Upholding the Australian Constitution Volume Eighteen

Proceedings of the Eighteenth Conference of The Samuel Griffith Society

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Table of Contents

Foreword

John Stone

As this Foreword is being written, the Queensland government has just been returned for a fourth term; the High Court's vital decision in the *Work Choices Case* is still awaited; and the nation appears consumed by the cries of those who place the liberty of "Jihad Jack" Thomas before the safety of his fellow citizens. Meanwhile, members of the Howard Government, while uttering palpably obvious statements about the problems attributable to what they call "an extremely small minority" of Australia's Muslim population, nevertheless seem to be *doing* nothing (or nothing effective) to address those problems in the years ahead.

Except for *Work Choices*, all this seems far removed from the topics considered during the 18th conference of The Samuel Griffith Society, held in Canberra on 26-28 May last, the Proceedings of which comprise this Volume 18 in our series, *Upholding the Australian Constitution*.

It is unusual – indeed, previously unknown – for the Society's conferences to focus upon any single theme. Typically, they range across several themes in a manner accurately described by Professor Dean Jaensch some years ago as "eclectic". The 18th Conference constituted a notable exception.

The central theme of the Conference – and hence of these Proceedings – was a celebration of the life and work of the Society's inaugural President, the late and much revered Sir Harry Gibbs, whose untimely death occurred on 25 June last year.

This is not the place to repeat my own feelings about Sir Harry: see, for that, Appendix I to Volume 17 of these Proceedings, *Tribute to the late Sir Harry Gibbs*. However, as that tribute noted:

> "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".

In line with that resolution, the Canberra Conference therefore began on the Friday evening with the Inaugural Sir Harry Gibbs Memorial Oration, delivered by Mr Justice Dyson Heydon, AC of the High Court of Australia. Justice Heydon's splendid address, *Chief Justice Gibbs: Defending the Rule of Law in a Federal System*, was, in my respectful opinion, a classic of its kind. It alone would render this volume outstanding.

However, in line with that Board of Management resolution, Justice Heydon's address was not alone. The first four papers to the Saturday session of the Conference were specifically designed as "a more general *festschrift* in appreciation of Sir Harry's life and achievements".

The first of those papers was given by Mr Justice Michael Kirby, AC of the High Court of Australia. Delivered by video because of His Honour's unavoidable absence in Fiji over the weekend in question, it was entitled *Sir Harry Gibbs Remembered*. As His Honour noted, he often found himself at variance with Sir Harry on the interpretation of the law; but rarely did he find himself at variance with him in terms of personal relationships. Indeed, Mr Justice Kirby's remarks about their shared experiences in the Australian Academy of the Forensic Sciences, and in the Order of Saint Michael and Saint George (of which Sir Harry was a Knight Grand Cross), will shed new light to Society members, among others, on the personality of our late President.

Our second paper brought to bear upon Sir Harry's life a quite different perspective, through the agency of the Hon Tom Hughes, AO, QC. As Commonwealth Attorney-General in the then Gorton Government, it was Mr Hughes who had the singular honour of recommending to Cabinet, and then to the Governor-General, Sir Harry's initial appointment as a Justice of the High Court of Australia in 1970. Few, if any, better appointments, I suggest, have ever been made in the history of that Court, and Australians will long be in debt to Mr Hughes's good judgment in that respect. His paper, *Sir Harry Gibbs: An Advocate's Perspective*, was as interesting as it was well received.

Mr David Jackson, QC, who was the second person to serve as Sir Harry's Associate during the latter's time as a Justice of the Supreme Court of Queensland, gave us a wide-ranging survey of Sir Harry's judicial attitudes and rulings. A life-long, and in latter years particularly close, friend of Sir Harry's, his paper, *Sir Harry Gibbs and the Constitution*, provided insights not given to less close observers.

The fourth paper in this opening bracket, *Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution*, was delivered by Mr Julian Leeser, one of the Society's most dedicated younger members and now Executive Director of the Menzies Research Centre. His conclusion is worth quoting:

> "As a Justice of the High Court Sir Harry did his duty. He interpreted the Constitution with particular regard to its federal character. As his time on the bench drew to a close, and in retirement, ... he became ever more concerned with the state of federalism .....
>
> "The further the interpretation of the Constitution moves from his vision, the harder it may be to return it to a jurisprudence that has regard to its federal character. I believe that the focus of federalism in the future will be less on legal federalism and more on political federalism ..... If the proper balance can be achieved then we will well and truly serve the distinguished memory of Sir Harry Gibbs".

Although these four papers constituted the formal *festschrift* called for by that Board of Management resolution quoted earlier, most of the remainder of the Conference was also devoted to matters dear to Sir Harry's heart. Outstanding in that regard were the two formal papers (Chapters Five and Six), and the Saturday dinner Address (Chapter Eight), devoted to various aspects of the current lawyer-driven "push" for Bills of Rights in Australia's State (and in due course federal) legal paraphernalia.

Professor James Allan's lively paper on the use of *Bills of Rights as Centralising Instruments* by those who regard themselves as knowing best – and to hell with popularly-elected Parliaments in that respect – set the stage in general terms. Speaking from his wide experience in Canada (Canadian *Charter of Rights and Freedoms*), the United Kingdom (*Human Rights Act* 1998) and New Zealand (New Zealand *Bill of Rights Act* 1990), Professor Allan brought to his topic both scholarship and practical knowledge.

In Australia we now have two of these Bills of Rights in being – the ACT *Human Rights Act* 2004 in the Australian Capital Territory, and the so-called *Charter of Rights and Responsibilities* in Victoria, which will become effective on 1 January next. The paper on the latter by Mr Ben Davies (another of the Society's most dedicated younger members), *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, will reward close reading. Not only does it dissect the spurious claims of the Charter's proponents (particularly Victoria's lamentable Attorney-General, Mr Rob Hulls), but it also lays out in detail the fraudulent processes by which those proponents went about their deliberate hoodwinking of Victorians as to its true import. Concern for this Labor government's anti-democratic legislation is matched only by contempt for the Liberal Opposition in failing to oppose it.

The seal was set on these two papers by Dr Janet Albrechtsen's lively address on Saturday evening, *An Australian Bill of Rights by Stealth?* As Sir David Smith later said in his Concluding Remarks:

> "On Saturday night Dr Janet Albrechtsen drew this [Bills of Rights] section of our conference to a close by reminding us of the pernicious strategy that has been set in train to slowly give us State and Territory charters of human rights that would induce us to accept the ultimate goal – an entrenched Bill of Rights in the federal Constitution. It is my earnest hope that this Society and its members will respond to this latest threat to our system of parliamentary democracy and to our individual rights as citizens".

Two of Sir Harry Gibbs's other abiding interests during his time as President of the Society were, respectively, the role of the Crown in our Constitution, and what we have termed, from the Society's outset, "the Aboriginal question".

As one of the founders of Australians for Constitutional Monarchy, Sir Harry's view as to the central role of the Crown in our Constitution was never in doubt. In his paper *A Republic: The Issues* (see Volume 8 of *Upholding the Australian Constitution*) he strongly rebutted the sheer nonsense emanating at that time from the republican camp. He would therefore undoubtedly have been delighted by *Head of State*, published last November by Macleay Press, in which his successor as President of the Society, Sir David Smith, KCVO, AO presented in immaculate detail the product of his researches into the constitutional position of the Governor-General in our Constitution.

Those researches, which have put to shame Australia's legal academic fraternity/sorority (or at least that part of it concerned with constitutional law), have however necessarily raised another question. If the Sovereign (presently Queen Elizabeth II of Australia) can no longer be seen as our constitutional Head of State

– a term which of course does not appear in our Constitution in any case – what then is her role in Australia today? That is the question to which Professor David Flint's paper, *The Role of the Sovereign*, is addressed.

As to the Aboriginal question, Sir Harry Gibbs brought to that question a deep sympathy for the plight of those genuinely disadvantaged Australians of Aboriginal descent. At the same time he also saw through the self-interested endeavours of the Aboriginal industry to use the "victimhood" of those disadvantaged people in order to line their own pockets with the pelf so liberally provided from seemingly inexhaustible governmental sources. He would, therefore, I suggest, have heard with the utmost interest the paper by the Hon Dr Gary Johns (a former Minister in the Keating Government), *Aboriginal Policy at the Turn* (see chapter 10).

Although the two remaining papers, by Stuart Wood and John Roskam respectively, were less directly related to specific issues dear to Sir Harry's heart, both also dealt, as one would expect from this Society, with the issue of federalism in its various manifestations, and both were equally warmly received. Indeed, it may not be going too far to say that the question and answer session following Stuart Wood's paper was as "warm" as any that I can remember in the Society's history!

In his Concluding Remarks drawing the Conference to a close, Sir David Smith said:

> "..... Sir Harry left some enormous footprints on this Society, its conferences, and its publications .....
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> "Each [of our first five speakers] spoke about different aspects of Sir Harry's life and work as lawyer, barrister, friend, judge and Chief Justice: together they gave us a wonderful word picture of a courteous and gentle man, an exemplar in the law, a judge of high principle, and a stout defender of the nation's Constitution and its institutions".

The Samuel Griffith Society was established to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) point of view. It is my hope that our 18th conference, directed as it was in the main to celebrating the life and works of a great Australian federalist, our former President, may have contributed further to that objective. It is in that spirit that, like its seventeen predecessors, Volume 18 in this series is now offered.

Inaugural Sir Harry Gibbs Memorial Oration

Chief Justice Gibbs: Defending the Rule of Law in a Federal System

Hon Justice Dyson Heydon, AC

The "bad" Roman Emperors of the first two centuries – Caligula, Nero, Domitian and Commodus – habitually had meted out to them, after their periods in office ended in violent death, the fate known as *damnatio memoriae*. Fortunately, Sir Harry Gibbs lived a long and productive life after his retirement from the High Court in 1987, but from 1987, at least in some fastidious legal circles, he has suffered a similar fate. He has been blamed for faults he lacked, and criticised for lacking qualities he had.

It is true that he has left no disciples. He has founded no school. Modern counsel desperate for an argument have recourse to him, but he is not much esteemed by modern courts. Yet he was one of the greatest judges, and one of the greatest Australians, of the 20th Century. Time does not permit any demonstration of that thesis in detail. The present audience is unlikely to dispute propositions of that kind about our former President, who made such prodigious efforts on the Society's behalf for so long. I want only to identify a few of Sir Harry's characteristics, and correct a few misunderstandings about him.

Manner in court

There was in him no element of schizophrenia or of split personality. There was no contrast of style and substance. He was a man of complete integrity in every sense of the word – in particular, all the qualities he exhibited operated in a mutually and harmoniously integrated way.

Most people will have had their first personal encounter with him in court. There he was cool, mild-mannered, unpretentious and tactful. He was quiet, unflustered, and, above all, unfailingly polite.

In this he was generally thought to stand in contrast to his energetic but combative predecessor, Sir Garfield Barwick, who was Chief Justice for 17 years. You will recall Sir Garfield's characteristic observations about his style at the Bar in his farewell remarks on leaving the Court in 1981:

> "I early found that I liked talking to a judge and I liked him to talk to me.... And I came to think that the silent judge, the chap who would not speak to me, was almost anathema. I had to devise means of making him talk. I may have succeeded in that. No-one has ever had to stretch himself much to make me talk, I am afraid, and no-one has had to work very hard to find out what the tendency of my mind may be, and some that may have disturbed. I am sorry if it has".[1]

Sir Maurice Byers, in a speech farewelling Sir Harry in 1986, said that Sir Garfield's style did not change on the bench:

> "As a Judge he liked talking to a barrister, particularly when the barrister was advancing his argument. I don't mean to suggest that when putting an argument you felt like a despatch rider delivering a message across no man's land against a storm of shells and bullets – only that you needed your wits about you to keep upright".

Sir Maurice said that the first few times he appeared before Sir Harry as Chief Justice:

> "I was quite disconcerted. It took me some time to spot the difference. I was the only one talking. All the Judges appeared to be listening".[2]

In temperament Sir Harry Gibbs was serene, calm, reasonable, balanced, controlled, thoughtful and moderate. Apart from ample professional learning across every field of the law, he had great wisdom, incisive powers of analysis, quickness of thought and acuity of mind. He was cultivated, fair minded, and in every way honourable. He was deeply sensitive to sufferings and disappointments and purposelessness in other lives – young people, for example, who could get no job and could see no prospect of getting one, or who preferred the dole to work.[3] He deplored what he saw as widening gaps between the standards of private and public schools,[4] and widening unmerited inequalities between rich and poor.[5] He was also deeply conscious of, and grateful for, the labours of Australians in all walks of life over earlier generations – "an inventive, self-reliant and very capable people".[6] He disliked any criticisms of the present generation for laziness. But he did not

have a starry-eyed view of either the nature or the destiny of man.

As to human nature, he deplored the ravaging of modern Australian society by crime, drugs and corruption, and the decline in standards of responsibility, decency and consideration for others.[7] He did not care for what he called "those wizards of law and accountancy who, using alchemy in reverse, seek to transmute the gold of income into the dross of something that is not taxable or, even better, tax deductible".[8] He would not have sympathised with Jack Cassidy, QC, a great figure at the New South Wales Bar in the 1950s and 1960s. When the late Justice Peter Hely started at the Bar on Sir Jack Cassidy's floor, his wife fell into conversation with Lady Cassidy at the first floor function. Lady Cassidy said: "How is Peter getting on?". Mrs Hely said: "He's finding it hard to pay the provisional tax on his income". Lady Cassidy said: "Ah, Jack doesn't have that problem. He gets paid in capital".

As to human destiny, Sir Harry was not over-optimistic. He said:

> "... in a world where so much labour is marred by monotony and tedium a man or woman engaged in professional activity has the opportunity to do work which is often satisfying, interesting and useful as well as modestly rewarding from a financial point of view and a sensible person cannot hope for much more from his occupation than that".[9]

Sir Harry had humanity, humility, dignity and civility. But he also had authority. He was vigorous, forceful, decisive, efficient, energetic, steely and tenacious. He was fully capable of making up his mind, unlike Sir Edward Davidson, Foreign Office Legal Adviser in the years 1918-1929. Davidson was known in the Foreign Office as "quoad Davidson", because when once asked his opinion, he said that quoad Legal Adviser he thought one thing, but quoad Davidson he thought something else.[10] Sir Harry could be direct to the point of bluntness. Neither in court nor anywhere else did he admire irrelevance, arbitrariness, long-windedness, affectation, pretentiousness, hypocrisy or emotion in others, and he avoided all these things in himself. Although his personal tastes and habits were of the simplest kinds, he took great care with his appearance, his attire being as impeccable as his courtesy.

Sir Harry was completely lacking in that common judicial vice, pomposity – unlike, for example, Sir Reginald Long Innes, Chief Judge in Equity in the Supreme Court of New South Wales in the 1930s. On one occasion Innes was called to give evidence as a witness in some dispute. The counsel who called him was a rather rough common lawyer who did not like him. Examination in chief usually opens with witnesses giving their names and occupations. This examination in chief began as follows: "What's your name?". With massive self-importance, as if disclosing a most portentous and significant truth, the witness said: "My name is Reginald Heath Long Innes, knight". Counsel then asked: "And what do you do for a living, Mr Knight?".

Manner in private

This summary suggests that Sir Harry had a remote and wintry personality, but informal contact revealed this to be illusory. Although shy and unassuming, he was approachable, good humoured and friendly. In an address delivered on the occasion of the centenary of Sir Owen Dixon's birth, he said that soon before Sir Owen's death he took Mr Justice Walsh, whom Sir Owen had not met, to see him at Hawthorn, "where Sir Owen entertained us with some candid descriptions of his predecessors on the Court".[11] To describe Sir Owen as "candid" in reminiscence is to speak with some euphemism, of course, but like Sir Owen, Sir Harry liked discussing the human comedy, particularly so far as it was reflected in the affairs of lawyers and judges. He enjoyed telling candid anecdotes of his own in his distinctive voice – rasping but not unattractive – about "Gar", or about the strange remark addressed to him by James Callaghan at Buckingham Palace, or about many other incidents in his long life.

In short, while in many respects no doubt the label "conservative" fitted him, any overtones it bears of hard, grasping, selfish indifference to the existence and difficulties of others were quite alien to him. They are also negated by the warm family life he and Lady Gibbs experienced with their four children.

There were other respects in which the label "conservative" did not fit. Some will be identified below, but one can be noted here. He was a monarchist and a Privy Councillor, he sat on the Privy Council, and he enjoyed doing so. He respected his colleagues as "eminent and well-known lawyers experienced in the common law".[12] Yet in 1981 he opposed the retention of Privy Council appeals in non-federal matters from courts other than the High Court as "anomalous and anachronistic".[13] He had probably come to this view, like Sir Garfield Barwick, years earlier. He said:

> "Although I would in many ways sincerely regret the breaking of this tie with the nursery of our laws, the present situation can hardly continue for long".[14]

Nor, indeed, did it.

Prose style

When Joseph Chamberlain died, Asquith said of him in the House of Commons:

> "As has been the case with not a few great men, speech, the fashion and mode of his speech, was with him the expression and the revelation of his character".[15]

The same was true of Sir Harry. He had a remarkable prose style – pithy, terse, precise, crisp, trenchant, undecorated and unambiguous. In one of Sir Harry's last cases as a barrister before the High Court, Sir Owen Dixon delivered a dissenting judgment rejecting his contentions. But that judgment took the unusual course of congratulating him on what it called his "very clear argument".[16] Above all, Sir Harry's judgments had pellucid clarity. Sir Maurice Byers said of his clarity:

> "This is at once the most difficult of skills to master and the writer's most precious gift to the reader. There is about almost every judgment of Sir Owen Dixon that I have read a slight haze of ambiguity, a hint of baffling distances and remote horizons. A Gibbs judgment is crystal clear".[17]

What Prince Ranjitsinhji said of W G Grace was true of Sir Harry: he made "utility the criterion of style". It is common for barristers to seek to start their researches by asking, "What's the principle?"; or saying, "Let's go to first principles". They then hunt for a short and forceful statement of the point in a book or judgment. Once found, that statement triggers unconscious recollection, and leads off into veins of learning to be mined for their valuable ore at leisure. In this process the wise lawyer took Sir Harry's judgments as the first port of call. To read a judgment of his is to be taken on a businesslike journey, without preliminary throat clearing or the erection of scaffolding, without any fuss or unnecessary elaboration or excursions into side issues, through the crucial questions to the end. The saying goes that if it is not clear, it is not French; it is certainly true that if it is not clear, it is not Gibbs.

While Sir Harry was on the High Court, it was commoner than it is now for each Judge to deliver a separate judgment, rather than the majority judgment being joint. For the reader joint judgments are dangerous. Reviewers say that it is important never to be rude about the autobiographies of sporting stars, because you never know who wrote them. The same is true of joint judgments. The relative rarity of joint judgments in Sir Harry's time means that posterity can enjoy his own prose, unpolluted by other hands. The quality of that prose was of the first importance for a defender of the rule of law.

Personal advantages

Sir Harry Gibbs came to the High Court with numerous advantages. One was a good school and university education, which gave him wide literary and historical interests. They were reflected, for example, in his address to the Johnson Club, Brisbane, on 13 December, 1984, the 200th anniversary of Dr Johnson's death. The address revealed a deep knowledge of that astonishing man and his times – a man, incidentally, who shared more than one quality with Sir Harry. Another advantage was six years in the Australian Army, including time at the front in New Guinea, for which he was decorated.

He had spent 16 years at the Bar. For quite a number of those years he carried out part-time law teaching at the University of Queensland, an activity that provides an opportunity for grasping, organising and stating simply the most fundamental aspects of legal principle.[18] He had a father who had been, and a brother who was, engaged in politics. He had spent six years doing all the work falling to a judge of the Supreme Court of Queensland at trial and on appeal, and three doing the work of a Federal bankruptcy and Australian Capital Territory judge. He thus had a wide acquaintance with human affairs. But there was a specific aspect of his background which was very important.

He had been brought up in Ipswich, a locality, of course, associated also with Sir Samuel Griffith, with a former Governor-General, and with the most famous female politician yet produced by this country. He lived there at a time when it was quite separate from Brisbane, having a distinct character as a mining and industrial city. His education at the University of Queensland, which he remembered with gratitude and affection, took place at a time when the University was very small and its Law School had just started, after a period when Queenslanders wanting a university education in law had to go south. Brisbane itself only had a population of 313,000.[19]

The time of his youth and early adult life was a time of limited communications, difficulties in travel, and a very small federal judiciary, not seen much outside Sydney and Melbourne. It was a time when citizens drew life from their local regions. They were provincial when provincialism gave strength – probably it still

does, but they gloried in their provincialism. Their ties to State governments seemed closer than their ties to the federal government. He understood deeply and instinctively the immense differences between the life and world view of residents of Queensland, living in its many large and small country towns scattered over vast distances with great variations in climate, topography and economic activity, and the life and world view of residents of already huge and ever-growing cities like Sydney and Melbourne. He knew the variegated make-up of the Queensland population, as did Arthur Fadden, who when Italy attacked France in June, 1940 was approached by an agitated constituent, the owner of a fruit shop. The constituent said that an angry mob had wrecked the shop and called him an Italian bastard. Artie Fadden sympathised. The unfortunate man protested: "But Mr Fadd, I no the Italian bastard, I the Greek bastard".

Just as Sir Harry cannot have liked the modern tendency of the Sydney-Melbourne vortex to suck people away from other parts of Australia, so he disliked the tendency of the Canberra vortex to suck governmental power away from the regions. He would have responded sympathetically to the future Mr Justice Crawford, who welcomed him at his first sitting in Tasmania as Chief Justice with the words:

> "Your Honour comes from a State like Tasmania, somewhat distant from the centre of affairs in this country".[20]

In short, although he left Queensland in 1967, he remained a Queenslander, and Queensland was of his very being.

Sir Harry Gibbs' conception of the rule of law

For Sir Harry one element of "the rule of law" was the idea that "cases, civil or criminal, are decided by applying legal rules, antecedently established, to facts dispassionately found".[21] To that succinct statement he added other elements:

> "..... that no-one however powerful is above the law, that no-one however humble can be made to suffer in person or property except in accordance with the law and that the law is administered openly with complete independence and with reason and moderation".[22]

In this way order and liberty could be balanced – "order, without which no civilisation can exist and liberty, without which existence may lose much of its value".[23] As one who had witnessed the Battle of Brisbane in 1942 between Australian and American troops, he knew something about the consequences of anarchy and had little doubt about its vices. He admired Australian courts; they:

> "..... display a genuine respect for the liberty of the individual citizen and are able to stand between the weak and the strong and to prevent the rights and freedoms of the individual from being subordinated to the interest of the State, or to powerful groups within the State".[24]

These criteria called for independence in judges. But that independence had to be rooted in principle. Temptations to search for expedient results for individual litigants or to use the litigation "to reshape society" had to be resisted.[25]

> "A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established".[26]

He thought it wrong to elevate "into legal principles one's own idiosyncratic views of justice". He deplored "using a computer to scour the law books of the world, from Wyoming to Swaziland, in the hope of finding some pronouncements that will fit one's preconceived notions".[27]

These are statements which his critics would expect him to have made and think the less of him for making. But he was not averse to the orderly development of the common law, particularly in the light of technological change. An example may be taken from the law of evidence, on which he was an expert.

