western Australian Labor Senator R H Nash died. The Liberal Premier of Western Australia, D R McLarty, wrote, *inter alia*, to Menzies on 20 December, 1951 after the Liberal and Country League Executive had voted to replace the deceased Senator with one of their own members:

"The Liberal and Country League Executive met a few night[s] ago and carried a resolution agreeing to the appointment of an LCL candidate, but I got them to agree that I should first consult you before making any final decision.

"Whatever action we take in this case will be a precedent for the future, but even if we should appoint a Labor nominee there is no certainty that future similar action would be taken in such States as New South Wales, Victoria and Queensland.

"In the event of our appointing a Labor supporter, I would like to know if the Electoral Act would be amended to make provision for the filling of the vacancy by a candidate of the same Party, and as you are aware this action should not be delayed. You will also be able to inform me if such action could be taken by means of legislation, or is [it] a constitutional matter requiring a referendum?

"In the past we have in this State filled three Senate vacancies by parliamentary action but the question of proportional representation did not then arise".[20]

In a letter of 10 January, 1952 McLarty wrote, *inter alia*, to the other State Premiers:

"My opinion is that, in view of the fact that proportional representation is now the method of election to the Senate, a member of the same Party, nominated by the Executive of the Party, should be appointed when future vacancies arise through death or other causes".[21]

The McLarty Government nominated J A Cooke (ALP) to take Nash's place. Although much was subsequently made of the observance of the McLarty rule, it in fact had only limited effect in maintaining the party complexion of the Senate as expressed by the voters at periodical elections of Senators.

An example of its limited impact came in 1959, following Senator John Spicer's resignation on 13 August, 1956 to become Chief Judge of the Commonwealth Industrial Court. In accordance with the McLarty rules he was replaced by G C Hannan, on the nomination of the Bolte Liberal Government in Victoria. At periodical elections in November, 1958 there were thus six vacancies to be filled in Victoria because Spicer's term had only commenced on 1 July, 1956. The six places were divided evenly between Liberal and Labor.

Had only five places been at issue, the Liberal Party would have won three seats to two. Victorian representation in the Senate during 1959–62 was, as a consequence, 4 LCP, 5 ALP, and one DLP, instead of 5 LCP, 4 ALP and one DLP had Spicer not resigned. (As it was, the Government had a majority in the Senate from 17 February, 1959 as a consequence of filling of a casual vacancy in New South Wales, whereas from 1 July, 1956 until after the 1958 elections it had only had half the Senate. It was in this period that, for the first time in the Parliament's history, there were a number of bills – including one to establish the Reserve Bank of Australia – meeting the requirements for a double dissolution under s. 57, but none eventuated.)

The McLarty rule operated in modified form in late 1962 when newly-elected Labor Senator Max Poulter died. The Queensland Country Party–Liberal Government led by Frank Nicklin refused to accept the Labor nominee, A E Arnold, who had been third on the Labor Senate ticket at the previous Senate elections, because he had won his union post on a unity ticket involving Communist and ALP support. Labor eventually brought forward another unionist, George Whiteside, as a second candidate and he won the vote with Government support. When the vacancy was contested in a State-wide ballot at the time of the November, 1963 House elections, the seat went to K J Morris of the Liberal Party, thus distorting voter dispositions as expressed in the periodical elections of 9 December, 1961.

Another flaw in the McLarty convention was exposed in 1966, again in Western Australia. Between the calling of periodical elections of Senators on 5 December, 1964 and House of Representatives general elections of November, 1966, two Liberal Senators died – Senator Vincent on 9 November, 1964, and Senator Sir Shane Paltridge on 21 January, 1966. They were replaced by Senator J P Sim and Senator R G Withers respectively. Sim and Withers had to face the electors of Western Australia at the House of Representatives general elections of 26 November, 1966.

New legislation (the *Senate Elections Act* 1966) was passed to cover, *inter alia*, a situation where there was an election to fill a casual vacancy separately from periodical elections of Senators, and to cover election of two or more Senators in such circumstances. In particular, the legislation made it clear that there would only be one ballot, on a proportional representation basis, and not one ballot for each vacancy; this was a matter upon which there was reportedly extensive Cabinet and intra-party debate. The consequence, in the case of Western Australia in 1966, was that the Liberal Party would inevitably lose one seat. The reason for this approach, according to Deputy Opposition Leader Gough Whitlam, was the prospect of litigation if a proportional approach was not followed. Nevertheless, once again, voter preference as revealed in periodical elections would be altered.[22]

The Government's magnanimity was hardly admired. The deputy leader of the Democratic Labor Party, Senator Frank McManus, gloated:

> "[T]he Government, with singular unselfishness and without regard to Senator Withers, a member of one of its own parties, who is to be the sacrificial offering, is determined that there shall be a single election for the two positions, which will result, it would appear, in the Government winning one and the Australian Labor Party winning the other. . . .
>
> ". . . I have noticed that in a number of Senate elections the Government has asked for a majority on the ground that it is vital that it should control the Senate. The Government can no longer say that. It can never use that argument any more, because it is now altering the law in such a way, I understand, as to ensure that whereas it could have had under the present law a 31 to 29 majority, under the amended law it will place itself in a position of having a minority".[23]

In another relevant observation, McManus pointed out that while the casual vacancy system would often work for the major parties, this would not be the case for cross-bench parties:

> ". . . [T]he effect of this Bill must inevitably be that in an election such as this, of the House of Representatives or the Senate, for a casual vacancy, a candidate of any party outside the major parties will not be able to be elected. Those are the facts of life. If a DLP Senator is elected under the proportional representation system in the future, and if he dies and the vacancy is to be filled, it is possible that the Parliament in the State from which he came will elect a DLP Senator for the period up till the next election. But it appears to me to be obvious that when that election comes only a representative of one of the major parties will be elected. So this Bill, in effect, is designed to ensure that in the case of casual vacancies at elections throughout the Commonwealth the candidate of the third party, the D L P, cannot be elected, even though that Party may have won the seat fairly and squarely at the general election. . . . It is unfair to the smaller parties. It is a denial of the system of proportional representation on which the Senate is supposed to be based".[24]

(This impact on cross-bench parties was certainly addressed in the 1977 referendum, and the Australian Democrats have taken extensive advantage of the facility thus offered.)

Those with concerns about the impact of the legislation on the Government's position in the Senate were vindicated. Notwithstanding its record-breaking but restless majority in the House, the Government found itself in a minority in the Senate, the consequence not only of the 1966 casual vacancy elections in Western Australia, but also the decision of South Australian Liberal Clive Hannaford to sit as an Independent. In the House it was forced to constitute a second Royal Commission on the sinking of HMAS *Voyager*. In the Senate, it was confronted with disallowance of regulations to increase postal charges. A deeper humiliation came later in the year, on the eve of periodical elections of Senators, when the Senate made an issue of use of the RAAF "VIP" fleet, and compelled the Government to table relevant documentation, including passenger manifests.[25]

When Prime Minister Harold Holt opened the Liberal Party's Senate campaign he said:

> "Although it enjoys a record majority in the House of Representatives, the Government is in a minority in the Senate. You may wonder why this is so. The immediate reason is the death last year [sic] of two Liberal Senators,

but the Senate is always close to an even division, because its members are elected by proportional representation, . . .".[26]

Meanwhile, the matter invariably featured in reviews of the Constitution. In the late 1950s a Joint Parliamentary Committee considered a range of constitutional matters, including inter-House issues. In its final report the Joint Committee wrote:

> "As the Committee has already reported to the Parliament, it sought a constitutional formula to require the Parliament or Governor of a State in making an appointment to fill a casual vacancy arising in the Senate, to choose some one who was a member of the same political party as the Senator whose place has become vacant. The Committee could not, however, find suitable language which would have covered all possible contingencies and, at the same time, avoided reference to political parties in the Constitution. ..... The difficulties proved to be insurmountable. . . .
>
> "..... [I]t would be possible for an appointment under section 15 to disturb the balance of party strength in the Senate, as for instance, if a State Parliament should replace a former government Senator by some one belonging to an Opposition party. In the present period of proportional representation for the election of Senators, such a choice could be sufficient to deprive a government of its majority in the Senate.
>
> "..... At this juncture, the Committee merely reiterates its view, expressed in the first Report, that all members who sat on the Committee thought the principle should continue to be observed without exception so that the matter may become the subject of a constitutional convention or understanding which political parties will always observe".[27]

It was upon the views of this Committee, of which he was a member, that Prime Minister Whitlam relied when championing the cause of a Labor replacement when Senator Murphy was appointed to the High Court.

In the wake of the events of 1974–75, the question of casual vacancies figured prominently on the agenda of the inter-parliamentary Australian Constitutional Convention when it met in Hobart in October, 1976. After a debate which featured many of the alumni of recent Australian political controversies, the Convention adopted the following resolution:

> "That this Convention affirms the principle that a casual vacancy in the Senate which occurs by reason of the death of a Senator or the disqualification or resignation of a Senator caused by *bona fide* illness or incapacity should, in order to maintain the principle of proportional representation and the wishes of the people of the State at the relevant Senate election, be filled by a member of the same political party as the Senator whose vacancy is to be filled. But in reaffirming this principle the Convention recommends that the Constitution be amended to provide that the person elected by the Houses of Parliament of the State should hold office for the balance of the term of the Senator whose place he is taking".[28]

This formed the basis of the alteration to the Constitution put to the electors the following May. The qualification about a resignation "caused by *bona fide* illness or incapacity" was, however, removed.

When the matter went to the voters they were told, in the YES case, that:

> "A YES vote . . . will ensure that your choice of Parties at a Senate election cannot be changed as a result of accident, resignation, illness, or death of a Senator.

"If the place, say, of a Liberal, Labor or National Country Party Senator becomes vacant, he will be replaced by another person from the same party.

"It is fundamental to your rights as a voter that representation in the Senate should always reflect the wishes of the electorate.

"A YES vote will guarantee your rights.

"It will confirm the principle that if a Senator dies or resigns, a Senator of the same political party will be appointed for the remainder of that Senator's term.

"A Yes vote will avoid the present situation under the Constitution where the balance of the Parties in the Senate can be altered against the wishes of the electorate".

The NO case criticised the proposed alteration to the Constitution on the basis that it would convert what had been:

".....an understanding that upon the occurrence of a *bona fide* vacancy, the State Parliaments would select a replacement Senator who was a member of the former Senator's party ..... [into] a rigid provision of the Constitution ..... [which was] very complex and will produce intricate questions of legal interpretation of great difficulty".

After traversing various problems of a practical nature, the NO case concluded with the observation that "[t]he result is a dangerous subversion of the State Parliament in favour of control by political parties".

J R Odgers, the tireless advocate of the method embodied in the new s. 15, commented in the sixth edition (1991) of *Australian Senate Practice* that the "matter was largely resolved" by the referendum.[29]

Why do Senators leave the Senate?

Another question to address in this study of casual vacancies is the circumstances in which Senators leave the Senate for reasons other than death.

1901–49: Prior to proportional representation the major cause of a casual vacancy was death. In this period there were 38 casual vacancies; 25 of these were the consequence of death. The remaining 13 can be accounted for thus: ill-health, one; absence/irregular attendance, two; integrity questioned, two; party pressure, one; to contest a seat in the House of Representatives, including after losing preselection for the next Senate election, four; acceptance of a Commonwealth appointment, one; acceptance of a State government appointment, two.

In these years, South Australia led the way with five such vacancies; there were none in either Queensland or Victoria.[30]

(This list does not include the Vardon/O'Loghlin case, which for a period fell within the ambit of s. 15. The previous election was, however, declared void and a fresh election for the single place held.)

(The comparable figures for the House of Representatives are that, of the 53 departures for reasons other than challenge or expulsion, 38 were occasioned by death and 15 by resignation.)

1949–77: In the first period of proportional representation, before the 1977 alteration to the Constitution, there were 29 casual vacancies, 21 of which were the consequence of death. In the Menzies/Holt years there were three resignations; one to accept a Commonwealth judicial appointment, another to fill a vacancy occasioned by the technical operation of s. 15, and a third to fill a vacancy caused by resignation of a terminally ill Senator.

Of the remaining five resignations, in the years after 1967, one was an age retirement; one was John Gorton's departure for the House of Representatives on his election as leader of the Parliamentary Liberal Party and his consequent assumption of the Prime Ministership; and three Commonwealth appointments, Dame Annabelle Rankin as High Commissioner to New Zealand, Vince Gair as Ambassador to Ireland, and Lionel Murphy to the High Court of Australia.

(In the House, the 43 by-elections during this period stemmed from 24 deaths and 19 resignations.)

In the years from 1949 to 1972, there does not appear to be any case where the Government sought to engineer a vacancy to enhance its strength in the Senate, even when it became increasingly unlikely that it would have a majority, or might even be in a minority. The Gair appointment in 1974 seems to be the first occasion since 1917 of a government actively seeking to cause a vacancy with the intent of improving its Senate position. It was not entirely unexpected. Speaking in the House of Representatives on 3 May, 1973, W C Wentworth (Liberal, Mackellar, NSW) spoke about an "engineered resignation of a Senator". Referring to Queensland and Western Australia, he said:

> " I do not know what will happen but I am ready to bet that the Labor Party will be making desperate efforts to engineer casual vacancies among long-term non-Labor senators for those two States".[31]

(In 1965, in New South Wales, the newly-elected Liberal–Country Party Government, headed by R W Askin, had the smallest of majorities in the Legislative Assembly. It appointed Abe Landa, a Minister in the previous Labor Government, as Agent-General in London. Its hope of winning his marginal electorate in a by-election ended in disappointment.)

1977 to the present — the age of resignation: Since the 1977 amendment, there have been 58 casual vacancies (including several Territory Senators); only four have been occasioned by death. (The comparable figures for the House demonstrate the same pattern – of the 38 by-elections, only five resulted from a death.)

As far as information is available, more than a quarter of those resigning from the Senate – 14 of the 54 – did so to contest House of Representatives seats, half of them successfully. Another two headed off to State Parliaments. Ten have gone immediately to government appointments (mainly diplomatic); one of these was to a State judicial post. Four took business posts. Perhaps 15 could be said to have retired on age or health grounds. Several resignations appear to have stemmed from internal party pressure. A small number – perhaps five or six – resigned a few months prior to completion of their term, not having sought re-election, or having been defeated. At least one resignation was on integrity grounds. And another resignation stemmed from an infringement of s. 44 of the Constitution; the vacancy was filled by the same Senator, who had been elected at a periodical election. (In the same year, a member of the House who infringed the Electoral Act had to face a fresh election.)

Can anything be done?

The history of new s. 15 of the Constitution is an example of Machiavelli's dictum in the *Discourses* that it is rare in human affairs that, in remedying one defect, we do not create another.

In the first decade after the Constitution had been altered in 1977 there was general satisfaction with new s. 15. The matter was studied by the

Constitutional Commission of the late 1980s. At the time there had been 13 casual vacancies, all but two the consequence of a resignation. It recommended no change except that Territorial Senators be treated in the same way as State Senators (as now happens). The Commission stated that it regarded the section as based on a "well understood" and "generally observed" convention:

> "[W]e regard the convention as meritorious given that it guards the democratic representation of parties in the Senate against disturbance by a Senate casual vacancy".[32]

Had use of the new s. 15 been sparing, and mainly a consequence of death, serious illness or a newly-elected Senator serving the last few months of the term of a retiring predecessor, it may not have been necessary to compose this essay.

But it is clear that there has been a great deal of latitude in the use of the new s. 15, a latitude not available to use so carelessly in the case of members of the House of Representatives. The consequence is that first entry to Australia's more prestigious House of Parliament, the Senate, is almost as much by party selection alone, and not by party selection as a prelude to popular election. The advantage of incumbency can be transferred in the Senate in a way which is impossible in the House of Representatives. This is notwithstanding the crucial importance of the Senate's elective character to the legitimacy with which it realises its significant responsibilities under the Constitution.

The complacent disposition of the Constitutional Commission has set the example. *Australian Senate Practice*, through its first five editions, was the advocate of what became the new s. 15. Its successor, *Odgers' Australian Senate Practice*, through five editions, has confined itself to discussing technical matters associated with the workings of the new s. 15, such as the timing of Senator Tate's resignation following the 1993 elections, five days after his new term commenced. The absence of analysis of the use of s. 15 (apart from an Appendix containing some details) is the more curious because the volume itself, in its exposition of the Senate's place in Australia's parliamentary system, rightly places much stress on the Senate's elected character.[33] Because of how the new s. 15 has been used it is not the Senate's representative character which is now in question, but its foundations as an elected House.

Another instance of neglect of this question came in 1999, the fiftieth anniversary of the first elections for the Senate using proportional representation. There was much to celebrate at the conference to mark this anniversary. But by then utilisation of the new s. 15, for reasons quite antipathetic to the reasons for its adoption, had become very clear. This is, indeed, the major weakness in the 1949 settlement for choosing Senators, but it attracted not a single paper – nor, it seems, a single mention – on the day.[34] Likewise, the ANU Democratic Audit, funded by the Australian Research Council, is not, so far, addressing the matter.

The immediate aim of this essay is no more than to call attention to the problem. But it is not easy to remedy. The new s. 15 has been entrenched in the Constitution, but it may only make sense while the present statutory scheme prevails. For example, it would be quite inappropriate if that scheme were replaced by one in which States were divided into Senate electoral districts, as has been recently proposed by former Federal Director of the Liberal Party, Andrew Robb, now member for Goldstein.[35]

A final consideration is the basic conundrum. For all the virtues seen in proportional representation, the handling of casual vacancies remains an

unresolved problem, even if it were possible to change the present system without resort to another referendum.. The view of the Northern Territory's Steve Hatton, as put to the Constitutional Commission, remains pertinent:

> "Despite problems with section 15 as it is, no possible changes amount to improvements without their own problems".[36]

The Commission itself observed:

> "We can see no change that will produce an impeccable and impregnable constitutional provision".[37]

Perhaps the best that may be hoped for is that the vigilance which compelled Duncan Kerr to withdraw from his shift to State politics will come to bear on the more indefensibly opportunistic resignations from the Senate.

But if there is no obvious path for reform where s. 15 is concerned, the same may not be said for what this example has to teach about constitutional reform in general. The change to the original s. 15, in particular, was ill-considered. And the argument about the matter deteriorated almost every time it was addressed after the first, relatively wide-ranging, examination by the Senate Select Committee on Deadlocks. As time passed the options narrowed rather than broadened. Convenience prevailed over principle.

It was a bad example of constitutional reform. Australians, once they make a change, are rarely sympathetic about revisiting it. But it is hard to imagine a stronger case for doing so than s. 15 in its 1977 form.

Endnotes:

1. On Duncan Kerr's proposed transfer to the Tasmanian State Parliament, see *Labor's Kerfuffle from Denison and back*, and Bruce Montgomery, *Dog day afternoon*, in *The Weekend Australian*, 19-20 January, 2002. Also relevant: *Members should serve full term*, in *The Canberra Times*, 16 January, 2002; *Kerfuffle leads to right conclusion*, in *The Age*, 17 January, 2002; *The Kerr muddle*, in *The Sydney Morning Herald*, 17 January, 2002.
2. For the purposes of this essay I have drawn on information in the *Parliamentary Handbook of the Commonwealth of Australia*, 29th edn, 2002, pp. 430–35; Harry Evans (ed.), *Odgers' Australian Senate Practice*, 11th edn, 2004, Appendix 7, pp. 699–701; and Joan Rydon, *Casual vacancies in the Australian Senate*, in *Politics*, XI (2), November, 1976, pp. 195–204, at pp. 202–04.

   Casual vacancies include cases where a Senator resigns but the vacancy is filled by election rather than selection by a State Governor or State Parliament. They do not include cases where an election is held to be void and the vacancy filled by other means. For example, the list does not include selection of J Vardon by the Parliament of South Australia on 11 July, 1907, subsequently held invalid by the High Court of Australia on 20 December, 1907; this vacancy was eventually decided at a special election on 15 February, 1908. It includes, on the other hand, Senator Gair's departure from the Senate in April, 1974, on the same basis that the list in *Odgers' Australian Senate Practice*, 11th edn, p. 700 includes Senator McMullan's resignation to stand for election to the House of Representatives, even though his successor was elected in the normal manner for Territory Senators.

3. On the contribution which the Senate makes to enhancing the representivity of the Australian Parliament, see J R Nethercote, *Representing People, not merely Majorities – an Analysis of Prime Ministerial views on the Senate*, Canberra, 1994.
4. Troy Simpson, *Appointments that might have been*, in *Oxford Companion to the High Court of Australia*, Oxford University Press, 2001, pp. 23–7, at p. 26.
5. Tom Uren, *Straight Left*, Random House Australia, 1994, pp. 390–1.
6. *Ibid*., p. 391.
7. *Ibid*., p. 391.
8. Mike Steketee and Milton Cockburn, *Wran — An Unauthorised Biography*, Allen & Unwin Australia, 1986, p. 61.
9. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1901 [1995], p. 435.
10. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Legal Books, Sydney, 1986, pp. 603–4.
11. Quick and Garran, *op. cit*., p. 436.
12. *Report of the Royal Commission on the Constitution* (Chair: J B Peden), Canberra, 1929, p. 42.
13. See Geoffrey Hawker, "John Maurice Power" and "William Albion Gibbs", Ann Millar, *Biographical Dictionary of the Australian Senate*, vol. 1, pp. 70–1 and 72–4 respectively.
14. Geoffrey Sawer, *Australian Federal Politics and Law, 1901–29*, Melbourne University Press, 1956, pp. 149–50; L F Fitzhardinge, *The Little Digger 1914–1952*, Angus & Robertson, 1979, pp. 256–60.
15. See *Commonwealth Parliamentary Debates (CPD)*, vol. 196, 21 April, 1948, pp. 1002–3.
16. *CPD*, vol. 207, 4 May, 1950, pp. 2217–24.
17. Report of the Senate Select Committee on *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* (Chair: Senator N McKenna), PP S.1, 1950, para 180, p. xxxi.
18. *Ibid*., para 95, p. xix, and para 181, p. xxxi.
19. *Australian Senate Practice*, 1st ed., 1953, pp. 28–9; 2nd ed., 1959, pp. 30-1; 3rd ed., 1964, pp. 57-8; 4th ed., 1972, pp. 64-5; 5th ed., 1976, pp. 113-4.
20. The letter is published in Geoffrey Sawer, *Federation Under Strain, Australia 1972–1975*, Melbourne University Press, 1977, p. 199.
21. *Ibid*., p. 200.
22. For debate in the House of Representatives, see *CPD HR*, 22 September, 1966, vol. 52, p. 1173; and vol. 52, pp. 1873–4.
23. *CPD Senate*, 26 October, 1966, vol. 32, p. 1461.
24. *Ibid*., p. 1462.
25. On the vicissitudes of the Holt Government in 1967, see Ian Hancock, *The V. I. P. Affair, 1966–67*, Australasian Study of Parliament Group, 2004. Published as *Australasian Parliamentary Review*, vol. 18(2), Spring, 2003.

26. Harold Holt, *Federal Election 1967 — Opening Address*, 9 November, 1967, p. 4.
27. *Report from the Joint Committee on Constitutional Review* (Chair: Sir Neil O'Sullivan), Canberra, 1959, paras 287–8 and 291, pp. 42–3.
28. *Resolutions Adopted at the Australian Constitutional Convention*, Wrest Point, Hobart, 27–29 October, 1976, para 9, p. 3.
29. J R Odgers, *Australian Senate Practice*, 6th edn, Canberra, RAIPA, 1991, p. 163.
30. The analysis in this section is based on information contained in Ann Millar (ed.), *op. cit.*, and Ann Millar, *Biographical Dictionary of the Australian Senate*, vol. 2, Melbourne University Press, 2004.
31. *CPD HR*, vol. 83, p. 1661.
32. *First Report of the Constitutional Commission* (Chair: Sir Maurice Byers), vol. 1, AGPS, 1988, p. 315 and p. 320.
33. Harry Evans (ed.), *Odgers' Australian Senate Practice*, 11th ed., 2004, chapter 1, especially p. 8; and pp. 16-7 and pp. 131-6.
34. Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change – 50 Years of Proportional Representation in the Senate*, Papers on Parliament No. 34, Department of the Senate, 1999.
35. Andrew Robb, *A Philosophy of Liberalism*, in *IPA Review*, vol. 57, 1, March, 2005, pp. 28–9.
36. Cited, *First Report of the Constitutional Commission*, *op. cit.*, p. 319.
37. *Ibid.*, p. 321.

Chapter Five
The Governor-General is our Head of State

Sir David Smith, KCVO, AO

"Constitutional reform is a serious matter. Unlike ordinary law reform whose effects are confined to specific areas and which may be modified or repealed if it turns out to have been ill-advised, constitutional reform impacts upon the entire system of law and government and is virtually irreversible. It follows that we have an obligation not only to ourselves but to our descendants to consider any proposals to change the Constitution of the Commonwealth or a State rationally, deliberately and with a complete understanding of the nature of that which is being changed and of what the consequences of the change will be".[1]

The republicans are at it again, despite the hiding that they received in 1999, and despite the fact that the latest polling shows support for the republic has declined since 2001. A cross-party republican forum has been established in the Commonwealth Parliament, and *The Australian* newspaper has taken up the cause again, so the task is before us once more.

And what is it that these politicians and *The Australian* want to foist on us? They want us to become a republic, but they don't yet know what sort of republic. In fact there is no such thing as "a republic". The United Nations recognises 191 independent countries in the world, and more than half of them – 104 by my count – are republics. Most of these republics are different from each other, and none of them offers a better system of government than the one we have enjoyed on this continent for more than 150 years, and as a nation for more than a century. As former Chief Justice of the High Court, Sir Harry Gibbs, has reminded us, most of the world's monarchies are free and democratic societies, and most of the world's republics are not. So when we speak of a republic, we need to know what sort of republic. Just remember that both Mary Robinson and Saddam Hussein were republican Presidents.

When the republicans came to the 1998 Constitutional Convention they had ten different republican models on the table. By the end of the first week they had reduced the number to four, and by the end of the second week they had their preferred model – the one which the Australian people threw out neck and crop at the 1999 referendum.

After the referendum, the Australian Republican Movement produced six republican models for consideration, and by last year they had reduced the number to five. At this rate they should have their one preferred model in sixteen years' time. In the meantime they support the proposal put forward by Mark Latham when he was Opposition Leader, and now supported by his successor, Kim Beazley, and by *The Australian*, that a plebiscite be held to ask the Australian people whether they want a republic.

This plebiscite proposal is blatantly dishonest. It would simply ask us whether we want a republic, but it would not tell us what kind of republic we would get. It would violate the provisions of our Constitution, that require the Australian people to be given the full details of any proposal to alter the Constitution before we are asked to vote on it, and not afterwards.

It has been my experience that the republican campaign is led by people

who are ignorant of, or deliberately misrepresent, the provisions of our present Constitution, and the effect of the constitutional changes that they seek. They have done this by putting forward two reasons for our becoming a republic, both of which are simply not true.

Their first argument is that Australia must become a republic in order to become independent. But Australia has long been a fully independent nation. In 1985 the Hawke Government established a Constitutional Commission and charged it with carrying out a fundamental review of the Australian Constitution. Three of the Commission's members were distinguished constitutional lawyers – Sir Maurice Byers, former Common-wealth Solicitor-General and chairman of the Commission; Professor Enid Campbell, Professor of Law at Monash University; and Professor Leslie Zines, former Professor of Law at the Australian National University. The other two members were former heads of government – the Hon Sir Rupert Hamer, former Liberal Premier of Victoria, and the Hon E G Whitlam, former Labor Prime Minister of Australia. The Commission was assisted by an Advisory Committee on Executive Government under the chairmanship of former Governor-General, Sir Zelman Cowen.

One of the Commission's terms of reference required it to report on the revision of our Constitution to "adequately reflect Australia's status as an independent nation". In its final report, presented in 1988, the Commission traced the historical development of our constitutional and legislative independence, and concluded:

> "It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament. ... The development of Australian nationhood did not require any change to the Australian Constitution".[2]

That report, it seems to me, effectively disposed of one of the propositions used by republicans when they try to argue that Australia needs to become a republic in order to become independent.

The second argument upon which the case for a republic is based is that the Queen, as well as being our Monarch, is also our Head of State, and that an Australian republic would give us an Australian Head of State. This proposition is also untrue. Furthermore, it is based on the equally untrue proposition that the Governor-General is nothing more than the Queen's representative, and has no independent constitutional role.

The fact is that the Australian Constitution gives the Governor-General two separate and distinct roles – one as the Queen's representative and another as the holder of an independent office. And this too was confirmed by the Hawke Government's Constitutional Commission in its 1988 report:

> "The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not Herself exercise those powers. ... Although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it".[3]

I shall return to those recent changes later in this paper.

The Queen plays an important role under our system of government as Queen of Australia,[4] as does the Governor-General as the Queen's representative and as the embodiment of the Crown in Australia. These separate and distinct roles are carried out without detriment to our sovereignty as a nation, and without detriment to our independence. To argue that the Queen is not Australia's Head of State does not in any way diminish the role that the Queen has in our Constitution and under our system of government as the Monarch. It is simply the case that she does not have, and therefore does not exercise, Head of State powers and functions.

The Australian Constitution does not contain the words "Head of State", nor was the term discussed during the constitutional debates which resulted in the drafting of the Constitution and its subsequent approval by the Australian people. In the absence of a specific provision in the Constitution, an examination of just who actually performs the duties of Head of State is a useful starting point in determining who occupies that Office.

These duties are performed by the Governor-General, and by the Governor-General only. The Sovereign's only constitutional duty is to approve the Prime Minister's recommendation of the person to be appointed Governor-General, or to approve the Prime Minister's recommendation to terminate the appointment of a Governor-General. The Governor-General is the Queen's representative, for that is how he is described in s. 2 of the Constitution, and that enables him to exercise the Royal prerogatives of the Crown in Australia. However, when he carries out his constitutional duties to exercise the executive power of the Commonwealth under Chapter II of the Constitution – the Chapter headed "The Executive Government" – and in particular under s. 61 of the Constitution, he does so in his own right, and not as a delegate or surrogate of the Queen.

Constitutional scholars, in their text books and in other writings, have referred to the Governor-General as Head of State, albeit on occasions prefixed by an adjective such as "constitutional" or "*de facto*".[5]

Prime Minister Gough Whitlam considered Governors-General Sir Paul Hasluck and Sir John Kerr to be Australia's Head of State, and ensured that when Sir John travelled overseas in 1975 he did so as Head of State, and was acknowledged as such by host countries.[6]

The media have referred to the Governor-General as Head of State for almost 30 years;[7] so much so that *The Australian*'s Editor-at-Large, Paul Kelly, was able to write two years ago:

> "Have Australians decided not by formal referendum but by informal debate that the governor-general is our head of state? ... Take the media eruption of calling the governor-general head of state, pursued in the papers, the ABC and commercial media. Simon Crean [then Leader of the Opposition] now refers to the office as the head of state".[8]

In recent years, scholarly commentators such as Richard McGarvie, formerly Governor of Victoria and a Judge of the Supreme Court of Victoria,[9] and Professor George Winterton, formerly Professor of Law at the University of New South Wales and now Professor of Constitutional Law at the University of Sydney,[10] joined the media in referring to the Governor-General as Head of State. And we have seen official Commonwealth Government publications, such as the *Commonwealth Government Directory*, now published as *A Guide to the Australian Government*, refer to the Governor-General as Head of State.

But all this is only anecdotal evidence; of much more significance in determining this important question is the legal evidence for the view that the Governor-General is our Head of State.

During 1900 Queen Victoria signed a number of constitutional documents relating to the future Commonwealth of Australia, including Letters Patent constituting the Office of Governor-General, and Instructions to the Governor-General on the manner in which he was to perform certain of his constitutional duties.[11]

Two distinguished Australian constitutional scholars, A Inglis Clark,[12] who had worked with Sir Samuel Griffith on his drafts of the Constitution, and who later became Senior Judge of the Supreme Court of Tasmania, and W Harrison (later Sir Harrison) Moore,[13] who had worked on the first draft of the Constitution that went to the 1897 Adelaide Convention, and who was Professor of Law at the University of Melbourne, expressed the view that the Letters Patent and the Royal Instructions were superfluous, or even of doubtful legality. They did so on the grounds that the Governor-General's position and authority stemmed from the Australian Constitution, and that not even the Sovereign could purport to re-create the Office or direct the incumbent in the performance of his constitutional duties.[14]

Unfortunately, British Ministers advising Queen Victoria failed to appreciate the unique features of the Australian Constitution, and Australian Ministers failed to appreciate the significance of the Letters Patent and the Instructions which Queen Victoria had issued to the Governor-General. Thus, between 1902 and 1920, King Edward VII and King George V were to issue further Instructions on the advice of British Ministers, and in 1958 Queen Elizabeth II amended the Letters Patent and gave further Instructions to the Governor-General on the advice of Australian Ministers.

In 1916, during a Canadian case before the Privy Council, Lord Haldane, Lord Chancellor of Great Britain and President of the Judicial Committee of the Privy Council, commented on the absence, from the *British North America Act*, of any provision corresponding to s. 61 of the *Commonwealth of Australia Constitution Act.*[15]

In 1922, during the hearing of an Australian case – an application by the State Governments for special leave to appeal to the Privy Council from the High Court's decision in the *Engineers' Case*[16] – Lord Haldane had occasion to make a similar observation when he asked, with reference to s. 61:

> "Does it not put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of active intervention in their affairs and handing them over, unlike the case of Canada, to the Governor-General?".[17]

Clearly Lord Haldane shared the view of our constitutional arrangements in respect of the Governor-General's powers which had been expressed earlier by Clark and Moore.

The views of Clark and Moore about the Governor-General's status under the Constitution, and the observations by Lord Haldane about s. 61, highlight one of the saddest aspects of the republican debate over the past decade or more. While much of the debate has concentrated on specific provisions in the Constitution, a major tactic has been to try and denigrate the entire document in general. But our Founding Fathers crafted and drafted a better Constitution than they have been credited with.

Although they were producing a Constitution for a Dominion that was not yet fully independent, they were also drafting a Constitution that would enable Australia to become a fully independent sovereign nation of the world, without one word of the Constitution needing to be altered. In particular, they gave to the Governor-General an additional independent constitutional position not given to any other Governor or Governor-General anywhere else in the British Empire. Sadly, it took Australian Governments eighty-four years to realise that fact, and I shall come back to the action taken by Prime Minister Bob Hawke in 1984 to resolve this issue.

The 1926 Imperial Conference of the Empire's Prime Ministers declared that the Governor-General of a Dominion would no longer be the representative of His Majesty's Government in Britain, and that it was no longer in accordance with a Governor-General's constitutional position for him to remain as the formal channel of communication between the two Governments. The Conference further resolved that, henceforth, a Governor-General would stand in the same constitutional relationship with his Dominion Government, and hold the same position in relation to the administration of public affairs in the Dominion, as did the King with the British Government and in relation to public affairs in Great Britain. It was also decided that a Governor-General should be provided by his Dominion Government with copies of all important documents and should be kept as fully informed of Cabinet business and public affairs in the Dominion as was the King in Great Britain.[18]

The 1926 Imperial Conference also made another decision which is of direct relevance to the contemporary debate in Australia. The Prime Ministers recognised that the Sovereign would be unable to pay State visits on behalf of any Commonwealth country other than the United Kingdom, and it was agreed that Governors-General of the various realms would pay and receive State visits in respect of their own countries. Buckingham Palace made it clear that it expected that Governors-General would be treated as the heads of their respective countries, and would be received by host countries with all the marks of respect due to a visiting Head of State. Canada exercised this right almost immediately and its Governors-General began visiting other countries the following year, 1927, but Australia waited until 1971, 44 years after Canada, to follow suit.[19]

The 1930 Imperial Conference resolved that, in appointing a Governor-General, the King should in future act on the advice of his Ministers in the Dominion concerned, and not on the advice of British Ministers as previously had been the case. It was also resolved that the making of a formal submission should be preceded by informal consultation with the King, to allow him the opportunity to express his views on the nomination.[20]

In 1953, in the course of preparing for the 1954 Royal visit to Australia, Prime Minister Robert Menzies wanted to involve the Queen in some duties of a constitutional nature, in addition to the inevitable public appearances and social occasions. It was proposed, in particular, that the Queen should preside at a meeting of the Federal Executive Council and open a session of the Commonwealth Parliament. As this was the first visit to Australia by a reigning Monarch, it was thought necessary to ensure that it was constitutionally in order for her to carry out these functions, and the Commonwealth Solicitor-General, Sir Kenneth Bailey, was asked for a legal opinion.[21]

In the matter of presiding at a meeting of the Federal Executive Council, the Solicitor-General advised that it would be necessary to arrange the business of the meeting with some care. His view was that such a meeting would not be able to exercise any of the statutory powers and functions conferred on the Governor-General in Council by Acts of Parliament, unless Parliament in the meantime were to pass an Act to empower the Queen in Council to exercise these functions.

By means of the *Royal Powers Act* 1953, Parliament did provide that:

> "When the Queen is personally present in Australia, any power under an Act exercisable by the Governor-General may be exercised by the Queen".[22]

The Act further provided that the Governor-General could continue to exercise any of his statutory powers even while the Queen was in Australia, and in practice Governors-General have continued to do so.

Special provision was also made to enable the Queen to open the Commonwealth Parliament. Section 5 of the Constitution provides for the Governor-General to appoint the times for the holding of sessions of the Parliament. In similar fashion, the Standing Orders of both Houses of the Parliament provide for the Governor-General to do certain things in relation to the Parliament. In 1953 both the Senate and the House of Representatives amended their Standing Orders to provide that, when the Queen is present in Australia, references to the Governor-General should be read as references to the Queen.[23]

Thus, although the Constitution and the Standing Orders of the Parliament confer the necessary powers and functions to preside over meetings of the Federal Executive Council and over the opening of Parliament on the Governor-General in his own right, and on him alone, the Queen is able to perform these functions of the Governor-General when she is in Australia, but only because Parliament legislated on the one hand, and amended its own Standing Orders on the other, to enable references to the Governor-General to be read as references to the Queen.