From the 1970s, concern began to grow about police reliance on unsigned records of interview. On the High Court, Murphy J began to reveal it from 1975.[28] With respect, this was to be expected, given the particular attitudes and interests of that judge. But his principal High Court ally came to be Gibbs J, who from 1977 advocated the use of aural or video-tape recording of police interrogation,[29] and who began to develop, and stimulate others to develop, principles restricting the admissibility of confessions the making of which is not corroborated. These principles are now partly found in case law and partly in legislation more recently introduced in all jurisdictions. The near universal use of video recording has proved a boon to accused persons who have not made admissions, has saved courts much time in hearing arguments about whether confessions were made and whether they are admissible, and has proved extremely disadvantageous to many guilty persons, for their videotaped confessions tend to have a much more damning impact on the trier of fact

than the impersonal and sometimes questionable record of a police officer's notebook.[30] Murphy J and Gibbs J may seem strange allies on this issue, but only to those who have become unduly blinkered by paying excessive attention to slogans and stereotypes.

He was conscious of many factors which were capable of eroding the substance of the rule of law while leaving its form in place. They included very high legal costs caused by, among other things, the rise of mega firms of solicitors, coupled with the limited availability of legal aid; delay caused by the excessive duration of litigation; the incompetence of lawyers; the ill-effects of fusion between barristers and solicitors; and "the suggestion ... that contingency fees might be charged" which, he said, "is one that I could not possibly support".[31] But he paid particular attention to factors adversely affecting the courts directly – the creation of new federal courts, with "resulting tangles of jurisdiction", many of which had to be dealt with during his Chief Justiceship;[32] the creation of special tribunals to deal with special subjects, which "may tend to narrow the vision and perhaps heighten the zeal of the members and cause them to lose a proper sense of proportion";[33] and the damaging impact of a Bill of Rights on judicial independence and the general work of the courts.[34]

Sir Harry's particular concern related to incompetence in the judiciary, for he thought it was vital to protect the public from insolence in judicial office as well as other forms of office. He was troubled by the risk of incompetence existing in judges appointed for reasons other than merit.[35]

Sir Harry several times[36] identified 1946 as the time when judicial appointments in England ceased to be political. He identified the author as Lord Jowitt, Lord Chancellor in the Attlee government. That some earlier appointments had been political cannot be doubted. Even so great a statesman as Lord Salisbury had, with his characteristic mixture of cynicism and self-mockery, explained that while one day great judicial officers like the Master of the Rolls might "be appointed by a competitive examination in the Law Reports", for the moment to ignore the claims of party "would be a breach of the tacit convention on which politicians and lawyers have worked the British Constitution together for the last two hundred years".[37] But not even Lord Salisbury's addiction to the old ways caused him to believe that this was an ideal system.

If it was Lord Jowitt who effected this beneficent change in it, it is not surprising. Old Tories used to say of Churchill: "Some of us have been members of the Conservative Party longer than Winston, but none of us so often". But Churchill only changed his party twice. Lord Jowitt did it four times. In 1929 he was elected to the House of Commons as a Liberal, but accepted the offer by the Labour Prime Minister, Ramsay MacDonald, of the Attorney-Generalship. He joined the Labour Party, stood again as a Labour candidate and won. In August, 1931 he was expelled by the Labour Party for joining the National Government, and in the ensuing election stood unsuccessfully as a National Labour candidate. In 1932 he unsuccessfully sought a Conservative seat. In 1936 he was readmitted to the Labour Party.

Jowitt's acceptance of the Attorney-Generalship in 1929 at the hands of the Labour Prime Minister had led to an unpleasant scene between himself and his erstwhile party leader, Lloyd George. Whatever his faults, Lloyd George had a long memory. Six months later, in a debate on the *Coal Mines Bill*, after Jowitt had spoken as Attorney-General, Lloyd George said: "As the Attorney-General has reminded us – and who should know better? – those who are genuinely seeking work cannot discriminate in the jobs which are offered them".[38] A Lord Chancellor with this supreme indifference to questions of political conscience was obviously the ideal man to introduce complete political neutrality into judicial appointments.

One aspect of the rule of law which Sir Harry Gibbs valued and sought to foster was reasonable certainty and stability. A well-known illustration can be found in the *First Territories Representation Case*.[39] The High Court by a 4:3 majority upheld legislation providing for the Australian Capital Territory and the Northern Territory each to elect two Senators. Gibbs J was one of the dissenters. He did so on the ground that when s. 7 of the Constitution provided that the "Senate shall be composed of senators for each State", it did not mean that it was merely to include Senators from each State, but was to be composed of them exhaustively. Section 122 permitted the Parliament to make laws allowing the representation of Territories in either House for the Parliament "to the extent and on the terms which it thinks fit". However, he held that those words had to give way to s. 7: while s. 122 permitted the election of representatives of Territories to the Senate they could not be Senators. He saw that conclusion as flowing as a matter of language and by reason of the central role of the Senate as the States' house in the legislature.

The *Second Territories Representation Case*[40] concerned the same legislation as did the *First Territories Representation Case*, and also concerned legislation providing for the Australian Capital Territory and the Northern Territory to be represented in the House of Representatives by two members each. The argument

for the invalidity of the latter legislation was that s. 24 of the Constitution confined membership of the House of Representatives to members chosen by the people of the Commonwealth in the States.

Although this argument was not formally inconsistent with the reasoning of the majority in the *First Territories Representation Case*, it was inconsistent in substance. And so far as there was a challenge in the *Second Territories Representation Case* to the decision of the first in relation to Senators, there was complete inconsistency. The only reason the argument was advanced was that one member of the majority in the *First Territories Representation Case*, McTiernan J had retired, and his replacement, Aickin J was thought likely to take the minority view in that case. So he did. But the outcome did not change, because although Barwick CJ adhered to the dissenting stand he had taken up in the *First Territories Representation Case* and, like Aickin J, declined to overrule it, Gibbs and Stephen JJ decided to follow that case rather than overruling it, despite their disagreement with it. Gibbs J did not see it as a sufficient reason to overrule the *First Territories Representation Case* "that one Justice has gone and another has taken his place".[41] He said:[42]

> "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of the decision did not survive beyond the rising of the Court.... It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".

He did not see the earlier decision as having been given in ignorance of some authority or principle, or as being in conflict with other decisions of the Court. All arguments advanced in the *Second Territories Representation Case* had been fully considered in the *First Territories Representation Case*; and the *First Territories Representation Case* had been acted on, in that Senators had been elected under the legislation.

Sir Harry Gibbs showed that same quality – subordination of personal opinion to duty – in two of his earliest decisions on the Court. In *Kotsis v. Kotsis*[43] he held that a registrar of a State court could exercise federal jurisdiction conferred on that court, but was in a minority of one. When the same issue arose soon afterwards in *Knight v. Knight*, he said: "I could not agree with the conclusion but I am bound by the decision".[44]

Sir Harry's adherence to the values of certainty and stability is illustrated in a different way by *Viro v. The Queen*.[45] The question was how a jury should be directed in murder cases where the issue of self-defence arose. One set of directions was favoured by Stephen, Mason and Aickin JJ. The other four justices disagreed, but without agreeing on a single position. Gibbs J decided in the circumstances that it was better for him to depart from the view he personally preferred and support that of Stephen, Mason and Aickin JJ. He said:

> "We would be failing in our function if we did not make it clear what principle commands the support of the majority of the Court. The task of judges presiding at criminal trials becomes almost impossible if they are left in doubt what this Court has decided on a question of criminal law".

Sir Harry Gibbs' conception of federation

Sir Harry Gibbs saw the Constitution as having seven vital characteristics – six positive, one negative. The six positive characteristics were that it created a system of government which was *indissoluble*, *federal*, *monarchical*, with a *bicameral* federal legislature, to which the executive was *responsible*, and regulated by the *judicial power* of the Commonwealth, which gave to the High Court, ultimately, the power to invalidate legislative and executive actions which were unconstitutional. The seventh, negative, characteristic was that the Constitution contained *no general bill of rights*.[46] It is fairly plain that Sir Harry approved of each of these characteristics. No controversy affecting the first, third, fifth, sixth or seventh came before the Court in his time. However, the third – the monarchical element – affected some of the Justices other than himself in different ways in November, 1975, and he himself was greatly concerned to defend it after he retired. He saw the second – the federal element – and the fourth – the bicameral character of Parliament – as closely related, and numerous controversies about them came before the Court in his time. Although he approved of these two features, he deplored the extent to which, by the time he came onto the Court, the position of the States had weakened in relation to the Commonwealth.

He considered that the only basis on which the people of the colonies would have agreed to unite was a federal basis, and that to this day no majority of electors in a majority of States could be found to support any change to a unitary system. He saw the key conception as being that the central government should have powers in matters of national concern, while in matters of regional concern the States – the constituent members of the federation – should have power.[47] He saw the States as "neither subjects of the Commonwealth nor subordinate to it".[48]

On the other hand, he accepted that in terms of legislative power, to some degree the Commonwealth was placed in a "position of supremacy, as the national interest required", by reason largely of s. 109, providing that Commonwealth laws validly made under the 39 heads of power conferred by s. 51, for example, should prevail over State laws to the extent of any inconsistency between them. But he said in one of his earliest High Court judgments, the *Payroll Tax Case*:

> "..... it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves".[49]

For that reason there were implications in the Constitution as to the manner in which the Commonwealth and the States respectively could exercise their powers vis-à-vis each other. Thus he said that a "general law of the Commonwealth which would prevent a State from continuing to exist and function as such would ... be invalid".[50]

Sir Harry applauded the slogan which Barton had used while campaigning for federation – that for the first time in history there would be a continent for a nation and a nation for a continent.[51] That was a true statement, for while the United States and Canada were of continental size, each actually occupied only half a continent, Canada contained two nations, and the Russian Czars ruled many nations. Sir Harry would also have been familiar with Roscoe Pound's aphorism that countries of continental dimensions can only be ruled as either federations or autocracies. His Queensland origins and attachments must have helped influence his antipathy to strong central power.

The weakening of the States

However, in the course of his own lifetime, even before he became a judge, the States had lost ground in many significant respects.

First, shortly after he was born, the *Engineers' Case* had overthrown two key doctrines advanced by the first three Justices of the High Court which favoured the States. One was the doctrine of "implied immunity of instrumentalities", which was thought to prevent the States and State offices from being taxed. The other was the doctrine of reserved powers: the doctrine that from the allocation to the Commonwealth of specific legislative powers in s. 51 could be inferred the existence of other powers reserved to the States. For example, it was said that s. 51(i) gave the Commonwealth power to legislate over international and interstate trade; that implied a prohibition on interfering with State powers over intrastate trade; and in turn it was said that other s. 51 powers should be interpreted in such a way as not to destroy the implied State power over intrastate trade.[52]

These doctrines were said to be erroneous in 1920, in the *Engineers' Case*.[53] The overthrow of the "implied immunity of instrumentalities" doctrine was less important, since it has come to be replaced by another principle serving a similar function, although in a weaker form. But the fall of the reserved powers doctrine seriously altered the federal structure. Sir Harry thought the case was "a prime cause of the decline of federalism in Australia".[54]

A second development adverse to the States arose from the attachment of conditions to grants made by the Commonwealth to the States under s. 96 of the Constitution. This had the effect of giving the Commonwealth some influence over or control of policy in fields like education and health over which it had no direct legislative power.

A further development was the legislative termination in 1942 of a double system of federal and State income taxes, and its replacement by the Commonwealth as the sole levier of income tax in return for reimbursement to the States of the sums lost.[55]

Another fiscal development adverse to the States took place in relation to s. 90 of the Constitution, which prevents the States from levying duties of excise. High Court decisions widening the conception of a duty of excise tended to squeeze State access to indirect taxes,[56] and to force the States to develop an artificial system of fees for licences to carry on business in the future levied by reference to past periods. This system was approved by the High Court in two cases argued in succession, *Dennis Hotels Pty Ltd v. State of Victoria*[57] and *Whitehouse v. State of Queensland*,[58] in the second of which H T Gibbs, QC was the successful counsel. Ex-barristers are often proud of, and defensive about, their forensic children, but this particular favoured child of victory, though never spurned by its father, came under increasing disfavour in Sir Harry's time on the High

Court, although it survived until 1997, well after his departure.[59]

Sir Harry summarised these developments as leading to "a lessening of financial responsibility on the part of the States and a duplication of governmental functions as the Commonwealth bureaucracy expands its empire into State territory".[60]

Another area of increased Commonwealth power which Sir Harry found particularly distasteful related to s. 51(xxxv), giving the Commonwealth legislative power over conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. On this Sir Harry cast a cold eye:

> "My predecessors on the High Court, by a series of decisions marked by a metaphysical subtlety of reasoning that would have delighted a medieval schoolman, invented a doctrine of paper disputes which has had the result that disputes which to the uninitiated might appear to be purely local in character have been held to extend beyond the limits of one State. The Commonwealth Conciliation and Arbitration Commission has thus acquired power to affect the wages and working conditions of most workers in Australia. It is something of a legal oddity that an instrumentality created by the Commonwealth Parliament has power to bring about economic results which the Parliament itself cannot achieve".[61]

All these developments took place during or were foreseeable in the period of Sir Harry's pre-judicial lifetime. They were the result of a mixture of legal and practical factors classically summarised by Windeyer J in the *Payroll Tax Case*, one of the first High Court cases in which Sir Harry sat.[62] Windeyer J said that at federation Australia:

> "….. became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the underlying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dependence. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case* ....".

The pace of such developments quickened during Sir Harry's judicial lifetime. From its inception, the Gorton Government which appointed Gibbs J to the High Court showed signs of a desire to widen the exercise of federal power. Coming events cast their shadows before, and these signs multiplied under the Whitlam Government and all succeeding Commonwealth governments.

These changes, then, arose through non-legal and legal factors. Among the non-legal factors which changed the position of the States were, for example, improvements in transport and falls in its cost: this increased interstate trade, and widened the trading field open to federal regulation. Some of the non-legal factors depended on political desire. Once the Commonwealth government was happy to make generous provision for the States by grants or by taxation arrangements provided the States accepted appropriate conditions, the *de facto* power of the Commonwealth was bound to rise. Indeed, Deakin had foreseen this in 1902, when he said that the Constitution had left the States "legally free, but financially bound to the chariot wheels of the Commonwealth".[63]

As we have seen, Sir Harry deplored this, but it was a matter outside his control, because by the mid 1970s the will of politicians to exercise their powers to the full was becoming very strong. In England it was the age of Mrs Thatcher. When Lord Carrington was asked, "What will happen if Margaret is run over by a bus?", he answered grimly, "It wouldn't dare". A similar political will on occasions began to show itself here. What upset Sir Harry more than a strong political will to use uncontroversial powers to the full was the employment of what he saw as invalid legal reasoning to disturb "the federal balance of the Constitution", to use a phrase much employed by him.[64]

Apart from legal developments which either had been controversial, like the *Engineers' Case*, or remain so, like the widening of "excise" or s. 51(xxxv), there were of course legal factors which had inevitably and uncontroversially changed the position of the States. They included the rendering invalid, under s. 109 of the Constitution, of State laws inconsistent with Commonwealth laws enacted pursuant to entirely uncontroversial exercises of legislative power pursuant to the heads of power in s. 51 – for example, many fields of commercial and intellectual property law, family law, and laws relating to postal, telegraphic, radio and television services.

Sir Harry did not criticise these trends. Indeed, he himself was to participate in them.

Sir Harry Gibbs' recognition of Commonwealth power

Sir Harry is sometimes represented as always taking the position most adverse to Commonwealth power in any case he heard. That is not correct. Take the *Concrete Pipes Case*.[65] On 30 June, 2005, *The Sydney Morning Herald*, in discussing his career, informed its readers:[66]

> "For most of [the Whitlam-Fraser period] of expansiveness in Commonwealth powers, Gibbs was in the minority.
>
> "In the *Rocla Concrete Pipes Case*, which enlarged the corporations power – constitutionally a move from the ice age to the concrete age – Gibbs was in the minority".

The imputation is that Sir Harry, unlike the forward looking majority, remained in the ice age. The fact is that all of the Justices, including Gibbs J, considered that s. 51(xx) of the Constitution gave the Commonwealth power to enact a law to regulate the trading activities of foreign, trading and financial corporations for the purpose of preserving competition in trade. The difficulty was that the key provisions of the Act were drafted so as to apply to all persons, not just these corporations. A majority of the Court held that it was not possible to employ s. 7 of the *Trade Practices Act* 1965 and s. 15A of the *Acts Interpretation Act* 1901 to read down the key provisions so as to apply only to those corporations, and to rest on other heads of power such as the trade and commerce power, the power to regulate dealings with the Commonwealth, and the Territories power. Gibbs J took the contrary view,[67] and McTiernan J briefly agreed.[68] Thus while it was true to say that Gibbs J was in the minority, it would have been even truer to say that he voted for a more expansive exercise of Commonwealth power than the majority did.

Another example of the fact that Sir Harry cannot be represented as a last-ditch opponent of all exercises of Commonwealth power is *Murphyores Inc Pty Ltd v. The Commonwealth*.[69] The High Court held that a regulation prohibiting the export of minerals without Ministerial approval was valid under s. 51(i) (which gives power to legislate on international trade and commerce), and that it was open to the Minister to take into account not merely matters of trade policy, but also the environmental impact of mining and processing mineral sands so as to extract the minerals to be exported. The High Court accepted the Commonwealth's argument that if a prohibitory law is within power, it does not matter whether the grounds for relaxing the prohibition relate to matters within that power.

The High Court was unanimous. Gibbs J agreed[70] with Stephen J and Mason J. Stephen J said it was not necessary for the factor appealing to the Minister as a ground for granting or refusing consent to be a ground relevant to international trade or commerce, or any other head of Commonwealth legislative power.[71] Mason J said that the regulation was wide enough to include environmental factors as relevant,[72] and that even so widely construed, it was not beyond s. 51(i): the law remained a s. 51(i) law whatever the motives which inspired it or the consequences which flowed from it.[73]

That case refutes another fallacy which has attached itself to Sir Harry's memory. In hindsight popular myth tends to position Mason CJ as the leader of centralist thought, and Gibbs CJ as the leader of anti-centralist tendencies. The *Murphyores Case*, where they were at one, demonstrates that that myth too must be qualified.

Difficulties for federalism after 1970

Some of the trends noticed by Windeyer J in the *Payroll Tax Case* and deplored by Gibbs J were not to reach their apotheosis until after the retirement of the latter, like the striking down of State indirect taxes as being duties of excise in *Ha v. New South Wales*.[74]

But many were in full flood before his retirement. Two may be noted briefly: the dilution of State representation in federal Parliament and the growth in use of the external affairs power to support Commonwealth legislation incapable of support by any other power.

The composition of the Senate

Gibbs CJ saw the Senate as a key element in the protection afforded by the Constitution for the States. The Senate "is an essential part of the Parliament in which the legislative power of the Commonwealth is vested". Apart from three limitations in s. 53, it has equal power with the House of Representatives in respect of all proposed laws. Beyond these limitations, the Senate could amend, reject or delay the passage of Bills proposed by the Government which had passed the House of Representatives.[75]

> "The requirements that the Senate shall be composed of senators for each State, directly chosen by the people of the State, and that equal representation of the original States shall be maintained, were not mere details of legislative machinery. They were obviously regarded as indispensable features of a federal Constitution and as a means of enabling the States to protect their vital interests and integrity".[76]
>
> He quoted with approval Quick and Garran's statement that the Senate:[77]
>
> "….. is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances".

Quick and Garran also said that the Senate was created for the purpose of enabling the States "effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States". Gibbs CJ saw "the protection of State interests by means of equal membership of the Senate" as "one of the conditions on which the people of the colonies agreed to unite". That was not so of the Territories: at the time of federation the Australian Capital Territory did not exist, and the Northern Territory of South Australia and British New Guinea were in a state of dependency, not comparable with the position contemplated for the States.[78] It was for these reasons, as seen above, that he construed s. 7 of the Constitution as prevailing over s. 122.

The external affairs power: s. 51(xxix) of the Constitution

Many have found s. 51(xxix) difficult to construe, and in the course of Sir Harry Gibbs' life on the Court, it came sharply to divide the Justices. By the time of his retirement, the majority in succeeding cases had established that s. 51(xxix), which gives the Commonwealth power to legislate in respect of external affairs, supported a law the purpose of which was to implement an international treaty entered into by Australia. Since then it has been said that a law implementing recommendations of international bodies, draft international conventions and international recommendations and requests is valid.[79] This may be called the "treaty interpretation" aspect of s. 51(xxix). It has also been held that a law relating to any person, matter, thing or conduct outside Australia can be supported by the external affairs power.[80] This "geographic externality" view rarely came before the Court directly while Sir Harry was a member.[81] After his retirement he said that the "geographic externality view" accords with the natural meaning of s. 51(xxix), though he did not specifically approve it.[82] However, in contrast, at all stages he strongly opposed the treaty implementation doctrine, at least in its broad form. In that broad form the majority recognised four limits to it, but they are not closely restrictive.

The first limit is that the Commonwealth must find another country willing to enter a convention with it. The second is that the convention must be made in good faith – not merely as a subterfuge to give the Commonwealth legislative power it would otherwise lack. However, as Gibbs CJ said in *Koowarta v. Bjelke-Petersen*,[83] that doctrine is "at best ... a frail shield, and available in rare cases" because it would be difficult to establish. Later he went further and said it was "for practical purposes ... meaningless".[84] Thirdly, the Commonwealth law must be reasonably appropriate and adapted to give effect to the convention: while legislation has sometimes failed this test, it is not hard to satisfy. Fourthly, since s. 51(xxix) is subject to the rest of the Constitution, it is subject to the implication in the Constitution that the legislation must not (a) discriminate against a State or (b) prevent it from continuing to exist and function: but this criterion too is not hard to satisfy. In Mason CJ's judgment in the *Tasmanian Dam Case* this limitation is recognised,[85] but three years later he pointed out to an American audience that the first limb of it had only been successfully invoked as a ground of invalidity twice in the previous 40 years,[86] and that the second limb was "such an abstract notion that it has so far proved incapable of useful definition".[87]

Gibbs CJ unavailingly urged a further limitation: the law must not operate entirely within Australia. If that limitation were not recognised, s. 51(xxix) would leave it open to Parliament to enact legislation which it had no other power to enact, and thereby deprive the States of any power to legislate in that field because of the operation of s. 109. That would ignore, and destroy, the federal nature of the Constitution. It may be noted that legislation which concerns matters entirely external to Australia does not have this vice; that is no doubt why Sir Harry was not concerned to dispute the geographic externality view extrajudicially, strong though the arguments against it are.

The majority judges in the leading cases, *Koowarta v. Bjelke-Petersen* and the *Tasmanian Dam Case*,[88] criticised the minority views as flawed. The supposed flaw is that they revived the "reserved powers" doctrine,

which had been repudiated in the *Engineers' Case*.[89] The majority did not, however, deal with the key point made by Gibbs CJ in particular.[90]

Gibbs CJ made it plain that his stand did not depend on the revival of the reserved powers doctrine, or on the concomitant need to identify any particular powers which were reserved to the States. His point was a different one. His point was that the external affairs power differed from all other powers conferred by s. 51 in its capacity for "almost unlimited expansion". Some of the other powers were broad and some were not, but there were limits to the application of all of them. That was scarcely true of the external affairs power:

> "….. there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power".

Hence he relied on what Latham CJ said in the *Bank Nationalisation Case*:[91]

> "….. no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament".

On Gibbs CJ's approach, a law, even if it gives effect to a treaty, is not a law with respect to external affairs if it forbids the building of a dam in Australia,[92] or forbids the cutting down of trees within Australia,[93] or regulates industrial relations in Australia.[94] However, a law relating to fugitive offenders or aerial navigation, although domestic in part of its operation, might involve international relations: if so, it could be within s.51(xxix).

Gibbs CJ also rejected the idea that a law was valid under s. 51(xxix) if it dealt with a matter of "international concern". He said:

> "The fact that a domestic issue gives rise to international concern does not convert a law with respect to a domestic issue into a law with respect to external affairs".[95]

I think it is correct to say that Gibbs CJ's argument has not been answered. That means that, despite the weight of steadily accumulating authority against his view, courageous counsel in future have at least some intellectual straw with which to make bricks in any challenge to the majority doctrine.

Any such challenge could also rely on a fallacy in the majority reasoning. It adopted the view that a wide power to legislate on external affairs is desirable in order to avoid Australia being a "cripple", unable responsibly to conduct international affairs.[96] The fallacy in that view is that the reasoning ignores a fundamental warning which Gibbs CJ gave about the task of constitutional interpretation:

> "... The function of this Court is to consider not what the Constitution might best provide but what, upon its proper construction, it does provide".[97]

The question: "Is there a constitutional gap?" is not to be answered merely by wishing or pretending that no gap exists.

Conclusion

It may be an illusion, but at least in major constitutional litigation Sir Harry appeared to be in dissent more frequently than is usual for a Chief Justice. He did not complain or rail about this, any more than he boasted about anything. Despite his discomfort about constitutional trends in the years before his retirement, and his even greater discomfort thereafter, Sir Harry thought the Constitution worked "reasonably well". He praised it for having "allowed democracy and the rule of law to survive in Australia". Provided democracy and the rule of law survived, he thought it would not be the particular provisions of the Constitution which determined whether the nation would thrive or decline, but "the intelligence, energy and decency of the people".[98]

We must hope that the future raises up people of his intelligence, energy and decency to defend the rule of law in our federal system as worthily as he did. For he was a sturdy and forceful and unselfconscious expounder of plain truths as he saw them. He confronted opposing views directly, head-on, without flinching. To use the words he used of Sir Samuel Griffith, he was "an exemplar of unselfish dedication to the law".[99]

Let me conclude by also applying to Sir Harry what Lytton Strachey said of James Fitzjames Stephen, another man who fought against the trends of his epoch. He said that he was: "A character of formidable grandeur, with a massive and rugged intellectual sanity and colossal commonsense".[100]

Endnotes:

1. Address of Sir Garfield Barwick on retirement on 11 February, 1981, 148 CLR v at vii.

2. Toast to Sir Harry Gibbs, New South Wales Bar Association Dinner, 5 December, 1986, *Bar News*, Autumn 1987, 9.

3. *Future of Youth* (1986) 19 *Australian Journal of Forensic Sciences*, 6 at 6-7.

4. Address – Speech Night at Knox Grammar School, 6 December, 1983, p.5.

5. Occasional address, College of Advanced Education, Canberra, 30 April, 1982, p.13.

6. *Sir Harry Gibbs Reflects*, in *Law Institute Journal*, May, 1987, 417 at 421.

7. Occasional address, College of Advanced Education, *op. cit.*, pp.11-12.

8. Address to the 23rd Annual Conference of the North Queensland Law Association, 17 October, 1981, p.4.

9. *Ibid.*, p.22.

10. A W Brian Simpson, *Hersch Lauterpacht and the Genesis of the Age of Human Rights* (2004) 120 LQR 49 at 50.

11. *Address of Thanks to his Excellency the Governor-General at the Commemoration of the 100th Anniversary of the Birth of Sir Owen Dixon*, 28 April, 1986, p.3.

12. *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 329 at 330.

13. *The State of the Judicature* (1981) 55 ALJ 677 at 679-680. See also *The State of the Australian Judicature* (1985) 59 ALJ 522 at 524-525.

14. *Ibid.* (1981), at 680.

15. House of Commons, 6 July, 1914, *Hansard*, p.847.

16. *Whitehouse v. State of Queensland* (1960) 104 CLR 609 at 617.

17. Toast to Sir Harry Gibbs, New South Wales Bar Association Dinner, *loc. cit.*, at 10.

18. For valuable biographical material, together with a classification and analysis of Sir Harry's judgments, see Justice G N Williams, *Sir Harry Gibbs* in (ed) M White and A Rahemtula, *Queensland Judges on the High Court*, ch. 3. See also the entries by the following in the *Oxford Companion to the High Court of Australia*: David Jackson and Joan Priest (*Harry Talbot Gibbs*) and Anne Twomey (*The Gibbs Court*).

19. Address on the occasion of the 75th anniversary of the University of Queensland Union, 19 July, 1986, p.3.

20. Address on 12 December, 1981.

21. Remarks at the Opening of the Lawasia Conference at Manila on 9 September, 1983, p.2.

22. *Ibid.*, p.6.

23. *Ibid.*.

24. Speech at swearing in as Chief Justice on 12 February, 1981, 148 CLR xi at xiii.

25. *Address of Thanks to his Excellency the Governor-General at the Commemoration of the 100th Anniversary of the Birth of Sir Owen Dixon*, 28 April, 1986, p.2.

26. *Queensland v. The Commonwealth* (1977) 139 CLR 585 at 599.

27. Reply by Sir Harry Gibbs to Toast, New South Wales Bar Association Dinner, *loc. cit.*, 9 at 12.

28. *Burns v. The Queen* (1975) 132 CLR 258 at 265.

29. *Driscoll v. The Queen* (1977) 137 CLR 517 at 542.

30. The history is discussed in *Kelly v. The Queen* (2004) 218 CLR 216 at paras [22]-[37].

31. *The State of the Australian Judicature* (1985), *loc. cit.* at 526.

32. *The Law – Fifty Years Later*, Address on the Occasion of the 75th Anniversary of the University of Queensland and the 50th Anniversary of the Establishment of the Faculty of Law, 7 May, 1985, p.20.

33. *Ibid.*, p.19.

34. *A Constitutional Bill of Rights?* (1986) 45 *Australian Journal of Public Administration*, 171 at 175.

35. *The State of the Australian Judicature*, *loc. cit.* at 527.

36. For example, *The Appointment of Judges* (1987) 61 ALJ 7.

37. Robert Stevens, *The English Judges*, p.14.

38. Peter Rowland, *Lloyd George*, p.657.

39. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 243-249.

40. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

41. *Ibid.*, at 600.

42. *Ibid.*, at 599.

43. (1970) 122 CLR 69 at 101-113.

44. (1971) 122 CLR 114 at 131.

45. (1978) 141 CLR 88 at 128.

46. *Some Thoughts on the Australian Constitution*, Address delivered at the All Nations Club, 21 November, 1985, pp.3-4.

47. *Ibid.*, p.6.

48. *Bradken Consolidated Ltd v. Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 122-123.

49. *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 417-418.

50. *Ibid.*, at 424.

51. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.15.

52. *R v. Barger* (1908) 6 CLR 41 at 54 per Griffith CJ ("inter-state" where secondly appearing is a slip for "intra-state").

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

54. *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 11 (1999), 291 at 294.

55. The legislation was held valid: *South Australia v. The Commonwealth* (1942) 65 CLR 373 (*The First Uniform Tax Case*).

56. For example, *Parton v. Milk Board (Victoria)* (1949) 80 CLR 229.

57. (1960) 104 CLR 529.

58. (1960) 104 CLR 609.

59. *Ha v. State of New South Wales* (1997) 189 CLR 465.

60. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.8.

61. *Ibid.*.

62. *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 396.

63. A J Hannan, *Finance and Taxation* in (ed) Mr Justice Else-Mitchell, *Essays on the Australian Constitution* (2nd ed, 1961) at p.249.

64. For example, *Second Territories Representation Case* (1977) 139 CLR 585 at 601; *The Commonwealth v. Tasmania* (1983) 158 CLR 1 at 100 (*The Tasmanian Dam Case*). It was an expression less respected by other Justices: in the *Tasmanian Dam Case* at 129 Mason J spoke of "ritual invocations of 'the federal balance' ".

65. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

66. *The Sydney Morning Herald*, 30 June, 2005, p.13.

67. (1971) 124 CLR 468 at 525-528.

68. *Ibid.*, at 499.

69. (1976) 136 CLR 1.

70. *Ibid.*, at 9.

71. *Ibid.*, at 14.

72. *Ibid.*, at 23-24.

73. *Ibid.*, at 20.

74. (1997) 189 CLR 465.

75. *Victoria v. The Commonwealth* (1975) 134 CLR 81 at 143-144.

76. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 246.

77. *Constitution of the Australian Commonwealth*, p.414.

78. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 247-248.

79. *Victoria v. The Commonwealth* (1996) 187 CLR 416 at 483 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (*Industrial Relations Act Case*).

80. *Polyukovich v. The Commonwealth* (1991) 172 CLR 501.

81. Except for observations in *New South Wales v. The Commonwealth* (1975) 135 CLR 337 at 360 per Barwick CJ, 470-471 per Mason J, 497 per Jacobs J and 502-504 per Murphy J (*Seas and Submerged Lands Case*).

82. *External Affairs Power: A Critical Analysis*, in *Oxford Companion to the High Court of Australia*, p.264.

83. (1982) 153 CLR 168 at 200.

84. *External Affairs Power: A Critical Analysis*, *loc. cit.*, p.264.

85. (1983) 158 CLR 1 at 128.

86. *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192. It has since had a little more application: *Austin v. The Commonwealth* (2003) 215 CLR 185.

87. *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience* (1986) 16 *Federal Law Review* 1 at 18. An example of the second limb is *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

88. *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

89. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 227 per Mason J and 241 per Murphy J; *Tasmanian Dam Case* (1983) 158 CLR 1 at 126-127 per Mason J, 168 per Murphy J, 220 per Brennan J and 255 per Deane J.

90. *Tasmanian Dam Case* (1983) 158 CLR 1 at 99-100. See Zines, *The High Court and the Constitution* (4th ed), p.283. At 284 Professor Zines works up an argument based on a remark of Mason J's which is claimed to meet Gibbs CJ's point: *sed quaere*.

91. *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1 at 184-185.

92. *Tasmanian Dam Case* (1983) 153 CLR 1.

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

94. *Victoria v. The Commonwealth* (1996) 187 CLR 416.

95. *External Affairs Power: A Critical Analysis*, *loc. cit.*, p.264.

96. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 229-230 per Mason J, at 241 per Murphy J; *Tasmanian Dam Case* (1983) 158 CLR 1 at 127 per Mason J, 221 per Brennan J and 258 per Deane J.

97. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 at 249.

98. *Some Thoughts on the Australian Constitution*, *op. cit.*, p.16.

99. *Sir Samuel Walker Griffith Memorial Lecture*, 30 April, 1984, p.1.

100. K J M Smith, *Sir James Fitzjames Stephen*, in *Oxford Dictionary of National Biography*, vol 52, 439 at 442.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the eighteenth Conference of The Samuel Griffith Society, and our second in Canberra.

As you all know, this Conference will have a special place in the annals of our Society, having been the first to occur since the death of our former President, the highly respected and warmly regarded Sir Harry Gibbs.

Much of our proceedings this weekend is dedicated to Sir Harry's memory, beginning with last night's splendid inaugural Sir Harry Gibbs Memorial Oration by His Honour, Justice Dyson Heydon of the High Court of Australia. The large attendance, including members and others from all mainland states of Australia, testified to the regard and affection in which Sir Harry was held by all who came in contact with him. They came last night to pay tribute to him, and needless to say given Mr Justice Heydon's eminence, they were not disappointed.

His Honour's address, the written version of which ranges somewhat further than the polished shorter version that he delivered to us at dinner last night, will be published in full in Volume 18 of our Proceedings, *Upholding the Australian Constitution*. It displayed that characteristic mix of wit, scholarship, felicity of expression and respect for all the best traditions of the law, for which Justice Heydon has rightly become renowned. On behalf of you all, I take this opportunity of reiterating the thanks that were so ably delivered to him last night by Bill Hassell.

In the course of preparing these introductory remarks, I had occasion to look back at those I made just over a year ago at our Coolangatta conference. Referring then to "the swelling tide of ignorant centralism rushing out of Canberra", I noted that "even the Prime Minister" – for whom, as I have made clear on the public record, I hold a high regard – "has not been immune from this disease". Hardly had that Conference concluded on April 10 than the Prime Minister, in what can only be described as an appalling speech to the Menzies Research Centre entitled *Reflections on Australian Federalism*, both confirmed his non-immunity and gave proof that the disease was far advanced.

Since then, the government's most important legislative endeavour has been directed to its *Work Choices* legislation (and accompanying regulations). That legislation purports to employ the corporations power of the Constitution (section 51(xx)) not only to do what might previously have been done under the conciliation and arbitration power (section 51(xxxv)) but also to do a great many other things which were clearly outside the ambit of the latter power.

Earlier this month I spent four days here in Canberra attending (with a little time off for the Budget) the High Court hearings of the case that the State and Territory governments, and some major trade unions, have brought against that legislation. As you know, those hearings concluded on 11 May, and the Court has reserved its judgment. I am confidently informed on all sides, by persons much more learned in the law than I, that the plaintiffs will lose their case and that the Commonwealth will prevail. To which I can only reply, as I have done elsewhere, that I have too high an opinion of most of the Justices to believe they would actually commit such a monstrosity as that would entail.

The viewpoint of those who dismiss my faith in that respect is founded, as I understand it, in the fact that there have been some past precedents (emanating from both sides of politics) in the use of the corporations power by the Commonwealth to enact legislation that might otherwise have been thought to be beyond its constitutional powers. Indeed, as I listened earlier this month to the arguments of counsel for the Commonwealth, the Solicitor-General, Mr David Bennett, QC it seemed to me that his argument boiled down to saying that, the Court having previously given the Commonwealth an inch, it was now incumbent upon it to give it a mile.

Some years ago, when commenting upon the outrageous abuse by the Commonwealth of the external affairs power of the Constitution (section 51(xxix)), Sir Harry Gibbs said that successive High Court interpretations of that power had been such that one could now almost replace the words "external affairs"

with the one word "anything". Had Sir Harry been alive today, I believe that he would have seen this latest grab for centralist power by the Commonwealth as further cementing that outcome – at least in so far as "anything" involving a corporation was concerned.

That brings me to our program, the first four papers in which today are devoted to Sir Harry's life and work. As I am chairing that section, I shall reserve any further remarks on those papers until, shortly, we come to them.

This afternoon, and again over dinner this evening, we shall have two papers, and an address, directed to the "progressive" lawyers' grab for further power for themselves via the enactment of Bills of Rights in one form or another. That too, you will recall, was a topic on which Sir Harry Gibbs's views are firmly on the record in Volume 6 of our Proceedings. We also look forward to a paper on the role of the Sovereign, and tomorrow, three papers on, respectively, the *Work Choices* legislation, the Aboriginal question, and the matter of federalism and the Liberal party, on which I touched earlier in these remarks.

It now remains to get the program under way. Our first paper this morning, *Sir Harry Gibbs Remembered*, will be delivered by video. Its author, His Honour Justice Michael Kirby, who has a prior and unbreakable commitment this weekend in Fiji, has specifically asked me to say how much he regrets his inability, as a consequence, to be present to deliver his remarks in person. For my part, let me only express my gratitude to Justice Kirby for undertaking to speak to us, albeit from a distance, this morning. On the assumption that this technology will work, let us now proceed to hear him.

The following four Chapters are specifically devoted

to

The Life and Work of the

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Chapter One
Sir Harry Gibbs Remembered*

Hon Justice Michael Kirby, AC, CMG

I am speaking to you from my chambers in the High Court of Australia in Canberra. It is a beautiful autumn day, and to my left is the new Parliament House and the old Parliament House. In front of me are the Brindabellas. I feel greatly privileged to be in this building, which is the ultimate place where we uphold the rule of law in this country. Here we maintain constitutionalism. We enforce the valid laws as made in the Parliaments. We safeguard the principles of fundamental human rights which are enshrined in our law.

I am here to celebrate with you the life of Sir Harry Gibbs, a great Chief Justice of this Court, a great jurist, a fine Australian, a believer in our constitutional traditions and a personal friend. I want to speak of my friendship with Sir Harry Gibbs. I must do so in this electronic form because I cannot be with you for this conference. We have found in the High Court, in the special leave applications which come to us by videolink, that when people speak to us in the disembodied form of telecommunications, they tend to be briefer. So it may be that my remarks to you about Sir Harry will be briefer than had I been there in your midst with my friend and colleague Dyson Heydon, and with other friends and colleagues pondering on the Constitution and reflecting on the contribution that Sir Harry Gibbs made to the work of The Samuel Griffith Society and, through the Society, to the life of our nation.

I want first of all to read to you my tribute to Sir Harry Gibbs. Then I want to reflect, at the end, upon his special contributions to the cause of liberal democracy, which is the cause that is enshrined in our Constitution and in the values that we cherish. We may have differences. We do have differences. Differences are healthy in a democracy. They represent the very essence of the competition for ideas that our Constitution enshrines and protects. But above and beyond the differences we have friendships and mutual respect and learning from each other. It is about friendship that I want to begin and to speak of my friendship with Bill Gibbs. It is a friendship which I still feel most tangibly and especially here, in this place, where he worked for so many years as a Justice and as Chief Justice, helping to shape the values of the nation as a land that lives under law.

At a time when love, sex and exclusive family relations are given so much emphasis, friendship, according to Andrew Sullivan, has been under-valued.[1] He quotes Cicero in *De Amicitia* as saying:

> "And this is what we mean by friends: even when they are absent, they are with us; even when they lack some things, they have an abundance of others; even when they are weak, they are strong; and, harder still to say, even when they are dead, they are still alive".

This is how I feel about my friend, Bill Gibbs. In many ways, we were opposites. His judicial and social philosophy was very different from my own. His life's experience was different. He looked at the world through different spectacles. We would often agree to disagree over this or that. But now that he is dead, I think back on the friendship that we shared in various activities where our lives were thrown together.

For a time, we both served in important federal positions – he as a Justice of the High Court of Australia and I, the newly appointed Chairman of the freshly minted Australian Law Reform Commission. Then we worked together in the committee of the Australian Academy of Forensic Sciences, he as President before I too took up that position. Over twenty years we attended together the meetings and ceremonies of the Australian members of the Order of St Michael and St George. He held the top office in that Order as a Knight Grand Cross (GCMG). I was Malcolm Fraser's last appointment to it in 1983 – the last CMG in the Australian list. Then there was the time we worked together in Australians for Constitutional Monarchy to preserve the system of government that everyone else scorned – saying it was doomed to popular rejection.

In most recent years, we would meet and exchange thoughts from the perspective of service on the nation's highest court. We skirted around points of difference but found many of agreement.

Now, in the aftermath of his passing, I think back on the life of this friend. What does it matter that we disagreed, even over things that seemed important, perhaps fundamental? We both knew that we lived

together in a society, and in institutions, that afforded many common links. Our friendship taught that you do not have to enjoy total agreement to be friends. Just enough common ground, of things shared and agreed, with the occasional difference to provide a frisson of excitement that made the agreements more pleasurable and surprising.

My friendship for Bill Gibbs was not as intense as that for Lionel Murphy. But it was true. And it was respectful. For there is no doubt that, in our Commonwealth, he was a figure of probity and great achievement.

Sir Harry Gibbs, one-time Chief Justice of Australia and Justice of the High Court of Australia, died in Sydney on 25 June, 2005. Typically, he forbade a State funeral. He was an intensely private and modest man. However, following his death, a State Memorial Service was held in St Stephen's Church, Sydney on 11 July, 2005. The large and varied congregation heard moving tributes about the high regard and affection that Sir Harry Gibbs had earned by his long life of public service and in civil society in Australia.

Born in 1917, Harry Talbot Gibbs was the elder son of a solicitor who practised in Ipswich, Queensland. Throughout his life he was known to his friends as Bill; but his formidable mien confined this name to those whom he admitted to friendship. He excelled at school and in his studies at the University of Queensland, where he graduated in Arts and Law with double First Class Honours.

He was admitted to the Queensland Bar just before the beginning of the Second World War. He saw service in the AIF in New Guinea, was promoted and mentioned in despatches. On demobilisation, he married Muriel Dunn, whom he had met at Law School. It was a happy marriage, blessed with three daughters and a son. The oldest daughter, Margaret, spoke for the family at the Memorial Service. Hers was a powerful speech about a loving father, husband and grandfather and a man who was always true to his word.

Bill Gibbs' career at the Queensland Bar flourished. He took silk in 1957. In 1961, at the then young age of 44, he was appointed a judge of the Supreme Court of Queensland. He was the first law graduate from the University of Queensland to join that Bench. He quickly demonstrated his skill and authority, performing trial and appellate work with equal ability in every field of law. At one stage it seemed that he would be appointed Chief Justice of Queensland.

However, as these things happen, he was passed over and soon, in 1967, he moved to the federal judiciary. For a short time he became the Federal Judge in Bankruptcy, based in Sydney. But in 1970 he was elevated to the High Court of Australia. He served on that Court, including for six years as Chief Justice, until his retirement in 1987. His judicial writings continue to be read in contemporary cases for their broad knowledge of the law and simplicity of expression. They were read and analysed repeatedly in the recent hearing that considered the States' challenge to the constitutional validity of the new industrial relations legislation.[2]

The time of Mr Justice Gibbs on the High Court was one of turbulence and challenge. Controversy surrounded Chief Justice Barwick's advice to the Governor-General (Sir John Kerr) that was followed by the dismissal of Prime Minister Whitlam and his government. Equal, or even greater, turbulence surrounded accusations against, and the trials of, Lionel Murphy, then a judicial colleague on the High Court. The latter events happened substantially in the period that Sir Harry was Chief Justice. There were many awkward moments. His well known sense of calm was often called upon to help steer the nation's highest court through those difficult years.

Sir Harry Gibbs' association with the Australian Academy of Forensic Sciences predated his retirement from judicial office. He was always intellectually lively. He loved a good debate and the clash of ideas – not least on the interface of science, medicine and the law. He came to Academy functions regularly, whilst serving as a Justice of the High Court. He was elected (if that is a word appropriate to the period in the life of the Academy when Dr Oscar Schmalzbach was Secretary-General) the President of the Academy between 1980 and 1982. Although he was elevated to Chief Justice in the midst of this period, he never failed to attend to the Academy's affairs, to participate in scientific sessions and to speak gracefully and generously at the dinners that followed.

Sir Harry Gibbs sometimes appeared bemused by the occasionally unconventional conduct of Dr Schmalzbach – a man as brilliant as he was irascible. But Sir Harry was unfailingly gracious to the members of the Academy, their spouses, partners and friends. In such an environment he was always quite formal. He knew that a code of public behaviour was expected of judges. He was old-fashioned but never quaint. In a gentle way, he could join in the merriment of the social events of the Academy. But never did he drop his

guard. We always knew that we were in the presence of a serious judge and considerable officer of state. By serving as President of the Academy, he maintained, and enhanced, its standing.