However, nothing could be done, except by way of a constitutional amendment under s. 128 of the Constitution, to delegate the Governor-General's constitutional powers to the Sovereign, and they remain exclusively with the Governor-General. As Sir Kenneth Bailey put it:

> "The Constitution expressly vests in the Governor-General the power or duty to perform a number of the Crown's functions in the Legislature and the Executive Government of the Commonwealth. In this regard, the Australian Constitution is a great deal more specific and detailed than is the earlier Constitution of Canada".[24]

The 1953 opinion by the Commonwealth Solicitor-General confirmed that the Governor-General is not the Queen's delegate in the exercise of his constitutional powers and functions, and explains why the Queen has never exercised any of these constitutional powers and functions, even when in Australia.

In 1975 the Commonwealth Solicitor-General, Mr (later Sir) Maurice Byers, gave Prime Minister Gough Whitlam a legal opinion in which he (the Solicitor-General) concluded that the Royal Instructions to the Governor-General were opposed to the words of the Constitution; that the Executive power of the Commonwealth exercisable by the Governor-General under Chapter II of the Constitution may not lawfully be the subject of Instructions; and that this had been the case since 1901.[25]

The Solicitor-General's first conclusion was that, as the Office of Governor-General was created by the Constitution, and as the Constitution also prescribed the nature and functions of the Office, Queen Victoria's Letters Patent, as amended from time to time, "were in many, if not most, respects unnecessary".

The Solicitor-General next referred to the Royal Instructions to the Governor-General that had been issued in 1900 and subsequently amended from time to time, and he concluded that they were not only anachronistic and unnecessary, but that they were also opposed to the words of the Constitution and therefore unlawful. Sir Maurice Byers went on to advise, in particular, that:

> "The Executive power of the Commonwealth exercisable by the Governor-General under Chapter II of the Constitution may not lawfully be the subject of Instructions".

The Solicitor-General's Opinion also dealt specifically with the widely-held but incorrect view that the Governor-General, because of the description of the Office as "the Queen's representative", could therefore act only as her representative, and he went on to refer, with approval, to the views expressed in the Privy Council by Viscount Haldane in 1916 and 1922 in relation to s. 61 of the Australian Constitution. He concluded his Opinion with: "I think no place remains for Instructions to the Governor-General".

As the 1953 and 1975 Opinions of the Commonwealth's Solicitors-General, and the 1988 Report of the Constitutional Commission, make clear, the reference in the Australian Constitution to the Governor-General as the Queen's representative is descriptive only, and does not define or limit his role as the holder of independent executive power in his own right as Governor-General.

The dismissal of the Whitlam Government on 11 November, 1975, two months after the Prime Minister had received the Byers Opinion, was to provide further evidence in support of all the legal opinions which had been given over the previous seventy-five years. Writing after the event, Governor-General Sir John Kerr, a former Chief Justice of New South Wales, said:

> "I did not tell the Queen in advance that I intended to exercise these powers on 11 November. I did not ask her approval. The decisions I took were without the Queen's advance knowledge. The reason for this was that I believed, if dismissal action were to be taken, that it could be taken only by me and that it must be done on my sole responsibility. My view was that to inform Her Majesty in advance of what I intended to do, and when, would be to risk involving her in an Australian political and constitutional crisis in relation to which she had no legal powers; and I must not take such a risk".[26]

After the Governor-General had withdrawn the Prime Minister's Commission, the Speaker of the House of Representatives wrote to the Queen to ask her to restore Whitlam to office as Prime Minister. In the reply from Buckingham Palace, Mr Speaker was told:

> "As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in

matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act".[27]

As the defining Head of State power is the power to appoint and remove the Prime Minister, that reply confirmed, if confirmation were needed, that the Governor-General is indeed Australia's Head of State. Even so, it took another nine years before the matter of Queen Victoria's Letters Patent and Royal Instructions, as amended, was finally resolved.

On 21 August, 1984, on the advice of Prime Minister Bob Hawke, the Queen revoked Queen Victoria's Letters Patent relating to the Office of Governor-General, all amending Letters Patent, and all Royal Instructions to the Governor-General, and issued new Letters Patent which, in the words of the Prime Minister, would:

> "..... achieve the objective of modernising the administrative arrangements of the Office of Governor-General and, at the same time, clarify His Excellency's position under the Constitution. The new Letters Patent do not in any way affect the position of Her Majesty as Queen of Australia or diminish in any way the constitutional powers of the Governor-General".[28]

On the contrary, the new Letters Patent strengthened the constitutional position of the Governor-General by not purporting to create the Office, as the original Letters Patent had done, and by acknowledging the creation of the Office by the Australian Constitution. At long last, the Royal Instructions that should never have been issued in the first place were revoked. No new Instructions were issued and none is now in existence. The 1901 views of Clarke and Moore finally were vindicated, and the Governor-General was acknowledged to be what in fact he had always been, namely, the holder of an independent Office created by the Australian Constitution and not subject to Royal, or any other, instructions.[29]

The legal evidence for the view that the Governor-General is Australia's Head of State which I have just put before you is not new. I first put it on the public record in 1995 in a public lecture I gave in Parliament House, Canberra, in the Australian Senate's *Occasional Lecture Series*.[30] I said it again in 1997 in a paper I gave at a conference held at the Australian National University, Canberra, by this Society.[31] It was the subject of a number of my newspaper articles and letters to the editor during the 1998-1999 campaign on the constitutional referendum. And last year it was the subject of one of my submissions to the Senate's Legal and Constitutional References Committee during its *Inquiry into an Australian republic*,[32] and is the subject of a booklet published late last year by Australians for Constitutional Monarchy.[33]

As was to be expected, many republicans have expressed their disagreement with my views about the Governor-General. During the campaign for the 1999 constitutional referendum, two of my strongest critics were former Governor-General Sir Zelman Cowen, and former Chief Justice of the High Court of Australia, Sir Anthony Mason. Yet Sir Zelman described the Governor-General as the Head of State in an interview he gave in 1977, while he was Governor-General designate,[34] and he did so again in a major lecture he gave in 1995, almost thirteen years after leaving office as Governor-General.[35]

As for Sir Anthony Mason, he tried to ridicule my claim that the Governor-General is our Head of State in the course of a lecture he gave to the Law School at the Australian National University in 1998,[36] but the arguments he used were totally wrong. In seeking to demean and diminish the Governor-General's role

under the Constitution, Sir Anthony claimed that, when the Queen arrived in Australia, the Governor-General ceased to function and the Queen took over his duties. This is not true, for it has never happened. In support of this fiction Sir Anthony claimed to have discovered a "robust" constitutional convention that prevented the Governor-General from appearing in public with the Queen. This also is not true, for they have appeared together at public functions on many occasions. This former Chief Justice of the High Court discovered a constitutional convention that does not exist, and based his so-called discovery on precedents that have never occurred.[37]

Sir Anthony should have known that there is no such constitutional convention, robust or otherwise. Not only is there a painting hanging in Parliament House, Canberra, showing the Queen and the Governor-General together at the opening of that building in 1988, but the then Chief Justice, Sir Anthony Mason, was present as an honoured guest and was seated in the very front row!

The fact is that, over the past ten years, not one republican constitutional lawyer or academic has sought to rebut the evidence which I have documented. This obviously worried the Senate's Legal and Constitutional References Committee as it conducted its final public hearing on the republic. In desperation, one of the Senators asked a republican witness from the University of Canberra, Dr Bede Harris, if he could prepare a response to my 29-page submission. He produced a one-page response in which he concluded that the term "Head of State" is not used in the Constitution; that it is a political term that means whatever the user wants it to mean; and that it is a term without any constitutional significance![38]

In saying this Dr Harris was echoing an earlier statement by Professor George Winterton that "debate over the identity of Australia's Head of State is an arid and ultimately irrelevant battle over nomenclature".[39]

If only Professor Winterton and Dr Harris had offered up these confessions years ago, they and their colleagues would not have spent more than a decade of wasted effort making the Head of State issue the central plank in their republican platform. Professor Winterton's remarks in particular tell us what has long been apparent, namely, that the republicans have no response to the evidence that the Governor-General is our Head of State, and that they have finally realised that this has punched a big hole in their case for a republic. And we must continue to punch away at their case for a republic, for no republic, of whatever kind, is any substitute for the system of government which we have now. And no republic will give us our independence from Britain, or an Australian Head of State, for we already have both.

As Sir Guy Green put it in his 1999 Menzies Oration:

> "Constitutional reform is a serious matter. ... [I]f it turns out to have been ill-advised [it] impacts upon the entire system of law and government and is virtually irreversible".

The drafting and approving of our present Constitution was a noble and uniting enterprise in which all Australians became involved. Today, the republican campaign to alter that Constitution and to give us a vastly different system of government is mean-spirited and divisive, and is founded on misrepresentation and falsehood. It must not succeed.

Endnotes:

1. Sir Guy Green, *Governors, Democracy and the Rule of Law*, The Sir Robert Menzies Oration, 29 October, 1999, p. 1. Sir Guy Green, who was Governor of Tasmania when he gave the oration, has also held office as Administrator of the Government of the Commonwealth of Australia, and as Chief Justice of the Supreme Court of Tasmania.
2. Final Report of the Constitutional Commission, Australian Government Publishing Service, Canberra, 1988, p. 75.
3. *Ibid*., p. 313.
4. *Royal Style and Titles Act* 1953.
5. See for example D A Low (ed.), *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85*, The Macmillan Press Ltd, London, 1988; David Butler and D A Low (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*, Macmillan Academic and Professional Ltd, London, 1991, particularly Chapter IV, Brian Galligan, *Australia*; Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge, 1995; and Stuart Macintyre, *A Federal Commonwealth, an Australian Citizenship*, a lecture in The Australian Senate's *Occasional Lecture Series*, 14 February, 1997.
6. Paul Kelly, *The Unmaking of Gough*, Angus & Robertson, Australia, 1976, p. 19.
7. See *The Canberra Times*, 8 December, 1977; *The Australian*, 23 June, 1995 and 6 September, 1996; *The Weekend Australian*, 24-25 June, 1995; *The Age*, 23 April, 2001; *The Daily Telegraph*, 24 May, 2001; *The Weekend Australian*, 2-3 March, 2002, to quote but a few examples.
8. Paul Kelly, *Top-level straightjacket*, in *The Australian*, 28 May, 2003.
9. Richard E McGarvie, *Are we lurching towards 'mediacracy'?*, *The Age*, 13 May, 2003.
10. George Winterton, *Echoes of 1975 as holes in the constitution are exposed*, in *The Sydney Morning Herald*, 14 May, 2003.
11. *Commonwealth Statutory Rules 1901-1956*, Vol. V, pp. 5301-3 and pp. 5310-12.
12. A Inglis Clark, *Studies in Australian Constitutional Law*, Charles F Maxwell (G Partridge and Co), Melbourne, 1901.
13. W Harrison Moore, *The Constitution of the Commonwealth of Australia*, Charles F Maxwell (G Partridge and Co), Melbourne, 1910. (First published in 1901.)
14. See also H V Evatt, *The Royal Prerogative*, The Law Book Company Limited, Sydney, 1987, p. 172. (First published in 1924 as H V Evatt, *Certain Aspects of the Royal Prerogative: A Study in Constitutional Law*.)
15. [1916] 1 A C, pp. 586-7. Quoted in H V Evatt, *The King and his Dominion Governors*, Frank Cass and Company Limited, London, 1967, p. 311. (First edition 1936.)

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

17. Transcript of argument, pp. 22-3. Quoted in Evatt, *The King and his Dominion Governors*, *op. cit.*.

18. Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs*, George Allen & Unwin, Sydney, 1983, p. 168. See also (Sir) Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967, p. 191; and D J Markwell, *The Crown and Australia*, The Trevor Reese Memorial Lecture 1987, Australian Studies Centre, London, 1987, pp. 9-10.

19. As at March, 2005, Australian Governors-General had made 63 State and official visits to 38 countries. In 1987, Governor-General Sir Ninian Stephen, acting on the advice of the Australian Government, cancelled a proposed visit to Indonesia because President Suharto had said that he would not be present at the welcome ceremony, but would instead send his Vice-President. That year Sir Ninian made State visits to Thailand, China, Malaysia and Singapore. In each of these countries the Governor-General was received as a Head of State. Shortly after the Malaysia and Singapore visits, the Indonesian Government admitted that it had made a wrong decision, claimed that it had been wrongly advised by its officials, and said that it would treat our Governor-General as a Head of State on any future visit. That promise was honoured in 1995 during a State visit to Indonesia by Governor-General Mr Bill Hayden.

20. Cunneen, *op. cit.*, p. 179; and Cowen, *op. cit.*, pp. 197-8.

21. *Constitution, sections 1, 2, 5, 61, 62: Royal visit, 1954: Functions to be Carried Out by Her Majesty the Queen*, Opinion of the Commonwealth Solicitor-General (Sir Kenneth Bailey), 25 November, 1953.

22. The *Royal Powers Act* 1953 has been invoked on rare occasions, and then only for symbolic reasons. The last occasion was 2 March, 1986 when, in a public ceremony at Government House, Canberra, the Queen proclaimed the *Australia Act* 1986 to come into operation on the following day. This would otherwise have been done by the Governor-General at a meeting of the Federal Executive Council. The Act had been given the Royal assent by the Governor-General on 4 December, 1985.

23. See Harry Evans (ed.), *Odgers' Australian Senate Practice*, Tenth Edition, Department of the Senate, Canberra, 2001, p. 171; and I C Harris (ed.), *House of Representatives Practice*, Fourth Edition, Department of the House of Representatives, Canberra, 2001, p. 225.

24. This point may be illustrated by comparing a couple of sections of the Canadian and Australian Constitutions:

    Canada. Chapter III. Executive Power.

    > "9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen".
    >
    > "15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue to be vested in the Queen".

    Australia. Chapter II. The Executive Government.

    > "61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's

representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

"68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative".

25. *Governor-General's Instructions*, Opinion of the Solicitor-General of Australia (Sir Maurice Byers), 5 September, 1975.

26. Sir John Kerr, *Matters for Judgement*, The Macmillan Company of Australia Pty Ltd, South Melbourne and Artarmon, 1978, p. 330.

27. *Ibid*., pp. 374-5.

28. Statement by Prime Minister Bob Hawke in the House of Representatives, *Parliamentary Debates*, Vol. H. of R. 138, 24 August, 1984, p. 380. The Prime Minister tabled a copy of the new Letters Patent relating to the office of Governor-General, together with the text of a statement relating to the document, but for some unknown reason he did not read the statement to the House, nor did he seek leave to have it incorporated in Hansard. The statement was later issued by the Prime Minister's Press Office.

29. The 1984 Letters Patent were amended by the Queen on the advice of Prime Minister John Howard on 11 May, 2003. The amendment provided for an additional circumstance in which a Governor-General might not be able to perform the duties of the Office, thus resulting in the appointment of a person to administer the Government of the Commonwealth. The amendment did not alter the position in relation to the matters discussed above.

30. Sir David Smith, *An Australian Head of State: An Historical and Contemporary Perspective*, in *Papers on Parliament*, Number 27, March, 1996, Department of the Senate, Parliament House, Canberra, pp. 63-80.

31. 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.

32. Sir David Smith, *Who is Australia's Head of State?*, Submission No. 20A to the Senate's Legal and Constitutional References Committee during its *Inquiry into an Australian Republic*. Copies of the submission are available from the Secretary to the Committee, Parliament House, Canberra, and it has also been published on the Committee's web site.

33. Sir David Smith, *The Governor-General is Australia's Head of State*, with a Foreword by John Stone, Australians for Constitutional Monarchy, Sydney, 2004.

34. Claude Forell, *The Fragile Consensus*, in *The Age*, 13 August, 1977.

35. Sir Zelman Cowen, *Williamson Community Leadership Lecture*, Melbourne, 31 May, 1995, p. 14.

36. Sir Anthony Mason, *The Republic and Australian Constitutional Law*, Australian National University Law School seminar paper, Canberra, 11 May, 1998.

37. For more detailed accounts of Sir Anthony Mason's many errors of law and of fact in his seminar paper, see Sir David Smith, *A Funny Thing Happened*

on the Way to the Referendum, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), at pp. 31-35; see also Sir David Smith, *Judicial Activism is Alive and Well, Even in Retirement*, in *Quadrant*, November, 2003, pp. 42-43.

38. *The Road to a Republic*, Report of the Senate's Legal and Constitutional References Committee, Parliament House, Canberra, August, 2004, p. 49.

39. George Winterton, *Who is Our Head of State?*, in *Quadrant*, September, 2004, p. 60. See also the reply to Professor Winterton's question in Sir David Smith, *Why the Queen is Not Our Head of State*, in *Quadrant*, November, 2004, pp. 52-54.

Chapter Six
Monarchs and Miracles

Professor Andrew Fraser

In the 1999 referendum on the republic, defenders of the monarchy failed to drive a stake through the heart of the Australian republican movement. The votes had hardly been counted before republicans were invoking their presumptively perennial right to demand a rematch at a time and on terms of their own choosing.

If monarchists are ever to achieve a decisive victory, they must not rely upon republicans to shoot themselves in the foot, once again, with another deeply flawed model of the "politician's republic". Should republicans succeed in their campaign to abolish the constitutional monarchy, the repercussions will be felt far beyond Australia's shores. Indeed, the fate of what used to be called the British race may very well hang on the outcome of this constitutional battle. The abolition of the monarchy in Australia would weaken the institution elsewhere, further fracturing the already fragile sense of kinship between the peoples of Britain and the old settler Dominions.

Of course, the recurrent splits in the republican camp may well doom them to yet another defeat. But if republicans believe that popular support for the monarchy is minimal, limited to a minority of spoilers, they will never rest content until they achieve their objective – and who could blame them? Unless and until the British monarchy, understood and accepted as such, captures the hearts and minds of the Australian people, it will be living on borrowed time.

Our rulers no longer conceive Australia as a *country*, the homeland of a particular people sharing a language, a religion and their own distinctive folkways. Instead, Australia has been reduced to an *economy*, open to the free flow of capital, technology and labour in a global system of production, distribution and exchange.

Swamped by "the rising tide of colour"[1] washing in from every overcrowded corner of the Third World, the old Australian dream of a new Britannia in the Southern Ocean is now little more than a faded memory. Only a miracle can save us now. Australia desperately needs a Patriot King to spark new life into the ancient British constitution, rekindling the ancestral spirit of Anglo-Saxon liberty in an ever more rootless, deracinated and fragmented population.

As things stand now, the hard core of support for the monarchy is to be found in a parochial party of the past possessing few friends among opinion leaders in the state or the corporate sector, the universities or the media. Many ordinary Australians do still revere the monarchy as an essential feature of our constitutional heritage. Their loyalty to the Crown reflects the historical experience of a distinctive people rooted in a particular place, sharing a collective memory of their genesis in the epic history of the British Empire.

Republicans often assert that they have a lock on the younger generation; still, not all Australian monarchists are only a few steps away from the grave. Generations of republican ideologues have themselves grown old satirising the hidebound conservatism of Australian monarchists, forever ridiculing the

British monarchy as an anachronistic and obsolescent relic of the colonial era. During the 1999 referendum campaign, members of the Australian Republican Movement (ARM) cast themselves as the progressive party of the future. But the future they proposed – a cosmopolitan, inclusive, multicultural regime open to the world with a resident for President – ran head on into the "parochial" traditions of Australian patriotism.[2]

Far from throwing in the towel, republican leaders will now pursue a more subtle strategy. Having already foreshadowed one or more "indicative" plebiscites leading up to a second referendum campaign, their aim is to wear down the opposition, stripping the constitutional monarchy of its legitimacy before committing themselves to any particular model of the republic. This war of attrition will be supplied and directed from the commanding heights of political, corporate and cultural power.

Indeed, the final push for a republic might even produce an unprecedented revolution from the top down. Relying on the best kept, dirty little secret of Australian constitutional law, republicans could break a deadlock by proceeding under s. 15 of the *Australia Act* (UK, 1986), permitting a phalanx of Labor-controlled Commonwealth and State Parliaments, acting jointly, to proclaim a new republican Constitution (thereby bypassing the s. 128 referendum procedure requiring a majority of the popular vote in a majority of the States).[3]

Republicans are already accustomed to rule from above, being massively over-represented among the managerial and professional classes. Republicans attract significant support from non-European migrant communities, but their most important constituency is found in prosperous inner city electorates within easy reach of an international airport. Priding themselves on their cosmopolitan sophistication, republicans are more likely than those who voted "No" in 1999 to deny that Australia is a much better country than most other counties. Similarly, republicans are less inclined to agree that they would rather be a citizen of Australia than of any other country.[4]

The typical, well-educated republican regards himself as a citizen of the world. Although republicans loudly proclaim their national pride, in the end their loyalty is to a state, or more accurately, the transnational state system, not to a particular people. When republicans refer to the sovereign people, they do not mean a pre-political community defined by historic ties of language, religion and blood, but rather the more or less random collection of individuals who find themselves resident, for the time being, in Australia.

Republicans believe that time is on their side, that the republic is inevitable. They hope that the parochial party of the past will simply fade away, overwhelmed and demoralized by the relentless onrush of replacement migration from the Third World. Should patriotic sentiment continue its steady decline in Australia, as it has elsewhere in the West, they may turn out to be right.

Australian patriotism and the future of the Anglosphere

Patriotism is a tie that binds members of a particular community together through time. It is a sentiment that acknowledges the obligation on those of us now living to respect the interests of both the dead and the unborn. "In the Greek the word *patriotism* goes back to love of one's fathers, and", according to Robert Nisbet, "to this day is quite evidently strongest where a political nation is

overwhelmingly composed of citizens who can be thought to be of common ethnic descent".[5]

Patriotism presupposes a durable community of memory, and for that reason an hereditary monarchy provides a natural focus for patriotic sentiment. But no successful patriotism can be anchored solely in the past. Patriotism must also generate the energy and commitment to carry a people forward into the future. Patriotic triumphs are never inevitable – they are the fruits of will, courage and determination.

If and when it occurs, the advent of an Australian republic will replace the traditionalist patriotism spontaneously generated within a free society with a narcissistic nationalism manufactured by the interlocking ideological media of state and corporate power. Cosmopolitan élites with no loyalty to the constitutional monarchy already manage almost every aspect of organised social life. Even the private realm has been invaded by highly refined techniques of media manipulation, therapeutic intervention and disciplinary normalisation. Accustomed to being in the driver's seat, members of the managerial overclass remain confident that, sooner or later, they will re-educate the hybrid population of a rootless mass society to accept one of their own as head of their own self-legitimating state.

Make no mistake about it. The republic is a constitutional device to expand managerial control over everyone within the territorial jurisdiction of the Commonwealth government. By getting rid of a British monarch, and removing the Union Jack from the flag, republicans aim to detach the federal Constitution from its original or core ethno-cultural identity. Once the supra-national authority of the British Crown has been nationalised, citizenship will become the exclusive property of the Commonwealth government. At that point, the corporate welfare state will be free to create a new Australian nation in its own disembodied image. The ideological mullahs of the managerial regime aim to purge the Australian people of their historic Anglo-Celtic or British identity.[6]

Australian élites were once ashamed of their convict origins. Nowadays the great and the good are embarrassed by any mention of their "English" Queen in the presence of visiting foreign potentates. In fact, of course, the Australian nation-state was created by a proudly British people, for whom it was a matter of historical record that the English Crown-in-and-out-of-Parliament was the original source for the fountain of law and justice. They understood that the term "British" is not simply an ethnic category. Its widespread modern usage grew out of a major constitutional achievement, the rise of the United Kingdom of Great Britain and Ireland. Ironically, historians tell us that British patriotism flowered within the neo-classical traditions of 18th Century Anglo-American or Atlantic civic republicanism.[7]

Despite the fact that the English, the Welsh, the Scots and the Irish were separate and distinct, albeit closely related ethnic groups, they had all taken on a common, or British, civic identity by the end of the 18th Century. In the settler colonies ethnic differences were even more readily submerged in a shared civic identity, so that colonial Americans and, later, Australians, Canadians and New Zealanders became more British than the British.[8] Throughout the Empire, increasing numbers of French-Canadians, Jews, Afrikaners, Germans, and Indians, to name but a few, were steadily incorporated into a global community of British subjects owing allegiance to the Crown.

Nevertheless, it must be acknowledged that "Britishness", understood as a civic identity, could never have arisen, nor could it survive, apart from the core ethno-cultural identity provided by the English people in particular. Indeed, the greater the genetic distance between any given ethny and the English people, the more likely they are to resent and resist their full assimilation into a British society.[9] Each in their own way, even *ethnie* phenotypically similar to the English, such as the Irish, the Quebecois, and Jews (whether Orthodox separatists or secular humanist advocates of mass immigration and multiculturalism), have worked to sever the civic significance of British identity from its ethnic roots.

Today, Australia's still predominantly Anglo-Celtic political class also rejects as "racist" any suggestion that the nation possesses a core, British ethnocultural identity. Contemporary Australian citizenship is grounded not in ethnicity but in bureaucratic paperwork. Our rulers are dissolving the old Anglo-Australian nation to put a newly disaggregated, polyethnic and multi-racial people in its place.

The Australian nation-state will cease to exist if republicans have their way. It will become a state without a nation. Patriotism will be displaced by new forms of statist idolatry. "Constitutional patriotism", as the new state religion is called, disapproves the love of fathers. Instead, we are to transfer our loyalty to an impersonal state liberated from the bonds of history and law.

Lest the managerial regime be confined within the old superstitious rituals of "ancestor worship" associated with the common law jurisprudence of liberty, progressive judges have already transformed the meaning of constitutionalism itself. The Constitution is no longer a set of fixed rules and principles intended to *limit* the potentially despotic reach of governments. On the contrary, in well-managed, modern republics, Constitutions are heavily-watered "living trees".[10] Open to perpetual innovation from the top down, their function is to *enhance* the power of the state. Tradition, authority and the common law spirit of liberty, all will be sacrificed on the multiculturalist altar of equality.[11]

Patriotic resistance could still derail the "inevitable" victory of the managerial republic. However, such a struggle must be waged in the name of the Australian nation, understood as part of a particular ethny. "An ethny," according to Frank Salter, "is analogous to a population of cousins". Anglo-Australians share myths of common ancestry, historical memories and many elements of a common culture with their ethno-cultural "cousins" in the various polities created out of the historic British diaspora emanating from the ancestral homeland in Britain.[12]

That Australians can never be an island unto themselves is something that was well understood by our fore-fathers. They valued their special relationship with other British-derived nations, especially but not exclusively those which still owe allegiance to the Queen, such as Canada, New Zealand and the UK itself.

Together with the USA, those nations inhabit a common English-speaking world, the Anglosphere, with its own distinctive language, history and civic culture.[13] Strong traditions of English individualism dating back to the Middle Ages, if not to prehistoric times, lent dynamism to the British diaspora and provided the cultural basis for the most successful liberal democracies and free market economies.[14] In the future, as in the past, the fate of the Australian nation, no less than that of the British monarchy, will depend upon the capacity

of the English-speaking peoples to preserve the vitality while enhancing the strength of their common civilisation.

For tactical political reasons, even the organisation leading the "No" campaign in the 1999 referendum, Australians for Constitutional Monarchy (ACM), has been loth to acknowledge openly the British character of the Crown. Australian patriots may love the forefathers who framed the Australian Constitution, but they often forget their kinship with the Canadians who drafted the *British North America Act*. Even the rebellious American colonists, who produced a rough facsimile of the 18th Century English Constitution at the Philadelphia convention of 1787, have slipped from their rightful place in the pantheon of British liberty. Tracing our constitutional ancestry still further back, to the Anglo-Saxon patriots who resisted the imposition of the Norman yoke, is no longer done in polite society, much less the classroom.

By inducing the constitutional amnesia causing us to forget who we are and where we came from, governments in every British Dominion, including Britain itself, have effectively corrupted "their" respective peoples. Having transformed British subjects throughout the Commonwealth into Australian, Canadian, New Zealand and British (now on the road to becoming European) citizens, the managerial state now asserts its own control over questions of national identity.

We have forgotten what it means to be free-born British subjects. At the same time, Australian citizenship amounts to little more than a legal formality. Citizens may be entitled to an Australian passport, or compelled to vote and serve on juries. But we can no longer take it for granted that voters or potential jurors speak the same language. Citizenship is now a vertical relationship between individuals and the state; it does not imply membership in a community of memory. By contrast, old-fashioned British patriotism gathered the far-flung subjects of the Crown together in a common world that would outlive them all.

That was then. For decades now, Australian governments have been busy hollowing out the social and cultural significance of the same statutory citizenship they were so eager to substitute for our common law status as British subjects.

All our connections to the ancient British constitution have been severed – save one. That one is the hereditary monarchy. The authority vested in the monarchy has waned, at times precipitously. But the Queen still serves as the only available pole-star of constitutional legitimacy for subjects cut adrift from a durable past by creeping republican governments brazenly acting in the name of the Crown. Could it be that only a Patriot King can now save a people that have grown terminally corrupt?

The idea of a Patriot King in an age of mass migration

Only the Crown can call both despotic governments and corrupted peoples back to the original principles of liberty owing their genesis to the ancient British constitution. At any rate, that is what the 18th Century opposition leader Viscount Bolingbroke tells us. Fearful that the rise of a vast, impersonal system of finance capital would transform government into a sort of self-imposed Norman Yoke, Bolingbroke wondered "whether, when the people are grown corrupt, a free government could be maintained, if they enjoy it; or established, if they enjoy it not?".[15] Certainly an elective monarch (whether called a

President, a Governor-General or a King) was ill-equipped and unlikely to save from themselves a corrupt people.

Bolingbroke was convinced that such a people might indeed be saved, but only "by means of a very different kind". That manner of salvation will not be open to us, Bolingbroke suggests, "without the concurrence and the influence of a Patriot King, the most uncommon of all phenomena in the physical or moral world". For Bolingbroke, it was axiomatic that "[p]atriotism must be founded in great principles and supported by great virtues".[16] If the people have fallen away from the spirit of liberty once associated with the ancient British constitution, it is the duty of their King to call them back to the first principles of free government.

The conventional wisdom has it that the monarch has no role to play in any decision to expunge the Crown from the Commonwealth Constitution. The Queen herself has said it is a matter for the Australian people and that she will accept whatever decision they make. In that respect, Her Majesty has *behaved* in the regular and thoroughly predictable manner expected of her. But no one should doubt that the monarch possesses a prerogative power to *act*, spontaneously and unpredictably, in defence of the Constitution. Australia's then Governor-General, Sir John Kerr made that clear on 11 November, 1975.

Ignoring the convention that the Governor-General can act only on the advice of his Ministers, Kerr invoked the reserve powers of the Crown to dismiss the Whitlam Labor government.[17] The Labor ministry still commanded a majority in the House of Representatives: nevertheless it immediately surrendered office to a caretaker government under Liberal Prime Minister Malcolm Fraser. Gough Whitlam's die-hard supporters remained in a state of denial for many years afterward, but at the time of his dismissal the Labor leader never dared to call into question the authority behind the vice-regal decision.[18]

The constitutional efficacy of Kerr's action illustrates the truth of Carl Schmitt's dictum that the "exception in jurisprudence is analogous to the miracle in theology".[19] Rooted in the faculty of freedom, political action always interrupts automatic and petrified processes; it represents a new beginning, breaking into the world as an "infinite improbability". For that reason, Hannah Arendt maintained that:

> "……. it is not in the least superstitious, it is even a counsel of realism, to look for the unforeseeable and the unpredictable, to be prepared for and to expect 'miracles' in the political realm".[20]

It is therefore worth asking whether the reign of a Patriot King in Australia could "effectively restore the virtue and public spirit essential to the preservation of liberty and national prosperity?".[21] Could the hereditary monarchy, once again, become the hinge upon which the whole Constitution moves?

In his day, Bolingbroke knew, such a suggestion would "pass among some for the reveries of a distempered brain".[22] Today, the ability of the monarch to act independently is even more hemmed in by rigid laws and conventions. But both reason and experience confirm that neither a King nor his subjects can be transformed forever into automatons. Certainly, Bolingbroke knew, the ancient British constitution has always stood upon a dual foundation.

Without question, the legal forms and political conventions of the parliamentary regime are an essential feature of our constitutional order. But the constitution dwells, as well, in the spirit and character of the people.

Bolingbroke warned that the preservation of liberty depended upon "the mutual conformity and harmony" of those two elements.[23] Once the spirit of the people is broken or corrupted, the fundamental order of the constitution must be altered, if not destroyed.

Our cosmopolitan élites believe that decades of mass immigration have transformed the character of the Australian people. Certainly, republican manifestoes regularly assert as established fact the conclusory claim that, "We are no longer a British people". If so, the change cannot be put down to immigration alone, since the United Kingdom abandoned the Dominions to enter Europe. Interestingly, John Hirst attributes some of the blame for that betrayal to the Queen, who "has been to Strasbourg to give her sanction to British membership of the European Community". In so doing, Hirst charges, she became "one of the enemies of rural Australia".[24]

Hirst's argument implies, of course, that the Queen owes a duty of protection to all her subjects wherever they may be. Bolingbroke agreed, declaring that when a people establish a free constitution, their Kings come "under the most sacred obligations that human law can create, and divine law authorize, to defend and maintain the freedom of such constitutions".[25]

The Crown has always been under a positive duty to protect the spirit of British liberty. That obligation became especially compelling once universal suffrage permitted every elected government to identify its own absolutist pretensions with the will of the people. Today, the allegedly enlightened despotism holding sway over the British peoples is even more insidious. In the name of universal human rights, their historic claim to secure possession of an ethnic homeland has been cast into doubt, both "at home" and in the old white settler Dominions.

In Australia, Canada, and New Zealand, and even in the United Kingdom, not to mention the United States, the ultimate genetic interests of the Anglo-Saxon ethny are at risk. Ethnie, like individuals and families, have an interest in securing "the indefinite survival of their own distinctive genes and their copies, whether these be resident in the individual, its descendants, or its collateral relatives".[26] Governments opening their borders to Third World immigration, and enforcing policies of official multiculturalism, have seriously compromised the genetic interests of the Australian ethny.

The Anglo-Australian people constitute a large, partly inbred, extended family, within which even distant kin "carry genetic interests for each other". But, because – at any given level of technology – the Australian landmass has a finite carrying capacity, mass immigration must replace Australian children with those of other, more or less unrelated, ethnic extended families.

If immigrant groups are genetically distant from the Australian ethny, the damage to its genetic interests will be especially pronounced. If England, for example, received 12.5 million closely related Danish immigrants, Frank Salter has calculated that the genetic loss to the remaining English would be relatively low, amounting to the equivalent of 209,000 children. But the same number of immigrants from India would cause a corresponding loss of 2.6 million children. Bantus are even more genetically remote from the English. An influx of 12.5 million Bantus would displace the equivalent of 13 million English children. If Indians or Bantus displayed higher fertility rates than the host population, the genetic losses incurred by the English would be higher still. [27]

In the same way, the abolition of the White Australia Policy stripped Australians of the ethnic monopoly over their antipodean homeland that the Federation of the Colonies in 1901 had been designed to secure. The resultant damage to their genetic interests can also be understood as an attack on the foundation of their constitutional freedoms.

The word "freedom" is derived from an Indo-European root meaning "dear" or "beloved".[28] In its primordial sense, then, freedom is the right to belong to a community of dearly beloved people, the family being the first and most important model for every such form of association. Every ethnic community is an extended family with a genetic interest in its own survival and enhanced vitality. Just as parents have a duty to care for their children, it might be said that every member of a free people has a moral obligation to defend his own ethny.[29]

Unfortunately, over the past half-century, governments throughout the Anglosphere have encouraged us to ignore the genetic interests of our ethnic kin through systematic campaigns of indoctrination and legal coercion. Such policies not only subvert the genetic continuity of the Australian ethny, but they also deprive us of our right to belong to a community of free people inhabiting its own homeland. But perhaps we are our own worst enemies. To the extent that the Australian people have been willing to squander their genetic interests of their own ethny by directing scarce territorial, cultural and economic resources to non-kin, they have been corrupted in a manner and to a degree hardly imaginable to Bolingbroke and his 18th Century contemporaries. Whether committed by a single individual or an entire race, suicide is a sin.

The problem Bolingbroke identified so long ago has finally come to a head: what can or should the reigning monarch do to restore the lost freedoms once enshrined in the ancient British constitution? Governments pursuing policies of forced integration in the name of an unachievable ideal of equality have trampled upon the freedom of association as well as the rights of free expression and private property. Having been denied or downplayed for the last three centuries now, the crisis of the ancient constitution has deepened, to the point where the very existence of the British people, at home and in the overseas Dominions, is now up for grabs. As a consequence, a Patriot King worthy of the name would recognize a moral obligation to defend to the death the genetic interests of his own ethny.

It was once taken for granted that the King would defend his realm personally, by force of arms if need be. But George II was the last British monarch to lead his armies into battle. Nowadays, the greatest threat to the survival interests of the British peoples comes, not from without, but from our "own" governing classes.

To save his people today, a Patriot King need not take up arms; he could rely instead upon the power of reasoned speech to rouse his people to the dangers of demographic decline and territorial displacement. At the very least, a patriot prince would defend the genetic interests of the hereditary monarchy itself, against managerialist regimes bent on extinguishing the spirit of the ancient British constitution, not just in Australia but throughout the entire Anglosphere.