Much is made of Sir Harry Gibbs' conservatism as a person, lawyer and judge. It is true that he was defensive of legal precedent. In the classification of lawyers according to Lord Denning's labels as "timorous souls" and "bold spirits",[3] Sir Harry Gibbs would have proudly rejected the category of "bold spirit". In his view of the world, it was for Parliament, and elected politicians, to be bold. Judges had a more modest function. He adhered to this view, despite much evidence of parliamentary neglect of large areas of the law and of oversight of human rights infractions. In our Commonwealth, there is unquestioned room for diversity in judicial philosophy. As David Jackson, QC remarked at his Memorial Service, with the recent ascendancy of more conservative judicial attitudes, some of Sir Harry Gibbs' constitutional views may return to general acceptance.

He was not opposed to law reform. On my appointment in 1975 as the first Chairman of the Australian Law Reform Commission, he invited me to lunch at the Australian Club. He spoke energetically about the need for reform of criminal law and procedure. Deriving as he did from Queensland, he was a strong proponent of Sir Samuel Griffith's Criminal Code of 1897. He was also a supporter of institutional law reform. Indeed, he was a strong supporter of Australia's institutions and was opposed to radical change of them.

Because of my treasured friendship with Lionel Murphy, I viewed from afar the painful period that he and Lionel Murphy shared in the High Court. When, in recent years, the present High Court Justices entertained Sir Harry Gibbs at a dinner to celebrate his 80th birthday, he spoke of that period. He emphasised (as those who were in the Court in those days have confirmed) that through all the upset and difficulty of those events, the principle of civility in relationships was steadfastly maintained. With Bill Gibbs, no other conduct was imaginable.

He had his own viewpoint. Sometimes it differed from that of Lionel Murphy who, I suspect, felt that he received less support from the Court than was the due of a colleague. In a small collegiate institution, there is a need for civility. When Lionel Murphy was dying, it was Chief Justice Gibbs who pursued the other Justices to ensure that they got their opinions written in time so that Justice Murphy's last judgments could be published. In the event, they were handed down just hours before Lionel Murphy's death.[4]

In the 1990s, I came to know Sir Harry Gibbs quite closely in Australians for Constitutional Monarchy (ACM). This was a body that Lloyd Waddy and I, with a few others, established to respond to the proposal initiated by Prime Minister Keating that Australia should move to become a republic.[5] We felt the need for other voices to be raised in the deafening silence of doubt and opposition. Bill Gibbs became the Chairman of the National Council of ACM. We had many meetings. Suddenly we found ourselves in close and unexpected alliance. For him, this was not only a matter of personal loyalty to the Queen but also a deep conviction about the merits of constitutional monarchy as a temperate system of government that worked well. At the Academy's dinners in the Sebel Townhouse, Sydney before its demolition, portraits of the Queen and Prince Philip looked down benignly on all of our activities. For Gibbs these symbols were not irrelevant. They gave stability and continuity to Australian public life.

He did not agree with all of my works as law reformer and judge. He probably disagreed with some of my activities as President of the Academy. I did not agree with all his social views or judicial opinions. But in ACM we worked together with a happy spirit in a common cause. He was to prove a formidable champion of the Australian Constitution and its fundamental system of government. In the end, ACM, unanimously ridiculed by the media and mocked by learned academics and feisty politicians, succeeded on referendum night. The Australian people in every State voted against the republic referendum. In part, this was because of the insistence, in which Bill Gibbs and I concurred, that ACM should be open to people of every race, creed, political persuasion and manner of life.

In the last five years of his life, Bill Gibbs was obliged to undertake dialysis for the failure of his kidneys; but he was never daunted and he never complained. With Bill Gibbs, in the law, in the Academy, in ACM and in life, what you saw was what you got. He was formal and courtly; but decent and unpretentious. He was a true Australian of the Old School. His broad Ipswich accent never left him. He was never false. He was honoured many times in his lifetime. To the end he was loyal and devoted to his wife Muriel, who was wheelchair bound in recent years. He insisted, unaided, on lifting her into transport and maintaining her involvement in his life and activities. Those of us who remember the times we spent in his company will

always carry a strong sense of respect and affection for Bill Gibbs – a most notable leader and example in the law and in Australian civic life.

Six weeks before his death, Bill Gibbs telephoned me. He wanted to arrange a date, when I would be in Sydney, to convene the annual luncheon of the members of the Order of St Michael and St George. We fixed upon a day in August, 2005. The usual venue, the Australian Club in Sydney, was settled. We chatted about the High Court. I asked after his health. "Not so good", he said. And that was it. He did not belabour his predicament.

In the old days of Garfield Barwick, Bill McMahon, John Gorton, Roden Cutler, VC and others of the great and good, the functions of the Order had been large and grand affairs. But with the passing of the years, most of the Knights Grand Cross, many of the Knights Companions and a good number of the CMGs too had died. We were now reduced to a very small band. Bill Gibbs was the doyen of us all. He made me feel welcome and significant. That was a gift he had with many.

Now I have attended the luncheon. The group of us is diminished in number. But we are especially diminished by the passing of this fine spirit.

Andrew Sullivan finishes his essay on friendship with a quotation from Augustine, for whom the end of friendship was the beginning of faith:

> "For wherever the human soul turns itself, other than to you [O God], it is fixed in sorrows, even if it is fixed upon beautiful things external to you and external to itself, which would nevertheless be nothing if they did not have their being from you. Things rise and set: in their emerging they begin as it were to be, and grow to perfection; having reached perfection, they grow old and die. Not everything grows old, but everything dies. But when things rise and emerge into existence, the faster they grow to be, the quicker they rush towards non-being".

Bill Gibbs' mortal person no longer is. But in the law books, his words and ideas continue to guide, to encourage and to warn. And amongst his friends, his memory will last as long as they do.

When I looked through the most recent volume of the record of The Samuel Griffith Society,[6] it contains a worthy tribute to Sir Harry Gibbs written by John Stone.[7] The tribute is written in a heartfelt way. It pays sincere respects to his contributions and his vital work for this Society. The book also contains, in an Appendix, a number of Sir Harry Gibbs' Australia Day messages.[8] I looked through those Australia Day messages for the wisdom that he shared with us over the decade before his death.

Every year these messages were truly engaged with contemporary events, but also with the fundamentals of our Constitution and with our institutions and the way in which our institutions respond to the dilemmas and puzzles of the time.

As with all of us, no doubt in your own cases, I did not always agree with every statement that he made. That is the nature of freedom. That is also the nature of our intellectual curiosity, and our differences of outlook and our different experiences in life, that give us a different slant on particular issues and lead us to see issues through different eyes and in a different light. Yet I was most interested in the fact that Bill Gibbs emerges from his Australia Day messages in many ways as a surprisingly old fashioned liberal. In the media, that thirst for over-simplifications, he was presented as an unreconstructed conservative. Yet if you read the Australia Day messages, often he makes the point that the true "conservative" will be defending the liberal values that are inherent in our Constitution. These are the values that the Constitution was established to protect and which, for a large part, it has protected during the hundred years or more of its existence.

For instance, writing on the terrible events of the 11th of September, 2001, he recognised the need for effective responses to the threat of terrorism.[9] Yet he cautioned against the excesses of security laws.[10] He expressed the importance of responding in a temperate way, consistent with our liberties. He warned of the dangers that had come about through internment in Australia during the First and Second World Wars.[11] And he pointed to the *Korematsu Case*,[12] and to the internment of the ethnic Japanese in the United States during the Second World War, as the excesses to which security can sometimes pass. On the issue of terrorism, he expressed strong views about the dangers of Guantanamo Bay. They were views that got even more strong as the years passed, and as the need to maintain the rule of law, even in the time of terror, became more clear.[13]

On the issue of refugees, he acknowledged the right of every nation to express its own migration policies. Yet he said that this has to be done consistently with the *International Convention on Refugees*.[14] He questioned whether some aspects of our recent response to the refugee problem were strictly consistent with that Convention.

In federal matters he was always, as you know, a strong proponent of the federal/state balance and of the role of the States, even though he acknowledged that sometimes in our federal history the States have not always adhered to their own proper conception of the States' role in our polity. He made a point that has been reinforced many times in recent years by Professor Greg Craven and by Professor Suri Ratnapala, both of whom have taken an active part in the affairs of The Samuel Griffith Society.[15] That in a sense, the federal/state balance and the role of the States in a federation is in itself an important protection for liberty. He made the point that federalism is a division of power. By dividing great power, particularly in a time of technology that concentrates great power, we help to ensure the defence of our liberties.

These were very important contributions to the thinking that is necessary for the contemporary age. They show that, to the end, Bill Gibbs was in tune with the issues of our time. His instruction in his papers for The Samuel Griffith Society, and his instruction in the law books and in the opinions in this Court in this place, remain with us to guide us in the years ahead. I am here to celebrate a great Australian, a fine judge, a devoted Chief Justice of the nation, a human being of firmness and principle but with human understanding. I am here to honour a friend who reached out, over our sometimes differences, to find common ground as I often did with Bill Gibbs, my friend.

Endnotes:

* Parts of this address were earlier published in *Quadrant*, Vol 49(9), September, 2005, p.54.

1. *Love Undetectable* (Vintage Books, 1998).

2. *New South Wales & Ors v. The Commonwealth*, HCA, decision reserved, 11 May, 2006.

3. *Candler v. Crane, Christmas & Co* [1951] 2 KB 164 at 178. See M D Kirby*, Lord Denning: An Antipodean Appreciation* [1986] *Denning Law Journal*, 103 at 108.

4. See (1986) 160 CLR v.

5. M D Kirby*, The Australian Referendum on a Republic – Ten Lessons* (2000) 46 *Australian Journal of Politics and History*, 510 at 521.

6. *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 17 (2005).

7. John Stone, *Tribute to the late Sir Harry Gibbs*, *ibid.*, Appendix I, 351.

8. Australia Day Messages 2001-2005, *ibid.*, Appendix II, 363.

9. H T Gibbs, *Australia Day Message, 26 January, 2002*, *ibid.*, 369.

10. *Ibid.*, 372. See also H T Gibbs*, Australia Day Message, 26 January, 2003*, *ibid.*, 374 at 375.

11. *Ibid.*, 375. See also H T Gibbs, *Australia Day Message, 26 January, 2004*, *ibid.*, 381.

12. 323 US 214 (1944).

13. H T Gibbs, *Australia Day Message, 26 January, 2004, loc. cit.*, 381.

14. H T Gibbs, *Australia Day Message, 26 January, 2002*, 369 at 371.

15. S Ratnapala, "Greg Craven, *Conversations with the Constitution*", (2005) 26 *Adelaide Law Review* 185.

Chapter Two
Sir Harry Gibbs: An Advocate's Perspective

Hon Tom Hughes, AO, QC

In my brief term of office as Attorney-General of the Commonwealth, two events served to establish a relationship between Sir Harry Gibbs and myself. First, I was responsible for recommending to Cabinet his appointment as a Justice of the High Court of Australia. Cabinet accepted my recommendation. He was sworn in on 4 August, 1970. I thought of him as the obvious candidate. So did Barwick. I proposed no alternative nominee. He replaced Sir Frank Kitto, whose letter of resignation I had received only a few weeks earlier.

Sir Harry's path to the High Court had been paved with disappointment. He was appointed to the Supreme Court of Queensland in 1961. There he soon established a reputation based on his undoubted competence, extending to fields (such as criminal law) where his practice at the Bar had not taken him. In 1966 the Chief Justiceship of that Court fell vacant upon the retirement of Sir Alan Mansfield to become Governor of the State. Many thought Gibbs to be the appropriate choice of successor. But his juniority in the pecking order told against him; Mack J succeeded to the office. He was senior, but inferior in ability, to Gibbs, who viewed with concern the prospect of a long association in office with his new Chief. A major difference between them was that Mack CJ possessed a more relaxed work ethic than that which actuated Gibbs in the discharge of judicial duties.

However, Gibbs derived some solace from an informal understanding that he was earmarked for appointment to the then proposed Commonwealth Superior Court, then on the drawing board as a scheme for relieving the pressure of work on the High Court. Even in those days there was such pressure. It has become greater since, notwithstanding drastic limitation of rights of appeal by means of an across the board requirement of special leave, and the ultimate establishment of the Federal Court of Australia in 1976.

In the meantime, Gibbs was appointed Federal Judge in Bankruptcy, where the work load was not sufficient to absorb his energy and talents. Some of the slack was taken up with his appointment under a concurrent commission to the Supreme Court of the Australian Capital Territory.

The second event that served to establish a relationship between Gibbs and myself was that in 1970 I instigated and then appeared as Commonwealth Attorney in the litigation that opened the door to effective Commonwealth trade practices legislation. This litigation became known as the *Concrete Pipes Case*.[1] Sir Harry was one of the seven Justices who heard that case in March, 1971, a hearing that was contemporaneous with ructions in the parliamentary Liberal Party that led to my loss of office later that month.

This was not my first appearance before a Court of which Sir Harry was a member. I had earlier – only a week after participating in his welcome to the Bench – appeared with WP Deane, QC and KR Handley on behalf of the Commonwealth in *Kotsis v. Kotsis*,[2] a case in which I was able to persuade only Sir Harry, among a Bench of seven Justices, that the attempted investiture of Commonwealth judicial power in the Supreme Court of New South Wales enabled a deputy registrar of that Court validly to make an order for interim costs in a matrimonial cause under the *Commonwealth Matrimonial Causes Act*. That decision was delivered on 24 December, 1970. Barwick and I found ourselves in New Delhi a few weeks later, at a Commonwealth Law Conference. I remember him making, after his fashion, a jocularly disparaging but friendly remark about the strength of my argument.

The tables were turned nearly twelve years later when a Court of seven Justices unanimously overruled *Kotsis*, with Sir Harry in the centre seat.[3] That was one of the very few High Court cases which Maurice Byers, QC lost while in office as Solicitor-General of the Commonwealth. He relied unsuccessfully on *Kotsis* to argue that a Master of the Supreme Court of NSW had no power to exercise invested federal jurisdiction to determine a question of privilege from production of documents, on the ground of public interest immunity, in an action in which the Commonwealth was a party. Between *Kotsis* and the *HCF Case*, Sir Harry, in *Knight v. Knight*[4] supported, albeit with expressed reluctance, the earlier decision, thus demonstrating his loyalty to the judicial principle embodied in the doctrine of *stare decisis*.

If one seeks an underlying, albeit unexpressed, reason for Sir Harry's dissent in *Kotsis* it was, I surmise, essentially this: his basic approach to the working of the Constitution was that the component organs of government (federal and State) should, as far as possible, be meshed together in their working. The investiture of federal jurisdiction in State courts – described by Dixon as the "autochthonous expedient" – would work with full effectiveness only if State courts were allowed to operate in accordance with the structure of their organisation under State law. If that meant that some invested functions would be exercised by persons who did not hold commissions as judges of the Court, so be it. An official such as a Master or Registrar could be a part of the Court, even though not one of its judges. This was the pragmatic view that appealed to Sir Harry as a lone dissentient in *Kotsis*.

Sir Frank Kitto, whose resignation paved the way for Sir Harry's appointment, had been, in more than one sense, a formidable judge. His appointment from the Bar in 1950 brought to the Court a luminous legal mind, deeply versed in equity jurisprudence. He possessed a gift for clear oral and written expression. However, great patience was not one of his virtues: he did not suffer gladly counsel whose contributions to argument he regarded as insufficient or deficient. By contrast, Sir Harry's patience and courtesy were legendary. In demeanour he was always a model judge. In many appearances before him I never heard a discourteous or acerbic word from his lips. He would test counsel's argument with very pertinent questions, but never with an edge in his voice.

Kitto was only 67 when he left the Court. I have no doubt that tensions between himself and Barwick contributed to his decision. I remember that when I was working with Barwick in London on a Privy Council brief in October, 1955, he described Kitto's contribution to the *Bank Case* as that of an "equity draftsman". That was an unjust "put down": Barwick's multiple good qualities, which I greatly admired, did not obliterate a tendency to engage in occasional harsh criticism of others.

Participation in the decision of the Full Court in *Strickland v. Rocla Concrete Pipes*[5] was a major task faced by Sir Harry in his first year on the High Court. What was at stake was the extent, if any, to which the corporations power expressed in s. 51(xx) of the Constitution authorised the enactment of Commonwealth legislation for the regulation of trade practices. The *Trade Practices Act* 1965 which Barwick, prior to his elevation to the Chief Justiceship in 1964, had pioneered when in office as Attorney-General, was the embodiment of his determination, as a self-styled radical Tory, to achieve reform in this area of the law.

The first obstacle to progress was the 62-year-old decision of the High Court in *Huddart Parker v. The Commonwealth*,[6] given in the days prior to the extirpation (in the *Engineers Case*) of the doctrine of reserved State powers. In short, this doctrine denied constitutional validity to any Commonwealth law that trenched upon the supposedly exclusive power of the States, implicitly reserved by s. 51(i), to regulate trade and commerce conducted within their borders. According to this old doctrine, the grant of power to the Commonwealth by s. 51(i) to legislate with respect to inter-state trade and commerce excluded by implication any power to legislate with respect to intra-state trading activities.

By 1971, *Huddart Parker* was an anomaly – an isolated island around which modern constitutional principle to the contrary had developed. But because it was directly in point, it was a road-block that had to be removed. Otherwise the spectre of invalidity stalked the 1965 Act. I appeared for the prosecutor in the first stage of the *Concrete Pipes Case*, in the Commonwealth Industrial Court. The defendants were charged with failure to register an agreement which, if the Act were valid, they were liable to register. As was expected, that Court regarded itself as bound by the decision in *Huddart Parker*, which had invalidated key provisions of the *Australian Industries Preservation Act* on the ground that the corporations power did not support them. That Act was the legislative product of the Deakin Government, which was of liberal hue.

As leading counsel for the Commonwealth in the *Concrete Pipes Case* I had the assistance of a galaxy of talent: Ellicott, QC (then Solicitor-General for the Commonwealth), WP Deane, QC and AM Gleeson. We obtained leave to appeal without difficulty, and then settled down to an argument which lasted for six days in March, 1971. I have a vivid recollection of an unsuccessful attempt by Richard Fullagar, QC, for one of the respondent companies, to persuade Barwick to disqualify himself on the ground of apprehended bias, because of his participation in the drafting and parliamentary progress of the Act under challenge. In the course of that argument, Barwick's displeasure was obvious. Leading counsel for the other respondent, JW Smyth, QC, a downy bird if ever there was one, did not join in the application – an abstention which left Fullagar isolated.

In contemporary conditions the argument in such a case would seldom, if ever, be allowed to last so long. Judgment was delivered on 3 September, 1971. By then I was six months out of office, swept to the back-bench by the onward march of troglodytic influences in the Liberal Party which had led to John Gorton's

replacement by William McMahon. The new Prime Minister, in uttering his words of dismissal, expressly – but hardly courageously – relied on pressure in the parliamentary party as the ground for doing so. The pressure was the product of the position I had taken on trade practices and on the territorial sea issue. About the latter I shall say more later.

The result of the *Concrete Pipes Case* was that the Commonwealth lost the battle but won the war. All the seven Justices, including Sir Harry, disapproved of *Huddart Parker* as an anachronistic relic of a bygone age. They consigned it to legal history's dust-heap.

However, five of the Justices, not including Sir Edward McTiernan or Sir Harry, dismissed the appeal on the ground of the inoperability of severance provisions designed to preserve partial validity in case the reach of the Act trespassed to some extent beyond permissible constitutional limits. In a judgment of that signal clarity which everyone practising before him came to regard as a hallmark of his judicial style, Sir Harry upheld the effectiveness of the severance provisions; in his view they were effective to preserve the validity of the 1965 Act in its application to corporations of the kind referred to in s. 51(xx) of the Constitution. So in two important constitutional cases heard during his first year of office, Sir Harry exhibited his judicial independence by delivering powerful dissenting judgments expressed in customarily felicitous and succinct language.

In constitutional cases concerned with the competitive interplay of constitutional power between the Commonwealth and the States, his inclination was generally towards a federalist solution; tending to be sceptical of the expansion of Commonwealth power at the expense of the States. For example, he took a narrow view of the external affairs power in s. 51(xxix) of the Constitution, as illustrated by his dissenting judgment in the *Territorial Sea Case*[7] and later in *Koowarta v. Bjelke* Petersen.[8] I appeared in the first of those cases for the Commonwealth, but in a non-speaking role, led by Maurice Byers, QC. Gough Whitlam had paid me the compliment of instructing that I be briefed, in recognition of the role that I had played as Attorney-General in promoting the case for Commonwealth legislation designed to establish legislative paramountcy in this area. That role led one journalist – the late Ian Fitchett – to describe me as John Gorton's "evil genius".

Sir Harry's first judicial encounter with the case-encrusted intricacies of s. 92 of the Constitution was in *SOS Mowbray v. Mead*.[9] The issue was whether a Tasmanian statute prohibiting the sale within that State of cooking margarine to which there had been added either a prohibited colouring substance or a prohibited flavouring substance infringed s. 92 insofar as it applied to sales of such products within the State by a company which had imported them for the purpose of so selling them. The court split 4-3 in favour of the validity of the law. To Barwick's disappointment (as he later intimated to me) Gibbs was one of the majority. I too was disappointed because I, with John Spender, had appeared for the importer, SOS Mowbray, a subsidiary of Marrickville Margarine, which had led the charge in several challenges based on s. 92 to State legislation dealing with trade in commodities.

The case turned on a knife's edge. One became embroiled in an argument, originated by Barwick's epoch-making submissions in the *Bank Case*, as to whether the admitted burden on inter-State trade was direct or remote. It is difficult to criticise the reasoning on either side of the judicial divide. In essence the matter for decision was one of impression. The case illustrated the high degree of technical artificiality which had enveloped the interpretation of s. 92. But Barwick thought that Gibbs "had let the side down" – which was an unjust conclusion.

The Tasmanian legislation was obviously designed to protect the local dairy industry: there was no public health factor justifying the prohibitions under attack. The importer would quite possibly have done better under the simple rubric established in *Cole v. Whitfield*,[10] according to which the criterion of infringement of s. 92 is the discriminatory, protectionist impact of legislation on inter-state trade. In thinking as he did about Gibbs's adhesion to the majority in SOS Mowbray, Barwick was perhaps giving expression to an underlying concern that a new member of the Court showed signs of breaking away from the complex and technical juridical doctrines that his work as counsel (in the *Bank Case*) and as Chief Justice had developed with respect to s. 92.

In writing about the judicial work of Sir Harry from the perspective of an advocate, it is unavoidable that I should, in part at least, assess his contributions to the law mainly through the lens of my own experience of appearing before him. I make no apology for doing so. That brings me to *Hospital Products v. United States Surgical Corporation*.[11]

This was a case in which the principal protagonists were denizens of a commercial jungle in New York

city. My client, Hospital Products, in the person of one Alan Blackman, prevailed upon United States Surgical Corporation in the person of one Leon Hirsch, who, with his wife, controlled it, to appoint Hospital Products as the Australian distributor of surgical stapling devices for which USSC had acquired patent protection in the US but not in Australia. Blackman utilised the appointment, obtained by making fraudulent assurances of his intention to serve the interests in Australia of USSC, as a cover for setting up an ingenious reverse engineering operation conducted on USSC demonstration instruments obtained under the distributorship. By means of that operation he was able to displace USSC product with facsimile product, thus appropriating and developing the Australian market for his own benefit in breach of a statutory obligation, arising under the proper law of the contract, to use best endeavours to promote the sale of USSC's product.

USSC went into battle in the Equity Division of the Supreme Court of NSW with the flag of fiduciary duty flying at its masthead. The case became a leading decision on the place of this equitable doctrine in commercial contracts. Sir Harry was in the majority for allowing an appeal from a judgment of the Court of Appeal, which had substituted explosive indignation for calm consideration of principle by subjecting the whole of Hospital Products assets to a constructive trust. Sir Harry burst the bubble of USSC's forensic pretensions in his usual pithy way by saying:

> "What is attempted in this case is to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions. It is not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for fraud and breach of contract were available to USSC ……..".

Lest it be thought that Sir Harry's judgment in *Hospital Products* disclosed a negative attitude to the development of principle in the field of fiduciary duty, one need only turn to *United Dominions Corporation v. Brian Pty Limited*,[12] where my victory in the former case was soon afterwards counter-balanced by experiencing the ashes of defeat on a question not then burdened with much authority. The question was whether "A", one of several intending partners, was under a fiduciary duty to disclose to the others in the course of negotiating for a partnership, all material facts known to A, but not to the others, that might affect a decision by an ignorant party whether or not to enter into the proposed partnership. With characteristic circumspection, Sir Harry forebore from propounding any general rule that "persons negotiating for a partnership *always* stand in a fiduciary relationship" to each other in the course of the negotiation. But he added: "I have no doubt that they may sometimes do so".[13]

The issue was whether the facts of the case opened the door to fiduciary obligation. One of the properties earmarked for inclusion in the proposed joint venture was owned by SPL, one of the intending venturers, which had given to UDC, another intending venturer, in connexion with another transaction, a mortgage containing a collateralisation clause, under the terms of which UDC was entitled to appropriate and receive from SPL moneys that might be derived from the proposed joint venture. UDC had not disclosed this clause to Brian Pty Limited, one of the venturers, during the course of negotiations. Brian was understandably put out when it found that what otherwise would have been part of its share of the profits had been eaten up by the operation of the collateralisation clause.

Views will always differ as to the position taken by Sir Harry when, in July-August, 1986, a sharp difference arose between him and Murphy J concerning the question whether the latter should take his seat on the Court while his conduct was under scrutiny by a Commission, appointed by the Commonwealth Government, and constituted by three former judges (Sir George Lush, Sir Richard Blackburn and The Hon Andrew Wells) to consider whether Murphy's conduct in relation to Morgan Ryan amounted to "proved misbehaviour" within the meaning of s. 72 of the Constitution. Sir Harry's publicly announced attitude was that his colleague should not sit while his conduct was under investigation. Murphy's strong view to the contrary, also publicly announced, was that he had a constitutional right and duty to sit until his guilt of misbehaviour was established.

The totality of my professional involvement on behalf of Lionel Murphy, before the Senate Committee which considered the allegations concerning Morgan Ryan, later in the High Court, led by Maurice Byers, QC (when back in private practice), and later again in the Court of Criminal Appeal when Murphy's conviction at his first trial was set aside, combines to make it inappropriate for me to say much about those unhappy and (as they appeared at the time) potentially cataclysmic events. I confine myself to saying:

(a) The public position adopted by Sir Harry demonstrated the steely determination of a mild-mannered man to act as he thought right in agonising circumstances under which a lesser person would have taken a softer option.

(b) History may well have taken a different course had Lionel Murphy exercised his option of testifying before the Senate Committee. It is a pity that Murphy, who displayed resolution during the whole unhappy affair, did not exercise that option.

Sir Harry went into compulsory retirement at the statutory age on 5 February, 1987. His enforced departure from the Court demonstrated the unwisdom of the constitutional change, effected by referendum during the lifetime of the Fraser Government, reducing the tenure of federal judges to age 70. Sir Harry (like all the others who have followed him in the office of Chief Justice) was very much at the height of his powers when the statutory time clock struck, as was demonstrated by his powerful and lucid contributions to public debate on a number of issues for many years afterwards.

Endnotes:

1. *Strickland v. Rocla Concrete Pipes* (*Concrete Pipes Case*) (1971) 124 CLR 468.

2. *Kotsis v. Kotsis* (1970) 122 CLR.

3. See *The Commonwealth v. Hospital Contribution Fund of Australia* (*HCF Case*) (1981-1982) 150 CLR 49.

4. *Knight v. Knight* (1971) 122 CLR 114.

5. *Loc. cit.*.

6. *Huddart Parker v. The Commonwealth* (1909) 8 CLR 330.

7. *New South Wales v. The Commonwealth; Victoria v. The Commonwealth; Queensland v. The Commonwealth; South Australia v. The Commonwealth; Western Australia v. The Commonwealth; Tasmania v. The Commonwealth* (*Territorial Sea Case*) (1975) 135 CLR 337.

8. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.

9. *SOS Mowbray v. Mead* (1971) 124 CLR 529.

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

11. *Hospital Products v. United States Surgical Corporation* (1984) 156 CLR 41.

12. *United Dominions Corporation v. Brian Pty Limited* (1984-1985) 157 CLR 1.

13. *Ibid.*, at 6.

Chapter Three
Sir Harry Gibbs and the Constitution[1]

David Jackson, QC

I was about to commence by saying that "Sir Harry Gibbs had a long life", but in deference to the previous speaker,[2] I shall commence by saying that he had a "longish" life. He was born in 1917 and was eighty-eight when he died. I had the good fortune to know him for forty-two years. I was his Associate in 1963 and 1964. As a junior barrister I appeared before him in Queensland on a number of occasions in the period until he moved to Sydney in 1967, and I argued many cases, constitutional and non-constitutional, before him in the High Court. We also were on friendly terms and after his retirement from the Court I saw him quite regularly socially, discussing the affairs of the day and, in the way of lawyers, the failings of others.

Sir Harry's involvement in constitutional affairs took place largely in the second half of his life and this paper will deal principally with his decisions on constitutional matters when a member of the High Court. His involvement in affairs concerning the Constitution was not only as a jurist. From an early point after retirement from the High Court he was active in commenting on constitutional matters, including decisions of the Court which he had left. He was the first President of this Society, holding that office for the thirteen years preceding his death. He was also active in the campaign against the proposal for an Australian republic, in 1999. Whilst he loved travel, it is obvious that he had no desire to become one of our "grey nomads".

Whether because of the introduction of the requirement to retire at seventy, or for other reasons, it seems more common now than it was at the time of his retirement from the High Court for former Justices to comment publicly on issues which are constitutional or on the constitutional/political boundary.[3] To enter into the arena in that way inevitably exposes one to possible criticism and I was surprised that he did. He was in many respects a very private man.

I can only speculate on the factors which led him to a more public role. They included, I think, a view that the legal order had changed very dramatically, and not altogether for the better, from that prevailing when he entered it. Another was that, when a judge, his reasoning on constitutional issues he regarded as important had most often reflected a minority view, although not necessarily being in the minority in the actual result. Having left the Bench he was more free to express his own views.

The federalist

What were those views? It involves no original detective work on my part to say that his approach to the Constitution was federalist. That was evidenced in later life by his presidency of this Society, which is avowedly federalist in its outlook, the first of its "Immediate Objectives" being:

> "The need, in view of the excessive expansion of Commonwealth power, to redress the federal balance in favour of the States, and to decentralise decision making".

It is perfectly legitimate, of course, to hold or express views about the Constitution which are federalist, or centrist, or anything else, but those terms are labels at a high level of abstraction. To Sir Harry, being a federalist was to have an underlying conception that the nation brought into being by the Constitution was a federation of States, and that the States and the new polity, the Commonwealth, each had its "role" in government nationally, and regionally.

In one sense, of course, that does no more than to state the question, and in a way which assumes answers to a number of underlying issues. Those underlying issues include the question of the approaches to be taken to the interpretation of the Constitution. Are the words to be treated as having a meaning fixed as at Federation? Are Commonwealth legislative powers to be interpreted broadly or narrowly? In considering validity of legislation, does one look at its form, or at its operation in substance?

I mention those underlying issues because labels such as federalist are often used in too simplistic a way; they cover a lot of ground. Notwithstanding that caveat, what one can say about the notion of being "federalist" which Sir Harry embraced was an underlying view that the Constitution involved two levels of government, federal and State, and that, by interpretation or implication, the ambit attributed to the

powers of the Commonwealth should not reduce the States to financial mendicants, to impotence or imposed uniformity in the development of policies, or to being mere agents of the Commonwealth.

The federalist view could be seen in *Victoria v. The Commonwealth*, one of his first constitutional cases on the High Court, the issue being whether the Commonwealth could levy payroll tax on the payrolls of the States. He held the tax valid, but said:[4]

> "The intention of the Imperial legislature in enacting the Constitution Act was to give effect to the wish of the Australian people to join in a federal union and the purpose of the Constitution was to establish a federal, and not a unitary, system for the government of Australia and accordingly to provide for the distribution of the powers of government between the Commonwealth and the States who were to be the constituent members of the federation".

and:

> "In some respects the Commonwealth was placed in a position of supremacy, as the national interest required, but it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves. Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-à-vis each other".

The matters which influenced him in adopting this approach to the Constitution do not immediately appear. I doubt, however, that his practice as a barrister made a large contribution.[5] I know that he gave advice on a significant number of constitutional matters when at the Bar,[6] but he did not appear as counsel in many such cases. According to the *Oxford Companion to the High Court of Australia*[7] he appeared as counsel in 28 cases in that Court. Only two of them were constitutional. Each was an excise case.[8] In one he challenged the State law; in the other he defended it.

The more likely cause, I think, is a reflection of the times, and of geography. Although Sir Harry lived in Sydney from 1967, he was very much a product of Queensland, and returned to it frequently. He had grown up when there was not the ease of interstate travel that exists today, and when the governments of the States played a much greater part in the affairs of individuals. It was a time also when the activities of the Commonwealth government in States other than New South Wales and Victoria seemed somewhat remote. In the legal area there were few federal judges. The High Court itself had had very few members from States other than New South Wales and Victoria. Its premises were in both Melbourne and Sydney, and its trips to other States were annual "visitations".[9] In short, in New South Wales and Victoria the Commonwealth was a more familiar entity than in the other States. There was also a conception, held rightly or wrongly, that there were some areas which really were the "preserve" of the States and should be left to them. "States' rights" was a political slogan, but it was thought to have a natural and rational, perhaps even constitutional, base.

Sir Harry's first few years as a Justice of the High Court were initially relatively "quiet" in terms of constitutional cases. That changed dramatically during the Whitlam Government from 1972 to 1975, and thereafter. The Australian Labor Party had been out of office for nearly a quarter of a century and came into office with plans for Commonwealth legislation in many new areas. The Fraser Government which followed it was also quite prepared to use Commonwealth powers.[10] So too have succeeding Commonwealth governments, whatever their political hue. There has been a vast increase in the amount of federal legislation since 1972 and, as one might expect, the legislative ambitions of the Whitlam Government and its successors gave rise to a considerable amount of constitutional litigation during Sir Harry's period on the High Court.

It would be impossible in a limited time to discuss each of the constitutional issues with which Sir Harry Gibbs was concerned, but I would like to make particular reference to four areas in which such issues arose, namely the composition of the Commonwealth Parliament, "money", the judiciary, and Commonwealth legislative powers.

The composition of the Commonwealth Parliament

The Constitution provides for two Houses of Parliament, the House of Representatives and the Senate.[11] The former, the lower House, is to be elected in proportion to population; the greater the population of a State, the more members it is to have.[12] The upper House, the Senate, is to have equal numbers of Senators for each Original State.[13] Thus Tasmania has as many as Queensland. Their possible terms are twice as long as those

of members of the House of Representatives.[14] The convention is that the government of the day is the party which has the majority in the House of Representatives, and the Prime Minister is in that House.[15]

Except in relation to money bills, the Senate has the same powers as the House.[16] We have had a relatively rigid party system, more so than in the United States, and the Senate has not been quite the "States' House" which some envisaged, even though for quite long periods the government of the day has not had a majority in that House. The possibility of disagreement between the Houses on the enactment of legislation will arise from time to time, particularly if the Opposition has, or can secure, a majority in the Senate. Such disagreements are to be resolved by the procedure of s. 57 of the Constitution.[17] It involves dissolution of both Houses, i.e. "double dissolution", and ultimately a joint sitting of the Houses following the consequent election, if the disagreement continues.

In April, 1974 the Governor-General, Sir Paul Hasluck proclaimed a double dissolution under s. 57 because of failure by the Senate to pass six laws proposed by the Whitlam Government.[18] After the election, at which the Government was returned, the Senate again had not passed the Bills, and the Governor-General convened a joint sitting.

Actions were then brought by two Opposition Senators, and by the State of Queensland, seeking, to put it shortly, injunctions to prevent the holding of the joint sitting: *Cormack v. Cope, Queensland v. Whitlam*.[19] The applications failed, it being left to the plaintiffs to challenge the proposed laws if ultimately they were passed. An important question, not then finally resolved, was whether the issue was justiciable, i.e., was it an issue which the High Court could decide, or was it for Parliament itself?

The six Bills were passed at the joint sitting, and the possible challenge foreshadowed in *Cormack v. Cope* emerged in *Victoria v. The Commonwealth*,[20] in which the validity of the *Petroleum and Minerals Authority Act* 1973 was in issue. The challenge succeeded, it being held that the Senate had not "rejected or failed to pass" the Bill when it was first in that House before the double dissolution.

In *Victoria v. The Commonwealth* the arguments advanced against intervention by the Court were somewhat different from those advanced in *Cormack v. Cope*.[21] These arguments failed, and the principle was thus established that the Court could determine whether the requirements of s. 57 had been satisfied. This was an important decision as to the respective roles of Parliament, the executive and the judiciary. Sir Harry was one of the majority, and an echo of the federalist can be heard in his observation[22] that:

> "Under the Constitution the Senate does not occupy a subordinate place in the exercise of legislative power. It is an essential part of the Parliament in which the legislative power of the Commonwealth is vested. It is expressly provided by s. 53 of the Constitution that, except as provided in that section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws".

Issues as to the composition of the Houses of Parliament arose again in the *Territory Senators Cases, Western Australia v. The Commonwealth*[23] and *Queensland v. The Commonwealth*.[24] The government of the Territories is dealt with by s. 122 of the Constitution. It provides amongst other things that the Commonwealth Parliament may "allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit". Section 7 of the Constitution, however, provides that the Senate shall be "composed of" Senators from the States, and the issue in the cases was whether "representation" of the Territories could be by a person who was a Senator,[25] or had to be by some lesser form of representation.

In the first case the Act was held valid by a majority of 4:3, Sir Harry being a dissentient. His view[26] was

> "… the Senate is an essential part of the Parliament in which the legislative power of the Commonwealth is vested. The requirements that the Senate shall be composed of senators for each State, directly chosen by the people of the State, and that equal representation of the original States shall be maintained, were not mere details of legislative machinery. They were obviously regarded as indispensable features of a federal Constitution and as a means of enabling the States to protect their vital interests and integrity. If the Senate has in practice not fulfilled the role that was originally expected of it, that is not to the point".
>
> A further challenge was mounted by Queensland a little later, largely on the basis that Sir Edward McTiernan (one of the majority) had retired and been replaced by Sir Keith Aickin, it being thought he would be more amenable to the States' case, and on the basis of some broad hints from Sir Garfield Barwick that another challenge would be worthwhile.[27] The perception of Sir Keith's likely view was correct, but the result in the case was the same, because Sir Harry Gibbs and Sir Ninian Stephen felt that their duty required them to follow the earlier decision. The reasons for judgment in the case deal

in detail with the circumstances in which the High Court should overrule its previous decisions. The following passage[28] from Sir Harry's reasons, in which he maintained his previous view, but felt obliged to follow the Court's earlier decision, indicates the measure of the man:

"No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".

He was, as I have said, a man of strong views, but he recognized that the institution was greater than the individual.[29]

"Money"

To function, governments need money. To obtain it they impose taxes, and by s. 51(ii) of the Constitution the new Commonwealth was given power to make laws with respect to "taxation; but so as not to discriminate between States or parts of States".

For most individuals mention of the gloomy subject of taxation turns one's mind to income tax. But that was not always so, and certainly it was not so at Federation, when the main sources of colonial revenue were duties of customs and duties of excise.[30]

The Constitution provided in s. 88 that within two years after the establishment of the Commonwealth, the Commonwealth was to provide for uniform duties of customs. The imposition of uniform duties of customs would trigger the operation of a number of other provisions of the Constitution, of which three are of present relevance.

One was s. 92, which provided that "trade, commerce and intercourse among the States" was thereafter to be "absolutely free". The duties imposed by the colonies on intercolonial movement of goods would thus be abolished. The second was s. 90, which provided that on the imposition of uniform duties of customs, the Commonwealth's power to impose duties of customs and excise would become exclusive. There was a transitional provision for the first ten years,[31] but the effect thereafter was that States' principal sources of revenue had gone.

The third was s. 96, which provided that during the first ten years after the establishment of the Commonwealth, and thereafter until Parliament should otherwise provide, the Parliament might "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". I would note that the very broad scope given to s. 96 in the *Uniform Tax Cases*,[32] together with high rates of income tax, has enabled the Commonwealth to be dominant in Commonwealth-State financial relations. It has maintained a system of grants, often tied to the requirement that the States adopt particular courses of action. The freedom of manoeuvre of the States has become significantly reduced. This was a topic on which Sir Harry felt that the system had become rather badly skewed, and should be changed.[33] In the nature of things there was relatively little he could do about this judicially, but his underlying view was reflected in his views on excise.

I mentioned above that the Constitution by s. 90 denied the States the power to impose duties of customs or excise. The practical extent of that deprivation depended on the ambit of the terms "duty of customs" and "duty of excise". No particular difficulty arose in relation to duties of customs, but the position in relation to duties of excise was different in two significant respects: how to identify a duty of excise, and how to approach the determination of that issue.

The difficulty in identifying duties of excise arose because at Federation the scope of the term in s. 90 was not entirely clear. The meaning which it had in practice in Australia at that time was as a reference to the taxes imposed on the producers of beer, spirits and tobacco products, and it seemed that it would probably apply to any tax imposed by reference to manufacture or production on manufacturers or producers of any type of goods. The concept, however, had a number of much wider meanings, particularly in England where it referred to whatever taxes – some quite unrelated to goods, or to their manufacture or production – were administered by the Excise Commissioners.

In *Parton v. Milk Board (Victoria)*[34] it had been held that a tax on a commodity at any point in the course of production or distribution before it reached the consumer was a duty of excise. As the concept of duty of excise continued to be expanded by judicial decision, the areas of possible State taxation were reduced

correspondingly. That led the States to exercises in considerable ingenuity to develop taxes which were not imposed on a step in production, manufacture, or distribution of goods.

The principal course adopted, which as a barrister Sir Harry had defended successfully in *Whitehouse v. Queensland,* was to impose a licence fee, not based on dealings in the goods in the period for which the licence would be in force, but based on the dealings which took place in the previous licence period. Legislation along these lines was adopted enthusiastically by the States. Because it involved a very "legalistic" distinction, it gave rise to the second question adverted to earlier – how should the issue be approached, as one of substance or as one of form.

In *Dickenson's Arcade Pty Ltd v. Tasmania*,[35] *MG Kailis (1962) Pty Ltd v. Western Australia*,[36] *HC Sleigh Ltd v. South Australia*[37] and *Logan Downs Pty Ltd v. Queensland*,[38] Sir Harry looked at the issue as one of form.[39] Whilst that view was also held by some other members of the Court, form had not always prevailed over substance in this connection,[40] and in *Ha v. New South Wales*,[41] the form (or "criterion of liability") approach was rejected, leaving *Whitehouse v. Queensland* and its companion case *Dennis Hotels v. Victoria* sidelined to practical irrelevance. My own view is that that is where those decisions deserve to be. They represented, I think, an approach which did not sufficiently reflect the fact that a constitution was being interpreted, and that its prohibitions should not be avoided by tricks of legislative drafting.

The other aspect I wish to discuss in this section concerns s. 92 of the Constitution – "trade, commerce and intercourse among the States shall be absolutely free". The operation of s. 92 had been the subject of many cases, before, and during, the time that Sir Harry was a member of the High Court.[42] The tests to be applied were not altogether clear, however, and their application was being eroded by *dicta* from some of the Justices, who felt that these tests were quite inappropriate.

Just over a year after his retirement, the Court unanimously decided *Cole v. Whitfield*[43] in which it adopted the new test of non-discrimination, namely that a law would only contravene s. 92 if it discriminated against, to put it shortly, interstate trade or commerce, in order to prefer intrastate trade or commerce.

The decision in *Cole v. Whitfield,* to my mind, was the catalyst for Sir Harry "going public" on constitutional issues. It came relatively shortly after he had retired, and I suspect that he felt that the ability to arrive at a unanimous decision on s. 92 so soon after his departure was a reflection on the inability to do so during his incumbency. (At least he did not go so far as Sir Garfield Barwick, who announced that the decision was "tosh".) In fact the *Cole v. Whitfield* approach seems to have been largely satisfactory. There have been many fewer s. 92 cases.

The Judiciary

In any consideration of Sir Harry Gibbs' work as a member of the High Court it needs to be remembered that the period was one of profound change for the Australian legal system and for the High Court itself.

One feature was that appeals to the Privy Council were finally abolished, and the role of the High Court as the final appellate court for the nation confirmed. Another, of great long term significance, was the establishment of the two large federal courts, the Family Court of Australia[44] and the Federal Court of Australia.[45] Each took from the Supreme Courts some of the federal jurisdiction previously exercised. Additional federal jurisdiction was also given to them. Conflicts inevitably arose, especially where a federal court was given exclusive jurisdiction in a matter. These conflicts are now largely of historical interest, but I would mention one area, namely the "accrued jurisdiction" of the Federal Court. The accrued jurisdiction was held to permit the Court to decide issues not arising under federal law but sufficiently factually connected with the circumstances which had attracted federal jurisdiction.[46] It will come as no surprise to hear that Sir Harry was not in favour of the existence of such a jurisdiction.

Arguments about the ambit of the powers which might validly be conferred on the Family Court also were before the Court on a significant number of occasions.[47]

May I mention also one vignette of the period. In 1973 Sir Johannes Bjelke-Petersen's government procured the enactment of a Queensland statute, the *Appeals and Special Reference Act* 1973, which would enable matters, including constitutional matters, to go to the Privy Council otherwise than via the High Court.

I shall not, notwithstanding the passage of years, say who gave advice to the Premier that the law would be held valid by the High Court. Suffice to say that it was not those who had to appear to support it, but rather persons of a more academic bent, not resident in this country. There could be no greater instance

of the red rag to the legal bull than to say to the High Court that its jurisdiction in constitutional matters could be bypassed, and it will come as no surprise that the *Appeals and Special Reference Act* was held invalid. It is interesting to note that the principal judgment, that of Sir Harry Gibbs, referred to the legislation as violating "the principles that underlie Ch. III" of the Constitution. He said that it would be "contrary to the inhibitions which, if not express, are clearly implied in Ch. III". The principle underlying Chapter III, it was said, was that questions arising as to the limits of Commonwealth and State powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in an Australian Court, the High Court of Australia.

Major decisions on Commonwealth legislative powers

Many decisions on the topics in which Sir Harry participated are also now of historical interest only, although they were important in their time. May I mention some which have an enduring effect.