Deracinated statism versus the ancient British constitution

For their part, constitutional jurists committed to the preservation of a free society should begin at once to determine whether and how the ethnic patriotism of the reigning monarch can be reconciled with his role and responsibilities within the Australian constitutional order. Analysis of that issue must begin from the premise that the Queen is *not* the Australian Head of State – that function is performed by the Governor-General.[30]

This proposition – a staple item in ACM's intellectual armoury – is sound as far as it goes, but it does rather beg the question of what the Queen actually *is*. The best answer is that she is the head of a *society*, one extending far beyond the territorial limits of any single state. The most salient feature of that society is its overwhelmingly British ethno-cultural character.

Though governments and, today, even the Queen, are loth to admit it, the British monarch is the *de facto* and even *de jure* head of a globe-girdling ethnic community. But the ethnic solidarity, much less the constitutional unity, of that community can never be taken for granted. Certainly, the American Revolution demonstrated that geography, politics and economic interests could fracture the bonds of kinship between closely related British peoples, as did the War for Southern Independence less than a century afterwards.

To those recognizing a continuing allegiance to the British Crown, the King has always portrayed himself as *parens patriae*, the father of his country. That kinship metaphor is deeply entrenched in the constitutional and legal history of the British Dominions. It implies that the King could be held morally, perhaps even legally, accountable should he fail to defend the interests of his ethnic family against a clear and present danger. Unfortunately, regal breaches of ethnic loyalty are not at all unknown. Indeed, in her 2004 Christmas broadcast, the Queen celebrated the Third World invasion of the British homeland. Lending her authority to the multi-racialist dogma that "diversity is indeed a strength and not a threat", Her Majesty took a swipe at those "extremists at home" who posed the only apparent danger to "peaceful and steady progress in our society of differing cultures and heritage".[31]

Clearly, the Queen recognizes no duty of loyalty to her co-ethnics. Why then should the people of the British diaspora retain their historic allegiance to the Crown? One need not share the Queen's evident animus towards ethnic patriotism (particularly, one suspects, among the English) to recognize that the reigning monarch still retains the formal constitutional power, indeed even a positive duty, to address her subjects throughout the Commonwealth. On the other hand, sooner or later, the Queen or her heirs and successors will be forced to recognize that the fate of the hereditary British monarchy is inseparably linked to the ethnic constitution of a particular people. Should the managerial classes succeed in their relentless campaign to detach the British (or the Australian) state from the British (or the Anglo-Australian) nation, the monarchy is doomed.

It follows that the British monarch must speak not just *for* herself but also on behalf of her predecessors as well as her heirs and successors. Likewise she must speak not just *to* those of her subjects in the here and now; she must also give voice to the needs and interests of the dead and the unborn – "not *any* dead and unborn: only those who belong" to the particular, cross-generational, pre-political community constituting the British ethny in the United Kingdom and the old white Commonwealth. "Not being elected by popular vote, the

monarch cannot be understood as representing the interests of the present generation". Speaking for absent generations, monarchs "are, in a very real sense, the voice of history".

There is a spiritual dimension to the kingly office that cannot be replicated, much less usurped, by modern governments managing mundane and material affairs of state in pursuit of yet another short-term electoral mandate. Indeed, it is precisely because the ancestral authority – literally, the genetic legitimacy – of the British Crown transcends the temporal powers of government that republicans want to rid themselves of it. They know, if the Queen does not, that the fate of the monarchy is bound up with the history and destiny of the British ethny. [32]

But, so long as the institution of the British monarchy survives, the succession of a Patriot King, or even its widely perceived possibility, could set the Australian Republican Movement back on its heels. If Bolingbroke was right, "a king can, easily to himself and without violence to his people, renew the spirit of liberty in their minds".[33] Kings can quicken the dead letter of the old constitution.

To confirm that proposition, one need only imagine how the republicanism debate in Australia would be transformed were the Queen, Prince Charles or Prince William to champion the constitutional unity of the British peoples. No doubt any such breach of convention would be met with a firestorm of outrage. Our political class expects the royal family to conform to a rigid code of personal and political *behaviour*. But, for just that reason, a patriot prince who refused to remain silent in the face of vital threats to the common interests of the monarchy and his people would demonstrate that freedom of *action* is open to any citizen with the courage of his convictions.

In seeking to renew the freedoms of the ancient British constitution in a modern Australia, a Patriot King would move beyond a sterile and backward-looking defence of the past. Instead, a patriot prince would inspire a forward-looking reconstruction of a British, or, more broadly, Anglo-American civilisation. By helping us to recover our historic identity as a British people, such a prince would inspire efforts to establish closer ties with our natural allies in the English-speaking world, including the most important British-derived nation, the USA.

At present, the Queen presides over a Commonwealth that is expanding its membership to the point of absurdity. A British Commonwealth that includes Zimbabwe but not the USA will be patently irrelevant to the future of Anglo-American civilisation. Of course, those hostile to the British ethny don't much care. Managerialist republican visions for the future depend on the deliberate devaluation of our British past. Australia's future, they believe, lies in Asia. Meanwhile, their self-loathing counterparts in the UK look set to submerge themselves in Europe. In both cases, history, politics and culture are to be subordinated to geography and economics.

Like Turkey, which cannot decide whether to join Europe or remain part of Islamic civilisation, Australia has become a "torn country",[34] split asunder by the deepening division between cosmopolitans and parochials. But, in a curious twist, it is the cosmopolitan, republican élites who have promoted the most parochial understanding of citizenship, carving up the Anglosphere into sovereign states, whose peoples are deemed to be foreigners to each other, despite their common origin in the British diaspora. A Patriot King would help

us to see over the walls that governments have erected around us.

Governments have an obvious interest in ensuring that people owe no allegiance to any authority above and beyond their own territorial jurisdictions. For much of the 20th Century, state-building took the place of Empire-building, much less nation-building. The appearance of a Patriot King would restore the true image of the British Commonwealth as an association of free people "united by one common interest and animated by one common spirit". A patriot prince would no longer aid and abet the division of the Anglosphere into separate, mutually indifferent and increasingly hollow nationalities. Instead, he would "endeavour to unite them, and to be himself the centre of their union".[35] It is not at all obvious that Australians, Canadians and New Zealanders have become freer through the systematic obliteration of their common law status as free-born British subjects.

Both the Queen and her most loyal subjects must now bend the knee before statist definitions of national identity. ACM is always careful to present the monarchy as an Australian institution. One can, of course, point out that Australia is still British in a formal or at least a residual sense by virtue of its allegiance to the Crown, and that most of its people trace their origins back to the United Kingdom. But this cuts no ice with officialdom, not even with Her Majesty's judges in the High Court of Australia. In their newly-minted vision of an auto-legitimating state, the Constitution creates the nation, not the other way round.[36]

Given the current ideological climate, one can hardly fault the monarch for remaining silent in the face of endless insulting references to our "foreign" Queen. In fact, the Queen is no more foreign to Australia than the spirit of the ancient British constitution, without which the formal, black-letter text of the *Commonwealth of Australia Constitution Act* (Imp, 1901) could never have sprung into life. But, if not even the Queen is prepared to do battle with the enemies of the ancient constitution, small wonder that ordinary citizens sometimes give up the ghost. Indeed, many now feel like strangers in their own land. To resist the massed wealth and power of the political, economic and cultural élites railroading us towards a republic is no easy task. But there can be no doubt that our future as a free people hangs in the balance.

Doubts over our fidelity to the original principles of constitutional liberty became unavoidable once the creation of an Australian republic was touted as the first step towards full membership in a new regional polity. Under the Keating Labor Government, it seemed that Australia was ready to defect from the West. Indeed, postmodernist republicanism already assumes that the constitution of our Asian future will not be a liberal democracy on any European or Anglo-American model. Alastair Davidson, for example, admits frankly that we may have to jettison a basic premise of Western constitutionalism, namely, the presence of citizens capable of thinking for themselves. Australians, he says, "will have to come to terms with an ideal of Confucian origin that says that wisdom teaches men and women to fit in and that life is suffering". Alone in Asia, Australians will have to "accept what Montesquieu called despotism".[37]

The civilising mission of a Patriot King

In reality, neither the republic nor the Asianisation of Australia is inevitable. Moreover, Australian republican rhetoric is fixated on an obsolescent model of sovereign statehood and national independence. International politics is in fact

no longer dominated by power struggles between independent nation-states exercising sovereign control over territory, resources and populations. Even the ideological struggles of the Cold War era have given way to deeper cultural cleavages between civilisations.

According to Samuel Huntington, Australia sits near the intersection of several geopolitical fault lines. Asia is not a homogeneous entity. It is divided between Sinic, Buddhist, Hindu and Japanese civilisations, not to mention the Islamic and Orthodox countries also to be found there. The "strange multiplicity" of Asia offers new opportunities for trade, commerce and intercourse, but it also poses a perennial danger to Anglo-Australian civilisation.

Whatever else they may be, Asian peoples are overwhelmingly non-Western and, not infrequently, anti-Western to boot. Australia, by contrast, is part of the globe-girdling Anglosphere, still the most dynamic and powerful element within Western civilisation. It would be an unmistakable sign of Western weakness were Australia to drift away from its ancient constitutional mooring into the vortex of inter-Asian rivalries. A patriot prince will challenge the ideological hegemony enjoyed by deracinated Australian republicans eager to "bandwagon with rising non-Western civilisations".[38]

In a new world order marked by pervasive conflict between cultures and civilisations, it makes little strategic sense for the Australian people to renounce their (distinctively Anglo-American) Western identity. Australia is not alone in the world. The Crown can act to reinvigorate the ethno-cultural community uniting us with English Canada, New Zealand, the United Kingdom and, above all, the USA. A patriot prince would crown his reign with everlasting glory by reawakening American citizens to the British roots of their own proudly independent nationhood.

A modern patriot prince, Bolingbroke reminds us, would "deem the union of his subjects his greatest advantage". At the moment, the fissiparous forces of disunity are in the ascendancy. That is why a Patriot King would be today, as in the eighteenth century:

> ".....the most powerful of all reformers; for he is himself a sort of standing miracle, so rarely seen and so little understood that the sure effect of his appearance will be admiration and love in every honest breast, confusion and terror to every guilty conscience, but submission and resignation in all".[39]

To a Patriot King, the governments of the Dominions would appear as so many factions inhabiting a common civilisation. Bolingbroke maintained that:

> "In whatever light we view the divided state of a people, there is none in which these divisions will appear incurable, nor a union of the members of a great community with one another, and with their head, unattainable".[40]

Precisely because nothing can be more uncommon than a Patriot King, he may be able to accomplish what common sense tells us is improbable or even impossible. Once he succeeds to the throne, nothing less than the hearts of his far-flung people "will content such a prince; nor will he think his throne established, till it is established there". Nowadays Australia is a country whose "people is divided about submission to their prince".[41] Unity can be restored only when a patriot prince demonstrates that allegiance to the British Crown enhances, rather than diminishes, the dignity of Australian citizenship.

One hopes that Bolingbroke figures prominently in the education of young Prince William. But all of us should heed Bolingbroke's advice to do everything

we can to become the sort of people worthy of a Patriot King. We must prepare ourselves for great changes in the world and in ourselves. Bolingbroke predicted that, after the succession of a Patriot King, the people would remain outwardly the same but "the difference of their sentiments will almost persuade them that they are changed into different beings".[42]

Conclusion

The appearance of a patriot prince would be a miracle indeed. But those who pray for such a deliverance must not neglect such means as are in their own power "to keep the cause of reason, of virtue and of liberty alive". The blessing of a patriot prince might indeed "be withheld from us", but to "deserve at least that it be granted to us, let us prepare to receive it, to improve it, and to co-operate with it".[43]

Were a patriot prince to campaign in defence of the monarchy, he would be subjected to a raging torrent of criticism and abuse. Yet when a good prince is seen "to suffer with the people, and in some measure for them...many advantages would accrue to him". For one thing, the cause of the British peoples generally "and his own cause would be made the same by their common enemies".[44]

What is the nature of that cause? In short, a patriot prince will call forth a spirit of resistance to both managerial statism and the abstract universalism of the capitalist marketplace. He will do everything in his power to civilise those too often wild and amoral forces. But, unlike the long-awaited Australian republic, the appearance of the Patriot King is not inevitable. Indeed, only a people whose lost liberties are restored to memory will recognise his coming as an opportunity to reshape their allegedly pre-ordained future.

The tables must be turned on Australian republicans. They aim to corner the market on both cosmopolitan tolerance and national pride. All defenders of the monarchy must therefore cast ARM in a new light. Behind the progressive face of official republicanism lie the sordid realities of worldly ambition, class privilege and the pursuit of power. Considered in the cold light of class analysis, a republican victory would enthrone the overbearing self-importance and ideological zeal of short-sighted provincial élites willing to sacrifice the genetic interests of their own people in return for a mess of postmodernist pottage.

Sociologically speaking, republicans represent the local branch plant managers and bureaucratic nodes of a transnational corporate state system ever more dependent upon the inscrutable workings of the divine economy. Having embraced the materialist religion of humanity, republicans rush to renounce their historical roots and traditional allegiances, thereby subverting the constitutionalist culture of mixed monarchy. Playing an important supporting role in the managerial revolution of our time, an all-pervasive, creeping republicanism is steadily deconstructing the fabric of British civilisation.

We no longer publicly call upon God to save the Queen. The ritual absence of the monarch from everyday life is but one more sign that we are no longer a serious people. Forswearing the faith of our fathers, we surrender our bodies to the state and our souls to the gospel of wealth. In the end, a Patriot King may have to save *us*. Remember, though: a King is, indeed, like unto God;[45] he cannot save those who will not save themselves.

Endnotes:

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6. On the managerial revolution generally, see James Burnham, *The Managerial Revolution: What is Happening in the World* (New York: John Day Company, 1941); also, Paul Edward Gottfried, *After Liberalism: Mass Democracy in the Managerial State* (Princeton, NJ: Princeton University Press, 1999); and Samuel Francis, *Power Trip*, in *The Occidental Quarterly* (Summer, 2003), Vol 3, No 2, pp. 69-78.
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11. Andrew Fraser, *A Marx for the Managerial Revolution: Habermas on Law and Democracy*, (2001) 28 *Journal of Law and Society* 361.
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15. Viscount Bolingbroke, *The Idea of a Patriot King*, [originally published in 1749] in David Armitage (ed.), *Political Writings* (Cambridge: Cambridge University Press, 1997), p 249.
16. *Ibid*., pp. 221, 234.

17. Sir John Kerr, *Matters for Judgement* (Melbourne: Macmillan, 1978).
18. See, especially, HO Browning, *1975: Crisis* (Sydney: Hale and Iremonger, 1985).
19. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, MA: MIT Press, 1985), p. 36.
20. Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (New York: Meridian, 1961), pp. 168-70.
21. Bolingbroke, *op. cit.*, p. 222.
22. *Ibid.*, p. 240.
23. *Ibid.*, pp. 247-8.
24. John Hirst, *A Republican Manifesto* (Melbourne: Oxford University Press, 1994), pp. 4-5.
25. Bolingbroke, *op. cit.*, p. 244.
26. Richard Alexander, quoted in Salter, *op. cit.*, p. 26.
27. Salter, *op. cit.*, pp. 59-75.
28. See, for example, the entry for "free" in the *Shorter Oxford English Dictionary*.
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33. Bolingbroke, *op. cit.*, p. 251.
34. See Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), pp. 138-54.
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36. *Sue v. Hill* (1999) 199 CLR 462.
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38. Huntington, *op. cit.*, pp. 151-4.
39. Bolingbroke, *op. cit.*, pp. 259, 261.
40. *Ibid.*, pp. 269-70.
41. *Ibid.*, pp. 264-5.
42. *Ibid.*, p. 251.
43. *Ibid.*, p. 222.
44. *Ibid.*, p. 239.
45. Cf. *James I on monarchy: speech to Parliament, 21 March, 1610*, in JP Kenyon, *The Stuart Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1966), pp. 12-14.

Chapter Seven
Native Title Today

Dr John Forbes

"Native title" is an inalienable, communal form of property effectively controlled by an oligarchy, or by an Aboriginal body similarly controlled. Broadly speaking it includes trust lands granted by State or federal governments, property purchased by means of the Land Acquisition Fund, and *Mabo*-style titles. Not many of the *Mabo* variety have actually been established, but lands-rights enthusiasts usually prefer to concentrate on them, as if other, better and more extensive Aboriginal tenures did not exist. However, let us concentrate here on the fortunes of *Mabo* title. As always, an understanding of the present demands a review of the past.

In the beginning

The campaign for *Mabo* title – or Brennan-Deane title, to give credit where credit is due – began eleven years after a Supreme Court judgment, never appealed, held that no such thing existed.[1] The litigation in Eddie Mabo's name began in 1982. For some ten years the claim was shaped, re-shaped and re-pleaded. One of the many charms of lawyers' law is that, however much the pleadings are re-jigged before trial, the credit of the final version is conventionally unaffected.

The nominal plaintiffs were inhabitants or former inhabitants of an island in Torres Strait. Their case began as a claim for individual rights, but, by grace of the High Court, it ended – so far as matters now – in a vague formula for communal titles for Aborigines, who were never parties to the action.

The High Court rarely conducts trials nowadays, so someone else had to be appointed to hear, organise and assess the evidence. Counsel for the plaintiffs wanted it to be the new Federal Court. Ostensibly he preferred its more "flexible" approach to evidence, but it may have been a silent thought that there was a better chance of finding an activist, or power-seeking judge in that forum. However, Chief Justice Gibbs referred the matter to the Queensland Supreme Court.[2] The hearing was assigned to Martin Moynihan J, who delivered his report to the High Court on 16 November, 1990.

Moynihan soon realised that, among the Melanesians, he was dealing with "a very different society and very different relationships ... towards land" than the judge who heard the Aborigines' claim in 1971. He also found cause to be sceptical, noting that "Eddie Mabo [was]... quite capable of tailoring his story to whatever shape he perceived would advance his cause":

> "I was not impressed with the creditability of Eddie Mabo. I would not be inclined to act on his evidence in a matter bearing on his self-interest (and most of his evidence was of this character) unless it was supported by other creditable evidence ... [His] claims ... are a curious concoction of fact and fantasy ... designed to advance Mr Mabo's cause both in these proceedings and outside them".
>
> It was not only Eddie's evidence that called for some grains of salt:

> "The evidence as to James Rice's claims concerning Dauar [Island] is to my mind in such an unsatisfactory state that I would not be prepared to act on it. It seems that the facts are now largely lost and what we see is part memory, part fabrication or perhaps confabulation and part opportunistic reconstruction".

But all this, and much more, sank without trace in the Mason High Court. Brennan J expanded the inquiry enormously, recoiling from the thought of distinguishing Melanesian from Aboriginal culture. The Melanesians, apparently, do not agree. In 2002 they declined to invite Mabo's widow, and surviving plaintiffs in Townsville, to join in the tenth anniversary celebrations of the High Court's decision. A spokeswoman for the Torres Strait Development Corporation explained: "They need to make a choice between being Aborigines or Torres Strait Islanders".[3]

The Melanesian plaintiffs in *Mabo* raised no issue about land rights for Aborigines. The Islanders were a settled agricultural people, not nomadic like the Australian tribes. But judicial eyes were set upon a place in history, although in fact history had already been made – the Commonwealth and most States had already passed laws to recognise Aboriginal land rights more efficiently, with greater certainty, and at much less expense than *Mabo*-type litigation.[4]

Three years after *Mabo* the Commonwealth established a Land Acquisition Fund and devoted almost $1.5 billion to it, so as to "fill in the legal blank cheque signed by the High Court [when it created] ... rights that would otherwise be little more than expressions of conscience".[5] Thereafter, in addition to, or instead of using the land rights Acts, Aboriginal organisations could purchase land in the normal way, without disrupting our long-established law of real property.

Justices Mason and Deane built their careers as black-letter lawyers, when that was still the recognised path to professional esteem. But the legal fashions were a-changing, and by 1992 there was more power and fashionable approval to be found in judicial "creativity". That was the gospel at judicial gatherings overseas, where Canadian judges enthused about their new bill of rights and its sweeping additions to their legislative powers – so much more interesting than judicial routine of the traditional kind.

In an extraordinary series of extra-judicial statements after the *Mabo* decree was handed down, Chief Justice Mason patronisingly dismissed anyone daring to suggest that it was an excess, not to say an abuse, of judicial authority. Glossing over the difference between judicial lawmaking that is necessary and incremental, on one hand, and gratuitous, sweeping decrees on issues not before the court, on the other, he delivered a *dictum* of breathtaking arrogance:

> "In some circumstances governments ... prefer to leave the determination of controversial questions to the courts rather than [to] ... the political process. *Mabo* is an interesting example".[6]

In other, more candid words:

> "Commonwealth Parliament should have recognised native title. It didn't, so we did".

The potential cost of the adventure to taxpayers, social harmony and the national economy was not considered. In form, *Mabo* is a judicial decision; in substance, it is radical and poorly drafted legislation.

In Canadian style, language was adjusted to remould popular opinion. The most speculative claimants instantly became "traditional owners", and infallible

"elders" and "leaders" were legion. Even the word "Aborigine" was suspected of political incorrectness, so the meaning of "indigenous" was altered, and limited to make it a synonym of "Aboriginal", to the exclusion of many other people who acknowledge Australia as the land of their birth.

The principal *Mabo* judgments were heavily influenced by models drawn from other societies with different socio-legal histories, such as Canada and the United States. It is interesting to compare the following passage in a recent High Court judgment about the immunity of advocates from suits for negligence. In response to a plea to follow American precedents and a recent judicial backflip in England, Chief Justice Gleeson and Justices Gummow, Hayne and Heydon retorted:

> "Where a decision [overseas] ... is based upon the judicial perception of social and other changes said to affect the administration of justice in [that country] there can be no automatic transposition of the arguments found persuasive there to the Australian judicial system".[7]

A very elastic law

Mabo itself did not establish any native title on mainland Australia, but it was a mysterious charter for judicial law-making. "Native title" could mean anything from an occasional right of entry to something akin to ownership. It all depended on native customs from place to place, as asserted by claimants, their anthropologists and other well-disposed witnesses. According to the long and various disquisitions in *Mabo*, the decisive customs might be those of a "clan or group", a "people", a "native people", a "community", a "family, band or tribe", a "tribe or clan", a "tribe or other group", a "relevant group" or an "indigenous people". Who, then, was an "indigenous person"? *Mabo* steered well clear of any definition of where that category begins and ends.

Subsequent cases have done little to reduce vague and verbose rhetoric to reasonably predictable legal rules:

> "Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous people ... provide its content. It is a relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs".[8] (I trust that this is clear.)

The concepts of continuous occupation and retention of traditional customs are so elastic that a trial judge's fact-finding discretion is virtually unlimited. If a "tribe", "community" (etc) seems to have petered out, continuity can be discovered by reference to outsiders supposedly "adopted" or "incorporated" into the original clan. There is scarcely any limit to indulgent findings that the adoption of European ways of living signifies a development, not substantial abandonment, of a pre-1788 lifestyle. After all, this is civil litigation, and it is only necessary to reach a plausible conclusion on the "balance of probabilities". The vaguer the law, the greater the power of the judges in charge of it.

The elasticity, not to say slipperiness, of *Mabo* concepts is well illustrated in the case of *De Rose v. South Australia*. The trial judge, O'Loughlin J, found that no relevant connection to land occupied by a cattle station survived, as most of the claimants had never bothered to visit the land in question:

> "Many of the Aboriginal witnesses have claimed that they have retained some affinity with the land. However, their actions belie their words. Occasional hunting of kangaroos ... stands out in isolation. No other physical or spiritual activity has taken place in the last twenty or so years.

> The claimants have lost their physical as well as their spiritual connection, and, because of that loss, there has been a breakdown in the acknowledgment of the traditional laws and ... customs. That breakdown is fatal to their applications".

However, a way round that difficulty was found by a full Federal Court.[9] In their Honours' opinion their colleague O'Loughlin focused unduly on the claimants' failure to visit the area. If he had thought more deeply about the case, he would have arrived at a better understanding of the view taken by the traditional laws and customs of that failure. It is, after all, quite possible for Aborigines to maintain that connection notwithstanding long absence due to European social and work practices. The possibility, if not probability, that "European social practices" might have engendered a strong preference for living in a different style in a more congenial place was not considered. The question – we must understand – is not whether claimants *have actually* lost their connection, but whether, according to their current story, *they think* they have lost it.

Perhaps the High Court, if given the opportunity, will put some objectivity back into the "connection" concept, but in the meantime it is difficult to think of anything the Federal Court cannot do in the quest for native title, if only it puts a *De Rose* mind to it.

The right to negotiate

No country could afford to leave its land law in such disarray, so we received the *Native Title Act* of 1993. It made no attempt to define "native title" or "Aborigine", but it added to the confusion by inventing a "Right to Negotiate" to which the judicial imaginations had not extended. Thenceforth the mere making of a claim over a tract of land, however vast, barred any development on it without the consent of the claimants or the Native Title Tribunal, a new bureau with a vested interest in *Mabo* metaphysics. "The right [to negotiate] is a valuable right that may be exercised before the validity of an accepted claim has been determined".[10]

Rapidly, that right became the most important and valuable aspect of many native title claims. However doubtful a claim might be, and whether or not it was ever taken to trial and proved, it was a right that could be very rewarding. While it had no immediate value in areas that seemed devoid of commercial resources, it could serve the collateral purpose of keeping grievances in the headlines. In more prospective areas would-be developers faced these alternatives: (1) Buy the claimants' consent with cash or kind; (2) Venture into a slow, complex and costly legal maze; or (3) Capitulate.

In June, 2002 the chief executive of the rural lobby Agforce complained, with a good deal of evidence to support him: "The moment an exploration permit is granted, almost immediately a native title claim is lodged over that area", giving the claimants "the opportunity to extort [*sic*] the mining companies".[11]

Paul Toohey, a journalist normally very supportive of Aboriginal politics, quoted, without dissent, a legal specialist in the new and fertile field:

> "Let's not be confused. It's just a right to delay and cause humbug. So the other side says: '[Damn][12] it, let's do a deal and get on with it. ... You just have to scatter seed to the blackfellas' ".[13]

The seeding process became known as "cashing out". Federal Court judges increased the pressure to "settle" by stressing the cost, delay and disruption of contested claims.

Nevertheless the Cape York Land Council, as recently as November, 2004, professed surprise and outrage at reports that it had canvassed a discreet "cashing out" with BHP Limited to keep "cultural heritage guides" away from prospective mining areas.[14] The protest of purity followed the original doctrine of a leading native title exponent, Mick Dodson, to the effect that money could not be, and never should be, a substitute for "the opportunity to exercise the human rights of freedom from discrimination and equality before the law".[15] There is a scene in Gilbert and Sullivan's operetta *The Mikado* where a favour is purchased from Pooh-Bah, the Emperor's Minister for Everything Else. The emolument is pocketed, albeit with a lofty expression of disgust: "Another insult, and, I fear, a small one!". The blandishments of "cashing out" have also proved irresistible.

Some products of the Right to Negotiate have been most attractive, whether or not the recipient oligarchs distributed the money fairly, or spent it wisely. A few examples must suffice. In April, 2003 a developer paid $1.5 million to two urbanised "tribes" for abandoning claims over the Gold Coast's Southport Spit.[16] In a more remarkable transaction, the Century Zinc mine in north-west Queensland was able to proceed only after promises by the company and the State government to transfer land, cash and benefits totalling $90 million, including $500,000 for a "women's business" centre. In the Northern Territory the Zapopan gold mining company purchased its freedom from a native title claim with a transfer of freehold and other material benefits. Less successful was a group that tried to halt the construction of a major gas pipeline in Queensland, only to have their case for an injunction robustly dismissed by Drummond J.[17]

Federal Court monopoly

Land law has always been a matter for the States and their long-established Supreme Courts. But the *Native Title Act* 1993 removed jurisdiction in native title cases to the recently-arrived Federal Court, where a majority of the judges had been appointed by the federal regimes of 1983-1996. Appointments to our traditional courts usually depend on retirements – a relatively slow process, which means that a government disposed to stack the bench has to stay in office for a considerable time. But it is quite different when a new Court is created and rapidly expanded – a description uniquely applicable to the Federal Court. In 2000 well over half of its *fifty* judges were appointees of one political party.

It was still possible to raise *Mabo* in a State court by way of defence to a prosecution. An early case of that kind is *Mason v. Tritton*,[18] which began in New South Wales before the Federal Court's monopoly was established. Native title was raised as a defence to a charge of illegal fishing. It failed at first instance, and on appeal, for want of any acceptable evidence. There was no High Court appeal. A gentleman from the Gulf Country, Mr Yanner, fared better in 1999. Charged with the offence of killing protected crocodiles, he argued that, as a part-Aborigine, he had a native title which exempted him from the fauna protection laws. The Queensland courts were unimpressed, but the High Court was persuaded that hunting in a motor boat, with a refrigerator to preserve the meat, was sufficiently traditional to entitle the defence to succeed.

Confusion confounded

The historian Marc Bloch has described history as occasional convulsions followed by long, slow developments. But in this case the next legal convulsion

was not long in coming. In *Mabo* Brennan J indicated that Crown leases were safe from native title claims, and in framing its *Native Title Act* the Keating Government relied on the oracle. But in the dying days of December, 1996, despite Brennan's refusal to change his mind, it was revealed that Crown leases were vulnerable after all.[19] Worse, there was no general rule. If a defendant refused to surrender or "cash out", the result in every single case depended on its own facts, the terms of the particular lease, and a judge's view of them. It was legal uncertainty on stilts.

The "Ten Point Plan"

Further legislation was needed to sort out the judicially crafted confusion. The new Coalition government produced a "Ten Point Plan". But political plans are not law. In 1997 the Senate made 217 amendments to the Bill. The government accepted half of them, but that was not enough to secure its passage. It was not until July, 1998 that the independent Senator Harradine "blinked", and a modified version of the Ten Point Plan became law, as the *Native Title Amendment Act* 1998. The superstructure erected on *Mabo* and the 1993 Act by federal courts and the Native Title Tribunal was already so obscure that the amendments ran to 350 pages!

But they did slow the traffic. Claims became harder to lodge, because more supporting information was required. Grants of leases made in 1994-1996, in the *Mabo*-induced belief that Crown leases extinguished native title, were validated. The Right to Negotiate no longer applied to claims over town and city areas, where some of the silliest, headline-seeking claims had been made. "Low impact" exploration for minerals could be exempted. It was declared that commercial, residential and community purpose leases, and agricultural and pastoral leases conferring exclusive possession, extinguished any native title that would otherwise affect them. Native title was subjected to general rights to water, fish resources and airspace. "Scheduled interests" notified by States and Territories as exclusive possession tenures were given protection. But a six-year deadline for new claims did not survive the Senate.

Compulsory acquisitions remained subject to the Right to Negotiate, while rights to compensation, statutory access rights, and arguments that certain leases do not confer exclusive possession, still leave plenty of room for litigation, as the plethora of subsequent law reports indicates. The "elasticity" of *Mabo* metaphysics, exemplified above, should not be underestimated. The immunity of some "scheduled interests" may also be open to question. Settlements and "cashing out" were formalised in provisions for "Indigenous Land Use Agreements". In certain cases the States were permitted to make arrangements *in lieu* of the Right to Negotiate, but little use has been made of those provisions.

In a comic sequel to the 1998 Act, a gentleman named Nulyarimma commanded the ACT authorities to arrest the Prime Minister, the Deputy Prime Minister and two other members of federal Parliament, and to charge them with genocide for supporting changes to the *Native Title Act* 1993.[20] When no warrants were forthcoming, the pursuer asked the ACT Supreme Court to order the police to act. After a very long and polite judgment the judge found the proceedings to be "essentially misconceived".

Mr Nulyarimma then appealed to three judges of the Federal Court – Wilcox, Whitlam and Merkel JJ. They reluctantly dismissed the appeal; the

composition of the court emphasises the impossibility of allowing it. However, their Honours took the opportunity to write long and gratuitous essays on international law and history, when a page or two of pertinent law would and should have sufficed. In native title cases, however flimsy they may be, many judges are either delighted, or feel obliged, to make elaborate displays of compassion and enlightened thought rarely bestowed on other disappointed litigants.

Putting *Mabo* into practice

The first few titles did not have to be proved. As we have seen, commercial considerations are one inducement to "settle". Another is the temptation for governments to avoid controversy and win modish Brownie points by conceding claims over Crown land. Politicians are ever ready to spend public money for political advantage, however fleeting, so why not public lands? Politically and economically this process is easiest where no prospect of economic return seems to exist. Of course that can change in future, but politicians' views of the future are usually myopic. A tract of Crown land may seem a small price to pay for peace and the approval of native title enthusiasts.

In December, 1997 the Federal Court rubber-stamped an agreement between the Queensland government and thirteen Aboriginal groups with respect to 110,000 hectares at Hopevale, on Cape York. This was the first native title agreement in Australia, but it involved a distinction without much difference, because the land was already in trust for Aborigines under State law. There were exemptions for existing mining operations, and mineral rights remained in the Crown. In mid-2002 Noel Pearson's brother, Gerhard, was still unsure of the precise arrangements at Hopevale:

> "The lawyers and government were so keen on getting an agreement and subsequent promotion [i.e. political kudos] that they pushed people into something that the community is [still] trying to unravel".

The next native title also resulted from a consent order. It covered 12 hectares of Crown land at Crescent Head, on the north coast of New South Wales. The agreement was approved by the Federal Court in April, 1997. The Federal Court's formal approval took almost an hour as Lockhart J, in a thespian process that was later imitated in places much more expensive for a judicial entourage to reach, invited sixty Dunghutti people to the front of the crowded courtroom to "better share the historic day". A few hours later the land was compulsorily acquired for a housing development, upon a down payment of $800,000 and a good deal more to follow.

In September, 1998 the High Court confirmed that a grant of freehold extinguishes native title.[21] This was one of the few points that had seemed clear since 1992, but so great was post-*Wik* uncertainty that a contested case was run through to comfort nervous landowners.

Some settlements do not concede title in the sense of exclusive occupation, use and enjoyment. Lesser rights of access may be involved. For example, in 1998 the Federal Court rubber-stamped an agreement between the Queensland government, graziers Alan and Karen Pedersen, and the Yalanji tribe over a pastoral lease of 25,000 hectares at Mt Carbine, about 300 kilometres from Cairns. It had taken three years to negotiate.

In return for a better class of lease, the Pedersens recognised the Yalanjis' right to occupy about 1 per cent of the property and to camp, fish, hunt and

protect sacred sites elsewhere. (The settlement may well have been more expensive if a mining company had been involved.) Three years later none of the "traditional owners" had returned to exercise the cherished rights. Discouraged by this lack of interest, Derrick Oliver of the Cape York Land Council attributed it to the pressures of modern life, poverty and substance abuse, adding this candid but decidedly impolitic comment:

> "To people who are sitting in bars or doing drugs that land would be three and a half hours out of their life. The hardest part is instilling in young people the desire to run with [native title]".[22]

The Pedersens, who found the long-running dispute an "absolute minefield", told journalists that they never really expected members of the tribe to seek access, although it would take just a phone call to do so.

In June, 2002 a Mrs Mobbs of "Gowrie" station, near Charleville, after waiting five years for a claim over her property to proceed, revealed a similar experience. She said that for at least twelve years no Aborigine ever sought to enter her property for any purpose. Perhaps she and the nominal claimants, like the Pedersens, were simply caught up in a search for a *raison d'etre* by one of the innumerable Aboriginal corporations.

The Hindmarsh Bridge affair demonstrated that even freehold land was and is liable to be "frozen" by ministerial decree under the *Aboriginal and Torres Strait Islander Heritage Protection Act*. After a great deal of expensive to-ing and fro-ing the federal Government and Opposition parties combined to excise that area from the operation of the Act. In *Kartinyeri v. Commonwealth* the High Court allowed that legislation to pass, rejecting the argument that, once special benefits are conferred on a particular race, they can never be reduced or taken away.[23]

At the end of 1998, the Native Title Tribunal published a *Five Year Retrospective* recording that 879 claims had been lodged, and 1,349 agreements made, mostly for minor rights. There had been just four "determinations", and none was the result of a fully contested case.

So numerous are the cases (reported and unreported) that one is forced to be selective. In 1999 a claim to exclusive possession of numerous town sites in Alice Springs failed, although limited rights of access were granted over some of them.[24] Soon afterwards a claim by the Larrakia people on the Cox Peninsula near Darwin succeeded, but that was under the Northern Territory Act of 1976, not under the *Mabo* banner. Even so:

> "Darwin folk [wondered] how it is that people they grew up with have suddenly become Aborigines when before they were just Darwinites like everyone else ... Will the majority of Larrakia, who live in houses, watch TV and speak only English now cross the harbour to dress in lap-laps and dance in ochre paint? In Darwin there is a widely held view that these people never were real Aborigines".[25]

Claims under the Northern Territory Act have rarely if ever failed, and nearly half of the Territory is now Aboriginal trust land.

In legal theory the "stolen children" cases are quite distinct from land claims, but they are a manifestation of the same political movement. The first case was decided in 1999 – *Williams v. Minister, Aboriginal Land Rights Act*, in the Supreme Court of New South Wales. The claim for damages failed when the plaintiff admitted that her mother voluntarily made her a State ward. The NSW Court of Appeal and the High Court upheld the decision of the trial judge.

In 2000 greater resources were devoted to *Cubillo and Gunner v. The*

Commonwealth, in the Federal Court. After a trial lasting 94 days, judgment was given in favour of the Commonwealth. O'Loughlin J observed:

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

An appeal was dismissed. Other unsuccessful cases were brought in NSW by Judy Stubbs and Valerie Linow. However, the results of these cases, and the reasons for their failure, do not appear to have affected the credit of the movement.