First the *Seas and Submerged Lands Act Case*,[48] in which the Commonwealth was held to have sovereignty over the territorial sea and sovereign rights in respect of the continental shelf. The States' cases in relation to the continental shelf were always rather speculative, but their argument in relation to the territorial sea was much stronger. It failed when the majority took the view that the instruments which established the colonies had described boundaries which were land boundaries. The territorial sea was therefore external to the States, and they had no sovereign rights in respect of it. Sir Harry dissented, saying:[49]

> "For the purposes of the municipal law of Australia there exists that division of sovereign authority which is characteristic of, if not essential to, a federal constitution. …The Convention recognizes that the sovereignty of Australia extends to its territorial sea: it says nothing as to whether that sovereignty is vested solely in the Commonwealth or is divided between the Commonwealth and the States".

Secondly, *Bradken Consolidated Ltd v. Broken Hill Proprietary Co Ltd*[50] raised the question whether the *Trade Practices Act* 1974 bound the Crown in right of a State. Sir Harry held that it did not, saying that although the Commonwealth could legislate so as to bind a State:

> "…..the States are neither subjects of the Commonwealth nor subordinate to it. It is a consequence of our federal system that 'two governments of the Crown are established within the same territory, neither superior to the other'. It seems only prudent to require that laws of the Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so".[51]

Thirdly, *Koowarta v. Bjelke Peterson*[52] dealt with the validity of the *Racial Discrimination Act* 1975 which was sought to be supported by, *inter alia*, the external affairs power. Sir Harry held that the law was invalid. His view[53] was that a law giving effect within Australia to an international agreement would only be valid under s. 51(xxix) if the agreement was with respect to a matter which itself could be described as an external affair. He did not regard the suggestion of Evatt and McTiernan JJ in *R v. Burgess*; *Ex parte Henry*,[54] that the power given by s. 51(xxix) might not be attracted if entry into a convention was merely a device to procure for the Commonwealth an additional domestic jurisdiction, as being an effective safeguard against destruction of the federal character of the Constitution. He ultimately said:[55]

> "It is apparent that a narrower interpretation of par. (xxix) would at once be more consistent with the federal principle upon which the Constitution is based, and more calculated to carry out the true object and purpose of the power which, after all, is expressed to relate, not to internal or domestic affairs, but to external affairs".

Fourthly, *The Commonwealth v. Tasmania*[56] – the *Tasmania Dam Case* – concerned the validity of the *World Heritage Properties Conservation Act* 1983. He held the law invalid. He said[57] in respect of the external affairs power that the problem of construction which arose was whether due regard should be had to the fact that the Constitution is federal in character and that the federal nature of the Constitution required that some limits be imposed on the power to implement international obligations. He went on to say that:

> "The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. …Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the executive. To say this is of course not to suggest that by the Constitution any

powers are reserved to the States. It is to say that the federal nature of the Constitution requires that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament' ".[58]

Fifthly, *Queensland Electricity Commission v. The Commonwealth*.[59] This was when the lights went out in Queensland as a result of a prolonged strike by electricity workers and the Commonwealth sought to pass a special law dealing with it. Five Justices held it invalid, as discriminating against the State. Once again Sir Harry said:[60]

> "It is now clear in principle, and established by authority, that the powers granted by s. 51 of the Constitution are subject to certain limitations derived from the federal nature of the Constitution. The purpose of the Constitution was to establish a Federation. 'The foundation of the constitution is the conception of a central government and a number of state governments separately organised. The Constitution predicates their continued existence as independent entities': …. The fundamental purpose of the Constitution, and its 'very frame' … reveal an intention that the power of the Commonwealth to affect the States by its legislation must be subject to some limitation".

Conclusion

This paper has been concerned with Sir Harry's approach to constitutional law, a topic on which he had particular views. A broader perspective of the man may be seen in Justice GN Williams' excellent essay in *Queensland Justices on the High Court of Australia* (2003), where the many fields covered by his judicial and non-judicial activities are discussed.

His views on some constitutional topics did not command a majority at the time they were expressed, but constitutional law has its swings and roundabouts. Many of his views were sought to be re-agitated in the recent challenge to the Commonwealth *Workplace Relations Act*. Issues arose such as whether the corporations power[61] means that any law which says that a trading or financial corporation must, or must not, engage in certain conduct, is necessarily valid. So too did the question how the heads of power in s. 51 were to be read together; in particular, did the presence of the conciliation and arbitration power in s. 51(xxxv) affect the ambit of other powers, such as the corporations power? The issues in that case await decision.

I started on a personal note. May I conclude on one. Sir Harry Gibbs was unfailingly courteous and pleasant. He inspired great respect and affection from those who knew him well. I have said that he was a very Queensland man; he was also a very considerable Australian.

Endnotes:

1. This paper is in large measure a reprise of a similarly titled paper delivered by the author under the auspices of the Bar Association of Queensland last year: *Sir Harry Gibbs and the Constitution*: Bar Association of Queensland's Inaugural Sir Harry Gibbs Memorial Oration, 4 November, 2005.

2. Hon TEF Hughes, AO, QC.

3. There were always exceptions, of course. Sir Isaac Isaacs was an advocate of constitutional reform. Dr Evatt retired from the High Court to go into politics. I counselled Sir Harry against public involvement in controversial issues, but to no avail. I thought it would do his reputation no good. Amongst other things I said: "You ought to be careful. People will say you're the first Justice since Bert Evatt to leave the High Court to go into politics". He took badinage in good spirit, but his views were strongly held and, on occasions when he spoke publicly, could be expressed with some vigour.

4. *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 417-18.

5. Except perhaps in relation to duties of excise, a matter discussed below.

6. I saw some of them in the 1970s when appearing for Queensland in some of the constitutional litigation

challenging legislation of Mr Whitlam's Government.

7. (2001) at 165.

8. *Brown's Transport Pty Ltd v. Knopp* (1957) 100 CLR 117; *Whitehouse v. Queensland* (1960) 104 CLR 609. In the latter case he also appeared in the Privy Council appeal, (1961) 104 CLR 621.

9. The peregrinations of the High Court tended to follow the seasons. Its visit to Brisbane took place in June. A caravan of seven large black cars, some of American, some of British, manufacture but no two the same would descend on the Brisbane Supreme Court premises. From them would debouch very soberly dressed and sober-looking men, and their staff. It might easily have been mistaken for a convention of rather up-market undertakers. For the under-prepared or those with a weak case, the hearings had the same atmosphere.

10. As in *Murphyores Incorporated Pty Ltd v. The Commonwealth* (1976) 136 CLR 1.

11. *Commonwealth of Australia Constitution,* s.1. As in many other respects, the model of the United States Constitution in the names of the Houses is followed.

12. *Constitution,* s. 24. An "Original State" is to have a minimum of five members: *ibid.*.

13. *Constitution*, s. 7.

14. *Constitution,* ss. 7, 13.

15. Whilst the Constitution makes reference to a "Federal Executive Council" (s. 62) and to "Ministers of State" (s. 64), the office of Prime Minister is not specifically referred to.

16. *Constitution*, s. 53.

17. Section 57 provides:
"57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representative will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
"If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
"The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent".

18. They were the proposed *Commonwealth Electoral Act (No. 2)* 1973, *Senate (Representation of Territories)*

Act 1973, *Representation Act* 1973, *Health Insurance Commission Act* 1973, *Health Insurance Act* 1973 and the *Petroleum and Minerals Authority Act* 1973.

19. (1974) 131 CLR 432.

20. (1975) 134 CLR 81.

21. They were summarised by Barwick CJ (134 CLR at 117-8) as being:
"The Commonwealth … advanced an argument of great significance. The submission was that this Court has no power to declare that a law which had not been passed in accordance with the law-making requirements of s. 57 of the Constitution was invalid, a submission somewhat akin to, though not identical with but of like consequence to, a submission which had been made by the Commonwealth in *Cormack v. Cope* (33). … it was claimed that as long as an Act has received Royal assent the Court cannot entertain the question whether it was passed in accordance with the constitutional requirements relating to the law-making processes. The argument has two distinct bases: first, that the question whether the constitutional law-making process had been followed is not in any case a justiciable matter; second, that the decision of the Governor-General that the Bill was a proposed law within the operation of s. 57, a decision to be implied from his assent to the Bill, was decisive and unexaminable by the Court. There was another somewhat cognate submission, namely, that in any case the provisions of s. 57 are directory only, so that failure to observe them will not produce invalidity".

22. 134 CLR at 143.

23. *Western Australia v. The Commonwealth* (1975) 134 CLR 201.

24. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

25. As provided for by the *Senate (Representation of Territories) Act* 1973.

26. 134 CLR at 246.

27. See *Attorney-General for New South Wales, Ex rel. McKellar v. The Commonwealth* (1977) 139 CLR 527 at 532-3. The broad hints were not wasted on Sir Joh Bjelke-Petersen, the then Premier of Queensland.

28. 139 CLR at 599. The first sentence of this passage was referred to recently by McHugh, Gummow and Heydon JJ in *McNamara v. Consumer Trader and Tenancy Tribunal* [2005] HCA 55.

29. The composition of the Houses of Parliament arose in other cases in this period. See *Attorney-General for the Commonwealth, Ex rel. McKinlay v. The Commonwealth* (1975) 135 CLR 1 and *Attorney-General for New South Wales v. The Commonwealth, Ex rel. McKellar* (1977) 139 CLR 527.

30. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed. (1910), p.530. Of course the introduction of the goods and services tax turns the clock back in some respects.

31. Section 87.

32. *South Australia v. The Commonwealth* (1942) 65 CLR 373 and *Victoria v. The Commonwealth* (1957) 99 CLR 575.

33. As early as August, 1944 the Rt Hon WA Watt, in his Foreword to Deakin's *The Federal Story*, said that "the financial relations between the Central Government and the States" were the "outstanding weakness" of the Constitution.

34. (1949) 80 CLR 229.

35. (1974) 130 CLR 174.

36. (1974) 130 CLR 245.

37. (1977) 136 CLR 475.

38. (1977) 137 CLR 59.

39. In *Logan Downs* he said (137 CLR at 64):
"… conflicting opinions have been expressed as to whether the criterion of liability under the statute imposing the tax, or the practical effect of the legislation, is determinative of the question whether the tax is a duty of excise. I accept the former view, although as I endeavoured to explain in *Dickenson's Arcade Pty Ltd v. Tasmania* (17) that does not mean that the name given to tax by the taxing statute, or the form of the provisions of that statute, will be decisive; it is still necessary to determine the legal effect of those provisions according to their proper construction".

40. See e.g., *Peterswald v. Bartley* (1904) 1 CLR 497 at 511; *Ha v. New South Wales* (1995) 189 CLR 465 at 498.

41. (1995) 189 CLR 465.

42. Three instances during his membership are *SOS (Mowbray) Pty Ltd v. Mead* (1972) 124 CLR 529, *Holloway v. Pilkington* (1972) 127 CLR 391 and *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of New South Wales* (1975) 134 CLR 559.

43. (1988) 165 CLR 360.

44. *Family Law Act* 1975.

45. *Federal Court of Australia Act* 1976.

46. *Phillip Morris Incorporated v. Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457. An attempt to review that decision failed in *Stack v. Coast Securities Pty Ltd* (1983) 154 CLR 261.

47. See e.g., *Russell v. Russell* (1976) 134 CLR 495; *Reg v. Demack, Ex parte Plummer* (1977) 137 CLR 40; *Reg v. Lambert, Ex parte Plummer* (1980) 146 CLR 447; *Ascot Investments Pty Ltd v. Harper* (1981) 148 CLR 337.

48. (1975) 135 CLR 337.

49. *Ibid.*, at 385-6.

50. (1979) 145 CLR 107.

51. *Ibid.*, at 122-3.

52. (1982) 153 CLR 168.

53. *Ibid.*, at 200-201.

54. (1936) 55 CLR 608.

55. 153 CLR at 200.

56. (1983) 158 CLR 1.

57. *Ibid.*, at 99-100.

58. *Ibid.*, at 100.

59. (1985) 159 CLR 192.

60. *Ibid.*, at 205.

61. Section 51(xx).

Chapter Four
Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution

Julian Leeser

It is difficult to present Sir Harry Gibbs in a new light. As the fifth speaker on a panel that is much more distinguished than I, my task is a hard one. It is an honour to follow: Justice Heydon, who is not only a judge of immense intellect but possibly Australia's finest after dinner speaker; Justice Kirby who, even through the virtual medium, is one of Australia's great juristic communicators; the distinguished former Attorney-General Tom Hughes, AO, QC; and David Jackson, QC, of whom it is said that, if High Court appearances were rugby tests, he would be among our most capped players.

Like the other speakers, I knew Sir Harry Gibbs. I was privileged to know him through my involvement in Australians for Constitutional Monarchy and this Society. He gave great intellectual weight to the things many felt instinctively. The man I knew was always very shy and reserved but he could also display a fine sense of humour.

During the republic referendum campaign, I attended a press conference at New South Wales Parliament House with Sir Harry and then accompanied him to his car. On the way out he was asked by a journalist what he thought of his former colleagues, Sir Anthony Mason and Sir Gerard Brennan, supporting the republic model. He replied, "Even Homer erred". The journalist gave him a puzzled look. I said to Sir Harry, "I don't think she quite got the reference". He replied, "I imagine she thought I meant Homer Simpson".

Sir Harry was also always generous with his time. He was happy to address law students and encourage young lawyers. He gave a well attended speech on his view of the role of the Chief Justice of the High Court at UNSW in my final year, replete with his capacity for clever understatement. I have had, throughout my short working life, a photo of Sir Harry Gibbs and me on my wall at work. It is a useful talisman from which to draw inspiration. A *festschrift* in honour of Sir Harry Gibbs is long overdue. I am delighted that the Society has decided to dedicate this conference to Sir Harry's work and am honoured to be part of it.

The Hon R P Meagher, AO, QC once said:

> "It is one of Sir Harry's great achievements to utter simple truths in a way that makes them seem blindingly obvious, although they were not so before he uttered them".[1]

This is true of Sir Harry's statements on federalism.

The issue of federalism is the focus of my paper. In it I am going to examine:

(a) Sir Harry Gibbs' background and his view of federalism; and
(b) His concerns about Commonwealth legislative and financial power.

The contribution of Sir Harry's experience and background

Sir Harry Gibbs grew up in Queensland. He attended school and university there and he practiced at the Queensland Bar from 1946 to 1961. During his time at the Bar he was regularly counsel for the Queensland Government in the High Court. He was counsel in two cases, both before the High Court and the Privy Council, involving s. 90 of the Constitution which deals with the prohibition on States raising excise duties. This issue became an interest of Sir Harry's both on the bench and in retirement. He was counsel in the *Dennis Hotels v. Victoria*[2] and *Whitehouse v. Queensland*[3] cases which establish that a backdated licence fee is not an excise.

Sir Harry's judgments do not espouse a broad general theory of federalism, although they do present a consistently federal approach to the Constitution. His judgments display what the obituarist Mark McGinness described as an "exemplary style – simple, logical, lucid, unambiguously expressed, without diversion, flourish or frills".[4] Sir Harry respected the great federalist Chief Justice, Sir Samuel Griffith and kept a picture of Griffith on the wall in his chambers.[5] Right from the time he was welcomed to Perth at his first sitting as Chief Justice he stressed the value of federalism. On that occasion he said:

> "It is of great importance in a federation that federal instrumentalities do not lose touch with the people of the States where most of the inhabitants of the nation live and most of the activities vital to its well-being are carried out".[6]

The first speech I have been able to find by Sir Harry Gibbs on federalism was given in 1985, late in his chief justiceship. He said of the federation that "[a]s a matter of history, the people of the colonies would not have united on any other basis". But he lamented that the framers' vision had not been implemented:

> "…..largely as a result of decisions of the High Court. By a process of expansive interpretation some of the powers given to the Commonwealth by the Constitution [have] already…been widened in a way which no one in 1901 would have thought possible. The result has not been entirely satisfactory".[7]

Gibbs' model of federalism

Gibbs believed that the essence of a federation is that:

> "…..there should be two levels of government, each of which is limited to its own sphere, but neither of which is subordinate to the other. There must be a division of powers, effected by a written Constitution which binds both levels of government, so that neither has absolute sovereignty. Each level of government should be independent and supreme within the area of its powers, and each should have under its control the financial resources necessary to enable it to perform its functions".[8]

Sir Harry's model of federalism was a coordinate model where two levels of government each have separate powers and functions. He told this Society in 1992 that federalism "is of the essence of the Constitution".[9] I would like to describe him as a "bright-line federalist". His vision for the appropriate division of powers in Australia "can be summed up in one sentence: nothing should be done by the Commonwealth that could be done equally well by the individual States themselves".[10]

Gibbs' support for federalism, both as a Justice of the High Court and as a writer and commentator after that time, was predicated on his view that it was the federal system that the framers of the Constitution had established "in the true sense".[11] The framers' conception was that they were creating a nation where the States would continue to have a separate sphere of responsibility where, to paraphrase Sir Henry Parkes, their powers would not be crippled, their authority diminished, or their rights invaded. Commonwealth powers were to be restricted and defined in s. 51 of the Constitution "for example, in relation to banking, insurance, fisheries and industrial conciliation and arbitration. The [framers] restricted the application of the provisions regarding trial by jury, and freedom of religion, to Commonwealth laws. They prohibited the Commonwealth from taxing State property".[12] The federal government was to be "given power only over specific matters in respect of which uniform legislation was desirable and that the residue of power was left to the States".[13] The framers, as Gibbs understood it, "proceeded on the assumption that State functions would include, as Griffith said, 'almost all matters which have a direct bearing on the social and material welfare of the people' ".[14]

Gibbs' federalist interpretation of the Constitution

Gibbs' view of the importance of the federal balance influenced his approach to the interpretation of the Constitution. As he said in *Koowarta v. Bjelke Peterson*, "in determining the meaning and scope of a power conferred by s. 51 it is necessary to have regard to the federal nature of the Constitution".[15] This was not a revolutionary concept. Nor was it the reserved powers doctrine which Gibbs, consistent with the *Engineers Case*,[16] rejected. It was a view of the Constitution that was, to some extent, shared by judges of the Latham Court who, in 1947, in *Melbourne Corporation v. The Commonwealth*[17] drew implications from federalism to prevent the Commonwealth legislating to impose special burdens or disabilities on State governments.

What underlay Sir Harry's federalism jurisprudence was best expressed in *Queensland Electricity Commission v. The Commonwealth*,[18] a case considering the application of *Melbourne Corporation* doctrine. Gibbs held that:

> "It is now clear in principle, and established by authority, that the powers granted by s. 51 of the Constitution are subject to certain limitations derived from the federal nature of the Constitution. The purpose of the Constitution was to establish a Federation. 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities': *Melbourne Corporation v. The Commonwealth*. The fundamental purpose of the Constitution, and its 'very frame' (*Melbourne*

Corporation v. The Commonwealth), reveal an intention that the power of the Commonwealth to affect the States by its legislation must be subject to some limitation".[19]

This meant that provisions of the Constitution need to be read, not in isolation, but in the context of the whole document. Gibbs' hope was that in defining the limits of Commonwealth power:

> "…..the Courts would have resolved any ambiguity by interpreting the provisions in a way that would maintain the federal distribution of power which the Constitution so obviously appears to guarantee. In other words, on principle one would have expected the Courts to hold that no single power of the Commonwealth should be given so wide an effect that the careful definition of other powers would be meaningless and that the States would be rendered subordinate to the Commonwealth in areas of power left to them by the Constitution.... The Court has rightly laid emphasis on the need to give a broad interpretation to constitutional provisions, but has ignored the necessary qualification that the Constitution as a whole may indicate that to give a narrower meaning to particular provisions would better preserve the federal balance that the Constitution intends to maintain".[20]

In relation to the limitations of the *Melbourne Corporation* doctrine and its extension Gibbs noted that:

> "There is not much value in a principle that protects the existence of the States and at the same time places no limit on the extent to which the Commonwealth can deprive the States of their functions".[21]

In relation to the external affairs power, for instance, Gibbs' notions of the federal balance required "that some limits be imposed on the power to implement international obligations conferred by par (xxix)".[22] This is particularly so as the external affairs power "differs from other powers conferred by s. 51 in its capacity for almost unlimited expansion".[23] In explaining the limits of Commonwealth power, imposed by the federal balance, Gibbs sought in aid a decision of Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ, on the defence power, where the Court held:

> "Nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear and a unitary system of government, under which general powers of law-making would belong to the Commonwealth Parliament, would be brought into existence notwithstanding the deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution. We proceed to state reasons why the Court should not ascribe an operation so far-reaching and, indeed, revolutionary".[24]

Gibbs held that in deciding whether legislation purportedly enacted under the external affairs power is valid it will be "necessary to have regard to the fact that the Constitution is a federal and not a unitary one".[25]

Similarly the federal nature of the Constitution placed limits on how Sir Harry viewed the scope of the corporations power. In *Actors and Announcers Equity Association v. Fontana Films*,[26] he said:

> "[H]aving regard to the federal nature of the Constitution, it is difficult to suppose that the [corporations power was] intended to extend to the enactment of a complete code of laws, on all subjects, applicable to the persons named in those paragraphs ... extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations".[27]

And:

> "…..The method which the courts have followed in the past, of approaching the solution of the difficult problems presented by such a provision as s. 51(xx) gradually and with caution, proceeding no further at any time than the needs of the particular case require, is the most likely, in the end, to achieve the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the Constitution requires".[28]

It is important to note however that Gibbs' view of federalism did not mean he was fast and loose with the provisions of the Constitution. Nor did it detract from his strict, technical approach to reading its provisions. Nevertheless, it did infuse his thinking about the outer limits of Commonwealth power.

Concerns about Commonwealth legislative power

Sir Harry Gibbs' view of coordinate federalism suggests that each level of government was to be independent of the other. This view of the federation influenced his thinking about the limits of Commonwealth power.