In *Rubibi Community v. Western Australia*,[26] a limited right of access to land near Broome for ceremonial purposes was recognised, again by consent. The area was already an Aboriginal reserve. In a remote part of the Northern Territory, an occupational title was recognised over a "phantom" town site that was surveyed in the late 1800s but then practically ignored.[27] In the absence of competing interests this claim met little resistance. The same applies to Western Australia's concession of desert lands to the "Spinifex People" in November, 2000. In that case the rubber stamp could have been wielded in court offices in Melbourne, Sydney or Perth, but Black C J took the opportunity for elaborate symbolism, venturing into the desert to make the consent order, as he sat in the sand in his court robes with local elders:

> "I thought it would help me in my understanding of things ... We had this wonderful experience of sitting under a tree for some considerable time and they were teaching me some words. It was a wonderful communication".[28]

The State reserved rights to all minerals, petroleum and water.

Black C J was off again in June, 2001, heart on sleeve, when he and his entourage flew from Melbourne to Cape York to ratify a concession to the Kaurareg people. Kneeling before the elders in a "highly emotional ceremony", he declared that "it was like being invited into a church or sanctuary".[29] That was not the Federal Court's last expensive publicity exercise. In 2004 another member of the Court carried the rubber stamp to some Torres Strait islands that were handed over by the Queensland government.

Serious contests

The first seriously contested matters to be finalised were: (1) *Yarmirr v. Northern Territory* (the *Croker Island Case*); (2) *Ward v. Western Australia*; and (3) *Yorta Yorta*. In every case the primary judgment was delivered in 1998, and the High Court's decision was handed down in 2002.

Yarmirr was a bid to take *Mabo* offshore so as to gain exclusive rights over part of the Arafura Sea. Judge and entourage camped on Croker Island to hear the Aboriginal witnesses; special arrangements for claimants are common in this class of litigation. But, after a long and costly trial, the award was limited to the protection of objects and places of "cultural significance" and a non-exclusive right to hunt and fish for non-commercial purposes. So the plaintiffs have the same rights to sail and fish there as the rest of us, no more, no less.

The judgment of Lee J in *Ward v. Western Australia* was delivered in November, 1998. The Kimberley Land Council sponsored a claim to 7,900 square kilometres of the State's north-west, including Lake Argyle mine, the Ord irrigation area and parts of the Northern Territory's Keep River National Park. Lee granted the whole claim, including rights to all natural resources in the vast

area concerned. But in March, 2000 his award was severely curtailed by a 2-1 majority of his own Federal Court, which held that modern land uses on the Ord River and in the Argyle mine were "completely inconsistent with the continued enjoyment of native title". Any traditional title to minerals (other than surface ochre) was extinguished by legislation long before *Mabo* was ever heard of. Native title over some remote areas and limited access rights to some pastoral leases were allowed to stand, but not on properties where Crown lessees had enclosed or otherwise improved their land. The creation of reserves, such as National Parks, also extinguished native title.

An appeal to the High Court yielded nothing but further legal costs charged to the taxpayers' account. *Ward* occupied 83 days in the Federal Court and 15 days in the High Court, where most appellants are fortunate to be granted a day or two. McHugh J concluded that *Mabo* title can "hardly be described as satisfactory", and that it is "a system that is costly and time consuming", in which "the chief beneficiaries are the legal representatives of the parties". As a consenting judge in *Mabo* itself, his Honour was understandably a disappointed man. *The Australian*'s legal correspondent had the final word:

> "[So] ends the social and legal adventure begun by Judge Malcolm Lee ... 4 years ago".

In the light of *Ward*, all that seems left of *Wik* is the proposition that a pastoral lease *may* fail to extinguish native title if its terms are very similar to those of the old, non-exclusive Queensland tenures that were involved in that case. In *Wik* itself there was an utterly unrealistic requirement of a legislative *intention* to extinguish native title, although the relevant laws were enacted, and the leases granted, many years before *Mabo* was heard of. By contrast, the judgments in *Ward* ask the more reasonable, objective question: "Does the subject lease *in fact* give exclusive possession?" If so, native title is out of the question.

If *Ward* and *Yarmirr* can fairly be called failures, *Yorta Yorta* was a disaster. After an interminable hearing the trial judge (Olney J) gave judgment on 9 December, 1998, one month after the primary judgment in *Ward*. The Yorta Yortas claimed 1800 square kilometres straddling the Victoria – New South Wales border. But this time the land was too valuable, and the numerous defendants too serious in their opposition, to permit a governmental cave-in of the sort that occurred in other cases, including *Mabo* itself (so far as the Commonwealth was concerned). Active defendants included the States of New South Wales and Victoria and the Murray-Darling Basin Commission.

Ultimately the trial judge had to cope with 11,600 pages of transcript recording the evidence of over 200 witnesses. This time, as fate would have it, the claimants' "oral history", a species of evidence that is usually very difficult to check, had to contend with a formidable document. It was a petition by the plaintiffs' forebears to the Governor of New South Wales, as long ago as 1881, declaring that their old way of life was extinct, and seeking an ordinary grant of land where they could settle down and live in the European way. And there were other difficulties for the plaintiffs:

> "Two senior members of the claimant group were caught out telling deliberate lies ... Evidence based upon oral tradition ... does not gain in strength or credit through embellishment by the recipients of the tradition, and for this reason the testimony of several of the more articulate younger witnesses has not assisted the applicant's case".

Or less ornately: "The problem with oral history is that it is also a

wonderful quarry for the creative and the fraudulent".[30]

Justice Olney was not so ready as some of his colleagues to swallow the evidence of anthropologists whole:

> "In preparation for this claim [Mr Hagen] spent 5 weeks working with the applicants. In evidence he conceded that his active participation in the conduct of the proceedings indicates a close association with the applicants, and perhaps a degree of partisanship on his part".

Olney was courageously unsentimental about "shell middens and scarred trees ... described by a number of witnesses as sacred":

> "[S]hell middens ... are nothing more than accumulations of the remains of shellfish frequently found on the banks of rivers. Trees from which bark has been removed to make canoes or other objects ... were also treated as sacred by some and as significant by others ... many are protected under heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved".

The Full Court of the Federal Court (Black C J dissenting on "spiritual" grounds) dismissed an appeal from Olney's judgment, and the High Court did the same. The disappointed litigants, their promoters and supporters promptly accused the courts of "genocide". Professor Bartlett, an academic protagonist of native title, bemoans the fact that in *Yorta* the courts preferred the written admission in 1881, the diaries of a 19th Century grazier named Curr, and other documentary evidence, to "aboriginal tradition".[31] Bartlett evidently lacks a practical lawyer's appreciation of matters going to credit. He does not consider the flexibility of "oral history" under the influence of witnesses' immediate interests, or the fact that the document-makers of the 19th Century made their contemporary notes unaffected by the modern politics of aboriginal separatism.

For several years after *Wik* considerable insecurity was felt by holders of Western Lands leases in New South Wales. But eventually, in *Wilson v. Anderson*,[32] the High Court decided that Crown leases of that type *do* prevail over native title.

Two recent cases are *Lawson v. Minister assisting the Minister for Natural Resources (Lands)*[33] and *Lardil Peoples v. State of Queensland*.[34] The *Lawson* claim failed because the land in question had been acquired by the New South Wales government for public works on the Murray-Darling river system. In the *Lardil Peoples* case the claimants failed to secure exclusive rights over the Wellesley Islands in the Gulf of Carpentaria. They were left with non-exclusive, non-commercial fishing rights, and rights to draw fresh water from springs, and to visit sacred sites. A similar conclusion was reached in *Gumana v. Northern Territory*,[35] although the plaintiffs in that case were already owners of the adjacent land under the 1976 Northern Territory land rights legislation.

To the end of 2002 all awards of native title, apart from one in Western Australia, were made by consent, and in many of those cases the rights recognised were less than exclusive occupation. (An example is the Shoalwater Bay Agreement (1996) which permits hunting for dugong on a military reserve.) Nevertheless, the extraordinarily vague and complex state of the law had by then consumed many hundreds of millions of dollars, a great deal of social harmony, and incalculable legal resources. By mid-2002 the Native Title Tribunal alone had spent more than $150 million since it was established in 1994.[36] The Commonwealth set aside $120 million for native title matters in just one

financial year, 2002-03. In 2003 Queensland abandoned its own native title legislation and handed the problems back to the federal tribunal, leaving three quasi-judicial recipients of State government patronage on life tenure, salaries totalling $675,000 per annum, and very little to do.

By the end of 2003 there were twenty "titles by consent", including eight on Torres Strait islands, courtesy of the Queensland government, and two small areas in New South Wales. Most of them were subject to mining and other prerogatives of the Crown, common law rights of the public, and rights of access for State and local authority employees.[37] No *Mabo* title had been established in South Australia, Tasmania or Victoria.

Native titles (exclusive or non-exclusive) are not to be confused with monetary payments or other arrangements entered into by private interests under pressure of the Right to Negotiate, such as the Striker Resources Agreement (WA, August, 1997 – compensation for mineral exploration), the Redland Shire-Quandamooka Agreement (Queensland 1997 – a mere promise to continue negotiations about claims on North Stradbroke Island), and the Cable Sands Agreement for beach mining in Western Australia (2001).[38]

But despite the modest achievements of the *Mabo* doctrine (consumption of public funds aside) efforts are made from time to time to keep it, and the now seldom heard-of Native Title Tribunal, in the media. During the Western Australian State election last February, when the Opposition parties made an ill-fated promise to channel water from the Kimberleys to Perth, Fred Chaney, Deputy President of the Native Title Tribunal and co-chairman of Reconciliation Australia, issued a warning that any such plan would have to contend with many native title claims along the way. (Incidentally, the estimated cost of the visionary channel was rather less than two years' sustenance for ATSIC.)

Disillusionment

Despite the devoted efforts of anthropological witnesses and some federal judges, and the dazzling versatility of cases such as *De Rose v. South Australia*, the returns from *Mabo* pale in comparison with the vast amounts of money and social energy expended on the cause. It would be interesting, albeit depressing, to know the true size of the bill for the Brennan-Deane experiment – the cost of all the lawyers, mediators, cultural advisers, anthropologists, travelling allowances, court resources and so on, but it is unlikely that we shall ever be told. At the time of writing (late March, 2005) there are almost 500 native title cases listed in the Federal Court section of the AUSTLII website. Some are short procedural matters, others are interim (non-final) hearings, but it can safely be said that few of them were run on a shoestring budget.

Now, after all the excitement and expense, a realisation is growing that *Mabo* was not such a wonderful creation after all. Professor Bartlett opens a chapter of his text with the gloomy prognostication: "Retreating from Mabo – Frozen Rights and Judicial Denial of Equality".[39] Noel Pearson has spoken despairingly of internecine quarrels over "the scraps of native title",[40] recalling not only internecine strife at Hopevale, but also the history of Wellington Common in central-west New South Wales, the very first *Mabo* claim. There, in November, 2001, after eight years of disputation and negotiation, an agreement seemed to have been reached. Then a new group of claimants intervened, and it was back to the drawing board.

Expressions of disappointment have gradually become plainer and stronger. In March, 2002 Rod Towney, chairman of the NSW Land Council, pronounced native title a "disaster". "Our people are being promised lots of land and lots of money and I know that will never happen ... We are better off buying [it] or claiming vacant land under our State Act", which delivered 76,200 hectares to Aborigines in nineteen years. Towney recognised that agreements arising out of native title claims often fall short of *recognising* native title: "Indeed", he declared, "some go a long way to avoid it", and the only winners are "lawyers and anthropologists".[41]

A few months later Senator Ridgway, a former land council officer, described native title, in the *Mabo* sense, as a "spectacular failure".[42] It was becoming quite clear that pre-*Mabo* legislation, with the Land Acquisition Fund, provided simpler, better and more certain access to land than the meandering judicial process. Journalists who had extolled *Mabo* joined the chorus:

> "The reality is that unless you are an Aborigine living in the remotest parts of the country [*Mabo*] was never going to give you much. The Spinifex people won title [in Western Australia] because there were few competing interests ... Elsewhere native title means little more than being able to push open the gate of a cattle station and visit country".[43]

By 2002 David Solomon, of Brisbane's *Courier Mail*, was resigned to the facts that "the *Mabo* decision will provide benefits for relatively few Aboriginal people", and that such benefits as there are would be "political and psychological, not economic".[44] But perhaps this underestimates the Right to Negotiate.

Peter Sutton, a distinguished and singularly impartial anthropologist, reflects that if the school of "Nugget" Coombs, Brennan and Deane were right, Aborigines with land rights would be distinctly better off than their *Mabo*-less brethren. But as he sees it, the very opposite is true; in his view land rights divorced from employment and education are "a hollow promise".[45] Nearly half the Northern Territory was in Aboriginal hands when the local parliamentarian John Ah Kit admitted: "It is almost impossible to find a functioning Aboriginal community [here]".[46]

In January, 2005 Warren Mundine, a member of the new National Indigenous Council, roundly declared that inalienable communal title means "sweet bugger all" to the nominal beneficiaries.[47] Increasing urbanisation, defying the theory of separatism, prevents most people of Aboriginal descent from mounting a credible claim, if they are interested in doing so. The most recent Commonwealth census reveals a rising tendency for Aborigines to live in urban rather than remote areas. Since the census before the last was taken, the Aboriginal population of Coffs Harbour has increased by 30 per cent, Queanbeyan's by 23 per cent, Roma's by 23 per cent, Brisbane's by 28 per cent, while there was a fall of 7 per cent at Tennant Creek.[48]

In the Federal Court, too, the novelty is wearing off. In December, 2004 it complained that unrealistic native title claims were clogging its lists, and it advised hopeful plaintiffs to settle for less than exclusive possession. At the same time it observed – seemingly unaware of what this says about native title litigation – that defendants usually obtain their anthropological evidence (when they can get any) from experts who are near the end of their careers, and so are less concerned "that their ability to do future work for applicant groups may be precluded because they have worked for a respondent".[49]

The symbiotic relationship of native title claimants and anthropologists was considered in a paper presented to this Society several years ago.[50] Some of

the judges are now aware of it:

> "[O]n occasions the evidence has more the ring of a convinced advocate than dispassionate professional ... There is an obvious risk that the involvement of the 'expert' in the preparation [of the case] will at least affect the weight [of] the evidence given ... [if not its] admissibility".[51]

As the appeal of *Mabo* title faded, so too did support for the dysfunctional Aboriginal and Torres Strait Islanders Commission (ATSIC), whose fifteen years of life cost more than $1 billion per annum. But its habits died hard. In 2004 it allocated $85,000 of public funds to Chairman Clark's personal legal fees. In February this year it decided to mortgage property in aid of a bankrupt housing corporation in Queensland, headed by a daughter of sometime Deputy Chairman, Ray Robinson. At the same time it embarked on an asset-stripping exercise while a Senate inquiry kept it on life support, with salaries running at about $65,000 per week. A few weeks ago the Senate relented and passed the abolition bill. Subject to payment of another four months' salaries to its eighteen commissioners, ATSIC is no more.

A new beginning?

Two years after native title was created a percipient critic described it as "too weak a form of tenure for many of the needs of present day Aborigines, which would be better served by a stronger form of proprietary interest".[52] To another writer it is "reminiscent of Australia's only other Utopian experiment – William Lane's venture in Paraguay. ... with miserable consequences for those it was meant to benefit".[53] As Alexander Solzhenitsyn told his Soviet masters thirty years ago: "There can be no independent citizen without private property". The adage: "Everyone's business, no one's business" was recently illustrated in Western Australia, where thousands of cattle on an Aboriginal grazing property near Wiluna had to be rescued by the State Pastoral Lands Board. Only two of thirteen watering facilities were still functioning.[54]

But disappointment is beginning to give way to constructive ideas of returning to normal property law. Early this year a National Indigenous Councillor, Warren Mundine, produced a paper suggesting a gradual change from communal titles to private property, in the form of long-term leases. He points out that 15 per cent of Aborigines in the Northern Territory already hold individual titles to land. He concedes that communal housing organisations have a poor record of rent collection, asset and debt management, and require perennial subsidies.[55]

Supporting Mundine, the Indigenous Council called on State governments to reduce the power of communal entities "with their problematic governance" by allowing Aborigines to enjoy "private ownership through an expanded lease system". One State has already responded. On 16 March, 2005 the Queensland Minister for Natural Resources, Mr Robertson, foreshadowed amendments to the State's *Aboriginal Land Act* to authorise trustees to grant individual leases and to sell portions in urban areas to commercial interests.

Mundine's plan was not completely out of the blue. The tectonic plates of Aboriginal politics have been shifting for the last three or four years, as Noel Pearson, Pat Dodson and others have advocated a change from welfare dependency and symbolic gestures to practical measures against alcoholism, domestic violence, child abuse and drug addiction.

In June last year Pearson demoted Justice Brennan's son, Frank, from the land rights *avant garde*, saying that he and other *Mabo* enthusiasts expect Aborigines to eschew private ownership while their own relatives are "high-earning lawyers and professionals".[56] Recently several communities accepted special government aid in return for promises of self-help to improve health and educational conditions in their areas. Last December the senior journalist Paul Kelly tested the breeze and wrote:

> "There is no better example of the transformation of our politics than the new position of Patrick Dodson and Noel Pearson that accepts mutual obligation ... [and acknowledges] the failure of the progressive Left's policy agenda over a generation. ... This represents probably the most sweeping rethink since the 1967 referendum [on Aborigines]. The aim is to terminate passive welfare delivery and substitute 'shared responsibility agreements' between local communities and government".[57]

But Mundine's proposal met immediate opposition from land council functionaries and other Aboriginal bureaucrats. While the present forms of native title – statutory and *Mabo*-style – are nominally communal, they are really fiefdoms of an oligarchy well insulated from the poverty of their brethren. The proliferation of these bodies under a special companies law is staggering. In June, 2002 there was a network of 2,709 Aboriginal corporations,[58] all drawing expenses from the public purse, more or less honestly and efficiently.

Naturally the oligarchs are horrified to think that their domains may gradually return to the normal law of property. The Queensland government's signs of sympathy for a "new deal" were condemned as "appalling" by a well-known local activist. However, Chaney of the Native Title Tribunal supports Mundine:

> "I have met a lot of Aboriginal people who would like to own their own home. That is how most Australians are able to build their security ... It is unfair that Aboriginal people cannot do that too".[59]

The federal Minister for Aboriginal Affairs, Senator Vanstone, has also expressed interest in a "quiet revolution" in Aboriginal affairs:

> "Being land rich, but dirt poor, isn't good enough ... There's a huge portion of [Aboriginal] land ownership and there doesn't seem to be anywhere near enough wealth being generated".[60]

She sees individual land titles for Aborigines as a "major policy area", ripe for reform.[61]

How to begin?

Understandably the plan is sketchy at this stage. It would be sensible to begin with a pilot programme based on statutory titles, such as those based on the Northern Territory Act. They would provide a much more secure and less complicated foundation for individual titles than tenures of the *Mabo* kind. A fundamental difficulty with *Mabo* is that every such title is a unique "bundle of rights" based on a determination (or agreement) about local native customs. Many do not confer exclusive possession, which is the only feasible basis for "privatisation".

No doubt the federal minister had these things in mind in February this year, when she spoke of making the Northern Territory Act "more workable by providing greater choice ... about what [Aborigines] might do with their land ... for example, more direct dealings between traditional owners and companies".

In the Territory the Commonwealth could act without the co-operation of the States, and there would be fewer land councils to contend with than elsewhere. But whatever scheme is adopted, there remains the fundamental, ever-evaded question of who is, and who is not, an "Aborigine".

Freehold or leasehold?

At this stage the Mundine plan envisages a leasehold system.[62] Both Mundine and the Minister have expressed reservations about tenures that would be freely alienable. However, fetters upon alienation would be somewhat at odds with the letter and spirit of private property and self-reliance. On one hand, the Minister wants to give Aborigines "the capacity to get some commercial benefit out of land"; on the other, she does not think that they should "necessarily [be] able to dispose of it". There is a difficult balance to be struck between the integrationist desire for greater independence and the lingering separatist belief that Aborigines should not have the same freedom to deal with their property as other owners or lessees.

No doubt restrictions could be imposed, by statutory or contractual conditions requiring the approval of some overarching authority before property is sold, mortgaged or sub-leased. But who would that authority be? The Minister for Aboriginal affairs, or the Aboriginal corporation in which the block was previously vested? Might not the corporation be opposed to a "privatised" scheme, and, if so, would it be unduly obstructive?

Would it be an inflexible condition that sales or mortgages be confined to other Aborigines? That would tend to make borrowing difficult, so perhaps the restraint on alienation would apply to sales only, leaving mortgages to the discretion of the individual? But then there would be a risk, if loan repayments fell into arrears, of forfeiture to the mortgagor. In that event, would the lender be prevented from re-selling it to anyone but an Aborigine? If so, another deterrent to lenders would arise. And in the matter of sales, would Aboriginal proprietors faced with a willing buyer and an attractive offer always be faithful to an "Aborigines only" regime? The definition of "Aborigine" is already stretched, and in such cases might it not be further extended?

It is quite likely that restraints on alienation would be criticised as "paternalistic" and "discriminatory" by some of the very people who now oppose the Mundine plan. That could present a political difficulty, because "anti-discrimination" laws have gained a *quasi*-constitutional status, so that "discrimination" is no longer an ordinary, neutral word, but a self-proving indictment of wrongdoing. But as a matter of law, restrictions would probably pass muster as "good discrimination"[63] under s. 8 of the *Racial Discrimination Act* and the Convention to which the Act refers:

> "Special measures ... for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms ... provided, however, that such measures ... shall not be continued after the objectives for which they were taken have been achieved".

If leaseholds, who will be lessor?

The obvious, but perhaps not the best answer, is: "The Aboriginal body holding the communal title to the land from which the lease was excised". This

predicates a friendly disposition in such bodies to the creation of, and dealings in, separate titles. Could that be relied on in the present state of Aboriginal politics, and if so, would the practices of the many councils and corporations be reasonably efficient, predictable and uniform?

If Aboriginal bodies are *not* to be the landlords, the Crown will have to fill the vacancy. There are two ways of achieving that result. Compulsory acquisition of communal land is one of them. Initially only small portions of communal holdings need be involved, and in the remoter areas their value would not be high. (Should there be maximum areas for "privatised" titles in urban and rural areas respectively?) Of course compensation would be payable, despite the difficulty of applying conventional "market value" concepts to native title of any kind.[64] Rents paid by lessees could be used for that purpose.

A second possibility is to borrow a technique from the law of mining leases. All such leases are granted by the Crown, whether the subject land is Crown land or land privately owned. By the same token it is the Crown, not the private owner, which has the discretion to allow or disallow dealings with a lease. Once again, rents could be directed to the Aboriginal body concerned in whole or partial compensation for the overriding grant.

If the communal titles underpinning leases *are* retained by Aboriginal corporations, better supervision of their financial affairs is highly desirable. As Mundine says, the financial records of many "indigenous" bodies and their controllers are spotty, to say the least. Although the media are generally indulgent towards them, reports of financial abuses are as common as reports of effective remedial action are rare.

In December, 2001 *The Sydney Morning Herald*, usually deferential in these matters, carried an article headed "Aboriginal Gravy Train Off the Rails", claiming that the NSW Aboriginal Land Council had frittered away more than $520 million in a decade of mismanagement and poor investments. Tony Koch of the Brisbane *Courier Mail*, a perennial apologist for Aboriginal money managers, admits that "Australia is awash with hundreds of millions of dollars of taxpayer funds distributed by ATSIC for which there is little or no accountability".[65] The Aboriginal academic Marcia Langton, usually quick to castigate any critic of "indigenous" affairs, told ATSIC in 2002 that Aboriginal communities were being "cleaned out" by corruption and that "a lot of Aboriginal money is going AWOL".[66]

An ATSIC Commissioner for South Australia, Brian Butler, believes that in some communities most of the "leaders" are bribed, and calls for "zero tolerance" of graft, to save communities (taxpayers?) from being "robbed" of large amounts of money.[67] In 2003 a government investigator found that the NSW Land Council had paid an insider named Coe thousands of dollars for legal advice, despite the fact that, several years earlier, he was struck off the barristers' roll after complaints that he drew thousands of dollars from the Aboriginal Legal Service while he and his family holidayed abroad. Soon afterwards the Service collapsed with debts of $2 million. A few weeks ago Coe's dismissal from another six-figure sinecure was recommended by legal advisers of the land council concerned.

In July, 2002 two Queensland ATSIC commissioners, Thompson and O'Shane, called for an independent inquiry into Deputy Chairman Ray Robinson's purchase of a home, and his alleged use of housing company funds for personal expenses.[68] No more has been heard of that, but in March, 2004 an audit of a Toowoomba corporation headed by Robinson disclosed that he had written cash cheques for more than $1 million in one financial year. Other "leaders" poured ATSIC money

into trips to Geneva to tell the United Nations about the evils of Australia and to campaign for Canadian-style treaties. ATSIC chairman Clark spent $31,000 on a 17-day trip to Ireland with his wife for a week-long conference that he attended for two days.

Freehold titles?

In remote or unattractive areas there would probably be little demand for freehold. In view of its capital cost, many people would probably find leases at modest rents a more attractive proposition. But in places where land values are higher, freeholds as well as leases could be made available. Some of the most expensive blocks might be in the tribal domain of the Sydney Metropolitan Land Council, whose holdings in the Warringah district are said to have a developmental value of more than $1 billion, thanks to the Land Acquisition Fund.

It is true that restrictions on dealings with freehold would be more difficult to reconcile with normal land law principles than restrictions on leaseholds. But that is not a self-evident reason for allowing Aborigines who are prepared to pay the higher initial price a choice of freehold title. A little lateral thinking suggests a way of creating freeholds without compulsory acquisition of existing Aboriginal land, or some other politically sensitive action by government. Adaptation of an old piece of co-ownership legislation could achieve a result even more congenial to self-determination than a leasehold scheme. The Partition Acts – as they were originally called[69] – enable a co-owner, who cannot persuade fellow owners to let him have a separate title, to seek a court order for severance or sale of the property as a whole. For present purposes the sale option should be excluded. The usual order here would be for severance of a specified part of the communal land, and registration of it in the applicant's name.

Alternatively, the leases could include an option to purchase after a certain period of time, or after improvements to a certain value were made. Provisions of that kind have existed in Crown Lands Acts and pastoral leases for many years.

Continuing rights

It would be naïve to suppose that if some version of Mundine's plan succeeds, the separate system of Aboriginal land law will soon disappear. Communal titles controlled by close corporations will be with us for years to come. Notwithstanding gradual excisions of individual portions, large parts of communal holdings – statutory trusts and a few quasi-freehold *Mabo* titles – will remain. There are people within and without the "indigenous community" with large financial, emotive or ideological investments in the *status quo*. The arrival of "private" land rights will not prevent Aboriginal corporations from making new applications for communal titles according to *Mabo* or existing land rights legislation. The *statutory* sources of titles could be gradually closed down, but only large-scale resumptions, or natural death by *ennui* could see the *Mabo* species vanish. It is to be hoped that the proposed private titles will not be liable to future *Mabo* claims, at the risk of setting "private" Aboriginal owners against "communal" brethren.

Minor (non-exclusive) titles may fade away, particularly those that were claimed merely to make a political point or to keep Aboriginal affairs in the headlines. Gradually they may be forgotten, as old mining tenures and ghost towns – and the rights of the Yalanjis – have been forgotten. The urban drift of Aborigines is not likely to be reversed. But sites associated with true believers, or

prospects of financial gain, will live while the adherents or prospects survive.

Nevertheless, the novelty of judge-made titles seems to be wearing off, even in circles which would not tolerate the slightest criticism of them a few years ago. Does it follow, then, that the Mason Court's adventure was a failure, as some admirers now believe? If its real purpose was to create a useful form of ownership for many Aborigines, the answer is probably "Yes". But if its real aims were to provide a fashionable display of judicial power, publicity for an already outmoded version of land rights, and to force politicians to legislate, the answer is "No". A few judges, invincibly persuaded that "in some circumstances governments prefer to leave such things to [us]", decided to force the legislative hand, "and they did".

It remains to be seen whether the judicial reversion to Rousseau is eclipsed by Mundine's vision of individual owners with secure personal holdings. Who knows, we may live to see native title lawyers beating their swords into ploughshares, and trudging back to the tranquil fields of conveyancing.

Endnotes:

1. *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141.
2. [1986] HCA 8.
3. *The Australian*, 1 May, 2002.
4. *Aboriginal Heritage Act* 1972 (WA); *Aboriginal Lands Act* 1995 (Tas); *Aboriginal Land Rights Acts* 1983 and 1998 (NSW); *Aboriginal Lands Acts* 1971 and 1991 (Vic); *Aboriginal Land Act* 1991 (Qld); *Aboriginal Lands Trust Act* 1966 and *Maralinga etc Land Rights Act* 1984 (SA).
5. I Hunter, *Native Title – Acts of State and the Rule of Law*, in Goot and Rowse (eds), *Make a Better Offer – The Politics of Mabo*, Pluto Press, Sydney, 2000, 107.
6. *The Australian*, 2 July, 1993: *Chief Justice Defends Ruling as Lawful*.
7. *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] HCA 12.
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46. *Ibid.*.
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55. *Ibid*..
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57. *The Australian*, 8 December, 2004.
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69. They survive in all our jurisdictions under various modern names.

Chapter Eight
Frauding the Vote in Queensland

Bob Bottom, OAM

Behind the scenes, beyond the scrutiny of either Parliament or press, an unpublicised political stand-off between the States and the Commonwealth is currently threatening to sink a rare bipartisan move at a national level to introduce proof of identity for enrolment for Australia's 12 million-plus voters.

New laws, passed last year in the Commonwealth Parliament, had been expected to be operational Australia-wide in three months time, from 1 July, 2005, and thus bring to an end perennial scandals over allegations of electoral fraud.

After nine months, the new laws have not even been proclaimed. In simple terms, they have been blocked by the States – in particular, by Queensland.

In June last year, the Commonwealth Parliament passed an *Electoral Integrity Act* which would have required voters to produce a copy of their driver's licence, or similar proof of identity, when enrolling to vote, or when re-enrolling for a new address.

At present, all a voter has to do to get on the electoral roll is to fill in their own details, that is, name and address, and have their enrolment form countersigned by "an elector or a person entitled to enrolment". That has long been criticised as being less than that required for renting a video or opening a bank account.

Proclamation of the new regulation was made contingent upon reaching agreement with the States. That agreement has not been forthcoming, and, according to my inquiries, the Commonwealth has just given the States another 14 days to reconsider their position.

It so happens that all of the States currently have Labor Party governments and, as a matter of public record, for two decades following the enactment of user-friendly electoral laws by a federal Labor government in 1983, Labor steadfastly opposed any move at either State or federal levels to tighten up enrolment provisions.

That was until 23 June, 2003, when, with minimal acknowledgement, an historic announcement was made in federal Parliament of belated bipartisan support for proof of identity for enrolment of electors for federal elections.

It was the tabling of a report of a Joint Parliamentary Standing Committee on Electoral Matters which recommended the regulation that voters be required to produce a copy of their driver's licence, or similar proof of identity, for enrolment.

The bipartisan agreement came after the committee discovered, among other things, that somebody had been able to enroll a cat as a voter – one of more than 70 instances of questionable enrolment cited by the Australian Electoral Commission for a ten year period.

The new-found unanimity was best explained by Labor's master electoral tactician, Senator Robert Ray, who had served on the joint committee for an unprecedented 20 years.

Acknowledging that proof of identity had been "contentious" and "partisan" in the past, he told Parliament:

> "Most of us now have form ... it is probably helpful to the Labor Party that the Liberal Party in Victoria and elsewhere has had a bit of form too, so we can have a more balanced look at these things".

A previous attempt to impose proof of identity for enrolment, requiring the witnessing of enrolment applications by designated professional people, was abandoned on the eve of the November, 2001 federal election.

Apart from continuing opposition then by the Labor Party nationally, a major factor was opposition at State levels, principally from Queensland, where the Beattie Government threatened to withdraw from joint roll arrangements with the Commonwealth.

A key finding of the Shepherdson inquiry, held in Queensland into rorting involving ALP pre-selection scandals, was quoted by the committee in support of widening the new scheme to cover not just enrolment but re-enrolment.

The federal committee quoted the closing submission of Russell Hanson, QC, in which he made the point that, in the vast majority of detected cases of false enrolment looked at during the Shepherdson inquiry, it was found that they had originally enrolled lawfully for one address, then changed their enrolment to a false address to enable them to vote in particular ALP plebiscites.

Ironically, the new scheme is actually in line with a proposition first raised on behalf of the Labor Party by Mark Dreyfus, QC, in a report on registration for internal voting and, in its own submission to the joint committee, ALP headquarters in Canberra attributes the driver's licence idea to Steve Bracks' Labor government in Victoria.

That now seems amazing, since the Bracks Government has gone back on its own proposal, to join the Beattie Government and other State governments to oppose proclamation of the new federal regulation.

Significantly, the federal committee had forewarned back in 2003 that it was conscious of threats to refuse to "progress legislation to introduce corresponding requirements into State and Territory enrolment processes, and of a consequent breakdown of joint roll arrangements".

In saying so, the committee referred particularly to a majority report of Queensland Parliament's Legal, Constitutional and Administrative Review Committee which, in rejecting previous proposals for voter identification, recommended in fact that the Queensland Parliament consider the re-establishment of a separate Queensland State electoral roll.

Introduction of a joint roll more than a decade ago has been one of the abiding reforms flowing from the historic commission of inquiry of the late 1980s presided over by Tony Fitzgerald.

Fitzgerald recommended establishment of an Electoral and Administrative Review Commission (EARC), largely to correct notorious gerrymandering of electoral boundaries under previous National-Liberal as well as Labor administrations. But Fitzgerald also was concerned about electoral fraud generally.

As he put it:

> "A fundamental tenet of the established system of parliamentary democracy is that public opinion is given effect by regular, free, fair elections following open debate".

In particular, Fitzgerald recommended that the State *Electoral Act* be reviewed:

"…..in an impartial manner to ensure that more effective means are developed to guarantee the accuracy of electoral rolls , to prevent fraudulent voting practices …".

One of the first tasks of the newly established EARC was to examine the state of the State rolls. Unlike other States, Queensland had since Federation continued to maintain its own rolls, separate from those of the Commonwealth, whereas other States had opted early for joint State-federal rolls. Despite long-standing recommendations to do so, Queensland resisted.

The EARC surmised:

"The most plausible explanation is suspicion at the political level that use of the Commonwealth roll would be in some way disadvantageous to the governing party of the day, and this view prevailed under Labor and non-Labor governments alike".

On the recommendation of the EARC, Queensland opted to adopt a joint federal-State roll, and that was achieved by January, 1992.

In its 1990 report, the EARC acknowledged public concern over electoral rolls, citing 57 items published in *The Courier Mail* and other Brisbane metropolitan media between November, 1986 and March, 1990, all but four of which related to the Queensland rolls.

Inquiries by the EARC disclosed extraordinary discrepancies between the numbers of electors on Queensland rolls when compared with Commonwealth rolls.

It was discovered that, when the Queensland election was held on 1 November, 1986, there were 1,563,294 voters on the Queensland rolls – 55,064 *fewer* than the 1,618,358 gazetted by the Commonwealth for Queensland three days earlier.

Yet, when the next Queensland election was held on 2 December, 1989, there were 1,780,785 electors on the Queensland rolls – 28,380 *more* than the 1,752,405 gazetted by the Commonwealth for Queensland the day before.

If a fair proportion of those 28,380 extra voters had been enrolled in marginal seats, it would have been enough to swing the election.

Queensland has long been the centre of allegations of enrolment fraud, much more so than perennial claims that have arisen in other States. None the less, when the Shepherdson inquiry was held during 2000 and 2001, its terms of reference were confined to enrolment for pre-selection ballots, excluding general elections.

There were findings against some 22 Labor Party figures, leading to the resignations from Parliament of a Deputy Premier, Jim Elder, and a high profile backbencher, Mike Kaiser (who has re-emerged since as a key electoral strategist at ALP headquarters in Canberra).

In all, 20 of the alleged rorters walked free, unable to be prosecuted because of expiration of the statute of limitations under lax State electoral laws enacted post-Fitzgerald by the Wayne Goss Government.

Of the remaining two, a Labor mayor in Townsville, Tony Mooney, was subsequently cleared by Queensland's Crime and Misconduct Commission, and the only person to be prosecuted, a former Goss adviser, David Barbagallo, emerged virtually unscathed, being fined $1,000 with no conviction recorded.

To his credit, Peter Beattie has brought in stricter electoral laws to give Queensland authorities more power to combat fraud involving State elections, as well as requiring all registered political parties to submit to Queensland

Electoral Commission supervision of pre-selections. In fact, in a letter published in the *Courier Mail* of 6 February, 2002, I congratulated the Premier, saying: "Having been a critic of past failures, I believe credit should be given where credit is due".

Such laws might well be considered for Victoria, where the media has been having a field day in recent weeks over allegations of continuing branch-stacking and falsified membership records – with former Labor Premier John Cain proclaiming that branch stacking and corrupt practices had become endemic within the Labor Party in Victoria.

Like Queensland, if political activists are prepared so openly to rort pre-selection processes at branch level, it raises serious question marks about just how active any of them might be at the grassroots level in organizing false enrolments for State or federal elections.

Like so many other Australians, for much of my life, my knowledge of voting fraud had been minimal, at best, notwithstanding the fact that I had long been involved in the political process. That was until, in semi-retirement, in sunny Queensland, something occurred which has prompted me into looking at electoral fraud in much the same sense that long ago I was propelled into investigating organised crime and corruption.

In a national sense, the two issues are equally serious. Each poses a threat to our democratic way of life. The reality of organised crime and associated corruption has long been recognised, and creditable measures have been instituted to combat it, at both federal and State levels. That is not so with still emerging revelations about electoral fraud; to the extent that, at a federal level, the Australian Federal Police, by what they term self-determined priorities, will not investigate any instances of multiple voting involving less than 12 votes.