External affairs

As I have mentioned, one of Sir Harry's key concerns was the potential interpretation that could be given to

s. 51 (xxix) of the Constitution – the external affairs power, which provides:

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

Sir Harry acknowledged that the external affairs power would give rise to "difficult decisions"[29] and would create "grave difficulties of interpretation". He agreed with Sir Harrison Moore who described it as a "somewhat dark"[30] power. The cases on the external affairs power raised the question of what constitutes "external affairs". Sir Harry's view was that the expression was a confined one. It related to: "the external relations of the Commonwealth",[31] "some matter indisputably international in character",[32] "relations with other countries or persons or things outside Australia",[33] or "matters concerning other countries".[34] However "a matter does not become an external affair simply because Australia has entered into an agreement with other nations with regard to it".[35]

He contrasted laws made pursuant to the external affairs power with laws which related to the "internal organization of the nation" and therefore "could not be regarded as a law with respect to external affairs".[36]

Sir Harry's view did not mean that the external affairs power has a narrow scope. For example, he conceded that the power could properly be used "in some circumstances, at least",[37] to pass a law to carry into effect an international agreement to which Australia is a party. It is not limited to matters geographically external to Australia. For instance, Sir Harry thought that diplomatic privileges, the pursuit of fugitives from another country, and laws making it an offence to excite disaffection with a friendly nation or aerial navigation are all matters which fall within the ambit of the external affairs power.[38]

Sir Harry rejected a view that the external affairs power would support the Commonwealth Parliament enacting laws to execute any treaty to which the Commonwealth is a party, regardless of whether the subject matter of the treaty was purely domestic and involved matters which did not relate to relations with other countries. He was particularly concerned that such a view would give the Commonwealth Executive the ability to "determine the scope of Commonwealth power".[39] This would potentially give the Commonwealth the power to:

> "…..control education, to regulate the use of land, to fix the conditions of trading and employment, to censor the press, or to determine the basis of criminal responsibility …the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed".[40]

In retirement Sir Harry continued to worry about the scope of the external affairs power. In a provocative statement to this Society he suggested that "[i]t is hardly an exaggeration to say that it would not make any practical difference if the word 'anything' were substituted for 'external affairs' in this provision".[41] Gibbs called for an amendment to the external affairs power to limit its scope along the lines he was suggesting in his judgments.[42] With the Commonwealth in possession of an unlimited treaty making power, Gibbs became worried about the amount of scrutiny treaties were receiving. He was pleased to see Parliament beginning to subject treaties to more effective probing.[43] He was also alarmed about the central role that the *Racial Discrimination Act* 1975, which had been enacted pursuant to the external affairs power, played in *Mabo*,[44] where it was used to strike down Queensland land law.[45]

Sir Harry was in the minority in almost all the cases concerning the federal balance. The minority view of the external affairs power has not prevailed. Gibbs thought that the combined effect of the external affairs power and s. 109 of the Constitution could annihilate State legislative power.[46] He concurred with a comment of David Jackson, QC, who in 1984 observed that "in the future the issue between State and Commonwealth Governments is more likely to be whether the Commonwealth power should be exercised, rather than whether it exists. In other words the resolution of the issue is likely to be by political, rather than by legal, means".[47]

Gibbs' fellow judges in the minority in cases concerning the federal balance were, variously, Sir Daryl Dawson, Sir Keith Aickin and Sir Ronald Wilson. It is appropriate also to pay tribute to Sir Ronald, who passed away last year shortly after Sir Harry. Whatever view one takes of Sir Ronald's role as President of the Human Rights Commission, as a High Court Justice, he should be remembered, like Sir Harry, as a great federalist.[48]

Corporations power

A discussion of Sir Harry Gibbs and federalism could not be held at this time without some further mention of the corporations power. Section 51(xx) provides that:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ..... Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

In the cases that examined the limit of the power, Gibbs found that the trading activities of trading corporations could be regulated.[49] He held that legislation could apply to a trading corporation "only in relation to such of its activities as are properly regarded as trading activities".[50] If its activities are "preparatory to the trade [and] do not form part of it",[51] then they are not trading activities:

> "The authorities in which s. 51 (xx) has been considered are opposed to the view that a law comes within the power simply because it happens to apply to corporations of the kind described in that paragraph…in the case of trading and financial corporations, laws which relate to their trading and financial activities will be within the power. This does not mean that a law under s. 51 (xx) may apply only to the foreign activities of a foreign corporation, for *ex hypothesi* the law will be one for the peace, order and good government of the Commonwealth. It means that the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it".[52]

Gibbs' view of the corporations power has not, at this stage, commanded majority support. His view was cited in aid in the recent challenge to the *Work Choices* legislation particularly as counsel tried to explain Sir Harry's view. If trading activities of trading corporations could be regulated, and financial activities of financial corporations could be regulated, but he did not mean that only the foreign activities of a foreign corporation could be regulated, what did he mean by the observation that "the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it"?[53]

It is difficult to speculate on the result of that challenge before the present High Court. It is also unwise to guess how Sir Harry might have determined the matter. Sir Harry's speeches in retirement seemed to express different views. At Samuel Griffith Society conferences, in 1992 and 1993, Sir Harry initially expressed concern at the potential of the corporations power, given the state of the authorities.[54] However, by 2001 he seemed, at least on one reading, to be expressing a somewhat different view. Sir Harry hoped that politicians of all major parties would put aside political differences and work "out anew which powers should be given to the Commonwealth and which to the States". In this context he observed that "some issues should be easy to decide – for example, to increase the power of the Commonwealth with regard to corporations".[55] At any rate it is idle to hypothesise what Sir Harry might write were he a Justice of the High Court hearing the *Work Choices* challenge.

Concerns about Commonwealth financial power

The second essential characteristic of a federation as Gibbs saw it was for each component part to have financial independence. The interpretation given to three of the financial provisions of the Constitution have made the achievement of this goal difficult.

Section 90 excise duties

Gibbs, using the words of Dr Johnson, described the taxes mentioned in s. 90 of the Constitution as "hateful".[56] His view of s. 90 was reflected in his statement that:

> "It is essential to the nature of a true federation that the States should have under their independent control financial resources sufficient to perform their functions. The way in which s. 90 has been interpreted is one of the factors which have contributed to the instability of federation in Australia".[57]

Section 90 prevents the States from raising excise duties. An excise duty has a vague meaning, but by 1983 it meant:

> "…..a tax directly related to goods imposed at some step in their production or distribution before they reach the hands of the consumer. This means that the person on whom the tax is imposed is charged by reason of and by reference to the fact that he has taken such a step in relation to the goods e.g., as manufacturer, producer, processor or seller".[58]

What was controversial is how this manifested itself. That is, in considering impugned legislation, the Court divided between those who thought that the practical effect of the tax was central to the law's validity

(i.e., if it produced the same result as an excise duty it was an excise duty) and those who favoured the legal effect (i.e., did the legislation provide for an excise duty?). Sir Harry favoured the legal effect test. He explained his view in *Hematite Petroleum v. Victoria*:

> "[Section] 90 makes exclusive to the Commonwealth a particular sort of tax. The question whether a State law infringes s. 90 can be answered only by determining whether it imposes that sort of tax. One must first define 'excise', and then ask whether the tax imposed by the State statute comes within that definition. It is irrelevant that the State statute brings about the same practical result as a duty of excise, for s. 90 does not forbid the States to achieve any particular economic result; it forbids them to enact a particular form of taxation".[59]

This led Sir Harry to support schemes whereby the States could charge licence fees to a business, based on the previous year's turnover, without being an excise duty, as such charges would not constitute taxes on goods. However he was not always in the majority and, partly because of the shifting composition of the Court during his 17 years on the bench, inconsistent decisions resulted.

Backdated licence fees relating to tobacco[60] and petrol[61] were upheld as not being excises. However an annual levy on the owners of livestock was held to be an excise,[62] as was a levy calculated on the number of animals slaughtered at an abattoir in a previous year[63] or the processing of fish.[64] Gibbs was critical of the uncertainty and lack of precision about whether a particular tax is an excise.[65] When the backdated licence fees were finally invalidated, in 1997, in *Ha v. New South Wales*,[66] he warned that the result of the decision was that "the imbalance between revenue and expenditure of both the Commonwealth and the States has become even more extreme and the financial dependence of the States on the Commonwealth has become even greater".[67]

Sir Harry Gibbs applied a purposive approach to s. 90. It was, in his view, an essential part of the pact of federation to abolish "customs barriers erected by the Australian colonies. The inclusion of excises and bounties in the areas forbidden to the States was obviously intended to make effective the Commonwealth's control of its tariff policy".[68] Sir Harry rejected a view that the section was designed in order to give the Commonwealth "a real control of the taxation of commodities",[69] or that it "enabled it to control the national economy as an economic union".[70]

Sir Harry also believed that the presence of s. 109 of the Constitution, which enshrined the supremacy of Commonwealth laws, also provides a reason to take a narrow view of the prohibition on excise duties. The presence of s. 109 in the Constitution means that "a State excise duty which counteracted the effect of a Commonwealth tariff" would be invalid.[71]

A wide interpretation of the meaning of excise duties would, in Sir Harry's view, force the States to "impose some forms of taxation which, although constitutionally permissible, are less economically desirable than taxes now categorized as duties of excise".[72] It would also continue to cripple the States financially as they had been "virtually prevented" from imposing income tax.

Sir Harry Gibbs' views of excise duties are not the accepted law, and in retirement he campaigned for an amendment to the Constitution to allow the States to raise excise duties.

It is interesting to consider the backgrounds of those Justices who, like Sir Harry, took a narrower view of excise duties. Every Justice who had been a State Solicitor-General prior to their appointment has adopted a narrow view of excise duties, and every Justice from a State other than New South Wales and Victoria (with the exception of Sir Gerard Brennan) also adopted a narrow view. It is also interesting to observe that there have been no cases on s. 90 since *Ha* in 1997, despite the fact that in that decision the Court was split 4:3 and only two justices, Gummow and Kirby JJ (of the majority), remain on the Court from that time. Perhaps the effect of the Goods and Services Tax has meant that the States have been less likely to attempt creative taxation measures.

The other interesting observation about cases involving s. 90 is that in 1974 in *Dickenson's Arcade Pty Ltd v. Tasmania*[73] the Court held that a tax on consumption was not an excise duty. This means that from 1974 the States would have had the power to raise their own consumption tax. Sir Harry said, while supporting the legality of a consumption tax raised by the States, that:

> "..... the exclusion of a consumption tax from the conception of an excise seems to be an anomaly in principle, because a tax on consumption would appear to have the same effect in passing into the price of the commodity, and reducing demand for it, as a tax on production, distribution or sale".[74]

It is interesting that despite the many complaints about vertical fiscal imbalance, no State took up this option.

Appropriations power

The second area of financial power where there was a potential for the Commonwealth to reach into areas of State action was, in Gibbs' view, the appropriations power. Section 81 of the Constitution relevantly provides:

> "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".

Gibbs understood the potential reach of this power. In the *Australian Assistance Plan Case*,[75] the Court was asked to consider what appropriating money "for the purposes of the Commonwealth" meant. Gibbs, in classic federalist style, observed:

> "It would be contrary to all principles of interpretation to treat the words 'for the purposes of the Commonwealth' in s. 81 as adding nothing to the meaning of the section. The 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'. They appear in a Constitution by which specific powers of legislation were conferred upon the Commonwealth and the general powers of the colonies which became the States were, with certain exceptions, continued. Throughout the whole of the Constitution, including the Chapter in which s. 81 appears, the expressions 'the Commonwealth' and 'State' are used to refer to the respective bodies politic rather than to the people forming a particular community. In this context the words 'the purposes of the Commonwealth' in s. 81 naturally refer to purposes for which the Commonwealth, as a political entity, is empowered by the Constitution to act.[76]
>
> "It therefore seems correct to say that 'purposes of the Commonwealth' are purposes for which the Commonwealth has power to make laws – purposes which however are not limited to those mentioned in ss. 51 and 52 but which ... may include matters incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government".[77]

Gibbs was in dissent in this case, but it provides another example of his application of federalist principles.

Section 96: grants power

The third provision of the Constitution whose interpretation created problems of vertical fiscal imbalance was s. 96. Section 96 allows the Commonwealth to make grants to the States on such terms and conditions as the Commonwealth Parliament thinks fit. The power was originally designed to last for the first ten years of federation "and thereafter until the Parliament otherwise provides". However, the Commonwealth Parliament has never chosen to limit its options under this power. In broad terms, s. 96 allows the Commonwealth, by making tied grants to the States, to enact legislation in areas in which it does not have express power to do so. Section 96 was the constitutional centrepiece of the Whitlam Government's policy programme.[78] Some s. 96 grants are made free of conditions but many are not. Sir Harry regarded the effect of grants made under s. 96 "as the most important cause of the distortion of the financial relations between the Commonwealth and the States",[79] and the source of a "Commonwealth bureaucracy which duplicates that of the States".[80]

In Sir Harry's view the most significant financial impact s. 96 has had on the States has been through the 1942 uniform taxation scheme which has effectively centralised income taxation. Under that scheme the Commonwealth imposed income tax rates about as high as the same sum previously collected by the Commonwealth and States combined. The tax rates have remained high enough to make it politically difficult for the States to raise their own income tax. This has led to a vertical fiscal imbalance where the Commonwealth raises more taxation than it needs and the States do not raise enough. Sir Harry suggested that the consequence of this imbalance was to place:

> "..... a strain on the federal system; it puts the financial relationship between the States and the Commonwealth out of balance. The result is a reduction of accountability, because the Commonwealth raises money although it is not responsible for the way in which it is spent while the States spend money although they are not accountable for the manner in which it is raised".[81]

As a judge, Sir Harry Gibbs only considered the extent of s. 96 grants on one occasion, in the *DOGS Case*.[82] No party asked the Court to overrule previous authority on s. 96 so there is no substantial consideration of the provision. Gibbs therefore held, one suspects reluctantly, that "if money is granted by the Commonwealth to a State, there is a grant of financial assistance to the State within s. 96 notwithstanding that the condition of the grant requires the State to pay all the moneys away".[83] He did add however that:

"The State cannot be compelled to accept the moneys, and the fact that it does accept them may be regarded as an acknowledgement of the fact that the moneys granted are of assistance to the State".[84]

States have been more willing to reject Commonwealth grants of recent times. But this has had consequences of both a political and economic nature. Nowhere is this better illustrated than in Victoria, where the Commonwealth government offered to pay $90 million towards refurbishment of the Melbourne Cricket Ground on the condition that federal workplace inspectors would be allowed on the site. By the Victorian government refusing the federal government's assistance for ideological reasons, the MCG redevelopment cost the Victorian taxpayers more than it otherwise would have.

Sir Harry also called for consideration of possible amendments to s. 96, but he was not really satisfied with either of the suggestions he made on this topic. The first suggestion was "to amend the Constitution in a way that would forbid the Commonwealth to make grants except for defined purposes". But he acknowledged that "such a course presents great practical difficulties… it is not easy to suggest a formula that would include purposes for which grants should be made and exclude those for which they should not".[85] His second proposal was in effect to revive and refine the "Braddon clause" to provide that "a specified proportion of the total revenues of the Commonwealth should be distributed to the States and to specify the proportions in which the States should share in the amount distributed".[86] An unsuccessful amendment of this kind was attempted in 1910.

Other issues

Over the years Sir Harry expressed a number of other concerns about the state of federalism both in his judgments and in speeches. He found the Whitlam Government's attempts to introduce legislation providing for Senators for the Territories to be invalid. This was because of his conception of the Senate as an institution designed to protect the interests and integrity of the States and the potential for the Commonwealth to undermine this by potentially placing:

"…..no limit to the number of Senators who may be chosen for each Territory. By legislation allowing a sufficiently large representation to the Territories, the House that is intended to be the organ of the States could be brought entirely under the control of Senators elected by residents of the Territories".[87]

Gibbs was again in the minority in this case. When, almost two years later, and as the result of the change of only one member of the Court, the Justices were asked to reconsider the issue,[88] Gibbs felt bound by the precedent of the earlier authority. In a phrase that beautifully encapsulates Sir Harry's approach to the judicial function he said, "I have had much difficulty in deciding what course my duty requires".[89] His duty indicated that he should follow the precedent although he thought it wrong. In retirement, Sir Harry maintained his support for the Senate, and was concerned about plans to weaken the Senate's power "to operate as an effective check on the combined power of the Executive and the House of Representatives".[90]

Even in relation to Court accommodation he was a federalist. As a High Court Justice he was the principal opponent of Sir Garfield Barwick's idea that all the Justices would be permanently based in Canberra.[91] No doubt this was in part because he was concerned that judges would lose touch with people in other parts of Australia. He was a strong supporter of the idea that the Court should continue to travel to the State capitals despite its permanent home in Canberra.[92]

Ironically, despite being promised appointment to the mooted federal superior court in the 1960s, Sir Harry did not support the place of the Federal Court in the justice system. He said in 1981 that "it is difficult to discover any valid reason for bringing it into existence".[93] His concerns related to the effect that the growth of the Federal Court may have on the position of the State Supreme Courts. He felt that rather than passing the original jurisdiction of the High Court to a new court, it could have been passed to the State Supreme Courts. His concerns have turned out to be justified, as the Federal Court's jurisdiction has continued to grow. Recently plans have been announced to allow the Federal Court to hear a limited class of criminal trials involving hard core cartel conduct under the Trade Practices Act. Cases involving Commonwealth crimes have traditionally been heard by State Supreme Courts.[94]

In retirement Sir Harry Gibbs became increasingly distressed by the state of federalism. He became the founding President of this Society, which has been dedicated to "promote discussion of constitutional matters through the articulation of a clear position in support of decentralisation of power through the renewal of our federal structure".[95]

In particular Sir Harry was worried that towards the end of the 20th Century plans were being made to

rewrite the Constitution with, as he put it: "the ultimate aim ... to destroy federalism … encouraged in the pursuit of that objective by the fact that federalism in Australia has already been weakened by the actions of Governments and the decisions of the Courts".[96]

He was therefore opposed to plans which he saw as weakening the federation, in particular, a mooted separate Aboriginal state. He warned that, based on overseas experience, a separate state might lead to division and potentially "the ultimate dissolution of the federation"[97] due to ethnic tensions which Australia has managed to avoid.

Similarly, as the republic debate gained a head of steam Gibbs became worried that not enough attention had been paid to the role of the States in a republic: in particular whether, in order to alter the Constitution pursuant to s. 128 to make Australia a republic, the referendum would need to pass in all States because, in effect, one was being asked to dissolve the "*indissoluble* federal Commonwealth under the Crown". His other concern related to the position of State Governors, and the need to consider amendments to the State Constitutions as well as the Commonwealth Constitution concurrently.[98] As we know, the republic referendum was soundly defeated, but those who seek its revival have not focused enough on these particular questions.

Conclusion

As a Justice of the High Court Sir Harry Gibbs did his duty. He interpreted the Constitution with particular regard to its federal character. As his time on the bench drew to a close, and in retirement, as the case law increasingly went against the meaning he believed the Constitution to have, he became ever more concerned with the state of federalism.

The further the interpretation of the Constitution moves from his vision, the harder it may be to return it to a jurisprudence that has regard to its federal character. I believe that the focus of federalism in the future will be less on legal federalism and more on political federalism. On the state of current authorities the question in the future seems to be not, does the Commonwealth have the power, but should it exercise it? The challenge of political federalism will be to resolve the tension between Commonwealth governments of both political colours wishing to pursue a broader agenda, and the need for the State governments to make themselves more efficient and dynamic to keep the Commonwealth at bay. If the proper balance can be achieved then we will well and truly serve the distinguished memory of Sir Harry Gibbs.

Endnotes:

1. Roderick Meagher, *Address Launching "Upholding the Australian Constitution", Volume 1*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993), 150.

2. (1960) 104 CLR 529.

3. (1960) 104 CLR 609.

4. Mark McGinness, *Conservative stickler followed precedent*, *The Sydney Morning Herald,* 2 July, 2005.

5. Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995), 57.

6. Transcript of Proceedings, *Welcome to the Chief Justice, Sir Harry Gibbs and Mr Justice Brennan at Perth* (High Court of Australia, 21 September, 1981).

7. Sir Harry Gibbs, *Some thoughts on the Australian Constitution*, Speech delivered at the All Nations Club, 21 November, 1985, 7.

8. Sir Harry Gibbs, *The Threat to Federalism*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), 183-184.

9. Sir Harry Gibbs, *Rewriting the Constitution*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), x.

10. *Ibid*, xiv.

11. Sir Harry Gibbs, *The Decline of Federalism?*, 18 (1) *University of Queensland Law Journal*, 1.

12. Sir Harry Gibbs, *The Constitution 100 Years On* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 13 (2001), xvi.

13. Sir Harry Gibbs, *Federalism in Australia*, in Alan Gregory (ed), *The Menzies Lectures 1978-1998* (1998), 261.

14. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 1.

15. (1982) 153 CLR 168 at 199.

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

17. (1947) 74 CLR 31.

18. (1985) 159 CLR 192.

19. *Ibid.*, at 205 (citations omitted).

20. Sir Harry Gibbs, *The Threat to Federalism*, *op. cit.*, 186.

21. *Ibid.*.

22. (1983) 158 CLR 1 at 99.

23. *Ibid.*, at 100.

24. *R v. Foster* (1949) 79 CLR 43 at 83.

25. (1982) 153 CLR 168 at 192.

26. (1982) 150 CLR 169.

27. *Ibid.*, at 181-182.

28. *Ibid.*, at 182.

29. *New South Wales v. The Commonwealth (The Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 389.

30. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 188.

31. (1975) 135 CLR 337 at 389.

32. *Ibid.*, at 390.

33. (1983) 158 CLR 1 at 99.

34. (1982) 153 CLR 168 at 188.

35. *Ibid.*, at 201-202.

36. (1975) 135 CLR 337 at 390.

37. (1982) 153 CLR 168 at 189.

38. *Ibid.*, at 190-191.

39. *Ibid.*, at 198.

40. *Ibid.*.

41. Sir Harry Gibbs, *Address launching "Upholding the Australian Constitution", Volume 1*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993), 137.

42. Sir Harry Gibbs, *Concluding Remarks*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 250.

43. Sir Harry Gibbs, *Australia Day Message, 26 January, 1996*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 16 (2004), 264.

44. *Mabo v. Queensland* (1992) 157 CLR 1.

45. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 5.

46. *Ibid*..

47. *Ibid*..

48. Interestingly, in an interview Sir Ronald undertook in 1997 in the light of *Bringing Them Home*, he was asked whether he would have taken a different approach to adjudication if he were to return to the High Court today. He responded:

> "I don't think that I would, but because my dominant feeling on the bench is that I have sworn to 'do justice according to law'. And it's that 'according to law' that makes it so damned difficult… the two decisions that I would not wish to confront again was the *Koowarta* decision and secondly *Mabo #1*. I wrestled for ages with *Mabo #1* and I still can't read section 10 of the *Racial Discrimination Act* in such a way as to find that it applies and so I dissented. Mind you, I wasn't alone. It was 4:3. So two other minds of some eminence reasoned along same lines, but I was longing to find with the majority. So you've posed a conundrum and frankly my only defence is that I gave it my best shot in these two cases but was compelled by my legal reasoning the way I did. It was a great honour to serve on the High Court but I can't say it was the highlight of my professional career. It was damned hard work". (From Julian Morrow, "Interview with a Commissioner", *Blackacre* (1997) 27, 29).

49. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 525.

50. (1983) 158 CLR 1 at 117.

51. *Ibid.*, at 118.

52. (1982) 150 CLR 169 at 182-183.

53. For instance in oral argument by NSW, South Australia and Queensland and distinguished by the Commonwealth.

54. See for example Sir Harry Gibbs, *Rewriting the Constitution*, *loc. cit.*, xviii, and Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*,187.

55. Sir Harry Gibbs, *The Constitution 100 Years On*, *loc. cit.*, xix-xx.

56. Sir Harry Gibbs, *A Hateful Tax*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), 123.

57. *Ibid*., at 126.

58. *Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 CLR 599, 615 per Gibbs CJ.

59. *Ibid.*, at 618.

60. (1974) 130 CLR 177.

61. *H C Sleigh Ltd v. South Australia* (1977) 136 CLR 475.

62. *Logan Downs Pty Ltd v. Queensland* (1977) 137 CLR 59.

63. *Gosford Meats Pty Ltd v. New South Wales* (1985) 155 CLR 368.

64. *MG Kailis Pty Ltd v. Western Australia* (1974) 130 CLR 245.

65. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, in DJ Collins (ed), *Vertical Fiscal Imbalance and the Allocation of Taxing Powers* (1993), 336.

66. (1997) 189 CLR 465.

67. Sir Harry Gibbs, *Federalism in Australia*, *loc. cit.*, 271.

68. Sir Harry Gibbs, *A Hateful Tax*, *loc. cit.*, 127-128.

69. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 334.

70. *Ibid*., 335.