How I became involved and concerned about electoral fraud is an intriguing story in itself.

In November, 2000, during proceedings of the Shepherdson inquiry, a reference was made to alleged false enrolments in the State electorate covering Bribie Island, about one hour's drive north of Brisbane, where my wife, Judy, and I happen to own a weekly newspaper, *Island & Mainland News.*

Out of local interest, we published a small item mentioning that counsel assisting the inquiry, Russell Hanson, QC, had said that there was "a 'suggestion' people were 'moved in' from Sydney and Melbourne and put into caravan parks before the State election of 1989".

That prompted two people to contact me to relate an extraordinary story. They recalled that, prior to the 1989 Queensland State election, they had been contracted to deliver letters addressed to electors throughout Bribie Island, then with a population of about 12,000. It involved delivery to about 4,600 homes and unit complexes. What they found was that many of the letters were addressed to people at addresses that simply did not exist.

Well, what's new, you might say? Yes, members of Parliaments, federal and State, have long complained about mailing out letters to constituents and sometimes having large numbers returned by Australia Post. And, yes, from time to time subsequent inquiries have found that some people have been wrongly enrolled, or dead people have been left on the rolls.

But the Bribie episode was unprecedented. That delivery was not by Australia Post, but by our deliverers – that is, the people who always deliver our local newspaper, door-to-door, and who know every letterbox.

Names of supposed voters from the electoral roll were listed one after another, along kilometre after kilometre of public waterfront land along Pumicestone Passage, all with odd numbers (for non-existent homes) to match even numbers of existing homes opposite the water, as well as around an area perhaps appropriately named Clayton's Park.

Significantly, allegations of massive false enrolments had been raised in the Queensland Parliament in October, 1989, about the very time the mail-out was being carried out at Bribie Island – two months before the 1989 Queensland election.

These allegations had included claims that 2,965 names on the roll for the State seat of Stafford could not be matched, and that 608 voters had left the addresses for which they had remained registered. In the seat of Salisbury, it was claimed that another 2,801 voters could not be matched, with 17 at fake addresses, including vacant lots, and 1,131 remained enrolled although their final electricity bills had been paid.

Which brings us back to Queensland's threat to re-establish its own separate roll should the Commonwealth press ahead with plans to tighten up enrolment regulations.

Again, in the case of Bribie Island, if you compare statistics from voting results for the 1987 federal election, when the Commonwealth roll was used, and the results of the 1989 State election, when Queensland last used its own separate roll, it provides an interesting illustration.

To be specific, at the main polling booth at Bellara, along the Pumicestone Passage side of Bribie Island, 1,515 votes were recorded for the federal election, and subsequently 2,394 for the State election – a difference of an extra 879 votes or an astounding 58 percent!

Such an episode at out of the way Bribie, and, by implication, other areas of Queensland, and possibly other areas of Australia, before and since, underlines the vulnerability of the democratic processes of not only Queensland but the whole of Australia.

Thus the current stand-off between the States and Commonwealth, over the simple introduction of proof of identity for electoral enrolment, is an issue that should concern all Australians.

Chapter Nine
The Use and Abuse of the Commonwealth Finance Power

Bryan Pape

> "We have been taught by long experience that we cannot without danger suffer any breach of the constitution to pass unnoticed".[1]
> "The Commonwealth Parliament has no general power to make laws for the peace, order and good government of the people of Australia".[2]
> "Finance is government and government is finance".[3]

Introduction

Upholding the Constitution is a fundamental tenet of the legislature, the executive and the judiciary. By its use of the appropriation and grants powers the federal Parliament has expanded its authority in its quest to gain absolute power over the States. As Lord Acton wrote in his famous letter:

> "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: .....There is no worse heresy than that the office sanctifies the holder of it".[4]

This paper examines some recent and pending Acts which seek to rely upon the appropriations power (s. 81 of the Constitution) for their validity. In doing so, it raises the vexed, but independent questions of standing and justiciability. The role of the Auditor-General, as a supposed watchdog, to warn both the Parliament and the people of abuses of financial power, is also considered. Finally, whether a successful challenge could be mounted to overrule the law on the use of the grants power is canvassed.

At the outset it is helpful to remind ourselves of the nature of the federal system:

> "[I]t involves the co-existence of national and State or provincial governments, with an established division of governmental powers; legislative, executive and judicial. As in the United States, the national government was given limited, specified powers. An approach to constitutional interpretation which stressed a reservation of State powers flourished for a time after federation, but was reversed by the *Engineers' Case* in 1920. Even so, as in the United States, the federal nature of the Commonwealth has been held to limit the capacity of the federal Parliament to legislate in a manner inconsistent with the constitutional role of the States".[5]
>
> As McHugh J has remarked:
>
> ".....the ultimate judicial umpire is the High Court. Its judgments ultimately define the powers and functions of the federal and State governments".[6]

However, without standing, the citizen is barred from challenging legislation which is beyond the power of the Commonwealth Parliament to enact. Where the States abdicate their responsibilities, and acquiesce in what may be an abuse of power by the Commonwealth, the citizen has at present no legal remedy. This is

of particular concern where there has been a tacit *inter se* arrangement cobbled together through political expediency:

> "The existence of consensual arrangements of this nature should not be used to justify the restriction of standing rights".[7]

The appropriation power

Chapter IV of the Constitution deals with finance and trade. For present purposes the key finance provisions of the Constitution are ss. 81 and 83. They provide as follows:

> "S. 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, *to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution*". (Emphasis added).
>
> "S. 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law....".

The effect of these provisions was first considered by the High Court in *Attorney-General for Victoria v. Commonwealth*,[8] the *Pharmaceutical Benefits Case*, in which it was held that the *Pharmaceutical Benefits Act* 1944 was beyond any purpose of the Commonwealth:[9]

> "Section 81 is not to be construed narrowly and is to be interpreted as allowing the appropriation of moneys to permit the Commonwealth to carry out the usual incidents of government such as payments for the executive and the judiciary. Nevertheless s. 81 is not to be construed as permitting something to be done which is otherwise beyond the legislative competence of the Parliament".

Dixon J in the *Pharmaceutical Benefits Case* rejected the idea that the power "to spend money is independent of the other powers of the Commonwealth".[10] That is consistent with his submissions in 1927 to the Royal Commission on the Constitution, set out in Annexure A.

> "The Commonwealth power of appropriation, however, is explicit; it is 'for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by' the Constitution. This power must be construed liberally; it is a great constitutional power, but it does not authorize the Commonwealth appropriating its revenues and moneys for any purpose whatever, without regard to whether the object of the expenditure is for the purpose of and incident to some matter which belongs to the Federal Government....
>
> "But the *Pharmaceutical Benefits Act* 1944 is beyond any purpose of the Commonwealth. No legislative, executive or judicial function or purpose of the Commonwealth can be found which supports it, and it cannot be justified because of the existence of the Commonwealth or its status as a Federal Government".[11]

The case which appears to have encouraged the Commonwealth to bypass its contrived use of the s. 96 power of tied grants to the States is *Victoria v. Commonwealth*[12] (the *Australian Assistance Plan Case* or *AAP Case*). Briefly, money appropriated for the Australian Assistance Plan under the *Appropriation Act* 1974-75 for payment of grants to 35 Regional Councils for social development was unsuccessfully challenged as beyond power. Both Barwick C J and Gibbs J strongly dissented.

The meaning of the words "for the purposes of the Commonwealth" was central to the construction to be given to s. 81. Barwick C J said:

> "[T]he Commonwealth is a polity of limited powers, its legislative power principally found in the topics granted by ss. 51 and 52. .. [T]o say that a matter or situation is of national interest or concern, does not, in my opinion attract any power to the Commonwealth".[13]

Gibbs J was of the view that these words:

> ".....do not in their ordinary sense have the same meaning as 'for any purpose whatever' or 'for such purposes as the Commonwealth may think fit' ".[14]

Five Justices effectively held the appropriation was valid by an unworkable alloy of diverse reasons. Mason J would have restrained the execution of the plan because it was outside the executive power of the Commonwealth, and in so doing reduced the result to a majority of four. The reasoning in the case is unsatisfactory as it has no predictive value. McTiernan J held that the dispute was not justiciable; it was within the field of politics not law. Stephen J held that the plaintiffs had no standing to bring the suit.

Disturbingly, Jacobs J observed that:

> "The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself".[15]

He held "that the appropriation of moneys of the Commonwealth Parliament cannot by itself be the subject of legal challenge".[16]

The following piece of doggerel encapsulates the *AAP Case*:

> "Thus for the scheme to be valid,
> It had to be firmly moored,
> In executive power. The tossed fruit salad,
> The motley smorgasboard,
> Of executive powers explored here had to yield,
> An accumulation of arguments which would afford
> Sufficient powers to 'cover the field'.
> Perhaps they did. But in the end the argument seems rather pallid".[17]

Finally, and importantly, the reasons of Murphy J go to the nub of the present topic. He remarked that:

> "If the plaintiffs' contentions were accepted, it would mean that the Parliament's use of the appropriation power had been unconstitutional since federation".[18]

In short, Murphy J held that the appropriations power was unlimited, and that Parliament is the authority to determine what are the purposes of the Commonwealth. Here he followed what Latham C J and McTiernan J said in the *Pharmaceutical Benefits Case.*

Murphy J described the background to the issue, and indeed the present problem for determination, in this way:

> "From the material supplied to the Court and an examination of the Appropriation Acts, it appears that there were many current programmes [that is, in 1974-1975], some of which had been in operation for many years and which are not clearly referable to any head of legislative power in the Constitution other than s. 81.
>
> "These include substantial appropriations in the Departments of Education, Tourism and Recreation, Science, Health, Housing and

Construction, Agriculture, Special Minister of State, Prime Minister, Media, Urban and Regional Development, Environment and Conservation, Labor and Immigration, and Social Security.

"To ascertain whether these appropriations are referable to one of the enumerated powers (other than s. 81) would involve exhaustive inquiry into the boundaries of the enumerated powers.

"The appropriation for those purposes not within the scope of the enumerated powers would, on the plaintiff's contention, be unconstitutional. Hundreds of items of appropriation since Federation and many hundreds of millions of dollars would have been unlawfully appropriated and spent.

"The chilling effect that such an interpretation would have on governmental and parliamentary initiatives is obvious. It is not a formula for operating a Constitution. It is one for stultifying government".[19]

To adopt Murphy J's approach to s. 81 would be like deleting paragraphs (i) to (xxxix) of s. 51 of the Constitution. If this were done it would then read:

"The Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth".

Unfortunately, those who advocate this position need to avail themselves of the provisions of s. 128 of the Constitution to bring about such an amendment. Its time may have arrived!

Enactments beyond power?

"My Government also employed for the first time on any scale direct money grants 'for the purposes of the Commonwealth' under s. 81. For a number of reasons the making of grants through State Governments unnecessarily complicates the machinery of government. In the case of the Australian Assistance Plan and the Australian Legal Aid Office, for example, several States had shown their unwillingness or their inability to provide urgently needed services".[20]

The *Roads to Recovery Act* 2000, consisting of 13 sections, provides for the appropriation by 30 June, 2005 of $1.2 billion to local government for roads, of which $850 million is being spent in rural and regional Australia (e.g., Wagga Wagga City Council $5.0 million) and the remainder in capital cities (e.g., Blacktown City Council $4.9 million).[21]

Section 4 simply states that "the main object of this Act is to provide $1,200,000,000 for road expenditure by local governing bodies", and s. 6(3) again simply provides "that the Consolidated Revenue Fund is appropriated for payments under this section". In short, there is no pretence by the Parliament that the appropriation of these moneys is for any purpose of the Commonwealth enumerated in s. 51 or elsewhere.

After 30 June, 2005 the Roads to Recovery programme is pending continuation under Part 8 of the *AusLink (National Land Transport) Bill* 2004, and payments as provided by s. 89 will be made in accordance with the appropriation for ordinary annual services under *Appropriation Act (No.1)*. These appropriations will be for a further $1.2 billion to be paid directly to local government in the four years to 30 June, 2009.

By putting the Nelsonian telescope to the blind eye the States have treated these payments to local government as windfall gains. It has allowed them to avoid any potential burden to provide this type of finance. A ditty attributable

to Sir Robert Garran, composed in the context of the States feigning a desire of regaining the income tax power, reveals their acquiescent approach:

"We thank you for the offer of the cow,
But we can't milk so we answer now,
We answer with a loud emphatic chorus,
You keep the cow and do the milking for us".[22]

Here the States have simply acquiesced to the Commonwealth invading the financing of local government. They are in truth *de facto* grants to the States. It is a good illustration of what has been described as "fruitcake federalism". In short, a bit of everything, where both the States and the Commonwealth are financing the same activity.

The same formula is applied by the Commonwealth under the Regional Partnerships Programme, for which the Commonwealth plans to spend $308 million over the next four years to 30 June, 2008.[23] For 2004 the estimated actual expenditure was $91 million and for 2005 it is also estimated at $91 million.[24] This expenditure purports to be authorized by ss. 6 and 15 of the *Appropriation Act (No.1) (2004-2005),*[25] which appropriated $178.628 million for Outcome 2 (greater recognition and development opportunities for local regional and territory communities) of the Department of Transport and Regional Services. Unlike the *Roads to Recovery Act* 2000, where the appropriation is a standing amount, the regional partnership expenditure is part of an appropriation for ordinary annual services and related purposes.

Appropriations under the *Roads to Recovery Act* 2000 and the Regional Partnerships Programme appear to rely upon ss. 81 and 83 of the Constitution. If this proposition is correct, then the activities which the Commonwealth can engage in are unlimited. This, of course, is tantamount to substituting a unitary system for a federal one.

What head of power did the Parliament rely upon to enact the *Australian Sports Commission Act* 1989? By s. 5 the Commission is established as a body corporate with perpetual succession, and under s. 43 (1) "there is payable to the Commission such money as is appropriated by the Parliament for the purposes of the Commission".

There is nothing in s. 51 of the Constitution which deals with sport as such. Is the Commission a trading corporation for the purposes of paragraph (xx)? Was it established under the *Commonwealth Authorities and Companies Act* 1997? How does the appropriation[26] of $128 million for 2005 to the Commission answer the description of being "for the purposes of the Commonwealth" under s. 81 of the Constitution? Of this amount, $31 million is allocated to "Outcome 1 – an effective national sports system that offers improved participation in quality sports activities by Australians", and $97 million to "Outcome 2 – excellence in sports performances by Australians".

Another topical illustration is likely to be in respect of the goal of the Commonwealth to establish 24 Australian Technical Colleges throughout Australia. It is a guessing game as to which head of power under s. 51 will be relied upon. The candidates could be the trade and commerce power under paragraph (i), or perhaps more likely, the corporations power under paragraph (xx). Yet again reliance may be sought on s. 81 to authorize the appropriation of money to fund this activity.

All of this ought to attract the same cutting criticism made by Professor Colin Howard in lamenting the High Court's decision in the *AAP Case*:

> "The most basic question posed by the litigation, however, was not squarely confronted at all. This was whether any government should be permitted to utilize an Appropriation Act for the purpose of acquiring Parliamentary sanction for a policy which could not be legislatively supported in any other way. It ought to be obvious that, federal questions apart, it borders on the scandalous in terms of governmental practice for Parliament to be presented with two lines of text, amounting to no more than brief and vague headings, as a basis for expending millions of public dollars in such a context. Those two lines concealed an important policy departure which was both new, in the sense that parliamentary sanction had not been gained by normal legislative methods, and highly contentious. The missing legislative methods include debate upon the proposed legislation which deals with the substance of the matter and not simply what it is expected to cost".[27]

Standing and justiciability[28]

If citizens wish to challenge the validity of Commonwealth legislation they are obliged to get a State Attorney-General to bring a relator action. In short, such actions are not maintainable without the fiat of the Attorney-General, which simply means that the Attorneys-General bring these actions in their own names.[29] As to the validity of an Appropriation Act, it is not ordinarily susceptible to effective legal challenge.[30] If so, then what are the extraordinary circumstances where it is capable of challenge? In determining an application to strike out a statement of claim, Gibbs C J held that it was arguable whether the plaintiffs as taxpayers had standing to challenge the validity of an Act under which public moneys were being disbursed.[31]

Professor P H Lane has suggested that the suppressed reason for not granting a citizen standing to attack unconstitutional expenditure is found in convenience. It is claimed that the Commonwealth would be an easy target because its powers are enumerated and specific.[32]

If this is so, then the decisions of the Supreme Court of Canada, starting with *Thorson v. Attorney-General of Canada*,[33] might offer the prospect of the High Court overruling its attitude to standing. In this case, Thorson, QC challenged the constitutional validity of the Appropriation Act providing money to implement the *Official Languages Act* (1968-69) (Can). Laskin J, as he then was, said:

> "I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder……The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; ... A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute.... The substantive issue raised by the plaintiff's action is a justiciable one; and prima facie, it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication".[34]

The approach of Laskin J in emphasizing the need to provide legal redress to citizens who challenge allegedly illegal expenditures of public money[35] needs to

be argued before the High Court. The Commonwealth pulls itself up by its own bootstraps by relying on the appropriations power to support activities for which no authority can be found elsewhere in the Constitution. Saying so doesn't make it so.

Surreptitiously, the Commonwealth has subverted the federal union and expanded its activities by relying on s. 81. The high water mark of the Commonwealth's expansion of powers reached through the use of s. 96 has now been well passed. Whether this higher limit is built upon a sound legal basis is doubtful because of the generally unsatisfactory spread of reasons in the *AAP Case*.

Some encouragement as to whether the High Court would grant standing to a citizen to challenge the unauthorized appropriation of moneys under s. 81 may be gained from the remarks of Gleeson C J and McHugh J, where they said "that it is not difficult to understand why, in the case of certain laws, it might be considered in the public interest to provide differently".[36] Laws which are claimed to exceed power under the Constitution would be a prime example. As Gibbs J observed:

> "It is somewhat visionary to suppose that the citizens of the State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible".[37]

A view approved of in *Bateman's Bay Local Aboriginal Land Council v. Aboriginal Community Benefit Fund Pty Ltd*.[38]

Murphy J urged the liberalisation of the requirements of standing for individuals.[39] Later he expanded upon this idea in *Attorney-General (Vic); Ex Rel Black v. The Commonwealth* (the *Defence of Government Schools Case – DOGS Case)* when he said:

> "A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and in my opinion, does not depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has standing in the courts to secure the observance of constitutional guarantees".[40]

So far as constitutional guarantees are concerned, there are none. At best there is a duty of the Parliament, the Executive and the Judiciary to uphold the Constitution. Citizens have a legitimate or reasonable expectation[41] that it will be administered according to law.

Alternatively, the Court could allow the suit to be heard, deferring its decision on the grant of standing as part of its decision whether to make an order declaring the Act invalid or to dismiss the proceedings for want of standing. Such a practice is used to determine applications for special leave to appeal in criminal matters. In short, the Court might make a grant of conditional standing.

The requirement of justiciability[42]

Standing and justiciability, whilst sometimes intertwined, are separate issues. In the present context, the asserted "matter" which falls for adjudication is the due and proper administration of the Constitution. For example, it is the registered electors who have the power to amend the Constitution in accordance with s.128. An analogy might profitably be drawn between the rights of an object of a discretionary trust to sue the trustee to require the trust estate to be

administered in accordance with the terms of the trust. Here the object has no proprietary interest but a mere expectancy.[43] Similarly, a citizen duly registered as an elector who has no proprietary rights to assert against the Commonwealth, ought to be entitled to enter the "temple of justice" to challenge the validity of appropriations for non-Commonwealth purposes.

At the very least, it would seem that "matter" should be widely and beneficially construed for the purpose of allowing notice to Attorneys-General under s. 78B of the *Judiciary Act* 1903. The Court is under a duty not to proceed in a matter arising under the Constitution, or involving its interpretation, until the Attorneys-General have considered whether they might seek to intervene in the proceedings. If an Attorney-General did so seek to intervene, and the Court refused standing to the individual citizen who initiated the s. 78B notice, then an alternative might be to allow an appearance as *amicus curiae*. Even in the *AAP Case* a majority held that the challenge to the appropriation power was justiciable.[44]

The Auditor-General – ally of the people? or, Who guards the guards?

Is the Auditor-General under a duty to report to Parliament as to whether appropriations are beyond power? *Prima facie*, the answer would seem to be "Yes". To ignore such a failure sits uncomfortably with the task with which an auditor is charged. The Auditor-General has complete discretion in the performance of his or her functions or powers.[45] "His duty is to criticize, make suggestions and to draw attention to any breach of law or regulation".[46] Where there is doubt the Auditor-General ought to obtain independent legal advice, and if equivocal, such matters ought to be disclosed. Section 25(1) of the *Auditor-General Act* 1997 allows the Auditor-General to report to the Parliament on any matter at any time.

A perusal of the reports of the Auditor-General to the Parliaments shows that so long as there are Acts which appropriate moneys from the Consolidated Revenue Fund, the Auditor-General is seemingly indifferent as to whether those appropriations are made under Acts which are contrary to the Constitution. Examining whether Parliament has the power to legislate is a matter which is apparently ignored by the Auditor-General. No mention of this issue was made in the Public Accounts Committee inquiry into reform of the Audit Office, or in the Auditor-General's response.[47]

It is submitted that the Auditor-General, in reporting to Parliament, is required to be satisfied that the Consolidated Revenue Fund is appropriated for purposes authorised by the Constitution. In short, the Auditor-General is a watch dog to warn Parliament when either it or the Executive exceeds the constitutional power to spend money. What would be useful is for the authority upon which reliance is placed to be disclosed. If s. 81 is the claimed source of the authority, then it should be recorded in the explanatory memorandum to the Bill, preferably with reasons to support such a contention. The second reading speeches and explanatory memoranda are silent on this aspect.

Overruling the law on the grants power

By way of illustration, for 2005 the Commonwealth has appropriated $1.5 billion[48] to the States for local government under the *Local Government (Financial Assistance) Act* 1995 *(LGFA Act)*. Through the Investing in Our Schools Program the Commonwealth is spending $1 billion in small capital projects of up to

$150,000 for 2005-08, in schools for library resources, computer facilities, air conditioning of class rooms, etc., under the *Schools Assistance (Learning Together–Achievement Through Choice and Opportunity) Act* 2004. The paragraphs of s. 51 of the Constitution have nothing to say on these topics.

The power to undertake these expenditures comes from the conditions attached to the grants to the States. Relevantly s. 96 provides:

> "S. 96 During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit".

A good illustration of how s. 96 works is given by s. 3(2) and (3) of the *LGFA Act*, which relevantly provides:

> "(2) The Parliament wishes to provide financial assistance to the States for the purposes of improving:
>
> a) the financial capacity of local governing bodies; .....
>
> "(3) The financial assistance is to be provided by making to the States, for local government purposes, of general grants under section 9 and additional funding under section 12".

Here the Commonwealth has the capacity to invade any field of activity it likes. University education is a first class example. As Sir Robert Menzies said:

> "The practical effect of all this, of course, has been that in the revenue field, the Commonwealth has established an *overlordship*. .....[T]his was a *major revolution* without any formal constitutional amendment at all".[49] (Emphasis added).

This development was not foreseen by the drafters of the Constitution. It was apparently assumed that the terms and conditions would be strictly relevant to the circumstances which called for financial assistance, which were expected to be rare.[50]

The key as to why the High Court should depart from its s. 96 precedent is to be found in the dissent of Starke J in declaring the *State Grants (Income Tax Reimbursement) Act* 1942 to be invalid:

> "The government of Australia is a dual system based upon a separation of organs and powers. The maintenance of the States and their powers is as much an object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. The limited grant of powers to the Commonwealth cannot be exercised for ends inconsistent with the separate existence and the self-government of the States, nor for ends inconsistent with its limited grants".[51]

What needs to be answered is whether the High Court would now overrule the precedent involved. Some of the factors which could warrant such a departure were conveniently collected in *John v. Commissioner of Taxation*.[52] However, there is no definite rule in which the Court will reconsider an earlier decision.

The first case on s. 96 was *Victoria v. Commonwealth*[53] in which the Court, in a laconic three lines, upheld the validity of the *Federal Aid Roads Act* 1926. Next came *Deputy Federal Commissioner of Taxation (NSW) v. Moran*,[54] of which Dixon C J in the *Second Uniform Tax Case*[55] expressed his dissatisfaction about its correctness when money is placed in the hands of a State with a direction to pay it over to a class of persons.

The temporary[56] nature (five years) of the 1942 Uniform Tax Legislation was driven by the extreme urgency of the threat of enemy invasion. While reliance on the defence power, other than for the *Income Tax (War-time Arrangements) Act*, was not argued to uphold the legislation, it could easily have been so.[57] (A chronology of events in 1942 is set out in annexure B).[58] Also, the limited way in which the 1957 *Uniform Tax Case* was argued calls for a review. Further, none of the parties in the *Defence of Government Schools Case*[59] asked the Court to overrule *Deputy Federal Commissioner of Taxation (NSW) v. Moran*;[60] they only sought to distinguish it.

It is submitted that the law on s. 96 suffers from there being no carefully worked out principle in the five cases mentioned above.

Conclusion

If the use of s. 96 by the Commonwealth and its tame acceptance by the States brought about a constitutional revolution, (without any formal amendment of the Constitution), then the abuse of the appropriation power to bypass the States has effectively destroyed the federal union.[61]

The torpidity of the States in failing to effectively repel the Commonwealth's invasion of their fields of activities, invites consideration as to whether there is now some undisclosed reason for this occurrence. On its face, such an invasion is against their interests. Or is it? The political ideology of the present six State and two Territory Labor governments is for a unitary system of government, despite some occasional feigned protestations that they subscribe to the masquerade of so called co-operative federalism.[62] The Commonwealth, by enthusiastically doing what the States should be doing, is being drawn into a financial vortex.

Unwittingly, the drafters of the Constitution do not seem to have provided against the States and the Commonwealth acting in a way which has brought about change from a federal union to a *de facto* unitary system. It is trite law that the Constitution does not provide for a national government with unlimited power; it provides for a federal government with specific enumerated powers. A perusal of the Acts listed in the Schedule to the *Administrative Arrangements Order*[63] signed by the Governor-General on 26 October, 2004, together with *Appropriation Acts*, shows that some of them are likely to have exceeded the power of the Parliament to enact.

If Australians desire to ratify this state of affairs, then a formal amendment of the Constitution needs to be made by a referendum. Such a move would bring on a debate for review of the federal system, including a reassignment of powers between the States and the Commonwealth.

Under the Constitution, the Parliament does not have plenary power; unlike the United Kingdom Parliament, it cannot do what it likes.[64] What is alarming, is that the citizen is denied access to the High Court to challenge appropriations which are beyond power. In short, the High Court needs to be afforded the opportunity of reconsidering the issues of standing and justiciability.

Annexure A

Extract from Minutes of Evidence by Owen Dixon, KC, on 13 December, 1927 for the Committee of Counsel (Owen Dixon, KC, Wilbur Ham, KC and Robert Menzies) of the Victorian Bar Council to the Royal Commission on the Constitution,[65] at p.780.

> "An examination of the Commonwealth Constitution supports the conclusion we have attempted to state, viz., that upon its true interpretation it restricts the power of Parliament to appropriate money to the subjects of the legislative power. The function of appropriating money seems to be treated as an exercise of the power of law making, and not as a separate power. The appropriation act is simply regarded as a law depending for its efficacy upon legislative power. If so, it follows that such an act, like any other statute, must be a law for the peace order and good government with respect to one or more of the enumerated subjects of legislation which come within that power.
>
> We have considered this matter somewhat closely, because we understand differences of opinion exist upon the subject, and in the view which we have suggested, *the Federal Parliament has upon a number of occasions and over a long period of time exceeded its powers in the expenditure of money*". (Emphasis added)

Annexure B: Chronology

3 September, 1939	War declared against Germany.
September, 1940	Japan signed mutual assistance pact with Germany and Italy.
7 December, 1941	Pearl Harbour attacked and war declared against Japan.
15 February, 1942	Fall of Singapore.
19 February, 1942	Darwin attacked.
4-8 May, 1942	Battle of the Coral Sea.
15 May, 1942	Uniform Tax Bills presented to House of Representatives.
4-6 June, 1942	Battle of Midway Island.
7 June, 1942	Uniform Tax Legislation assented to as a temporary measure [to end on 30 June, 1947].
22-26, 29-30 June, 1942	Hearing of challenge to the validity of the Uniform Tax Legislation in Melbourne.
23 July, 1942	Uniform Tax Legislation upheld; Latham C J, Rich, McTiernan, Williams J J; Latham C J dissenting on *Income Tax (War-time Arrangements) Act*; Starke J dissenting on both the *States Grants (Income Tax Reimbursement) Act* and the *Income Tax (War-time Arrangements) Act.*
2 September, 1945	Execution of surrender document by Japan.

Endnotes:

1. Lord Macaulay, *History of England*, in *The Life and Works of Lord Macaulay* (Longmans Green and Co, 1912), Vol I, p. 26.
2. Latham C J in *The Lord Mayor, Councillors and Citizens of the City of Melbourne v. Commonwealth* (1947) 74 CLR 31 at 47.
3. Sir Earle Page, *Truant Surgeon,* Ann Mozley (ed.) (Angus and Robertson, 1963), p.126.
4. Lord Acton, *Letter to Mandell Creighton, 5 April, 1887*, in *Essays on Freedom and Power,* Gertrude Himmelfarb (ed.) (World Publishing, 1948), pp. 335-336.
5. Gleeson C J in *Austin v. Commonwealth* (2003) 215 CLR 185 at 211, [17].
6. *Ibid*., at 277, [211].
7. Australian Law Reform Commission, Report No. 27, *Standing in Public Interest Litigation* (Australian Government Publishing Service, 1985), para. 174.
8. *Attorney-General for Victoria v. Commonwealth* (1945) 71 CLR 237.
9. Later paragraph (xxiiiA) of s. 51, inserted by the *Constitutional Alteration (Social Services)* referendum of 1946, authorized the payment of pharmaceutical benefits.
10. (1945) 71 CLR 237 at 269.
11. *Ibid*., per Starke J at 265-6.
12. *Victoria v. Commonwealth* (1975) 134 CLR 338.
13. *Ibid*., at 361-2.
14. *Ibid*., at 374.
15. *Ibid*., at 405.
16. *Ibid*., at 410.
17. Gertrude Gerard [Professor Tony Blackshield], *A Reply to The AAP Case* (1977-78) 2 UNSWLJ 105 at p.115.
18. *Victoria v. Commonwealth* (1975) 134 CLR 338 at 410.
19. *Ibid*., at 419.
20. E G Whitlam, *The Labor Government and the Constitution*, in Gareth Evans (ed.), *Labor and the Constitution 1972-1975* (Heinemann, 1977), p. 308.
21. *Roads to Recovery Programme, Annual Report 2002-2003* at p.15 and at p.11; www.dotars.gov.au/transprog/downloads /Road_R2R_AnnualReport-02-03.pdf , viewed 19/2/2005.
22. Sir Robert Garran, *Prosper the Commonwealth,* (Angus and Robertson, 1958), p. 208.
23. www.budget.gov.au/2004-05/ministerial/download/trans port.pdf, at p.15, viewed 19/02/2005.
24. Table 2.7: Administered programmes that contribute to Outcome 2 (operating expenses), Department of Transport and Regional Services 2005 Budget Statements, Budget Related Paper No. 1.15 at p.66; www.dotars.gov.au /dept/budget/0405/dotars_pbs0405.pdf, viewed 27/02/05.
25. *Appropriation Act (No 1) (2004-2005)* at p.135.

26. *Ibid*., at p.53.
27. Colin Howard, *Public law and common law – parliamentary appropriation*, in D J Galligan (ed.), *Essays in legal theory* (Melbourne University Press, 1984), at pp. 24-25.
28. See generally, Simon Evans and Stephen Donaghue, *Standing to Raise Constitutional Issues in Australia*, in Gabriel A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century* (Copyright Publishing Company Pty Ltd, 2002), at pp. 77- 81 and 97-103. See too, Australian Law Reform Commission, Report No. 78, *Beyond the door keeper – Standing to sue for public remedies* (Australian Government Publishing Service, 1996).
29. *Anderson v. Commonwealth* (1932) 47 CLR 50; *Pye v. Renshaw* (1951) 84 CLR 58. For example, *Attorney-General for Victoria (at the relation of the Victorian Chamber of Manufactures) v. Commonwealth* (1935) 52 CLR 533.
30. Per Mason C J, Deane and Gaudron J J in *Davis v. Commonwealth* (1988) 166 CLR 79 at 96.
31. *Davis v. Commonwealth* (1986) 61 ALJR 32 at 36-37.
32. P H Lane, *The Australian Federal System* (Law Book Co, 1972), p. 824.
33. [1975] 1 SCR 138; (1974) 43 DLR (3d) 1.
34. *Ibid*., at 145; at 6-7.
35. *Remmers v. Lipinski* (2001) 293 AR 156 at para [35].
36. *Truth About Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 599.
37. *Victoria v. Commonwealth* (1975) 134 CLR 338 at 383.
38. (1998) 194 CLR 247 at 263.
39. *Victoria v. Commonwealth, loc. cit.*, at 425.
40. (1981) 146 CLR 559 at 634.
41. Paul Finn and Kathryn J Smyth, *The Citizen, the Government and "Reasonable Expectations"*, (1992) 66 ALJ 139 at p. 146.
42. See generally, P H Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 1997), pp. 506-508.
43. Cf. Mason J in the *AAP Case* at 402.
44. C A Saunders, *The concept of non-justiciability in Australian constitutional law*, in D J Galligan (ed.), *Essays in legal theory* (Melbourne University Press, 1984), pp. 49-50.
45. Section 8(4), *Auditor-General Act* 1997. The *Audit Act* 1901 was enacted pursuant to s.97 of the Constitution and was repealed by s. 3 and Schedule 1 of the *Audit (Transitional and Miscellaneous Amendment) Act* 1997.
46. K W Knight, *Budgeting and Financial Management*, in R N Spann (ed.), *Public Administration in Australia* (Government Printer of NSW, 1973), p. 408.
47. Joint Committee of Public Accounts, Parliamentary Paper No. 40 of 1989, Report 296, *Auditor-General, Ally of the People and Parliament – Reform of the Australian Audit Office* (Australian Government Publishing Service, 1989); Parliamentary Paper No. 193 of 1989, *Accountability, independence and objectivity: a response to report 296 of the Joint Committee of Public*

Accounts (Australian Government Publishing Service, 1989).

48. Table 1.1 and 1.5 in note 24 above.
49. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth Power in the Australian Federation* (Cassell, 1967), pp. 91-92.
50. Cheryl Saunders, *The Strange Case of Section 96*, Paper 11, Intergovermental Relations in Victoria Program, Law School, University of Melbourne, 1987, pp. 11-12.
51. *South Australia v. Commonwealth* (1942) 65 CLR 373 at 442.
52. (1989) 166 CLR 417 at 438-439.
53. (1926) 38 CLR 399.
54. (1939) 61 CLR 735.
55. *Victoria v. Commonwealth* (1957) 99 CLR 575 at 607.
56. *States Grants (Income Tax Reimbursement) Act* 1942; *Income Tax (War-time Arrangements) Act* 1942. Both Acts were to continue in operation "until the last day of the first financial year to commence after the date on which His Majesty ceases to be engaged in the present war", and no longer. The formal surrender of Japan occurred on 2 September, 1945, and as such Uniform Tax Legislation was to end on 30 June, 1947. *The State Grants (Tax Reimbursement) Act* 1946 repealed and replaced its precursor with effect from 1 July, 1946. What was temporary was now permanent.
57. Cf. Fullagar J in *Victoria v. Commonwealth* (1957) 99 CLR 575 at 655.
58. It should be noted that the preamble to the *Income Tax (War-time Arrangements) Act* 1942 was in the following terms:

    > "Whereas, *with a view to the public safety and defence of the Commonwealth* and of the several States *and for the more effectual prosecution of the war* in which his Majesty is engaged, it is necessary or convenient to provide for the matters hereinafter set out". (Emphasis added).

59. (1981) 146 CLR 559.
60. *Loc. cit.*.
61. Note that the Constitutional Commission recommended that s. 81 be amended to allow the appropriation of the Consolidated Revenue Fund "for any purpose that the Parliament thinks fit"; per Sir Maurice Byers, E G Whitlam & Ors, *Final Report of the Constitutional Commission*, (Australian Government Publishing Service, 1988), para. 11.296 (i).
62. Cf. Brian Galligan and John S F Wright, *Australian Federalism: A Prospective Assessment*, in *Publius*, (2002) Vol. 32(2), p. 156.
63. http://www.pmc.gov.au/parliamentary/docs/aao.pdf, viewed 8/03/05.
64. Simon Jenkins, *Big Bang Localism–A Rescue Plan for British Democracy* (Policy Exchange, 2004), p. 133.
65. Sir John Peden & Ors., *Appropriation of Revenue*, in *Report of the Royal Commission on the Constitution* (Australian Government Printer, 1929), Ch. XIII, pp. 137-140.

Chapter Ten
Australia's International Legal Obligations: Maritime Zones and Christmas Island

Dr Dominic Katter

> "Once it was said that the law followed the flag. Now, international law is everywhere. Its influence *increases*".[1]

Introduction

Territories and boundaries are part of our everyday lives. History texts contain many examples of disputes over land boundaries. Maritime boundaries are more elusive. The demarcation and delineation of maritime territorial claims (and non-claims) and zones of national jurisdiction must be acceptable, not only to the negotiating states, but also to the international community, in that the seas are fundamental to trade.

Traditionally, nations claimed a limited jurisdiction over the maritime environment adjacent to their coastlines. A consequence of jurisdictional extensions by sovereign nations has been increasing conflict between domestic and international law. In an attempt to clarify the domestic jurisdiction, international bodies have actively and systematically co-ordinated the formulation of new laws of the sea, promoting change within international maritime law.

Purpose

This paper focuses on the alleged conflict between recently introduced Australian domestic legislation and international legal principles. Recent Australian domestic legislation has excluded certain maritime zones surrounding islands from the Australian "Migration Zone" under the *Migration Act* 1958. This paper attempts to evaluate these legislative changes in the context of international law obligations, in particular the 1982 *United Nations Convention on the Law of the Sea* (*UNCLOS III*). The finite question that this research investigates is whether a "bar" or *refoule* on so-called "asylum seekers" being able to apply for visas under the *Migration Act* breaches Australian international law obligations.

Legislative amendments

Over the last few years, numerous amendments have been made to Commonwealth legislation regarding migration, fisheries and Customs. In March and April, 1999 a number of boats carrying persons without immigration clearance attempted to reach Australia, undetected, by landing on the coast of the mainland and upon territorial islands to the North-West. In response, the Commonwealth established a "Coastal Surveillance Task Force". This newly created body recommended comprehensive amendments to the off-shore enforcement of Commonwealth laws. Significantly, new legislation, the *Border Protection Legislation Amendment Act* 1999, was introduced. That legislation incorporated amendments to the *Customs Act* 1901, the *Migration Act* 1958 and the *Fisheries Management Act* 1991.

The Explanatory Memorandum to the Bill noted that the amendments provided for:

1. The boarding and searching of ships and aircraft, in certain circumstances, in Australia's territorial sea, Australia's contiguous zone, the high seas, and (in the case of the *Customs Act*) Australia's Exclusive Economic Zone (EEZ);
2. "Hot pursuit" of ships whose master has not complied with a request to board; and
3. "Hot pursuit" of "motherships" (that is, ships reasonably suspected of being used in direct support of, or in preparation for, a contravention of specified legislation involving another ship) in certain circumstances.

Relevantly, the Commonwealth stated that it intended any extra-territorial operation of the legislation to be determined by reference to international law, including treaties and customary international law.[2] These "border protection" amendments applied predominantly to the territorial sea and the contiguous zone. The amendments also extended the policing powers available for relevant offences within the EEZ and high seas.[3] Additionally, the legislation sought to make the preparation of an offence unlawful. Further, the *Migration Act*[4] provided the basis for the commencement of a "hot pursuit" of a foreign vessel, which is preparing to commit a migration offence (external to the contiguous zone) and has failed to comply with a direction to allow Commonwealth officers to board.

The matter of illegal immigration became a national issue as a result of the "*MV Tampa* incident" in August and September, 2001. The Norwegian registered *M V Tampa* took on board persons from the vessel *Palapa*. The *Tampa*, under the command of Captain Rinnan, commenced voyage towards Indonesia, but then changed course for Australia. The Commonwealth of Australia prevented the persons from the *Palapa*, who were now on board the *Tampa*, from coming ashore on Christmas Island.

Subsequently, further amendments were made to the border protection laws. The *Border Protection (Validation of Enforcement Powers) Act* 2001 attempted to "put beyond doubt the legal basis for actions taken against foreign ships" within Australian sovereign territory and to "confine judicial review of an enforcement action". The *Customs Act* 1901 was also amended by the amendments regarding border protection. Additionally, subordinate legislation made the *Fisheries Management Act* 1991 and the *Migration Act* 1958 prescribed Acts in accordance with the provisions of the *Customs Act*. Section 184A(5) of the *Customs Act* created circumstances in which an officer of the Australian Defence Force may request to board a foreign vessel. The *Migration Act* replicated the provisions of the *Customs Act* in ss 245B(5) and 245C(1).

Under these further amendments to the *Migration Act*, certain Australian island territories were designated as "excised offshore places".[5] Any unauthorised person who arrives in an excised territory is not able to apply for an Australian visa unless the Minister exercises discretionary power. Anyone who enters the migration zone, including Australian citizens, must present themselves for immigration clearance.[6] These "excised offshore places" are: Ashmore and Cartier Islands in the Timor Sea (from 8 September, 2001); Christmas Island in the Indian Ocean (from 8 September, 2001); Cocos (Keeling) Island in the Indian Ocean (from 17 September, 2001); and offshore resource and other installations (from 27 September, 2001). The *Migration Act*, however, does

not extend to the territories of Norfolk Island, Heard and Macdonald Islands and the Australian Antarctic Territory. Places included in this definition continue to be part of Australia, and Australian citizens (and lawful non-citizens) can move to and from those areas as they move between any parts of Australia.

Therefore, the "migration zone" includes the land area of all the States and Territories of Australia and the waters of proclaimed ports within those States and Territories. The provisions of the *Migration Act* continue to apply within those "excised offshore places". The purpose of the migration zone is to define the area of Australia where a non-citizen must hold a visa in order to legally enter and remain in Australia.[7]

The question then is whether these legislative amendments are a valid exercise of coastal state jurisdiction in accordance with international law.

International law

International law can be defined as "the body of law which participating nations recognise as binding them in their conduct towards each other". Notably, international law does not generally deal with the actions of individuals. The *Statute of the International Court of Justice* establishes a court to determine legal disputes between states. Article 38 of that Statute identifies primary sources of international law.[8] These primary sources can be separated into three sub-groups:

1. International agreements to which the disputing states are a party;
2. Customary international law; and
3. General principles of law recognised by nations,[9] often referred to as *opinio juris*. Normally this involves consideration of the domestic laws of a state and identifying if the state laws have universal recognition.

International law is basically a system of rules and principles that aims to govern the relations between sovereign states. This paper discusses these primary sources of international law in the context of the amendments made to the *Migration Act*.

Multilateral treaties

The Commonwealth of Australia, using its recognised prerogative powers, has entered into several multilateral treaties, qualifying the international law of the sea as it relates to the maritime areas surrounding Australian territory. Treaties can be bilateral, that is, similar to a contract between states for a specified purpose. Alternatively, treaties may be multilateral, by establishing international rules of conduct for all parties to the treaty. Treaties commonly only bind those parties which are signatories, but treaties may make provisions for third parties that are non-parties to the agreement. *UNCLOS III*, the *Vienna Convention on the Law of Treaties* 1969, and the *Charter of the United Nations* 1945 are therefore examples of multilateral treaties, which establish rules of international conduct for states.

Australia's signature of an international convention/ agreement does not, of course, have effect within Australian domestic law without ratification.[10] The provisions of an international treaty require statutory implementation before the treaty is to form part of Australian law.[11] However, treaties are sometimes used to identify the existence of customary international law, as treaties often codify such law. As stated by the learned President of this Society, the Right

Honourable Sir Harry Gibbs, GCMG, AC, KBE in the 2000 Proceedings, even:

> ".....if a Convention is not incorporated into Australian law by statute, the Courts may give effect to it in two ways. They may conclude that the Convention is a statement of international law and that the common law should be developed consistently with it, or they may hold that individuals would have a legitimate expectation that administrative decision makers would not act inconsistently with the Convention".[12]

The High Court has held that a clearly recognised principle of customary international law can be used as a guide in respect of the duties and obligations of the state.[13] The Commonwealth Attorney-General's Department currently states on its website that customary international law is an important source of international law, and unlike treaties, a state is not required to have accepted a rule of customary international law to be bound by it. Therefore, international consensus on protection of people seeking asylum, or nations taking pre-emptive action to defend their sovereignty, may constitute emerging general principles of law recognised by nations (*opinio juris*). However, as Sir Harry Gibbs went on to state in the 2000 Proceedings:

> "It has not yet been explained how a person who has no knowledge of the existence of a treaty can have an expectation of that kind".[14]

Understandably, whilst international treaties may not authorise the use of procedures to enforce the treaties' provisions, customary international law may provide suitable remedies or alternatives. This customary international law position supports a general argument and/or presumption within Australian law, that statutes should not contradict the established rules of international law.[15] However, significantly, the High Court has determined that the presumption, that Parliament did not intend to contradict international treaties and/or customary international law, has only "restricted operation". In *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh*,[16] Mason C J and Deane J held that the presumption is only relevant if the words within a statute are ambiguous.

The High Court held unanimously in *Horta v. Commonwealth*[17] that:

> "The parliament's power with respect to 'external affairs' was not confined to the enactment of laws consistent with the requirements or constraints of international law ... [An enactment] within the legislative competence of the parliament, regardless of whether the treaty is void or invalid under international law or whether the making of a treaty or the implementation of its provisions would or would not be inconsistent with Australia's international obligations".

Doctrine of freedom of the seas

The classical assumption proposed by the Dutch scholar, Hugo Grotius, and derived from natural law was that the seas are open to all. Grotius developed the *mare liberum* theory in the 17th Century. His theory assisted the Dutch Republic in its trade in the East Indies. However, Grotius later modified his theory so that a sovereign state could claim jurisdiction and exclusive rights over part of the High Seas. It is this *mare liberum* theory, as developed by Grotius, that provides the foundation for the "freedoms" of the High Seas:

1. The freedom to navigate;
2. The freedom of overflight;
3. The freedom to fish; and

4. The freedom to lay cables and pipelines.[18]

Economic interest has remained the backdrop for the application of these theories until the present day.

UNCLOS III

UNCLOS III established some important changes to previous Conventions such as those of 1958, especially with respect to the delimitation of maritime zones. The objective of *UNCLOS III* was the establishment of a constitution for the oceans. It codified the customary international law of freedom of the seas. It entered into force, after obtaining 60 ratifications, in 1994.

Its provisions established three maritime zones. Each of these is subject to a specific juridical regime:

1. Territorial Sea: the area in which a state has full sovereignty;
2. Exclusive Economic Zone: the area in which a state has sovereign rights; and
3. High Seas: that part of the ocean in which a flag-state has jurisdiction only over its own vessels.

Significantly, the continental shelf was re-defined in Part VI of *UNCLOS III* in Article 76(1) as follows:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

More distant shelf areas may be claimed by the coastal state in certain circumstances, as prescribed in the remaining paragraphs of Article 76. The new definition is based on technical criteria, and clearly reflects the current technological advances and technical capability to explore and exploit mineral resources from the seabed.

Territorial sea

UNCLOS III, in Article 2, confirms the sovereignty of a state over its land territory and internal waters to the "belt" of sea adjacent to its coast called the territorial sea.[19] Article 3 of *UNCLOS III* allows states to establish a territorial sea extending for 12 nautical miles from the maritime baseline. Sovereignty extends to the air space above the territorial sea and to its bed and subsoil. Sovereignty over the territorial sea is not absolute, but is subject to the principles of customary international law. The most significant exception is the right of all states to enjoy innocent passage through other states' territorial seas. Generally,[20] Australia exercises a claim to the territorial sea with a breadth of 12 nautical miles.[21]

The sovereignty of Archipelagic Islands, such as the Cocos/Keeling Islands (which are excised under the *Migration Act*) extends to all the waters enclosed by the archipelagic baselines, their bed and sub-soil and airspace above. There is a right of innocent passage through archipelagic waters. Archipelagic Islands may have designated sea-lanes and air routes through the archipelagic waters in which all states enjoy rights.

Innocent passage through the territorial sea

Coastal states must allow and not hamper the right of innocent passage in territorial seas to the ships of all other states. Article 19 of *UNCLOS III* states that passage of a foreign vessel is considered prejudicial to the peace, good order or security of the coastal state if the vessel engages in:

1. The use or threat of force against the coastal state;
2. Exercise or practice with weapons;
3. Any act aimed at collecting information to the prejudice of the coastal state;
4. Any act of propaganda against the coastal state;
5. Launching, landing or taking on board of aircraft;
6. Launching, landing or taking on board of any military device;
7. *Loading or unloading any thing or person contrary to the customs, fiscal, immigration or sanitary laws of the coastal state* [emphasis added];
8. Any act of pollution;
9. Fishing;
10. Research activities;
11. Any act aimed at interfering with communications systems or facilities of the coastal state; and
12. Any other activity not having a direct bearing on passage.

Submarines are required to navigate on the surface and show their flag. A coastal state is not normally permitted to suspend the right of innocent passage.

Rights and obligations of coastal states

A coastal state, in respecting that right of innocent passage, may adopt laws and regulations on many aspects of navigation through the territorial seas, which must be given due publicity and must be complied with by foreign shipping. The coastal state may designate sea-lanes and traffic separation schemes for the regulation of shipping through its territorial seas.

Sovereignty over the territorial sea includes criminal jurisdiction on board foreign ships passing through the territorial sea. Article 27(2) of *UNCLOS III* enables the coastal state to "take any steps authorised by its laws for the purpose of arrest or investigation on board a foreign ship". The provision to take "any steps" can be contrasted with subsequent provisions enabling coastal states "control" over their EEZ. Kaye states that "the coastal State is to determine for itself what management principles it might wish to apply within its territorial sea, as an exercise of its sovereignty".[22]

Jurisdiction within the territorial sea

The territorial state has jurisdiction over foreign merchant vessels in internal waters,[23] and over crimes[24] committed on board such vessels.[25] This jurisdiction is concurrent with that of the flag state.[26] Foreign ships that enter in distress may not be subject to the jurisdiction of the coastal state.[27]

In *Wildenhus's Case*,[28] a treaty between the United States and Belgium granted each state jurisdiction necessary to maintain order on board merchant vessels located in internal waters. In that case, a murder below decks committed on board a Belgian ship in a US port was enough to found that jurisdiction. Generally, the jurisdiction of the coastal state is not exercised unless the offence disturbs the peace, dignity or tranquillity of the port.

As O'Connell comments, "a State has the competence under international law to extend its criminal law to any area which is subject to its sovereignty".[29]

Contiguous zone

Article 33 of *UNCLOS III* provides that the contiguous zone may not extend beyond 24 nautical miles from the baselines upon which the territorial seas are measured. Shearer defines a contiguous zone as:

> "[A] body of waters lying between the territorial sea and the high seas in which a coastal state may exercise certain enforcement powers in relation to its laws applying on land or in the territorial sea ... in effect it is a policing zone".[30]

Therefore, *UNCLOS III* provides a coastal State with sovereignty over the territorial sea, and policing powers to prevent nominated offences in the contiguous zone. Fitzmaurice states that the contiguous zone is not a "belt" of coastal state sovereignty, or jurisdiction beyond the territorial sea, it is merely a "policing zone".[31] Shearer states that:

> "It is sometimes rashly assumed that the contiguous zone is a zone of extended coastal state jurisdiction in matters enumerated in Art 33, viz. customs, fiscal, immigration, and sanitation. A close reading of the text and the drafting history, however, reveals that this is not so. The contiguous zone is juridically part of the high seas ... Moreover, the coastal state may only exercise 'control' (not sovereignty or jurisdiction) over the contiguous zone necessary:
>
> (a) to *prevent* infringement of the specified laws within its *territory or territorial sea*, and
>
> (b) to punish infringements of those laws committed within its territory or territorial sea".[32]

Article 33 of *UNCLOS III* provides two "limbs" under which a State may exercise control. Shearer proposes that the first limb is to prevent offences of "inward-bound" vessels intending to enter the territorial sea; the second limb provides for outward-bound vessels that have committed an offence within the territorial sea. *UNCLOS III* restricts the punishment of vessels in the contiguous zone to offences committed within the territorial sea. Therefore, punishment of vessels in the contiguous zone is arguably restricted to those vessels leaving the territorial waters.

The Commonwealth of Australia has claimed a contiguous zone beyond the territorial sea in the *Maritime Legislation Amendment Act* 1994. The application of coastal State powers was summarised in the Explanatory Memorandum to the *Border Protection Amendments Bill* 1999.[33]

The distinction between the *UNCLOS III* provisions pertaining to the territorial sea and the contiguous zone emphasise the intention of the drafters of *UNCLOS III* to differentiate the two "belts" of jurisdiction. Therefore, it has been argued by academics and the media that coastal states are limited in their ability to take preventative action against foreign flag and non-flag vessels, such as those carrying "asylum seekers", in the contiguous zone.[34] There is the potential for a breach of the duties espoused by Article 300 of *UNCLOS III*, that is the fulfilment in good faith of obligations assumed under the Convention. There is therefore the potential for Australian vessels acting in accordance with the *Migration Act* to act in breach of international law.

Exclusive Economic Zone

Under *UNCLOS III*, coastal states retain sovereign rights over the exclusive economic zone, although these sovereign rights limit the classical freedoms of the High Seas of other states. Part V of *UNCLOS III* creates a specific legal regime, the Exclusive Economic Zone (EEZ) in which coastal states have:

> "Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities of the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

Under Article 57, this EEZ is not to extend beyond 200 nautical miles from the baselines. With regard to the *Migration Act*, Article 73(1) enables a state:

> "In the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws adopted in compliance with this convention".

Shearer suggests that coastal States merely have preferential rights to the fish stocks within the EEZ. Article 58(2) applies:

> "……Articles 88 to 115[35] and other pertinent rules of international law to the exclusive economic zone in so far as they are not compatible with this part".

Commentators have suggested that the detailed and specific articulation of enforcement powers of a coastal state contained in Part V of *UNCLOS III* is markedly distinct from similar, more general powers contained elsewhere in *UNCLOS III*.[36]

Australian maritime zones

The Commonwealth's sovereignty with regard to the territorial sea was proclaimed by s. 6 of the *Seas and Submerged Lands Act* 1973. Australia exercises a claim to twelve nautical miles of territorial sea. The Commonwealth has claimed a contiguous zone beyond the territorial sea. Similarly, Australian sovereignty over the contiguous zones and an Exclusive Economic Zone have also been claimed by subordinate regulation.[37] These legislative enactments have effectively adopted the international conventions signed by Australia into domestic law.

The coastal state does have sovereign rights to the resources within the territorial sea; however, its ability to enforce its rights within the EEZ is restricted to the conservation of the marine environment. Arguably, vessels stopped and boarded for *Migration Act* offences in the EEZ are under the jurisdiction of the flag state and not subject to the jurisdiction of the coastal state.[38] Generally speaking, the laws of the flag state apply in relation to ships, and except in certain circumstances, only the flag state can exercise jurisdiction in relation to ships entitled to fly the flag of that state (Article 92, *UNCLOS III*).

It has been argued that coastal state jurisdiction over the high seas would not recognise the operation of Australia's customs and migration laws within the EEZ.[39] Therefore, the establishment of jurisdiction beyond the territorial sea is essential for the enforcement of coastal state laws upon vessels of flagged states operating within the EEZ and adjacent high seas.

Jurisdiction and sovereignty – conclusion

Current Australian domestic legislation allows for a non-Australian flag vessel to be boarded and arrested for a *Migration Act* offence which may be committed outside Australia's contiguous zone.[40] Therefore, the *Migration Act* allows actions against non-Australian and non-flagged vessels within the 200-mile Exclusive Economic Zone.

The High Court has held that there is no territorial limitation placed upon the Commonwealth Parliament in passing laws for the "peace, order and good government of the Commonwealth". Further, it is for the Commonwealth to decide whether a law will be for the peace, order and good government of the Commonwealth.[41] The Commonwealth Government has the power to legislate with extra-territorial effect.

Significantly, the jurisdiction of the Commonwealth is not limited to laws which are consistent with international law, despite principles of international law to the contrary,[42] provided there is a sufficient nexus between Australia and the matters to which the laws relate.[43] Provided that valid nexus[44] exists between the state and the alleged offence, international law will recognise the jurisdiction of the state. The operation of jurisdiction extra-territorially is generally permitted where the offence is against the "security, territorial integrity or political independence of the state". Further, common "law courts have viewed the extension of jurisdiction legitimate where the intended result or the intended victim were within the territory and it was necessary to protect peace, order and good government".[45]

In *Davis v. Commonwealth*, Brennan J (as he then was) held that:

> "[T]he executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of the legislative power".[46]

Brennan J identified the prerogative power as a source of constitutional authority, which enables the Parliament to take action to protect the sovereignty of the Commonwealth and its laws. A use of a state's prerogative power includes relations with another state (known as the domestic act of a state).[47] The common law has held such acts of state to be non-justiciable in Australian Courts.[48]

The High Court of Australia has determined that the Commonwealth Parliament has the power to decide what international laws it will enforce in accordance with the Commonwealth Constitution. The accession of Australia to an international agreement will have no effect on the law of Australia.[49] Australian domestic legislation should, if possible, reflect the obligations imposed by international law; however, the Australian Parliament has been recognised as having the power to pass legislation with extra-territorial effect. Therefore it can be argued that the Commonwealth Parliament has a prerogative power to pass laws which may conflict with international laws, regardless of whether the *Migration Act* could be argued to be in breach of the sovereignty of a flag state.

By enacting these legislative amendments, Australia has adopted a dualist approach to international law, reflecting a historical predilection for positivism and a reluctance to relinquish internal sovereignty.[50] As a result, the

Commonwealth Parliament must ratify an international treaty before it can operate domestically. Additionally, customary international law is not obliged to be followed unless ratified by domestic legislation.[51] As Shearer has stated, Australia must ensure that it carefully and selectively adopts international law into domestic law to "guard against the danger of ... hasty incorporation of international law to the possible prejudice of the beneficial development of the common law of Australia".[52]

There is a general presumption of law that Parliament would not intend a statute to be inconsistent with the established rules of international law and comity of nations. In *Chhu Kkeng Lim v. Minister for Immigration, Local Government and Ethnic Affairs*,[53] the High Court favoured the construction of a Commonwealth statute which accorded with the obligations of Australia under an international treaty.

The High Court has clarified the circumstances in which that presumption can be used to interpret domestic legislation. Generally, there must be some ambiguity within the legislation which would provide recourse to international law to assist with statutory interpretation.[54] However, recourse to international law to assist in the construction of domestic law is not required if the statute expresses a clear intention which is contrary to international law.[55] Further, there is no requirement in the Constitution that the Commonwealth's legislative power is confined within the limits of Australia's legislative competence as recognised by international law. Therefore, our constitutional system limits full review by Australian courts in determining whether domestic legislation has breached international law.[56]

Although there is a strong presumption in the common law against the extra-territorial operation of law (*extra territorium jusdicenti impune non paretur*: "the sentence of those adjudicating outside their jurisdiction can be disobeyed with impunity"), the Australian Parliament is sovereign and expresses the will of the Australian people within the democracy.[57]

Australia's sovereignty, as espoused by the application of the *Migration Act* to the Islands excised from the migration zone, is within prerogative power.[58] As the President of this Society wisely stated in the 2000 Proceedings:

> "Some commentators say that the increasing inter-dependence of the nations of the world, and the need for Australia to relate to other nations, have made it necessary for us to transfer some of our sovereignty to the United Nations. It is true that we cannot live in isolation. It does not follow that we should allow remote Committees to decide what rights the inhabitants of Australia should have. The decisions they have so far made do not convince us that they have more wisdom than our own processes can provide".[59]

Endnotes:

1. Kirby, *Visions of the Legal Order in the 21st Century: Essays to honour His Excellency Judge C J Weeramantry* (Ed. Sturgess and Anghie), *The Growing Rapprochment Between International Law and National Law*. Parts of this contribution appeared in an earlier form in the paper by the author, *The Impact of International Human Rights Norms: A Law Undergoing Evolution* (1995), 25 *Western Australian Law Review*, 1.
2. *Border Protection Legislation Amendment Bill* (1999), Bills Digest No. 70,

1999-2000, Andrew Grimm, 13 October, 1999 at 2.

3. This is attempted by the use of the doctrine of "constructive presence": Churchill, Lowe, *The Law of the Sea* (2nd edn) (1988), Manchester University Press, at 172 –3.

4. Ss 184A(5), 184B(1), *Customs Act* 1901; ss 245B(5), 245C(1), *Migration Act* 1958.

5. The amendments bar unauthorised arrivals at these places from applying for a visa (section 46A); allow Commonwealth officials to move those people to a declared safe country (section 198A); and provide officials with discretion on whether to detain these people when in that offshore place (subsections 189(3) and (4)).

6. "*Offshore entry person*" is defined as a person who entered Australia at an excised offshore place, and became an unlawful non-citizen because of that entry (arrived without a visa or other authority under the *Migration Act*).

7. People who enter Australia's migration zone unauthorised at an excised place are barred from making any visa application as a result of entering Australia in that area illegally. The Minister, however, has the power to permit such people to make applications for visas of a specified class.

8. There are also "Secondary Sources", which allow the International Court of Justice to consider the writings of legal theorists.

9. The *Statute of the International Criminal Court* (Rome, 17 July, 1998: UN Doc A/CONF 183/9; 37 ILM 999 (1998)), Article 21(1)(c) allows the International Criminal Court to apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction of the crime, provided those principles are not inconsistent with ... international law and internationally recognised standards".

10. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 193 per Gibbs J, at 212 per Stephen J, and 224 per Mason J.

11. *Victoria v. Commonwealth* (1996) 187 CLR 416 at 481 per Brennan C J, Gaudron, McHugh and Gummow J J.

12. Rt Hon Sir Harry Gibbs, *The Erosion of National Sovereignty*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 12 (2000), p. xii.

13. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 519, per Mason C J, Wilson and Dawson J J. Though this has been limited to issues arising from an ambiguity in the Statute, per *Acts Interpretation Act* 1901, s. 15AB.

14. *Loc. cit.*, p. xii.

15. *Jumbunna Coal Mine, NL v. Victorian Coal Miners' Assn* (1908) 6 CLR 309 at 363 per O'Connor J.

16. *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 128 ALR 353, at 362.

17. *Horta v. Commonwealth* (1994) 123 ALR 1, at 2, 4 per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J.

18. Report of the International Law Commission to the General Assembly, Document a/3159, printed in *Yearbook of the International Law*

Commission 1956, Vol II, 253 at 259. (Also issued as Official Records of the General Assembly, Eleventh Session, Supplement No 9.) As recognised by the First Committee during *UNCLOS I*. See *Ordering the Oceans: The Making of the Law of the Sea*, at 16.

19. *Convention on the Territorial Sea and the Contiguous Zone* (Geneva, 29 April, 1958; 516 LTNTS 205), Article 1, par 1; *United Nations Convention on the Law of the Sea* (Montego Bay, 10 December, 1982; UN Doc A/Conf 621122; 21 ILM 1261 (1982)), Article 2. Australia claims sovereignty over the territorial sea and seabed through the *Seas and Submerged Lands Act* 1973, s. 6, upheld as constitutional by the High Court of Australia in *New South Wales v. Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337; 8 ALR 1; 50 ALJR 218.
As to the constitutional position with respect to the Australian States, see the *Coastal Waters (State Title) Act* 1980; *Coastal Waters (State Powers) Act* 1980; *Port MacDonnell Professional Fishermen's Assn Inc v. South Australia* (1989) 168 CLR 340; 88 ALR 12; 63 ALJR 671: *Halsbury's Laws of Australia* (1998) at 215.

20. An exception to the width of the territorial sea are the waters surrounding the Australian Islands in the Torres Strait, which are limited to three nautical miles. *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters (Torres Strait Treaty)* (Sydney, 18 December, 1978; Australian Treaty Series 1985, No. 4), Article 3(2).

21. *UNCLOS III*, Article 3. On 20 November, 1990 the territorial sea was extended to 12 nautical miles by Proclamation under the *Seas and Submerged Lands Act* 1973, s. 7: *Commonwealth Gazette* S297, 13 November, 1990. See also Opeskin, Rothwell, *Australia's Territorial Sea: International and Federal Implications of its Extension to Twelve Miles* (1991), 22 *Ocean Development and International Law*, at 395-431.

22. Kaye, *International Fisheries Management* (2001), Kluwer Law International, London, at 90.

23. "See, for example, *R v. Anderson* (1868) LR 1 CCR 161; 11 Cox CC 198; *Wildenhus's Case* 120 US SC 1, 30 L. Ed. 565 (1887). This is an example of territorial jurisdiction. For the immunity of warships, see *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116 SC (US), where a public vessel owned by Napoleon as the reigning Emperor of the French was claimed by two Americans as having been forcibly taken by Napoleon's agents. As a result of their claim the vessel was arrested in the port of Philadelphia. The court held that the vessel was a public one commissioned and armed by the French Government for public purpose. As such, the vessel enjoyed the right to free passage. However, the court noted that were a sovereign to descend from the throne to become a merchant, he submits to the law of the country. Thus, a public vessel used for commercial purposes has no immunity": *Halsbury's Laws of Australia* (1998), at 215.

24. These rules apply to merchant ships and government ships operated for commercial purposes: *Convention on the Territorial Sea and the Contiguous Zone* (1958; *loc. cit.*), Pt I, Section III, Subsection B, Article 21; *United*

Nations Convention on the Law of the Sea (1982; *loc. cit.*), Pt II, Section 3, Subsection B. See *Halsbury's Laws of Australia* (1998), at 215:

> "Warships enjoy full immunity: *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116 SC(US). For the application of the *Customs Act* 1901 in cases of smuggling, see *R v. Bull* (1974) 131 CLR 203".

25. The local authorities may arrest persons on board foreign ships in internal waters: *R v. Garrett; Ex parte Sharf* [1917] 2 KB 99; (1917) 5 BILC 95; *Wildenhus's Case, loc. cit.*. For arrest on board a foreign ship for the purposes of extradition, see the *Eisler Case*: Jeniungs R, *Extradition and Asylum* (1949), 26 *British Yearbook of International Law*, 468.

26. *R v. Anderson* (1868), *loc. cit.*; *Wildenhus's Case, loc. cit.*. In *Re Sutherland* (1922) 39 (NSW) 108, an application for *habeas corpus* in respect of people detained as convicts under French law on board a French ship in Sydney harbour was refused because their detention was justified under French law. The *United Nations Convention on the Law of the Sea* (1982; *loc. cit.*), Article 218 provides that the coastal state may take action against a vessel that is voluntarily within a port with respect of any discharge from the vessel outside the internal waters, territorial sea or exclusive economic zone.

27. *The Creole* (1853) IV Moore, Int Arb 4375 at 4377. As to the meaning of distress, see *The May v. R* [1931] SCR 374 at 381; [1931] 3 DLR 15, SC (Canada), where an American fishing vessel was seized after having anchored 2.5 miles from the Canadian coast. The court determined that entry by a foreign vessel into Canadian waters cannot be justified on the ground of "stress of weather" unless the weather is such as "to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside the territorial waters he will put in jeopardy his vessel and cargo". In this case the court held that the Captain simply wanted to be more comfortable than he would have been outside the three-mile limit. This was an insufficient reason for entering Canadian waters: at 23.

28. *Wildenhus's Case, loc. cit.*.

29. O'Connell, *International Law of the Sea*, Vol II, (1984) Clarendon Press, Oxford, at 919.

30. Shearer, *Australia's New Maritime Zones* (1995), 69(1) *Australian Law Journal* 26, at 26.

31. Fitzmaurice, *The Territorial Sea and Contiguous Zone* (1955), 8 *International and Comparative Law Journal* 73, at 111.

32. Shearer, *Maritime Jurisdiction and Enforcement: Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels* (1986), 35 *International Comparative Law Quarterly*, 320 at 330.

33. Paragraph 41: "It will be seen that contiguous zone jurisdiction differs according to whether or not there has been a contravention of Australian law in Australia or in the territorial sea. If a ship entered the contiguous zone in circumstances where it was suspected that an offence was about to be committed, Australia would have jurisdiction to exercise the control necessary to prevent the contravention occurring. In the case of an attempted importation of drugs, for example, this control might extend to

seizing and disposing of the drugs. However, there would be no jurisdiction to arrest or charge the persons involved with attempting to commit an offence against Australian law, since no offence would have occurred within Australia's territory or territorial sea".
Paragraph 42: "However, if there has been a contravention of customs, fiscal, immigration or sanitary law, and the ship is leaving Australia after having been used in the contravention, there is jurisdiction to arrest the persons on board, since the coastal state may exercise the control necessary to punish infringements of customs, fiscal, sanitary and immigration laws which have occurred within its territory or territorial sea".

34. Shearer, *loc. cit.*, (1986); McLauchlin, *Coastal State Use of Force in the EEZ Under the Law of the Sea Convention* (1999), 18 (1) *University of Tasmania Law Review*, 11; O'Connell, *op. cit.*; Churchill, Lowe, *op. cit.*.

35. *UNCLOS III*, which incorporates provisions such as Art 88: "No state may validly purport to subject any part of the high seas to its sovereignty"; Art 94: "Duties of flag states"; Art 111: "Right of hot pursuit".

36. Kriwoken, Haward, VanderZwaag, Davis, *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (1996), Kluwer Law International, London, at 59 – 69.

37. *Commonwealth Gazette* S290, 1 August, 1994 (proclamation 29 July, 1994), incorporated into the *Seas and Submerged Lands Act* 1973, ss. 10B and 13B.

38. McLauchlin, *op. cit.*, at 14 - 16.

39. *Ibid.*; Shearer (1995), *op. cit.*; Donaghue, *Sovereignty and International Law* (1995), 17 *Adelaide Law Review*, 213: 1. No jurisdiction as an offence is yet to take place in the territorial sea. 2. Duty to prevent rather than board and arrest. 3. No internationally recognised exception to the doctrine of freedom of the seas and flag state jurisdiction.

40. Ss 184A(5), 184B(1), *Customs Act* 1901; ss 245B(5), 245C(1), *Migration Act* 1958.

41. *Polyukhovitch v. Commonwealth* (1991) 172 CLR 501, at 605 per Deane J, at 635-6 per Dawson J.

42. *Fishwick v. Cleland* (1960) 106 CLR 186. There is no requirement in the Constitution that the Commonwealth's legislative power is confined within the limits of Australia's legislative competence as recognised by international law: *Horta v. Commonwealth* (1994) 181 CLR 183 at 188-9, per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J.
However, this is in direct contrast to the *pacta sunt sevanda* (agreements are binding) principle prescribed by Art 2 (2) of the *Charter of the United Nations*, as amended (including the International Court of Justice), (done at San Francisco, 26 June, 1945), in force 24 October, 1945; and Art 26 of the *Vienna Convention on the Law of Treaties* (done at Vienna, 23 May, 1969), entry into force for Australia and generally, 27 January, 1980.

43. *Polyukhovich v. Commonwealth, loc. cit.*, at 599 per Deane J. The nexus can be defined between the state and the subject of the law by considering the territorial, nationality, protective, universality and passive personality principles; for more detail see Reicher (ed.), *Australian International Law: Cases and Materials* (1995), The Law Book Company, Sydney, at 244-6.

44. The criteria for establishing a valid nexus are discussed by Triggs. They are: (1) the territorial principle, which applies when an offence occurs within the territory of the prosecuting state; (2) the nationality principle, which applies when the offender is a national of the prosecuting state; (3) the protective principle, which is exercised where an extra-territorial act threatens the integrity of the prosecuting state; (4) the passive personality principle, which applies where the victim of the offence is a national of the prosecuting state; and (5) universality principle, which permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals, where the accuser's attack upon international order is of common concern to all mankind. Triggs, *Australia War Crimes Trials: A Moral Necessity or a Legal Minefield?* (1988), 16 *Melbourne University Law Review*, 382, cited in Reicher (ed.), *op. cit.*, at 244-245.

45. *Liangsiriprasert v. United States* [1991] 1 AC 225, at 251.

46. *Davis v. Commonwealth* (1988) 166 CLR 79 at 111.

47. "An act of the executive as a matter of policy performed in the course of its relationship with another State, including its relations with the subjects of that State ... is an act of State": Wade, *Act of State in English Law: Its Relations with International Law* (1934), 15 *British Yearbook of International Law* 98, at 103.

48. *Coe v. Commonwealth* (1979) 24 ALR 118 at 128, per Gibbs J; *Horta v. Commonwealth* (1994) 123 ALR 1 at 6 and 9; found the character of the actions and decisions made by the government were not justiciable; the court held it was unnecessary to answer the question of actions being justiciable; per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh J J.

49. *Bradley v. Commonwealth* (1973) 128 CLR 557.

50. Mason, *The Relationship Between International Law and National Law, and its Application in National Courts* (1992), 18 *Commonwealth Law Bulletin* 750, at 750.

51. *Kartinyeri v. Commonwealth* (1998) 195 CLR 337, at 384-5 per Gummow and Hayne J J.

52. Shearer; quoted in Alston, Chiam (eds), *Treaty Making and Australia: Globalisation Versus Sovereignty?* (1995), Federation Press, Leichhardt, at 93-98.

53. *Chhu Kkeng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38, 53 per Brennan, Deane and Dawson J J.

54. *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 ALR 353 at 362, per Mason C J and Deane J, noted reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is amenable to construction which is consistent with the provisions of an international instrument, which imposes obligations upon Australia, then a construction which is consistent with international law should prevail.

55. *Horta v. Commonwealth* (1994) 181 CLR 183 per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J at 188, 189.

56. The High Court has determined that issues arising from an exercise of the Parliament's prerogative power are not susceptible to judicial review:

Koowarta v. Bjelke-Petersen (1982) 153 CLR 168 at 229, per Mason J; *Minister for the Arts v. Peko-Wallsend Ltd* (1987) 15 FCR 274.

57. The Commonwealth Parliament can make laws in accordance with the heads of power established in the Constitution, but it cannot make laws to remove High Court jurisdiction (ss 75, 76, 77 of the Australian Constitution). The consequence of this doctrine in Australia is that a court cannot deny the validity of an exercise of legislative power merely on the grounds that the legislation abrogates freedoms which in the court's opinion should be preserved: *Nationwide News Pty Ltd v. Willis* (1992) 177 CLR 1, at 43 per Brennan J, and at 85–6 per Dawson J.

58. The Commonwealth of Australia has inherited all of the sovereign rights of the Queen: *Davis v. Commonwealth* (1988) 166 CLR 79 at 93. The prerogative powers of the Commonwealth include the power to enter international treaties, deal with other states and declare war, etc; *Simesk v. Macphee* (1982) 148 CLR 636 at 641-2.

59. Rt Hon Sir Harry Gibbs, *loc. cit.*, p. xx.

Chapter Eleven
The United Nations as a Source of International Legal Authority

Professor Gregory Rose

What are the connections between the United Nations and The Samuel Griffith Society? One is that Australian constitutional lawyers are now examining the relationship between international law and constitutional law.

Justice Kirby of the High Court of Australia first argued for the relevance of international law in construing the federal constitutional requirement of "just terms" in compensation for compulsorily acquired property (s. 51(xxxi)). In *Newcrest Mining v. Commonwealth* in 1997, he stated that in cases of ambiguity in the federal Constitution, "international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights".[1] The argument for the relevance of international law to constitutional interpretation was pressed in judgments by his Honour again in *Kartinyeri v. Commonwealth* in 1998,[2] concerning interpretation of the power to legislate in relation to race (s. 51(xv)), and again almost each year subsequently.[3]

The argument has generated controversy and has been viewed critically by other High Court Justices. Justices Gummow and Hayne in *Kartinyeri*, Justices Gleeson, McHugh and Gummow in *AMS v. AIF* in 1999,[4] and Justice Callinan in *Western Australia v. Ward* in 2002,[5] each stated that it is inappropriate to apply the principles of international law to constitutional interpretation. In *Al-Kateb v. Godwin* in 2004, Justice McHugh described the argument as "heretical".[6]

Controversy concerning the relevance of international law to constitutional law is erupting also in other constitutionally and democratically governed States. In the USA, Justice Ruth Bader Ginsburg of the federal Supreme Court aroused public criticism for her 2003 address to the American Constitutional Law Society, which advocated a similar deference to international law in constitutional interpretation. However, her argument has since been supported by at least two other Supreme Court justices in the USA. [7]

Back in Australia, in legal fields beyond constitutional law, such as human rights law, environmental law and commercial law, questions concerning the role of international law are evident. They range from questions concerning the predominance of the Executive in treaty-making, to the wide legislative powers that treaties vest in Parliament, to the latitude available to judges when employing international law in the application of legislation and common law.[8]

Competing Australian and international law

Some Australian legal academics have begun to describe the prevailing Australian attitude to international law as anxious, worrying and defensive. It has been viewed as a legal expression of the insular politics of Australian fundamentalism.[9] However, skepticism concerning the roles of international law within Australian laws is achieving higher profile and taking on a sense of immediacy for several more plausible reasons.

These include the rapid expansion of the scope, volume and prescriptive detail of international norms, and the fact that these norms increasingly impact on matters that concern the internal governance of countries, rather than merely aspects of their international relations. These norms are sometimes made by means of procedures that do not require the direct consent of an affected State, or that attenuate the requirement of individual State consent, where the norm is formed by the broader will of the "international community". International mechanisms to monitor, promote or coerce State compliance are emerging, lending to these norms new and substantial consequences.[10]

Consequently, there is growing concern in some quarters over perceived conflicts between national interests, set out in domestic laws and policies, and international laws. For example, concern has been articulated by some members of the current Australian Government, especially about international human rights norms that address aspects of Australian domestic governance.

Of course, not all Australians express such concern. Some members of Australian civil society support those same international norms, and see in government unease advantageous opportunities to exert influence. Indeed, the tension between international and domestic rules is often the product of a political struggle between domestic players projected onto an international stage. For example, in the human rights field, the domestic players might be generalised as lobby groups leveraging international norms against national governments. While majoritarian governments see the engagement of international institutions against them as an international interference in their democratically legitimated domestic mandate, the lobby groups see it as international legitimation of their rights.

This brings us directly to the question of whether the legal position articulated by an international institution about a State's domestic obligations should take precedence over a conflicting political position held by that State. In other words, should the State consider itself bound by an international norm in the absence of its specific sovereign consent to it, especially an international norm concerning its internal governance?

Sovereign consent to international laws

According to the traditional paradigm, international laws derived their legitimacy from the consent of sovereign States. The idea that a sovereign's consent is required as a precondition to it being legally bound in its international relations is as old as the idea of the State itself. This international principle reflected the reality in Italy when the legal notion of the State evolved during the Renaissance. Italian city States found it convenient to recognise each other as equals and to respect the immunities of each other's ambassadors. The doctrine of sovereign equality that they developed was later applied to the geographically wider modern State.

In 1648, the Peace of Westphalia shaped much of Europe as we know it today, defining some contemporary borders and formalising sovereigns and national polities. The Treaties certify the birth of the modern State, and recognise the respective secular sovereigns' rights to make alliances among themselves and with foreign powers.[11] Thus, the notion of sovereign equality, meaning that one sovereign State may not legally impose on another an obligation without the other's consent, became a fundamental feature of both the main sources of international law: treaties and customs.

The development of international law at the global level continues to be premised on the traditional theory of sovereign State consent. Nevertheless, in contemporary practice, direct consent is becoming less important. The increasing globalisation of all aspects of human life – economic, technological, social, cultural and political – has required increased levels of legal cooperation and coordination across national borders. International law has developed in range, depth and complexity, and international institutions have developed procedures to make it easier to adopt and apply international laws. Modern States have effectively ceded aspects of their sovereignty, in the sense of their absolute internal legal independence, to facilitate greater international cooperation and coordination.

Concerning the formation, application and interpretation of treaties, the *Vienna Convention on the Law of Treaties* is an authoritative statement of traditional principles. It provides that no agreement may impose obligations on a third party without its consent.[12] Conversely, every treaty obligation is premised on the consent of the parties to it. Nevertheless, the prerequisite of consent by States before they may be bound by treaty provisions is becoming attenuated as a result of the adoption of new procedures for negotiation, amendment, interpretation and enforcement of treaties.

In the negotiation of multilateral treaties in which many States participate, the use of "package deal" texts to which no reservation can be made, and of consensus or majority voting procedures for adoption of texts, reduce State negotiators' opportunities to incorporate national goals in an international text. Nevertheless, the State might find itself compelled to adopt the package deal because of the major disadvantages of exclusion from the multilateral regime.

In relation to amendments, non-objection and majority voting procedures are used to expedite entry into force without the requirement that States ratify amendments. For example, under the "tacit consent" procedure, if a Party does not object within 90 days after adoption of amendments to technical annexes of some International Maritime Organisation conventions, the amendments enter into force without the State's ratification or explicit consent. Under the *Montreal Protocol on Substances that Deplete the Ozone Layer*, certain amendments (called "adjustments") to the Protocol can be adopted by two-thirds majority vote, and will then enter into force automatically for all parties as specified in the adjustment.

Concerning the interpretation of treaties, independent experts committees and compulsory dispute resolution provisions have reduced State influence over the interpretation of some treaty texts. Trends that attenuate the prerequisite of consent are also evident in the imposition of obligations on non-parties to comply with communal resource regimes. For example, parties to the *High Seas Fish Stocks Agreement* are bound by subsequent related regional high seas fisheries agreements, even though not parties to them.

Concerning the formation of international legal custom, called customary international law, sovereign consent is also a traditional feature. The theory is that custom is formed by the concurrence of two complementary components: a particular pattern of practice by States in their international relations ("State practice"), together with the opinion of those States that their practice is a legal obligation ("*opinio juris*"). Both State practice and *opinio juris* are required to be near universal and uniform.[13] Examples of customary

international laws include the recognition of sovereign equality, honouring of treaties and protection of foreign diplomatic envoys. The consent of the sovereign State to the legal norm is implicit in the component of *opinio juris*. Disagreement, i.e., lack of consent, that a particular practice is a legal obligation, would undermine the near universal and uniform consent necessary to empirically prove the presence of *opinio juris*.

There are conceptual problems in the traditional theory of customary international law that manifest themselves in the myriad practical difficulties concerning state consent. In relation to both practice and *opinio juris* there is now controversy over whether mere statements (not linked with other positive action) can be considered to amount to State practice and can thereby produce "instant custom". United Nations resolutions would take on a legislative aspect if mere conference and meeting resolutions themselves were formative of customary international law.

There is also a diversity of opinions as to which bodies have the authority to pronounce that there is sufficient empirical evidence to prove the existence of a customary international law at a point in time. Candidate bodies include the judgments of the International Court of Justice and other international tribunals and national courts, and the opinions of international committees, meetings and academic researchers.[14]

The conclusion that must be drawn from this brief survey of contemporary developments in treaty and customary international law formation is that, in a variety of ways, the requirement of sovereign consent as a precondition to being legally bound is eroding.

In the absence of the direct consent of a sovereign State to be bound by a particular international law, whether treaty or custom, some other source of legitimacy needs to be found if the international law is to bind that State. This requirement for an alternative source of legitimacy is most acute where international laws address how a State must conduct its internal affairs. Claims of superiority for international law *vis á vis* national law need to be assessed by criteria that indicate their relative legitimacy.

Democratic criteria for international legitimacy

Despite critiques of its Euro-centric, masculinist and/or post-colonial aspects, many scholars presume an inherent authority in international laws over national laws. On this view, at least certain international laws are superior because they manifest "natural law". They are the basic laws of human experience, dictated by reason, universal and binding over all other laws.[15] This perspective is most evident in discourse concerning international peremptory norms, or "*jus cogens*", that prevail over all other international laws. However, it also extends to the wider fields of universal or *erga omnes* laws, concerning human rights or humanitarian rights and international environmental or natural resources obligations.[16] Governments and advocacy groups utilising the authority of international law for instrumental purposes reinforce this presumption of superiority with powerful rhetoric, especially in the field of human rights.[17]

Nevertheless, it is not a simple matter to identify natural laws or to determine who should be entrusted to identify them. Different religious and cultural systems would tend often to disagree on specific formulations. Great uncertainty surrounds even which international laws might be considered "*jus*

cogens", and negotiators of the *Vienna Convention on the Law of Treaties*, which codified the concept, could not agree on any.[18] Nor might an identified general principle of natural law be straightforward to apply to a complex and unique situation in a particular place and time. Therefore, the natural law seems a structure too poorly defined to clearly overshadow specific national laws.

Nor can the search for legitimacy conclude that it is simply the physical power to enforce international laws that forms a satisfactory legal criterion. National regimes can often exert greater physical force than can multilateral legal regimes, and there is no certainty as to this until after coalitions are formed and battle is done. Relative physical force is *realpolitik* but not a legal formula. Any claim to superior legal legitimacy must therefore rest on a more jurisprudential basis than brute power to enforce compliance.

That jurisprudential basis is the concept of relative justice. Two categories of justice criteria – procedural justice and substantive justice – form the indicators suggested here to prove the relative legitimacy of international law.[19] It would be necessary to demonstrate that the international law is superior in terms of both its qualities of procedural and substantive justice.

Procedural justice requires that a law be adopted in accordance with the appropriate legislative or judicial processes, as set out in some constitutional order. Substantive justice requires that the law conform to the moral, social, economic and cultural values of those persons it addresses.

The contemporary history of states demonstrates that the various values of a polity are most reliably determined by polls of its members. These are conducted regularly in the form of elections to government of persons who represent their values, or sometimes by *ad hoc* referenda on particular issues. Thus, democratic government has emerged as a reliable system to deliver substantive justice, which could synonymously be called democratic justice. Its democratic accountability mechanisms concurrently make it a more reliable deliverer of procedural justice also.

For an international law to have greater legitimacy than the national law of a liberal democratic state, then, it would need to be demonstrable that the international law is at least as just. To demonstrate that, first, the international law needs to be adopted under constitutional procedures, as guided by liberal principles, to promote democratic values. Second, it needs to be demonstrated that the international law promotes those values more effectively than the conflicting national law. The latter demonstration is a comparative utilitarian calculation of how many people are benefited, how much, and over how long.[20] For example, the value to a State X of cheap oil that produces air pollution might be less than the value to all other states of mitigating the damage to them caused by the drift of that air pollution. In this case, the international law could be more legitimate than the law of State X.

If it were demonstrated that functional democratic processes inform international law-making, then the greater legitimacy of international over national law-making might be premised on its greater democratic authority. By drawing on every voter in the world, albeit in appropriately qualified, weighted and indirect ways, it would identify substantive values more widely and thoroughly than do national law-making processes that draw on national communities only.

This simplistic account of substantive justice does not pretend to evaluate various models of democracy (representative, participatory, pluralist,

deliberative, etc) or the various views of liberal principles (utilitarian, rights-based, redistributive, etc) that guide democratic governance. For example, it does not address the strengths and weaknesses of the ways that a nuanced rights-based approach to democracy might affect the balance of conflicting interests between oppressive democratic majorities and sub-national minorities in need of protection. It merely illustrates the claim that liberal democracies can and do make for the legitimacy of their domestic laws.

As an alternative source of legitimacy to direct sovereign consent, has international law-making developed such constitutional procedures – ones that employ democratic processes guided by liberal principles?

United Nations constitutional processes

The bulk of contemporary international law at the global level is formed by the adoption of treaties and resolutions, primarily through United Nations fora. An examination of the liberal democratic qualities of these legal norms requires study of their formal adoption processes, which are set out in United Nations constitutional documents, and a survey of the implementation of those adoption processes in practice. That is, law-making is examined for its adherence to constitutionality, democratic authenticity and liberal principles.

Although the United Nations is not one monolithic organisation but several institutions, generically called organs, agencies and programs, their decision-making processes are similar and inter-related. The chief constitutional document is the *United Nations Charter*. It prevails over all other treaties.[21] The Charter sets out the purposes and principles of the United Nations, its organs, and their functions and decision-making procedures. The principal organs are the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice and the Secretariat. The Assembly and Councils can be likened to the legislative arm of government, and the Court and Secretariat to the judiciary and executive arms, respectively.

Only the Security Council has the authority to make binding decisions that all United Nations members must carry out, while the Assembly and other Councils are empowered merely to make recommendations.[22] For the binding decisions of the Security Council to have procedural legitimacy or constitutionality, they need to conform to procedures set out in the Charter. Yet the history of Security Council decision-making is coloured by departures from its constitutional procedures. Article 27 provides that each member of the Security Council shall have one vote, and that decisions on substantive matters shall be made by affirmative vote of nine of the fifteen members, including the concurring votes of the five permanent members. Nevertheless, the practice of adopting substantive decisions despite abstentions (instead of concurring affirmative votes) of permanent members of the Security Council has become regular.

The General Assembly also departs readily from other constitutional constraints. Article 12 provides that the General Assembly shall not make any recommendation with regard to a dispute or a peace and security situation that the Security Council is currently engaged by, unless the Security Council requests it to. Yet, the General Assembly commonly adopts such recommendations.

Delivery of procedural justice is not assisted by the parlous relationship of the Security Council and General Assembly to the judicial arm of the United

Nations. The Court's decisions indicate that the majority of its judiciary have considered it to be subordinate to both the General Assembly and the Security Council,[23] despite occasional rhetoric concerning judicial independence. Thus, the Court does not address itself to scrutiny of the constitutionality of decisions taken by either body.

These cursory observations of United Nations decision-making procedures identify significant shortcomings in procedural legitimacy that are common under its own constitutional processes. It does not have a robust separation of judicial powers, and its fundamental constitutional procedures for decision-making are not adhered to. Thus, not all international laws made by the United Nations enjoy procedural legitimacy.

To assess the legitimacy of United Nations decisions it is also necessary to consider whether they are substantively just, by examining the democratic qualities of its decision-making processes. Are they adequately designed and employed to identify and conform to the moral, social, economic and cultural values of those persons they address?

The major players drafting the *United Nations Charter* designed most decision-making procedures premised on the notion that all States are sovereign equals. Accordingly, all members of the United Nations General Assembly and two of its Councils have equal voting rights. Of course, this design is not inherently democratic. China and India, with over a third of the world's population (2 billion people), each have one vote, in common with Nauru (12,000 people).

Nor is there any procedural requirement that a state's vote conform to the values of its populace as identified by democratic polls. India is a reasonably functional democracy while China is not, yet there is no distinction between the votes that each exercises in these organs. Thus, the "one size fits all" institutional decision-making processes are designed too poorly to be able to reflect the moral, social, economic and cultural values of "the peoples of the United Nations" that the Assembly and Councils purport to serve.

Even a decision-making process that actually was based principally on indicators of democratic quality might need to be formulated to additionally reflect inherent differences in state interests in particular subject matters. For example, a United Nations institution adopting international laws concerning polar region management might better formulate its decision-making procedures to give special weight to the affected interests of polar countries. Weighting mechanisms in the decision-making procedure could include extra or chambered votes, vetos or monopoly over initiatives. Global decision-making on many other subjects – health, environment, human rights, fiscal, etc – could be distributed as votes weighted by relevant indicators, such as population, human development, economy, geography, natural resources, etc.

In summary, in our time of micro- and failed States, and of middle, great and super-power States, it is fantasy to believe that all 191 United Nations Member States must have identical voting weights and procedural status. Recommendations of organs based on equal votes often reflect the bizarre unreality of this legal fiction. The minority of truly capable and powerful States can be dictated to by overwhelming numbers of small States who lack the capacity to act on their own recommendations.

The chasm between notional equality and actual capacity was recognised by the drafters of the Charter in one respect. Recommendations and decisions in the UN Security Council were subjected to permanent veto rights allocated only

to the then five Great Powers (China, France, USSR, UK, USA), who formed the majority of its then nine members. The remaining four Security Council members were elected by the General Assembly for biennial terms. To reflect the broader membership of the United Nations in the wake of decolonisation, the number of non-permanent members was increased from four to ten by means of a Charter amendment in 1965.[24]

The ten non-permanent members are now elected on a geographically representative basis, in accordance with the regionalisation of United Nations membership into five geographic blocs formalised in 1968.[25] Since the drafting of the Charter, the powers of Brazil, Germany, India and Japan have risen, while China and the USA have risen further and the USSR, the UK and France have declined in relative economic, military and technological resources.

As discussed below, models for further expansion of Security Council membership to 25 are now proposed by the United Nations Secretary-General. However, any amendment of the Charter can come into force only on ratification by all five current permanent members,[26] who are unlikely to agree to significantly dilute their own procedural rights. Thus, the pattern of power from a passing moment in history has been frozen into present and future Security Council decision-making. It is not democratically representative or reflective of special interests.

Finally, do United Nations decisions follow liberal principles comparable to those that a liberal democratic state should adhere to? Liberalism has many disputed meanings, but included among its core principles are adherence to the rule of law and equal treatment before the law. These principles are strongly promoted in United Nations human rights instruments and statements. Yet they frequently do not find their way into United Nations practice.

Concerning the rule of law, some institutional departures from constitutional procedures were noted above, but other substantive examples are abundant. Concerning equal treatment of states in United Nations law, notorious departures are legion. The General Assembly cannot agree on a comprehensive condemnation of terrorism because many members support terrorism against Israel. The Security Council failed to act when it could have prevented genocide in Rwanda, although it did act in the former Yugoslavia. The Commission on Human Rights has engineered its own demise for its denials of equal treatment for states to which it applies human rights norms. Examples include its current reluctance to condemn genocide in Sudan. The malfeasance of the Commission and its sub-commissions, treaty committees and rapporteurs in applying human rights laws to all equally, leads to the inexorable conclusion that liberal principles at the heart of the human rights project are not applied by the United Nations itself.

Examination of the liberal and democratic qualities of United Nations decision-making formative of its legal norms is an unhappy process. It is apparent that formal decision-making procedures are not adhered to, that decision-making procedures employed are poorly designed to produce democratic quality, and that basic liberal principles are often flouted. United Nations constitutional processes are therefore inadequate to give its laws greater legitimacy than the national laws of a liberal democratic State, in the absence of that State's consent to the specific international law. The familiar observation that, although the United Nations is flawed, "if we didn't have it, we would have to invent it", tritely avoids considering whether we might invent

better international legal decision-making processes.

Enhancing constitutional legitimacy

Presuming that globalisation continues to require an increasing range, depth and complexity in international legal cooperation and coordination, new international legal decision-making processes are still sorely needed. The precondition of a state's sovereign consent being directly addressed to each new legal decision, in order that it bind the state, currently inhibits the delivery of the required legal standards (much as the prerequisite that each attendee at this conference must agree to the menu of a common meal would inhibit the rapid delivery of the meal). Therefore, alternatives to specific consent need to be developed to streamline processes for adopting international legal decisions and, to be legitimate, they need to be premised on constitutional procedures delivering democratic justice.

There appear to be three ways forward. One is a program to reform the United Nations from within, in accordance with the provisions of the Charter. The second is progressively to negotiate treaties that alter the processes for adopting legal decisions, incrementally altering decision-making procedures for particular subject matters under each treaty. The third is to develop alternative law-making institutions outside of the United Nations.

First, reforming the United Nations from within is the project that the current Secretary-General, Kofi Annan, would like to leave as his legacy. On 21 March, 2005 he proposed the organisation's most ambitious project for constitutional reform since its inception.[27] The most discussed proposal is to expand the Security Council by nine members, from 15 to 24, including either six new permanent members without veto powers, or eight new renewable positions. The other substantial proposal is to abolish the defunct Trusteeship Council and replace it with a Human Rights Council, smaller and more authoritative than the current Human Rights Commission. Each of these changes requires a Charter amendment. The Human Rights Commission would be dissolved, and a Peace Building Commission established under the Economic and Security Council by resolution.

The difficulty with the reform proposals is that they do not address the fundamental lack of democratic justice embedded within the Charter's foundations. They do not alter the entrenched veto powers of the permanent five members of the Security Council, or the fiction of sovereign equality in other decision-making organs. In fact, it is impossible to reform these from within the framework of the Charter, as the majority of United Nations members are not democracies and would oppose reforms premised on democratic justice. Therefore, efforts to reform from within, in accordance with the Charter, will be forever fruitless.

The second approach, which is to incrementally alter decision-making procedures for particular subject matters by means of *ad hoc* treaties, is already in progress. United Nations treaties concerning tropical timber, atmospheric ozone depletion, climate change and nuclear safety each differentiate the obligations of various categories of their parties.[28] They and others also set their entry into force provisions according to criteria related to the treaty subject matter, rather than according to the number of ratifications by sovereign equals. Outside the United Nations, institutions concerned with financial and trade matters have long qualified sovereign equality in decision-

making procedures by applying economic criteria. Nevertheless, treaties are negotiated on the fictitious premise of sovereign equality and are *ad hoc*. They form a meandering path that wanders without a destination.

The third approach, which is to develop alternative law-making institutions outside of the United Nations, is the only one that offers any potential. It is likely that other political alignments outside the UN, such as the G8, NATO or the "coalition of the willing", will develop international law-making roles independent of and overlapping the mandate of the United Nations. Weighted voting, direct democratic representation, chambered decision-making and strengthened judicial oversight of procedural integrity might ultimately evolve as new international institutional structures are built. This would seem to be the only hope to develop democratic justice in international law-making. The process of adoption of an international political model along these complex lines would be a fraught process requiring resolute leadership. However, it is not impossible.

Useful insights are available from the experience of the European Union, which has jettisoned the one-State-one-vote principle. It has qualified voting procedures that vary with the topic, three inter-dependent decision-making bodies that represent sovereign and popular concerns, counter-balancing of interests through chambered procedures, and a robust Court of Justice, and it is constantly seeking to improve the quality of its decision-making procedures by means of constitutional reform.

Yet one need not look so far as Europe. The Australian Constitution provides a federal legislative procedure that qualifies popular votes with regional votes that have differentiated *per capita* weights. The effect on Australian law-making of the Senate's differentiated *per capita* voting is moderated by the House of Representatives, and the combination of both Chambers seeks to set a balance between regional and popular values.

Conclusion

We have found that Australians have good reasons to be skeptical about the United Nations as a source of legal authority in Australian law. United Nations law-making often lacks procedural rigour and is not premised on democratic justice. All liberal democratic societies must be skeptical concerning the legitimacy of laws adopted and applied to them by the United Nations that conflict with their own valid laws.

Nevertheless, a modern globalised world needs international laws and a legitimate system for international law-making. The current United Nations model will not last forever. It was built on the ruins of the League of Nations (1920-1946). The primary objective for its core organs, as set out in Article 1 of the Charter, is to maintain international peace and security, yet there are 35 armed conflicts raging at the moment and many more have gone before, while evidence of any conflagrations that the United Nations has prevented is scarce.

The Iraq oil-for-food US$10 billion scandal, and its alleged influence on Security Council decision-making, is symptomatic of a fundamental state of crisis. The Trusteeship Council that oversaw decolonisation is already defunct, and the General Assembly and Security Council are chronically dysfunctional. Currently, the central institutions of the United Nations are in terminal decline, and it is probable that alternative institutions will begin to evolve in two or three decades.

Therefore, the time has come to look to the future and to think about the fundamentals of a global political architecture better adapted to the weighty international law-making needs of the emerging 21st Century. A democratically and procedurally robust constitutional basis for international law-making is essential – one that could produce norms considered legitimately applicable within Australia even in the absence of specific sovereign consent.

Endnotes:

1. *Newcrest Mining (WA) Ltd v. Commonwealth* [1997] HCA 38. See also Kirby, Michael, *Popular Sovereignty and the True Foundation of the Australian Constitution*, in the 1997 Deakin Law School Public Oration, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_deakin2.htm. Parts of the following discussion draw on a useful survey in Charlesworth H, Chiam M, Hovel D, Williams G, *Deep Anxieties: Australia and the International Legal Order*, 25 *Sydney Law Review* (2003), 424.
2. *Kartinyeri v. Commonwealth* [1998] HCA 22.
3. See the cases cited below and *Austin v. Commonwealth* [2003] HCA 3.
4. *AMS v. AIF* and *AIF v. AMS* [1999] HCA 26.
5. *Western Australia v. Ward; Attorney-General (NT) v. Ward; Ningarmara v. Northern Territory* [2002] HCA 28.
6. *Al-Kateb v. Godwin* [2004] HCA 37.
7. See Kirby, *op. cit.*, and *O'Connor praises international law*, WorldNetDaily, 27 October, 2004, available at http://www.wnd.com/news/article.asp?ARTICLE_ID=41143.
8. Charlesworth *et al*, *op. cit.*.
9. *ibid.*.
10. Kumm, Matthias, *The Legitimacy of International Law: A Constitutionalist Framework*, 15.5 *European Journal of International Law* (2004), 907 at 913.
11. Van Creveld, Martin, *The Rise and Decline of the State* (Cambridge University Press, 1999), 86.
12. *Vienna Convention on the Law of Treaties*, Art. 34.
13. *North Sea Continental Shelf Cases* [1969] ICJ Reports 3.
14. Thus, theoretical difficulties beset the list of human rights that comprise "customary international human rights law", identified by the expert members of the United Nations Human Rights Committee under the *International Covenant on Civil and Political Rights* in their General Comment 24 (1994). See Murphy, John F, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), 23.
15. The association between international law and natural law was made by the "father of international law", Hugo Grotius, in *De Jure Belli Ac Pacis* in 1625.
16. Goldsmith, Jack L, Posner E A, *The Limits of International Law* (2005), 24.
17. Discussed in Ignatieff, Michael, *Human Rights as Politics and Idolatry* (Princeton University Press, NJ, 2001).
18. Murphy, *op. cit.*, p. 20.

19. Drawn from Bodansky, Daniel, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 *American Journal of International Law* (1999), 596.

20. "An action may be said to be conformable to the principle of utility ... when the tendency it has to augment the happiness of the community is greater than any it has to diminish it". Bentham, Jeremy, *An introduction to the principles of morals and legislation*, in Bowring, John, *The works of Jeremy Bentham* (Edinburgh, 1943), vol. I, p. 1.

21. Charter Article 103 provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

22. Charter Article 25 provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Recommendations of the General Assembly, however, can carry legal weight as *indicia* of customary international law.

23. Decisions of the Court open to such interpretation include its 1998 decision on *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United States of America*), and its 2004 advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

24. Charter, Article 23.

25. General Assembly XVIII (1968), Resolution 1991.

26. Charter, Article 109.

27. *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNGA Report of the Secretary General, A/59/2005, 21 March, 2005 (incorporating recommendations from United Nations *Report of the High Level Panel on Threats Challenges and Change, A more secure world: Our Shared Responsibility*, 2004).

28. Cullet, Philippe, *Differential Treatment in International Law: Towards a New Paradigm of International Relations*, 10.3 *European Journal Of International Law* (1999), 549.

Appendix I
Tribute to the late Sir Harry Gibbs

John Stone

Since its seventeenth Conference, to which these Proceedings are principally devoted, The Samuel Griffith Society suffered a tragic blow from the death, on 25 June, 2005, of its President, the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE. Apart from an article which I was able to contribute on 1 July to *The Australian* (see below), and an appropriate donation which the Society has made to Kidney Health Australia (in lieu of flowers, on the occasion of the State Memorial Service for Sir Harry in St. Stephen's Church, Macquarie Street, Sydney on 11 July), there has been no opportunity for any more formal tribute from the Society's members to the memory of the man who, since the Society's inception, presided over it and, in doing so, lent to it the lustre of his name and reputation.

In editing these Proceedings I have therefore felt it appropriate – and I trust that members may agree – to include this short Appendix as a tribute to Sir Harry, on behalf of all members of the Society.

Since much of what I would wish to say in such a tribute has already been said in that newspaper article to which I referred above, and since in all probability the great majority of our members will not have seen it at the time, it may be best to begin by quoting it in full.

***The Australian*, 1 July, 2005**
Harry Gibbs – a wealth of wisdom

John Stone **farewells Sir Harry Gibbs, a former chief justice of Australia and an avowed federalist.**

"In *The Knight's Tale* Chaucer describes his principal character as 'a verray, parfit gentil knyght'. There could hardly be a more apt description of the late Sir Harry Gibbs, who died in Sydney last Saturday aged 88, and whose remains were cremated in the utmost privacy on Tuesday. Under his extremely firm instructions, all public notice of his death was withheld until after his cremation. In death, as in life, he remained modest almost to a fault -- a truly perfect gentle knight indeed.

"Legal commentators will doubtless attest to Sir Harry's greatness as a judge -- first in the Supreme Court of Queensland, then in the Federal Bankruptcy Court, and finally during his 16-year career in the High Court, including as Chief Justice from February,1981 until retirement in August, 1987.

"Others have previously assessed his judicial standing. Lord Wilberforce, often described as the greatest English 20th Century judge, who became a friend of Sir Harry's after sitting with him in the Privy Council, described him as 'essentially the professional Judge, patient, receptive,....', and said that he (Wilberforce) 'was personally the better -- and the happier -- for having known him'. So were we all.

"That quote, from Joan Priest's biography, *Sir Harry Gibbs: Without Fear or Favour*, accompanies another from a very different but also eminent Law Lord. Lord Denning, often regarded as a radical, paid Sir Harry the supreme professional compliment of saying not only that 'his work as Chief Justice was of the first quality', but also that 'I would rank him as one of the greatest of your Chief Justices, rivaling even..... Sir Owen Dixon'.

"I first met the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE (to give him, rightfully, his full title) after he became Chief Justice. The National Debt Commission (since abolished) was then chaired, *ex officio*, by the Chief Justice of the High Court, and the Secretary to the Treasury was also, *ex officio*, a member. The Commission's meetings were brief and formal, but his attention to detail and his unfailingly courteous conduct of proceedings were evident.

"When The Samuel Griffith Society was first conceived in late 1991, there arose the question of who should be its inaugural President. I 'phoned Sir Harry and, after explaining the nature of our enterprise, invited him to accept this wholly unpaid office in this wholly unknown body. Having examined our draft Statement of Purpose (and indeed contributed to its final form) he readily accepted. Overnight, the Society became one which – all the animadversions of the *bien pensants* notwithstanding – could not be ignored.

"Why choose Sir Harry Gibbs in this role? First, because the Society's central purpose was to promote debate about Australia's Constitution from a *federal* (i.e., anti-centralist) perspective. Even to one not learned in the law, it was obvious that Sir Harry had long been the outstanding judicial exponent of such a viewpoint. His dissent in the *Australian Assistance Plan Case* (the Whitlam Government's abuse of the Appropriations power), his dissent in *Koowarta* and, above all, his dissent in the *Tasmanian Dams Case* (the Hawke Government's abuse of the external affairs power), all marked him out as one respecting the fundamentally federal nature of Australia's constitutional arrangements, and distrustful, on general civil liberties grounds, of the creeping concentration of constitutional power in that most un-Australian of our cities, Canberra.

"Incidentally, those concerned about the headlong rush of Commonwealth Ministers into areas having nothing to do with their responsibilities would do well to recall Sir Harry's dissenting judgment in the *AAP Case*, where, as he truly said, the Whitlam Government's interpretation of Section 81 (the Appropriations power) was such that, if accepted, it would mean that the Commonwealth could do anything it liked merely by including a two line expenditure item in the relevant *Appropriations Bill*.

"During the following thirteen years The Samuel Griffith Society has held 17 weekend conferences. Apart from the first, which he was forced to miss because of an unbreakable engagement in London (the installation in St Paul's Cathedral of his personal heraldic banner as a Knight Grand Cross of the Order of Saint Michael and Saint George), Sir Harry attended all but the last two, in Perth and Coolangatta, to which, on medical advice, he was unable to travel. For all those years he also presided, with that same attention to detail and that same unfailing courtesy, over our telephone hook-up Board meetings.

"From 1993 onwards, he composed each year an Australia Day message to members of the Society, edited texts of some of which have appeared on *The Australian*'s Opinion page. Apart from contributing no less than eleven papers to our conferences, he also wrote for the Society several 'tracts for the times' on

such issues as the 1999 proposal to amend the Preamble to the Australian Constitution.

"Last year, Volume 16 of the Society's Proceedings, *Upholding the Australian Constitution*, included Sir Harry's Australia Day messages for 1993 to 2000 (the 2001 to 2005 messages will appear in Volume 17). In an introductory note I said that, '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)'. They were 'moderate, judicial (naturally), logical, incisive and pithily expressed'.

"Sir Harry's messages were also often extremely topical. In 1993, when we were being lectured *ad nauseam* about our 'shameful' past by people laughably describing themselves as historians, how refreshing it was to read that: '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 1994, among all the hand-wringing then (and to a lesser degree, still) prevalent within the Aboriginal industry and its collaborators, consider the following words of calmly moderate reason: 'No person of goodwill 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.....the result will be resentment rather than reconciliation'.

"A more recent (2002) message confronted squarely much of the nonsense spouted by refugee activists: 'To acknowledge, as the *Convention Relating to the Status of Refugees* provides, that there should be no discrimination against refugees on the ground of race, does not mean that it would be in any way wrong in principle for a government to adopt an immigration policy that is racially based so far as persons other than refugees are concerned'.

"Even more confronting to those thoughtless persons who, in the face of the mounting body of evidence as to the non-viability of non-integrated societies, continue to insist that our immigration policy should be rigidly 'multicultural', are the immediately following sentences: 'While it would be grossly offensive to modern standards for a state to discriminate against any of its own citizens on the ground of race, a state is entitled to prevent the immigration of persons whose culture is such that they are unlikely readily to integrate into society, or at least to ensure that persons of that kind do not enter the country in such numbers that they will be likely to form a distinct and alien section of society, with the resulting problems that we have seen in the United Kingdom' (and not only there).

"At a time when, in particular, legitimate questions are being increasingly raised about the capacity of Muslim immigrants either to whole-heartedly embrace their fellow Australians, or to give their loyalty first and foremost to Australia rather than to their religious culture, these words continue to put to our government questions of a kind which it appears fearfully reluctant to answer.

"At the time of his swearing in as Chief Justice, Sir Harry said that, if Australia's courts were generally trusted, 'it is because they are seen to apply

the law. Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles'.

"It was Sir Harry's unhappy fate, over the next 24 years, to observe a growing number of judicial persons doing just that – most grossly so in *Mabo* – with consequences for Australians' trust in their courts that, as his words implied, have predictably flowed from such activist behaviour".

The article was accompanied, I should add, by a most appropriate photograph of Sir Harry, at his desk and surrounded by his books, and carrying the following caption: "**Modest almost to a fault:** Sir Harry confronted those who insisted that our immigration policy should be rigidly 'multicultural' ".

That caption, of course, draws upon the passage, quoted in the article, from Sir Harry's Australia Day message to members for 2002. That message, along with those for 2001 and 2003-2005, is included in Appendix II to this volume of the Proceedings.

It goes without saying that Sir Harry was held in the highest respect by our members for his learning, his scholarship, and his transparent integrity of character. Beyond that, however, he was also regarded with great personal affection. In May, 2003, at the outset of the Society's fifteenth Conference, held in Adelaide (and as it proved, the last which, because of health problems, he was able to attend in person), the Board of Management, on behalf of the membership and without Sir Harry's foreknowledge, made a formal presentation to him.

The presentation took the form of four books, plus a "rare" copy of *The Commonwealth of Australia Constitution Act together with the Debates and Speeches on the same in the Imperial Parliament*, published in 1900. Professor David Flint, who was entrusted by the Board with the task of making the presentation speech, concluded by saying that the Society made "this presentation to you, Sir Harry, as a small token of the esteem in which we hold you, and for the active leadership you have given to The Samuel Griffith Society,……". (The full text of Professor Flint's remarks is given in Appendix I to Volume 15 of the Proceedings).

At a meeting on 6 July, 2005 the Board of Management discussed, in a preliminary fashion, ways in which the Society might seek to commemorate our former friend and colleague. It resolved that, at the Society's next Conference in 2006, arrangements should be made for the delivery of a lecture in his honour, to be known as The Sir Harry Gibbs Memorial Oration, and that this Oration should be given on a regular basis (annually or biannually) at Society Conferences thereafter. It also resolved that some part of the 2006 Conference should be set aside for papers constituting a more general *festschrift* in appreciation of Sir Harry's life and achievements.

That is all to the good. However, I personally believe that the power of Sir Harry Gibbs's life and achievements is such as to live on in any case for other reasons. Two examples spring immediately to mind.

This volume of our Proceedings contains, at Chapter Nine, a particularly important paper by Mr Bryan Pape, *The Use and Abuse of the Commonwealth Finance Power,* in which he forcefully traces the abuse by successive Commonwealth governments over the years of ss. 81 and 83 of the Constitution. Beginning in a small way as early as 1926 in respect of the *Commonwealth Aid*

Roads Act of that year, the abuse in question came to its first full flowering in the *Australian Assistance Plan Act* 1974, when the Whitlam Government (of course!) purported to take power to make grants to various so-called Regional Councils throughout Australia. Encouraged by the weak and divided decisions of a majority of Justices who heard the resulting High Court challenge by the State of Victoria in 1975, successive Commonwealth governments have continued to abuse the Appropriations power ever since, and the Howard Government not least.

Sir Harry's dissenting opinion in the *Australian Assistance Plan Case (AAP Case)* was, as always, a model of intellectual clarity and federal constitutional principle. It is not, I believe, mere wishful thinking on my part when I say that his words in that dissent will ring out again in some future challenge to this increasingly flagrant abuse of Commonwealth power.

My second example is of a rather different kind. Two days ago, on Sunday, 17 July, 2005 the ABC TV *Insiders* program was largely devoted to the aftermath of the London bombings by Islamist terrorists. In the course of that program its presenter, Mr Barrie Cassidy (formerly chief press secretary to Prime Minister Bob Hawke) put up on the screen the words occurring in the third paragraph of Sir Harry's Australia Day 2002 message, which had been quoted in that article in *The Australian* reproduced above.

In doing so, Mr Cassidy drew particular attention to what he called Sir Harry's "prescient" reference, three years ago, to "the resulting problems that we have seen in the United Kingdom", when "persons whose culture is such that they are unlikely readily to integrate into society" are allowed to "enter the country in such numbers that they will be likely to form a distinct and alien section of society". This very morning, here in Sydney, Australia's most prominent and highest-rating radio talk-back host, Mr Alan Jones, quoted in full (twice, at different points of his program on Station 2GB) those same words of Sir Harry's. I predict that, in this respect also, the latter's "wealth of wisdom" will continue to be drawn upon by successive generations of Australians.

Let me conclude with those words quoted by Sir Harry's biographer, Joan Priest, from Lord Wilberforce, who, as noted in my article in *The Australian*, is often described as the greatest English 20th Century judge. He said of Sir Harry that he, Wilberforce, was "personally the better – and the happier – for having known him". I believe that I speak for every member of our Society in saying that the same was true for us all.

Sydney
19 July, 2005

Appendix II
Australia Day Messages, 2001-2005

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Editor's Note

On the occasion of each Australia Day since the Society's inception, our late President, the Rt Hon Sir Harry Gibbs, forwarded an Australia Day message to all members of the Society.

As explained in the Foreword to Volume 16 of these Proceedings, the opportunity has been taken, commencing with Appendix I to that volume, to record these messages in the Society's Proceedings. For reasons of space, that Appendix was confined to Sir Harry's messages for the years 1993 through 2000. The messages for the years 2001 through 2005 are now recorded here. Sadly, they will be the last to be received from him.

Australia Day Message, 26 January, 2001

As we all know, this Australia Day occurs at a time when we are celebrating the centenary of the adoption of the Commonwealth Constitution.

The federation of the Australian colonies had the incidental benefit that it could not have been achieved without a written Constitution which provided for a bicameral legislature and which entrenched the position of the States. These and other safeguards that the Constitution provides are not widely understood or valued. Politicians tend to chafe at the power of the Senate, which, it is true, sometimes acts capriciously, and businessmen sometimes assert that they would prefer the uniformity of a centralised system to the diversity caused by conflicting State laws and regulations. However, since nowadays the Executive so often controls the lower House of Parliament, with a unicameral legislature a government can readily become an elective dictatorship, whereas the existence of the Senate, and the division of power between the Commonwealth and the States, provide checks on the abuse of power.

The fact that our Constitution can be altered only by referendum has meant that no Australian government has been able to take advantage of a temporary majority in Parliament by altering the constitutional framework in a fundamental respect, without first obtaining the approval of the people. An Australian government could not follow the example so unconscionably set by the Queensland government, which in 1922 abolished the Legislative Council of that State, nor could it readily alter the nature of the Senate as the Blair Government in the United Kingdom has done with the House of Lords. The wish of a former Prime Minister to see the States done away with has remained a wish.

Our federation today is very different from that envisaged by the framers of the Constitution. That has been due largely to decisions of the High Court, which since the 1920s have generally favoured central power, but in part also, to the acquiescence of the States themselves, which have agreed to uniformity of action on a scale which would not be contemplated in the United States.

The competition policy, which all States and the Commonwealth have adopted, is an example of this uniform Commonwealth-State action. The insistence on competition no doubt is beneficial to trade and commerce, but that is no reason to require the policy to be applied to all human affairs. The application of the policy to the legal profession has caused nothing but harm; for example, lawyers now advertise and tout for business on a grand scale, and instigate class actions whenever persons suffer a common misfortune. It is almost beyond belief that bureaucrats should seek to extend this doctrine to the medical profession in a way which might lower the qualifications of medical specialists.

Although the nature of the federal compact has changed, the Constitution has enabled Australia to remain a free and democratic country, under the rule of law, during a turbulent century when much of the world suffered oppression, revolution or chaos.

Not to our surprise, the media has proclaimed that while celebrating our centenary we should feel shame for the way in which the Aboriginal people have been treated in the past and for the unfortunate situation of some of them at present. The white settlement of Australia was inevitably a catastrophe for the Aborigines, because the two cultures that came into conflict were millennia apart in point of development. It would be hypocritical, as well as futile, to

express regret or apology for the white settlement of Australia, which was of course the foundation of the existence of our nation.

There were individual crimes and blunders, as there have been in all societies. Aborigines were treated as an inferior race, which was an enduring humiliation for them, and some policies of the governments may seem unacceptable to those who apply the standards that attract popular support today; but it is absurd to judge the past in the light of present opinions.

A current matter of grave concern is the state of Aboriginal health, but governments have made considerable efforts, and expended large sums of money, in trying to ameliorate that situation, and in a great many instances Aboriginal health is the product of the manner of living which those affected have adopted. We may well feel pity or sorrow for the state of Aboriginal health, but not shame.

Surely we should be concerned when we consider what is likely to be the effect on the present generation of children of indoctrinating them with the belief that we are invaders, usurpers of the land of others, and that our history is a shameful one.

The truth is that our history is one of which we can be proud, and that we should feel nothing but gratitude to the framers of our Constitution.

I wish you all a happy Australia Day.

Australia Day Message, 26 January, 2002

I wish to say a few words about two issues of particular significance that fell for consideration during 2001 and that are likely to cause continuing controversy during 2002.

Opinions differ widely as to what should be done with respect to the hundreds of people who, claiming to be refugees, seek to be smuggled, by boat, onto the remote islands, reefs and shores of Australia. The "Pacific Solution" – the interception of the boats and the transport of the boat people to various Pacific islands – has been adversely criticised in terms that sometime verge on the hysterical. One criticism, that the policy of the Government is racist, is quite ill-founded. Most of the boat people have come from central Asia, but that is not the reason for their exclusion; whatever their race, they are prevented from making an unauthorised intrusion into Australia, particularly since their attempt is made in pursuance of a conspiracy to which each of them is necessarily a party.

To acknowledge, as the *Convention Relating to the Status of Refugees* provides, that there should be no discrimination against refugees on the ground of race, does not mean that it would be in any way wrong in principle for a government to adopt an immigration policy that is racially based so far as persons other than refugees are concerned. While it would be grossly offensive to modern standards for a state to discriminate against any of its own citizens on the ground of race, a state is entitled to prevent the immigration of persons whose culture is such that they are unlikely readily to integrate into society, or at least to ensure that persons of that kind do not enter the country in such numbers that they will be likely to form a distinct and alien section of society with the resulting problems that we have seen in the United Kingdom. However, the "Pacific Solution" does not discriminate against the boat people on the ground of race.

The criticism that the policy of the Government was in breach of its international obligations, raises more difficult questions. The 1951 *Convention Relating to the Status of Refugees* (which has been extended by the 1967 Protocol to apply to all refugees, no matter when they attained that status) forbids a state from expelling a refugee lawfully within its territory, save on grounds of national security or public order. A refugee is defined as a person who has left the country of his or her nationality with a well founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion. A person is a refugee if he or she satisfies that criterion, and this will necessarily be before his or her status has been formally determined. The Convention does not prescribe how, when or where a formal determination of refugee status is to be made, indeed it does not expressly require that any such determination should be made, although an obligation to make a determination might well be implied.

Obviously not all persons who claim to be refugees will in truth answer the criterion prescribed by the Convention. Literally millions of people in the Third World seek to escape from their homelands and to settle in developed countries like Australia. Some do so because of a well founded fear of persecution, others to leave a society which is in a state of collapse, and others simply because they wish to enjoy the economic and social benefits which a developed society offers. Many, even if refugees, wish to choose their preferred place of refuge, and pass

through several countries where they would be free from persecution to seek to enter a country such as Australia, where they hope to enjoy the advantages offered by a liberal society. The Convention recognises that penalties may be imposed on refugees who are present in a state without authority and who have not come directly from a territory where their life or liberty is threatened, unless such persons have presented themselves to the authorities without delay and have shown good cause for their illegal entry and presence. However, it does not seem to me to make clear whether such persons may be expelled.

If a boat person transported to (say) Nauru proves to have been in fact motivated purely by a desire for economic or social benefit, it will be clear that there has been no breach of the Convention. If however, he or she is determined to be a refugee, the question then does become whether Australia has acted in breach of the Convention. That will depend on whether the Convention requires that when a person claiming to be a refugee is apprehended in Australian territorial waters or on an Australian ship, the formal determination of the status of that person must be made in Australia. The Convention does not expressly so require; whether it implicitly does so is an arguable question.

Two things are however clear. One is that the "Pacific Solution", although it may serve as a deterrent, cannot forever protect Australia from unauthorised entry; considerations of cost and practicality mean that the policy is unlikely to be continued indefinitely. The second is that the Convention needs to be rewritten or entirely abrogated. The Convention is ill suited to the conditions of today, when thousands of people are moving across state boundaries in search of a better life.

The plight of the boat people may evoke sympathy, but the immigration policies of a government must be determined by the national interest, rather than by sympathy for individuals.

Another matter which raises serious questions for consideration is the war against terrorism. Terrorism to achieve a political result within a particular society is not uncommon, but what is new is the use of terrorism to damage or destroy a foreign society for ideological reasons . After the eleventh of September, [2001] it was argued by some that the United States was not justified in going to war; it was said that the proper response to the criminal actions committed on that day was to seek the extradition of the criminals and put them on trial. The impracticability of seeking to extradite Osama Bin Laden has been made clear by subsequent events. The atrocities of the eleventh of September made it clear that American society was threatened by men ruthless and capable enough to inflict immeasurable damage if they could obtain nuclear or biological weapons, as it appears they planned to do. The United States was entirely justified in taking extreme measures to counter this threat, and it was prudent for Australia, which sorely needs the United States as an ally, to support the United States, whether or not the terrorists directly threatened Australia.

In the emergency situation created by war, governments tend to adopt drastic measures in the mistaken belief that they contribute to national security. For example, in the early days of World War II in Australia, persons were interned simply because they had Italian names. Similarly, in the United States, American citizens of Japanese descent were unnecessarily incarcerated. It is not surprising that the security services now are seeking to be given extraordinary powers to arrest persons on suspicion and to hold them for some

days incommunicado for questioning. Powers of that kind are quite unnecessary, and we would undermine, rather than strengthen, our free society by resorting to such absolutist measures.

In spite of the tribulations of 2001, life has continued on its common way for most Australians, and we have escaped the social disruption and economic uncertainties that have affected many other parts of the world.

Australia Day Message, 26 January, 2003

During the year the Society held another successful conference, which was notable for the fact that the opening speech was delivered by the Chief Justice of Australia, the Honourable Murray Gleeson, AC. Appropriately, the vote of thanks was proposed by the Honourable Mr Justice Dyson Heydon, who,we were very pleased to learn, has been appointed to the High Court. As one expected, his appointment provoked expressions of regret that a woman was not appointed, since Mr Justice Heydon will take the place of Justice Mary Gaudron.

There are a number of reasons why appointments to judicial office, particularly to the High Court, should be made on merit – i.e., on learning and proved ability in the working of the courts – and, subject of course to character, on no other consideration. The High Court decides questions of great moment, and not infrequently does so by a majority of one, so that there is no room on the Court for any except those who are best qualified.

Further, the Court is not a representative body – its duty is to apply the law, and not to favour sectional interests – and indeed it would be impossible for the Court to represent all sections of society. It is true that there are some very able women in the legal profession, but it is no disrespect to them to say that none has the learning, ability and experience of Mr Justice Heydon.

For Australia the year ended unhappily, with the nation threatened by terrorism and by war. Those threats require difficult decisions to be made. We now know that the terrorist gangs, which exist in various parts of the world, and are united at least by a fanatical adherence to the more extreme doctrines of Muslim ideology, are capable of patient and skilful planning to achieve their murderous purposes, and are willing to include among their innocent victims Australians, or indeed any others they regard as infidels, even if their preferred targets are Americans and Israelis. What we do not know is how likely it is that these zealots will attempt to commit an atrocity on Australian soil.

Notwithstanding that uncertainty, the Government must (as it has done) take steps to avert a possible catastrophe of the terrorists' making. It is obvious that in peacetime it is impossible to guard every vital installation and every place where people congregate. Great reliance must therefore be placed on our intelligence services to discover in advance the terrorists' plans so that they may be aborted.

The intelligence bodies must accordingly be given the powers necessary to perform their vital functions. This must, however, be done with the minimum detraction from the freedoms which we value. This is particularly so since experience has shown that some members of the intelligence services (like other people) may act with excessive zeal – remember, for example, the many harmless citizens who were interned for no sufficient reason in the two World Wars.

The proper balance is not easy to achieve – among the controversial questions as to the extent of the proposed powers are three that may be mentioned. Should ASIO or the police be given the power to require persons who are suspected of having knowledge of terrorist activities to answer questions, and to detain them for questioning? It might be thought that such a power would justifiably be conferred in the interests of society as a whole, provided that the power is hedged about with safeguards sufficient to prevent its abuse.

Should a person so detained be held incommunicado? Many would think

that although terrorists lurk in the shadows, the agents of government should work in the open, to make them more readily accountable.

Should children be detained for the purpose of questioning? Unfortunately it is notorious that evil persons do not scruple to use children as their agents. Questions such as these will have to be considered carefully by Parliament, and perhaps ultimately by the Courts.

The decision whether Iraq will be invaded will not be made by Australia. The only justification for an invasion, which would result in what is euphemistically called "collateral damage" to many innocent citizens, as well as the inevitable military casualties, and which would be likely dangerously to inflame opinion in the Muslim world, would be that war was necessary as a reasonable measure of defence.

Since it is highly improbable that Iraq would attack any of the Western powers except in its own defence, an invasion of Iraq could be justified as a defensive measure only if Iraq has chemical, biological or nuclear weapons and is likely to provide them to terrorists. No doubt if it has weapons of this kind, it would not hesitate to allow terrorists to use them, but many remain to be convinced that Iraq has these devastating weapons. The report of the weapons inspectors is due, I think, tomorrow (27 January) and may make the position clearer.

It is to be hoped that a wish to remove Saddam Hussein from power, or a mere suspicion that he has destructive weapons, will not be regarded as a sufficient cause for war. If a war is commenced, and the Australian Government is convinced that its commencement was justified, one question will be whether the United Nations has given sanction to it, and another whether it is in Australia's interests to take part. In considering the latter question, it would be relevant to take into account the fact that there are good reasons for acting in support of so valuable an ally as the United States, and the possibility that destructive weapons if supplied to terrorists might be used against Australian interests, or even within Australia.

One wonders whether North Korea is as threatening to peace as Iraq.

Let us hope that Australia Day will be the commencement of a time which is safer and happier than the omens would at present indicate.

However that may be, I offer best wishes to you all, and I hope to see you at our next Conference, to commence in Adelaide on 23 May, 2003.

Australia Day Message, 26 January, 2004

You will have received the proceedings of our Conference held last year in Adelaide which discussed, amongst other matters, some of the proposals that were to be put to the South Australian Constitutional Convention later that year. One of those proposals, which is of particular interest, namely for the introduction of citizens' initiated referenda, is due to be considered by the South Australian Parliament. Another matter discussed, about which I wish to say a few words, concerns the need for, and the role of, Upper Houses in our constitutional systems. This is particularly relevant, because a Commonwealth Committee has been examining the power of the Senate to obstruct legislation passed by the House of Representatives, and in particular, whether there can be devised an acceptable alternative to the provisions contained in s.128 of the Constitution for a double dissolution.

Under our system, unlike those of the United States and France, except in the most exceptional circumstances, the party, or coalition of parties, which has a majority in the House of Representatives, chooses the members of the executive government. The will of the Executive usually dominates the House of Representatives, so that, unless there is a party revolt, the legislation introduced by the Executive will be passed by the House. This combination of legislative and executive power would, particularly if a radical Government held office, be likely to result in the passage of partisan legislation, and to pose a threat to the rights and liberties, not only of minorities, but also of sections of society not in favour with the Government, unless the power was subject to an effective check. One such check is at present provided by the Senate. The judiciary provides another, but its powers are limited.

Of course, an Upper House that can review, but not ultimately reject, legislation serves a useful purpose. But a Chamber with such limited powers could not prevent the passage of extreme or ill considered legislation. The House of Lords in the United Kingdom now is no more than a house of review, and has been unable to prevent the passage of legislation which it considered undesirable, including legislation radically affecting the composition of the House of Lords itself. In Queensland, where the Legislative Council was abolished in the 1920s, there have been occasions in the past where hastily conceived legislation has been rushed through the Legislative Assembly, on occasion under cover of darkness.

For the Senate to operate as an effective check on the combined power of the Executive and the House of Representatives, it must be able to do more than delay or review legislation. It must be able (and it is at present able) to reject legislation without the House of Representatives having power to over-ride the rejection. Of course, it may choose not to do so when the party which controls the House of Representatives also has a majority in the Senate.

The power of the Senate can be abused. The Senate may sometimes reject legislation that is desirable or even necessary, simply for political reasons or out of a stubborn desire to obstruct the Government. Is there a way, other than by the procedure of s.128, of resolving a deadlock caused when the Senate obstructs legislation, without depriving the Senate of its essential power? Certainly this could not be done by enabling the House of Representatives to over-ride the Senate within one sitting of the Parliament. It will not be easy to suggest a procedure, alternative to s.128, which preserves the power of the Senate, but in

any case, the history of referenda suggests that an amendment to s.128 will be difficult to procure, and impossible if it lacks bi-partisan support. Changes to the electoral laws might make it more likely that a Government would have a majority in the Senate, if that is considered desirable.

The war in Iraq has had little or no effect on the lives of most Australians, although it has stirred the emotions of some. Whatever views are held concerning the reasons for the war in Iraq, or the planning for the administration of Iraq when the war was concluded, it is too soon to know whether the United States' apparent strategy will eventually succeed. However, there is certainly reason to be proud of the skill and discipline displayed by Australian service men and women not only in Iraq, but also in the Solomons, and before that in Bougainville and Timor.

There remains the threat of terrorist activities. There is no doubt of the ruthless determination of terrorists in various parts of the world, including South East Asia. We simply cannot tell how high is the risk of serious terrorist activity on Australian soil, but prudence requires that steps be taken to guard against the possibility. Such steps have been taken, and the considerable expense and inconvenience caused by those measures means that the terrorists have already caused damage to Australia.

Since the main defence against terrorism is good intelligence, the present situation requires that sufficient powers be given to our intelligence agencies to make their work effective, but this should entail the least possible interference with ordinary rights and liberties. The powers that have been given to ASIO, to detain for questioning persons believed to be able to assist the collection of intelligence important in relation to a terrorism offence, are drastic. However, they are hedged round with safeguards, including the need for a warrant by a judge or magistrate, and the requirement that the questioning be conducted in the presence of a prescribed authority, who is usually a retired judge. Only experience will show whether these safeguards are sufficient. In one respect, however, the provisions go too far. They forbid lawyers and some other persons from communicating information relating to questioning or detention. The object of these provisions is clear enough, but the result would be to prevent publication of the fact that an abuse of power or a serious error of judgment had occurred.

More controversial is the United States' expedient of detaining over 600 persons of various nationalities, including two Australians, at Guantanamo Bay in Cuba for an indefinite period, during which they have been kept virtually incommunicado and are subject to questioning, and during which the United States Government has contended that they have no right of access to the ordinary courts. It is said that the detainees will either be released, when they are no longer of law enforcement, intelligence or security interest, or will be tried before a military commission. The legal justification claimed for holding them in this way appears to be that they are unlawful enemy combatants.

Of course, ordinarily enemy combatants captured in battle are entitled to be treated as prisoners of war, which means that they are to be treated humanely, and cannot be subject to interrogation, and that the circumstances in which they may be tried and punished are strictly limited by international conventions. The detainees are obviously not being treated as prisoners of war. On the other hand, not all enemy combatants are entitled to the protection afforded to prisoners of war. Certainly a spy or saboteur in civilian clothes

would not be protected. Indeed, to obtain protection under the Geneva Conventions, military personnel must be identified by a uniform, or, in the case of militia or volunteers, by a fixed distinctive sign recognisable at a distance. Also, a soldier in uniform who has broken the laws of war, e.g., has committed a war crime, is not protected. Unprivileged belligerents of these kinds would be subject to trial by a military tribunal.

We simply do not know, because the Government of the United States has not disclosed, what (if any) acts of the detainees meant that they lack the protection of the Geneva Conventions or indeed even whether they were belligerents at all. A person who is not a combatant, but who commits an act of terrorism, should be tried for his criminal acts in the ordinary criminal courts, and not before a military commission. Attempts have been made to litigate, in the United States' courts, the question whether the ordinary courts have jurisdiction to pronounce on the validity of the detention; these proceedings have had varying results, but the question will not be resolved unless and until the Supreme Court pronounces on it.

It must be said that some of the criticisms of the suggested procedure before a military commission are exaggerated or theoretical. Anyone who has had experience of courts martial knows that it is not necessarily true that an accused will not be properly defended by a military officer. The admission of hearsay evidence does not offend against fundamental principles of justice. It may be unfairly insulting to the members of the military commission to say that they will not endeavour to give the accused a fair trial.

There are, however, some obvious objections to trial in these circumstances. In particular, it is not known what is the nature of the charges, or what is their legal basis. Speaking generally, the accused is not entitled to be given access to all the prosecution material, and discussions between the accused and his lawyer are to be monitored, although apparently these disabilities will not be applied to the trial of one of the Australians, Mr Hicks. If the evidence intended to be produced against the detainees includes that obtained by questioning at Guantanamo Bay, it will have been obtained in violation of fundamental rights. In any case, it is contrary to ordinary notions of justice and to the principles of the rule of law that the detainees should be denied the opportunity to test in the ordinary courts the question whether they are rightly classed as unlawful enemy combatants, and whether their detention and proposed trial are lawful.

Although it is too much to expect that we shall soon see an end to terrorism generally, I am sure that we all hope that during 2004 we shall continue to be free from acts of terrorist violence within Australia.

Best wishes to you all. I hope that distance will not deter you from attending the next Conference in Perth from 12th –14th March, 2004.

Australia Day Message, 26 January, 2005

This is the fourteenth Australia Day since the foundation of the Society. During the year, we have again held a successful Conference – this time in Perth. The papers delivered at the Conference are collected in Volume 16 of *Upholding the Australian Constitution*, but it should not be thought that the Conference papers are read only by the members of the Society. They are available on the internet and our website has recorded a pleasing number of "hits."

2004 ended with the tsunami and its catastrophic consequences, which were of such enormity as to eclipse all earlier events. We should not forget that throughout the year death and destruction on a large scale have been caused by war, terrorism and (particularly in Africa) genocide. On the other hand, Australia has remained secure and prosperous, and has played an increasingly important part in international affairs. We have reason to be proud of the actions of Australian troops and civilians who have served or who are serving in the conduct of the war, or in peace-keeping operations in countries in the region where law and good government have failed or are under threat, or in efforts to restore some normality to those parts of Indonesia which were devastated by the tsunami.

We remain threatened by terrorism. The threat is made particularly difficult to avert by the facts that terrorists are elusive, ruthless and fanatical to such an extent that they are prepared to commit suicide in order to perpetrate their crimes. In these circumstances it is understandable that measures should be taken which would be unacceptable in normal times. It is important, however, that such measures should infringe as little as possible the rights long recognised by the law, and should not allow those who carry them out to act in a way that would offend the ordinary standards of humanity.

In this regard, it has been a matter of concern that the United States has, in combating terrorism, resorted to "interrogation" measures which deny the long standing principles of liberty to which the United States is dedicated. In particular, it proposes to establish prisons in a number of countries and to incarcerate there some alleged terrorists without trial for an indefinite period, possibly for life. If many reports are correct, the treatment of some prisoners at Guantanamo Bay can only be described as torture, and United States officials have connived at the removal of suspects to other countries, such as Egypt, with the expectation that they will be tortured in an attempt to obtain information concerning terrorists and their activities.

Even viewed in the light of the momentous happenings of the year, it must surely be agreed by supporters of all political parties that the recent federal election and its results were of considerable significance to all Australians. The fact that the Government has control of the Senate as well as the House of Representatives is both an opportunity and a temptation. The Government now has an opportunity to ensure the passage of necessary legislation which the Senate had previously prevented, sometimes on grounds of mere caprice. On the other hand, unfettered power tempts holders of that power to abuse it by, for example, enacting legislation that unduly favours one section of society or is otherwise oppressive or unfair in its operation. It is, of course, hoped that the Government will seize the opportunity and resist the temptation.

During the campaigns that preceded the election, both major parties laid emphasis on their respective policies concerning matters of health and

education. When the Constitution was first accepted by the Australian people and passed into law, it was intended that health and education should be matters within the exclusive jurisdiction of the States. That has long since ceased to be the case; the influence of the Commonwealth in those fields has been largely due to the interpretation and use of s.96 of the Constitution, under which the Commonwealth makes grants of finance to the States on conditions which enable the Commonwealth to achieve results otherwise beyond Commonwealth power.

The trend towards centralism was, during the election, pushed a little further. It was announced as government policy that the Commonwealth itself would establish technical colleges and would make grants directly to school bodies. It would appear that these things could not be done by the use of s.96, which refers to financial assistance to any State. Perhaps the scope of the appropriation power will fall for consideration if the Commonwealth's actions are challenged.

Further, Ministers, not expressing government policy, have suggested that the Commonwealth should assume sole responsibility for hospitals and universities. There is no doubt that the division of functions in these fields has proved to be far from satisfactory. Besides the difficulty of avoiding conflict between the demands of different bureaucracies there is the fact that when power is divided so is responsibility, so that each blames the other for deficiencies in the system.

The remedy, however, is not to transfer to the Commonwealth all power to deal with health and universities. It is anomalous that although the central authorities seem whole-heartedly committed to a policy that values competition above most other considerations in relation to business, they fail to recognise that competition between the States may be equally valuable. Health and education very closely affect every citizen, but the needs of the inhabitants of one State would not necessarily be the same in every respect as those of another State. It is not too much to hope that in the field of medicine, for example, the advances of technology, efficiency, or standards of care and compassion in one State may provide a model for others. Perhaps one role of the Commonwealth would be to enact and enforce uniform minimal standards.

The balance originally provided by the Constitution, between the powers of the Commonwealth and those of the States, has largely broken down, but has not been replaced by any coherent division of powers. It would be a great achievement if the Commonwealth and the States could reach an agreement as to the extent of their respective powers in relation to health and education in a way that would avoid the deficiencies of the present system. No doubt questions of finance amongst others would make it difficult to reach agreement. It would be for the good of the nation if these difficulties could be overcome.

There are many matters that obviously appear to call for reform in the interests of the nation and which will no doubt require the attention of the government. Many of these matters will give rise to controversy – for instance, the reform of industrial relations is likely to attract the opposition of the unions, and the achievement of a Commonwealth-State plan to ensure the continued flow of water in our inland rivers will probably cause some States to hold back because of the financial consequences. There is, however, one reform which, if successfully implemented, should (in Macbeth's words) buy "golden opinions from all sorts of people", even one hopes from the officials of the

Treasury and the Australian Taxation Office. This reform may at first sight seem insignificant compared with other matters of great moment that will be considered by the government, but in fact would be of very great benefit to business, trade and the community generally.

The reform to which I refer is the re-writing of the income tax legislation. This does not necessarily involve issues concerning levels of taxation. The laws relating to income tax are a disgrace. There is nothing new in that reproach – it has been true for at least a decade, the only change being that the situation is getting worse. The legislation is absurdly voluminous compared with our own earlier legislation, and with other tax systems, and the volume increases rapidly from year to year.

Much of the legislation is obscure to the point of being incomprehensible. It gives the Australian Taxation Office unacceptably wide discretionary powers, including those given by the anti-avoidance provisions of part IVA, which were inserted in an over-reaction to some earlier decisions of the High Court. It is, I think, true to say that many practicing accountants no longer try to unravel the mysteries of the legislation by reading its provisions – rather they rely on the various documents and rulings issued by the Australian Taxation Office – a subordination of the rule of law to the opinions of the Executive. The uncertainty of the law is an impediment to business generally.

What is needed is a completely new statute of manageable size and clearly drafted. By clarity of drafting, I do not suggest that there should be a repetition of the ill-fated attempt to put the income tax law into "Plain English". Without clarity of thought, there can be no clarity of expression. If the present obscurities of the law were removed, there would be no need to confer on the Taxation Office discretionary powers that are offensively wide.

Such a task, if undertaken, could not be left to the Treasury and the Australian Taxation Office, although officials from those bodies might of course provide invaluable assistance. The undertaking should, I think, be carried out under the supervision of a body including representatives of business, the legal and accountancy professions and academia, and if thought necessary experts from the United States and the United Kingdom. It would not be an easy task, but its successful completion would be a lasting achievement to the credit of the government and something of lasting value for Australians generally.

I have said that this proposal would not necessarily entail any considerations of taxation levels. One would hope that the taxation scales will be reviewed. However, that review should be a separate exercise from the re-writing of the legislation and should be kept separate from it because, whereas there are likely to be widely differing views as to what scales are appropriate, there should be general agreement that the tax law should be rendered clear and accessible. The re-writing of the taxation law could provide simplicity; the achievement of equity is another question.

At this rather restless time, when it has become common to urge us to make unnecessary changes (although necessary changes are often resisted), there have been suggestions that the date on which Australia Day is celebrated should be altered. The intention of Australia Day is to mark the foundation of what Australia is today, and the foundations of what has become modern day Australia were laid on 26 January, 1788. The 26th January is an appropriate date on which to celebrate the achievements of the nation.

I would remind you that our next Conference will be held at Coolangatta

from the 8th to the 10th April, 2005 and hope you will be able to attend.

Appendix III

Contributors

1. Addresses

Bob BOTTOM, OAM was educated at Marist Brothers College, Broken Hill but left school aged 15 to become a cadet journalist. Since then he has spent a lifetime investigating and reporting upon organised crime and corruption in Australia, and is the author of seven best-selling books on these topics. His report on organised crime in NSW (1978) was a landmark document of its kind. Since then he has participated in the setting up of the National Crime Authority (1983) and its more recent reformation into the Australian Crime Commission; the establishment of the NSW Independent Commission Against Corruption (1988); and establishment of the Queensland Crime Commission (1998). Most recently he has assisted a Victoria Police Organised Crime Strategy group in tackling Melbourne's gangland warfare.

The Hon Chief Justice Paul de JERSEY, AC was educated at Church of England Grammar School, Brisbane and the University of Queensland (BA, 1969; LLB, 1971), and was called to the Bar in Brisbane in 1971, becoming Queen's Counsel in 1981. A judge of the Queensland Supreme Court since 1985, he was appointed Chief Justice in 1998. During 1996-98 he was President of the Industrial Court of Queensland and also Chairman of the Queensland Law Reform Commission. He has been Chancellor of the Anglican Diocese of Brisbane since 1991.

2. Conference Contributors

Dr John FORBES was educated at Waverley College, Sydney and the Universities of Sydney (BA, 1956; LLM, 1971) and Queensland (PhD, 1982). He was admitted to the New South Wales Bar in 1959 and subsequently in Queensland and, after serving as an Associate to Mr Justice McTiernan of the High Court, practised in Queensland as a barrister-at-law. After a long career in the Law Faculty of the University of Queensland (1969-1999), during which time he published texts on the History and Structure of the Australian Legal Profession, Evidence, Administrative Law and Mining and Petroleum Law, he retired, and has since become perhaps Australia's foremost expert on the law of native title.

Professor Andrew FRASER was educated at Burks Fall High School, Ontario and at Queen's University, Kingston, Ontario (BA, 1969); University of North Carolina (MA, 1971); Queen's University (LLB, 1975) and Harvard (LLM, 1982). After emigrating to Australia in 1975 he taught briefly at the University of Queensland Law School before transferring in 1977 to Macquarie University, where he currently holds the post of Associate Professor in the Department of Public Law. He is the author of *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity*, and *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance*.

Bruce GRUNDY was educated at Church of England Grammar School, Brisbane and La Trobe University (BEd, 1975). His 44-year career in journalism, teaching and the media began when he joined the ABC in 1961, and has included periods as producer of ABC Radio Rural and Talks programs; executive producer of ABC Television Current Affairs and Radio Australia programs; and editor of Brisbane's *The Weekend Independent* newspaper. In 1979 he left Radio Australia for the Department of Government in the University of Queensland, becoming Associate Professor in the Department of Journalism there in 1991. He is now Journalist in Residence and Senior Lecturer in the School of Journalism and Communication at that University.

Dr Dominic KATTER was educated at St Joseph's College, Brisbane and at several Universities in Australia and abroad. His BA (1994), LLB (1996) and LLM (1998) at the University of Queensland were followed by his M Phil (Cantab) (1999) and his SJD (2003) at Queensland University of Technology. After a period as Associate to Mr Justice Callinan of the High Court he commenced practice at the Queensland Bar in 2001, and has since appeared before the High Court as junior counsel. He has lectured in a number of subjects at the University of Queensland and the Queensland University of Technology.

Kevin LINDEBERG was educated at Maryborough Boys High School and holds an Associate Diploma in Industrial Relations from Brisbane College of Advanced Education (1988). A former Queensland public sector trade union organiser who now works as a freelance political cartoonist/caricaturist, he has become the central figure in the unresolved Heiner Affair, arising out of the clandestine and allegedly illegal shredding of the Heiner Inquiry documents by the Queensland Cabinet in 1990. His public interest disclosure in that affair has come before federal and State Parliaments, including both Senate and House of Representatives committees. The affair, which is listed by the international archives/recordkeeping community as one of the 14 great document shredding scandals of the 20th Century, remains a matter of concern to anyone concerned with legal and constitutional propriety in Queensland and more generally.

John NETHERCOTE was educated at Blakehurst High School, Sydney and the University of Sydney (BA, 1968). After joining the Commonwealth public service in 1970, he worked over the years for the Public Service Board, the Royal Commission on Australian Government Administration, the Public Service Commission of Canada and the Defence Review Committee. He joined the staff of the Senate in 1987 and his assignments there included Secretary to the Senate Standing Committee on Finance and Public Administration and overseeing publication of Odgers' *Australian Senate Practice* (6th edition). He also edited *Parliament and Bureaucracy* (1982) and was a joint editor of *The Constitutional Commission and the 1988 Referendums* (1988) and *The Menzies Era* (1995). Since retirement from the Senate staff he has written extensively for *The Canberra Times* on public service matters and edited *Liberalism and the Australian Federation* (2001).

Bryan PAPE was educated at Wagga Wagga High School and the University of New South Wales (BComm, 1969) and was admitted to the NSW Bar in 1977, where he practiced, mainly in taxation litigation, for nearly 25 years. During

this time he also served as a full-time member of the Taxation Board of Review No. 1 (1981-1984) and as a part-time member of the Australian Accounting Standards Board (1992-1994). In 2000 he took up appointment as Senior Lecturer in Law in the University of New England. He has had a long and active interest in public affairs and is presently Chairman of the New England Federal Electorate Council of the National Party.

Professor Suri RATNAPALA was educated in Colombo, Sri Lanka, undertaking his first degree (LLB, 1970) at the University of Colombo. Before migrating to Australia in 1983 he served as a Senior State Counsel in the Attorney-General's Department of Sri Lanka, where he was involved in drafting that country's republican Constitution. He completed his LLM degree at Macquarie University in 1987 and his PhD(1995) at the University of Queensland, where he has taught since 1988. He is now Professor of Public Law there and co-editor of the *University of Queensland Law Journal*. He is the author of numerous articles in professional journals and a number of other publications, including *Welfare State or Constitutional State?* (1990), *The Illusions of Comparable Worth* (1992) (with Gabriel Moens), and *Mabo: A Judicial Revolution* (1993) (co-editor). His most recent work is *Australian Constitutional Law: Foundations and Theory* (2002).

Professor Gregory ROSE was educated at Mount Scopus College, Melbourne and at Monash University (BA, 1981; LLB, 1983; LLM, 1989). In 1990 he joined the Marine Resources Program at the Foundation for International Environmental Law and Development at the University of London, becoming its Director (1991-1994). In 1994 he joined the Department of Foreign Affairs and Trade, becoming head of the Trade, Environment and Nuclear Law Unit in the Legal Office of that Department. In 1998 he moved to the University of Wollongong, where he is now Associate Professor in the Faculty of Law, Director of Research for the Centre for Transnational Crime Prevention and a member of the Centre for Maritime Policy. His research specialises in international law, focusing on both terrorism and environmental issues.

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. 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. He is now a visiting Scholar in the Faculty of Law of the Australian National University, where his researches have done much to clarify the role of the Governor-General in Australia's constitutional arrangements.

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 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 and is the Editor and Publisher of its Proceedings.