71. (1983) 151 CLR 599 at 617.

72. *Ibid*..

73. (1974) 130 CLR 177.

74. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 336.

75. *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338.

76. *Ibid.*, at 374.

77. *Ibid.*, at 375.

78. Gough Whitlam, *The Labor Government and the Constitution*, in G Evans (ed), *Labor and the Constitution 1972-1975* (1977) 308.

79. Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*, 188.

80. Sir Harry Gibbs, *The Decline of Federalism?*, *loc. cit.*, 5.

81. *Ibid.*, 6.

82. *Attorney-General (Vic); Ex rel Black v. Commonwealth* (1981) 146 CLR 559.

83. *Ibid.*, at 592.

84. *Ibid*..

85. Sir Harry Gibbs, *Vertical Fiscal Imbalance and the Allocation of Tax Powers: Constitutional Reform*, *loc. cit.*, 339.

86. *Ibid*., 340.

87. (1975) 134 CLR 201 at 247.

88. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

89. *Ibid.*, at 599.

90. Sir Harry Gibbs, *Australia Day Message, 26 January, 2004*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 17 (2005), 379.

91. Joan Priest, *op. cit.*, 81.

92. Transcript of Proceedings, *Official Welcome from the Tasmanian Bar* (High Court of Australia, 28 April, 1981).

93. Sir Harry Gibbs *The State of the Australian Judicature* (Address to the Australian Legal Convention, Hobart, 10 July, 1981), 3-4.

94. Peter Costello, *Additional Funding for the ACCC: Criminal Cartel Enforcement* (Press Release, 9 May, 2006).

95. *Appendix 2: The Samuel Griffith Society*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), 273.

96. Sir Harry Gibbs, *The Threat to Federalism*, *loc. cit.*, 183.

97. Sir Harry Gibbs, *Federalism in Australia*, *loc. cit.*, 269.

98. Sir Harry Gibbs, *A Republic: The Issues*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), 1-16.

Chapter Five
Bills of Rights as Centralising Instruments

Professor James Allan

I am a long standing opponent of Bills of Rights, be they constitutionalised or statutory. I have developed something of a sideline interest and niche market writing about their sins, omissions, flaws, failings, tendency to promote puffed-up, sanctimonious moralisers in the judiciary and academia, and most tellingly their raw illegitimacy in democratic terms.[1]

What I have not done before is to write of their centralising, anti-federalist tendencies. It is with much gratitude, therefore, that I thank John Stone for having invited me to think about this topic and to address you on it today.

My initial inclination was to proceed straight to the issue of the effects these instruments have on federalist constitutional arrangements. Yet on second thoughts I have decided that would be a mistake. To make the case for the centralising tendencies of a Bill of Rights it is first necessary to be given a taste of how they work, how they enumerate a set of moral abstractions that virtually everyone supports, but that are so indeterminate their words resolve nothing. Instead, the resolving of the myriad rights-based disputes thrown up by Bills of Rights is handed over to the unelected judges, to committees of ex-lawyers. Bills of Rights are sold up in the Olympian heights of moral abstractions where there is near consensus. (Who, for example, is against the right to free speech?). Yet they have their real, practical effect down in the quagmire of social policy line-drawing, and down here there is only ever disagreement and dissensus – more exactly, there is disagreement between smart, reasonable, well-meaning, even nice people who just happen to disagree about where to draw lines when it comes to, say, immigration procedures, or who can marry, or how best to strike the balance between accused criminals and public safety, or even what sort of campaign finance rules or hate speech provisions we might want. (And notice that you can chant the mantra "right to free speech, right to free speech, right to free speech" for as long as you want, it will not help you answer these last two.)

Characterized in that way, rather than in the moral certainties and disagreement obfuscating abstractions of Bill of Rights proponents, and the immediate question that arises is why such essentially moral and political line-drawing should be translated into pseudo-legal disputes and handed over to unelected judges, rather than treated as political disputes and decided through the democratic process, meaning by voting and letting the numbers count.

Consider a sampling of what the judges of the Anglo-US world have done with these Bill of Rights instruments. In Canada and the US, jurisdictions with entrenched, constitutionalised models, the judges have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising;[2] they have foreclosed the prevention of abortion (in the US)[3] or struck down, as procedurally flawed, the existing abortion regulations leaving nothing in their place (in Canada);[4] they have mandated that each and every refugee claimant be given an oral hearing;[5] they have created and imposed new criminal procedure standards;[6] they have twice over-ruled the Canadian federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote;[7] they have even struck down (extrapolating from the Bill of Rights to the preamble to the Constitution) legislation reducing the salaries of provincial judges that was brought in as part of a general province-wide reduction of public servants' pay.[8]

Meanwhile in New Zealand and the United Kingdom, jurisdictions with statutory Bills of Rights of the exact sort the State of Victoria proposes to copy, the judges have done almost as much. True, with statutory models the unelected judges cannot overtly strike down statutes they feel infringe some enumerated right or other. However, they *can* do what amounts to rewriting or redrafting such legislation – they can go a long, long way towards reading 'black' to mean 'white', provided they think this is more in keeping with what *they believe* to be fundamental human rights.

The judges of the House of Lords in the United Kingdom have said that they can use their new statutory Bill of Rights to let them depart from the unambiguous meaning that a piece of legislation would otherwise bear:

> "Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, [the Bill of Rights] may none the less require the legislation to be given a different meaning… [It] may require the court to… depart from the intention of the Parliament which enacted the legislation. …. It is also apt to require the court to read in words which change the meaning of the enacted legislation, so as to make it [Bill of Rights] compliant".[9]

The New Zealand judges have travelled almost as far. Only five years ago three of seven judges on their highest domestic court were prepared to say that because of New Zealand's statutory Bill of Rights it was no longer the case that later statutes impliedly prevail over earlier, inconsistent statutes.[10] They were of the view that they could use the Bill of Rights to prefer the earlier statute if they thought it more in keeping with a rights-respecting outcome.

Bills of Rights then are powerful tools, whether of the constitutional or statutory varieties. They are emotively attractive because they are sold to the public up in the Olympian heights of moral abstractions (such as "due process", "equality", "no unreasonable searches", "freedom of religion", etc). They hand a significant amount of power to the unelected, unaccountable judiciary – power that can on occasion go to their heads.[11] And this inevitably means a politicization of the judiciary, too. Why? Well, as judges become ever more powerful, their decisions will more and more infringe on what were before considered to be political line-drawing exercises. Relatedly, the desire to appoint people of a like-minded political and moral outlook will increase.

In brief, then, Bills of Rights are sold on the basis that moral answers are self-evident – that it is self-evident how a right to free speech, say, should affect campaign finance rules or hate speech enactments or defamation provisions. In actual fact, however, virtually no Bill of Rights cases involve morally self-evident outcomes – just trawl through all the Canadian *Charter of Rights* cases of the last 24 years, or all of the New Zealand *Bill of Rights Act* cases of the last 16 years. None involves moral blacks and whites and self-evidently right outcomes and answers.

Worse for proponents of these instruments, when judges disagree about the scope or reach of rights or whether an enactment imposes a reasonable limitation, the judges vote. Four votes beat three, full stop. Under a Bill of Rights the authoritative decision-making rule is *not* that the most references to Mill or Milton or the *International Covenant on Civil and Political Rights* prevails; it is a purely procedural rule. The judges vote. A Bill of Rights merely affects the size of the franchise (and, too, the accountability of those exercising power).

Bear all that in mind now as we turn to the question of how a Bill of Rights might affect federalism. In particular, bear in mind the absolutist-sounding, universalist nature of rights guarantees, because an immediate and initial question that arises is the extent to which such guarantees can co-exist with the pluralistic, different-sizes-for-different-States approach that underlies and justifies federalism.

Listen to US Supreme Court Justice Antonin Scalia's defence of federalism:

> "Now there are many reasons for having a federal system, but surely the most important is that it produces more citizens content with the laws under which they live. If, for example, the question of permitting so-called 'sexually oriented businesses' – porn shops – were put to a nationwide referendum, the outcome might well be 51 per cent to 49 per cent, one way or the other. If that result were imposed nationwide, nearly half of the population would be living under a regime it disapproved. But a huge proportion of the pro-sex-shop vote would be in states such as New York, California, and Nevada; and a huge proportion of the anti-sex-shop vote would be in the south, and in such western states as Utah and New Mexico. If the question of permitting sexually oriented businesses were left to the states – which is surely where the First Amendment originally left it – perhaps as much as 80 per cent of the population would be living under a regime that it approved. Running a federal system is a lot of trouble; a large proportion of the time of my Court is spent sorting out federal-state relations. It is quite absurd to throw away the principal benefit of that system by constitutionalizing, and hence federalizing, all sorts of dispositions never addressed by the text of the Constitution".[12]

When Justice Scalia there talks of federalizing, he refers to the centralising effect of court decisions made under the US Bill of Rights – decisions that produce "one coast-to-coast disposition of such controversial issues as pornography, abortion, homosexual rights, and (soon to come) suicide".[13]

Our task, in this paper, involves some speculation about Australia. Were Australia to adopt a Bill of Rights, what would its effects be in terms of producing uniformity, one-size-fits-all outcomes, and coast-to-coast dispositions at the expense of diversity and different-outcomes-for-different-States?

What follows will be my conjectures as regards that question. However, some caveats, provisos and

stipulations are needed before this can be done. Firstly, I will for the most part assume a Commonwealth Bill of Rights is what we are considering. Of course I know – and am delighted – that this awful possibility is *not* in fact looming on the horizon or an immediate prospect. State Bills of Rights are the real, actual threat at present (and I will say a brief word or two about them at the end). Yet it is a Commonwealth Bill of Rights that raises the preponderance of federalist issues, so I will assume one of those for the purposes of this paper.

Secondly, and this needs to be made explicit, the centralising effects of a Bill of Rights are hard to disentangle from division of powers or division of legislative authority questions. In other words, the Justices of the High Court already have scope and tools (whatever one might think of the legitimacy of those tools) to weaken federalism and to impose one-size-fits-all outcomes. Nor is it any revelation to say that the States of Australia look to be pretty enfeebled, enervated entities compared to their Canadian provincial cousins, or even compared to the US States.

So what follows is in that sense a relative claim – the effects of a Bill of Rights here in Australia would be grafted on to the existing reality as regards the relatively weak position of our States. In addition, that reality needs also to acknowledge that the Commonwealth can, and does, centralise things through its preponderant control over taxation and the purse strings. Bluntly put, it buys its way into matters affecting, say, health care and education, and by that means exercises a fair degree of control over matters that are State responsibilities.

Thirdly, I will start by assuming an entrenched, constitutionalised, Canadian or US-style model. I realise, of course, as we all do – including those pushing for a Bill of Rights – that the requirement to win a s. 128 referendum before a constitutionalised model could come into existence in Australia means that a statutory model is by far the more likely possibility.[14]

Nevertheless, this model has the most obvious centralising effects. So I will start there. Later I will consider what a statutory version might do.

All those provisos and caveats need to be kept in mind as we turn to speculate on where a Bill of Rights' centralising effects will be most keenly felt.

Let us begin our musings by setting out the four ways a Bill of Rights might potentially affect a legal system once it comes into force. The first way (and first, too, in terms of when it happens) has to do with criminal procedure. A justiciable Bill of Rights inevitably has some influence on how criminals are required to be investigated, processed and tried – things such as how searches need to be executed, or when access to a lawyer needs to be provided, or the prescribed timing and sorts of trials, or whether reliable, incriminating but arguably improperly obtained evidence is to be excluded.

The second potential influence or effect is the birth of a Bill of Rights cause of action sounding in money damages. In other words, a Bill of Rights might lead to civil actions against government and public bodies that garner successful plaintiffs money, sometimes lots of money.[15]

A third possible effect relates to the way in which statutes and secondary legislation are interpreted. A Bill of Rights can give rise to a new, less text-based or less plain meaning approach to interpretation. The judges, relying on such a newly enacted or adopted instrument, might prefer "Bill of Rights-friendly" approaches (or more accurately put, their own contestable view of what is a Bill of Rights-friendly approach) to what meaning they give regulations, statutes, or even constitutional provisions. The House of Lords case cited above makes this abundantly plain.[16] This can be thought of as an "interpretation on steroids" or Alice in Wonderland effect of Bills of Rights.

The last potential effect is a version or offshoot of the third. Instead of the Bill of Rights changing the way statutes (and secondary legislation, and perhaps even constitutional provisions) are interpreted and understood and have meaning imputed to them, the effect here is to change how the common law is understood. The third effect amounts to the redrafting of statutes; this one amounts to a re-writing of the common law, of the rules built up over time from the case-by-case adjudication of the judges.[17]

Those are the four main ways that a Bill of Rights might potentially affect a legal system, once one comes into force. As regards the question of the centralising effects of these instruments, though, it is the first and third of those ways that most obviously matter.

So my prediction would be that the first centralising effects of our mooted Bill of Rights would be felt in the realm of criminal procedure and criminal law. As it happens, in this realm the different-sizes-for-different-States outlook happens to be alive and well here in Australia. Three of our States have Criminal Codes; three do not. Queensland's *Criminal Code* was drafted by none other than Sir Samuel Griffith; unlike Canada's *Criminal Code* and New Zealand's *Crimes Act*, Griffith's Code was in the comprehensive Macaulay

and Bentham tradition, not the narrow Stephen tradition. This is the Criminal Code more or less copied by Western Australia. Tasmania, however, opted for the narrower sort of codification that preserved the common law. And as I just noted, the three other States have no Code at all.

But let us focus on criminal procedure. All Bills of Rights these days mention something like "the right to a fair trial" and "the right to be secure against unreasonable searches", to take just two examples. Put such absolutist sounding tools in the hands of the judiciary, and what would happen to the present differential requirements across the States vis-à-vis the need for a unanimous jury verdict,[18] or trial by jury versus judge alone,[19] or how juries are chosen,[20] or legal aid entitlements,[21] or when access to a lawyer must be provided,[22] or even the fate of myriad varying reverse onus provisions? In the United States what has happened is that:

> "The Supreme Court has created what Congress itself has no power to create: a highly detailed national Code of Criminal Procedure. Nowadays it is a rare state prosecution indeed that does not give rise to some arguable claim that this national Code of Criminal Procedure has been violated".[23]

Or let us speculate about other matters that would appear to fall under the aegis of the criminal law. Abortion is a good example. Start with an explicit right to due process, observe the creation of a "right to privacy", then watch the judges infer or imply from that a right to abortion (as happened in the US), and all the differences between the Australian States as regards the regulation of abortion would surely disappear.

Or what about euthanasia? The Northern Territory's recent experiment with a liberalized euthanasia regime was quashed by the Commonwealth. Had it been a State experimenting with such a regime, though, the Commonwealth could have done nothing – or at least nothing other than threatening to hold back GST money or some such purse string menace. Thrust a Bill of Rights into the equation, however, one with "the right to life" as a central feature, and we all know that such experimentation could be stopped in an instant by the High Court judiciary. These judges might stop it, or they might not. But the point is that it would be wholly up to them, and nothing in the three words "right to life" would constrain them either way. Their own moral sentiments would be determinative. And whatever one thinks of such an ultimate decision-making rule, it is not obviously best described in terms of federalism. The judges' ruling would be a one-size-fits-all one.

The same questions raised by euthanasia (and any more laissez-faire attitude taken in future by one of the States) could (in theory) be raised by suicide. Or, provoking at least as strong feelings, there is prostitution, a close cousin of Justice Scalia's example above of pornography. Post-Bill of Rights uniformity would seem a strong likelihood vis-à-vis regulating prostitution.

Of course, coast-to-coast standardization has frequently happened in Australia already, without a Bill of Rights – think of blood alcohol limits, say, or Justice Scalia's pornography example. In fact, the latter (notwithstanding past efforts to produce uniformity) is a good vehicle for sketching in more detail how Bills of Rights act as centralising instruments.

Adopt a Bill of Rights and there would certainly be included "the right to free speech". Whatever the unelected judges decided, as regards how that amorphously phrased, indeterminate right ought to play out down in the quagmire of social policy-making line drawing, its implications as regards pornography would inevitably be coast-to-coast. If the fundamental human right to free expression has implications X, Y and Z as regards the purveying of pornography in New South Wales (or rather, the majority of top judges vote amongst themselves that it is to have those implications), then it can hardly be held to have different implications and ramifications in South Australia, or Tasmania, or even (dare one suggest it) Victoria. Turn an issue into one of transcendent and fundamental human rights, and a one-size-fits-all outcome is carried in its wake. The moral absolutism and self-assuredness (or less kindly put, sanctimoniousness) of rights-talk and of framing issues in terms of universal entitlements seem to me to be anathema to the federalist, experiment-to-see-what-works-best mindset.

Consider some more examples. Hate speech provisions (which presently differ from State to State) would appear open to the same sort of "coast-to-coast" treatment due to this right to free speech.

Then again, we could leave behind the criminal law but stay with this particular right. Imagine how a personal "right to free speech" would affect campaign finance provisions. Let us assume that one of the States wanted to experiment, and try to take some of the money out of electioneering by enacting a statute that allocated television broadcast time to the political parties based on some combination of how they did at the last election and current polling, while also forbidding the purchase of such broadcast time. How would such an experiment fare? Could we see the six States each opting for different campaign finance laws?

Here, in fact, we do not need to make use of our imaginations. The first of the so-called "implied

rights" cases[24] shows us what the centralising effects would be. Once the judges create or invent "a freedom of communication concerning political matters" (discerning it in some mystical fashion from the text and structure of a Constitution whose authors explicitly, deliberately and after much thought foreswore any personal right to free speech), and this new entitlement, albeit a limited one, must – and does – apply across the board. Whatever the States might want, they are foreclosed from trying it. And that is the centralising effect of an implied right, of a dwarf right, of a non-personal right, of a bracketed and (for now) contained freedom applying only against the legislature.

We all know that the effect of an explicitly enumerated, personal "right to free speech" would be greater still.

Allow me to indulge myself with one last foray into speculation before moving on. Consider the potential centralising effects here in Australia as regards:

- "The right to vote" and electorates or constituencies that favour rural voters (because such constituencies contain fewer voters than urban ones).
- "The right to freedom of religion" (a beefed-up s. 116, and one now applying to the States too) and the wearing (or not wearing) of headscarves to schools.
- "The right to freedom of religion" (again, a beefed-up s. 116 applying to the States as well) and the funding of parochial schools from the public (State) treasury.
- "The right to vote" and rules regarding when prisoners can (and cannot) vote.

In all four of these examples, assume that one or more of the States either already has laws to this effect or wants to bring them in. Assume further that others of the States do not. My bet is that the enumerated right would lead to a centralised, one-size-fits-all outcome.

Over time, we would be sure to see other centralising outcomes, though some would be unexpected and others still unintended.

Return to my third assumption, now, and put it away. No longer will we imagine the effects of an entrenched, constitutionalised Bill of Rights. Instead, consider what a statutory version enacted by the Commonwealth Parliament might do.

Such a version would be sure to have a reading down provision, a section that tells the unelected judges to read all other statutes in *what they consider to be* a Bill of Rights friendly manner. The New Zealand version, section 6, reads:

> "Whenever an enactment *can be given a meaning* that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning *shall be preferred* to any other meaning". (my italics)
>
> The UK version, section 3 (1), reads to start:
>
> "So far as *it is possible to do so*, primary legislation and subordinate legislation *must be read* and given effect in a way which is compatible with Convention rights". (my italics)
>
> And in the State of Victoria's Bill, sections 32(1) and (2) read:
>
> "(1) So far as *it is possible to do so* consistently with their purpose, all statutory provisions *must be interpreted* in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right *may be considered* in interpreting a statutory provision". (my italics)

As I indicated above, it is mainly these reading down provisions that empower the judges to achieve most of what they could under a constitutionalised Bill of Rights. Instead of striking down statutes, they re-write them. And the evidence from New Zealand and the UK makes plain that this is a possible – no, a probable – outcome. (Victoria's added section 32(2) makes things even worse. This certainty-destroying adornment is exceedingly likely to lead to a ratchet-up effect, in my opinion.[25])

In terms solely of its centralising effects, the potency of any Commonwealth statutory Bill of Rights would depend upon the extent to which it could be used to read Commonwealth legislation more expansively. There would be no question of striking down or rescinding State legislation (as there would be with a constitutionalised instrument). But where Commonwealth legislation is otherwise constitutional, an expansively interpreted or re-written statute could have centralising effects.

Moreover, the very existence of such a statutory Bill of Rights will soon be given – by the judges – a quasi-constitutional status. This happened in New Zealand.[26] It will happen here. And that means it will affect how the judges read the Constitution itself. Throw a statutory Bill of Rights into the equation, and the debate in *Al-Kateb*[27] over whether to interpret the Constitution in the light of international human rights-

based decisions – a debate Justice Kirby lost resoundingly[28] – may come out the opposite way. In fact, I think it virtually certain that it would.[29] And once that happened, we would get rights-based constitutional interpretation – or rather, the picking and choosing and application of those overseas precedents felt by the particular judge and his or her clerks to be sympathetic and agreeable ones – through the backdoor.

It is unclear which of my speculations above could be achieved only with a statutory Bill of Rights. Here, I simply say, "more than you would expect". Bills of Rights always surprise most of their original drafters and proponents in terms of their potency and ability to shift decision-making powers to the highest court. And that generally entails, in a federal system such as Canada's or the US's or Australia's, a degree of centralisation, of anti-federalism.

That leaves just State Bills of Rights. They would appear, despite their many other faults, to have no centralising effects. At any rate, that is one's *prima facie* impression. However, even that may be too optimistic, at least in the following sense. Such a Bill of Rights will fall ultimately to be interpreted by the High Court, by Commonwealth appointed judges. So such State instruments will increase the power of centrally appointed judges, which can be thought of as a sort of centralising effect.

Worse, were two or more States to enact Bills of Rights, we can be abundantly confident that there would be considerable overlap as regards content, as regards which rights are enumerated. Now these rights, as I have already stressed, are articulated in broad, amorphous, indeterminate terms. They constrain hardly at all where the many highly debateable and disputed lines have to be drawn by the unelected judges. It is almost never the case that sincere, reasonable, smart, well-meaning people all agree about what some right demands down in the quagmire of where Bills of Rights are litigated and have real, actual effect. Accordingly, we would expect different judges to draw the lines in different places. The most cursory glance at the ramifications of, say, the right to free speech and how it has played out in Canada, the US and New Zealand as regards campaign finance laws, or hate speech provisions, or defamation rules or anything else shows this to be true. The same goes for other enumerated rights. The judges decide and no two jurisdictions decide in precisely the same way.

The irony of an Australian situation where there were multiple State Bills of Rights is that the High Court would impose uniformity and coast-to-coast dispositions. The Justices of the High Court are extremely unlikely to allow the right to be secure against unreasonable searches to mean one thing in Victoria and something different in New South Wales. The same goes for the right to life, or to freedom of religion or association. So in that sense, an ironic one really, even various State Bills of Rights might engender a sort of centralising effect.[30]

I want to finish by considering whether the basic notion of parliamentary sovereignty is compatible with federalism. This may appear to be a question unrelated to whether Bills of Rights are, or are not, centralising instruments. Yet I think that appearance is mistaken. The motivating rationale and justification for parliamentary sovereignty is that each generation should be left to decide fundamental issues for itself – including issues about rights – by letting the numbers count and majorities rule (rather than letting the numbers count only on the High Court and resorting to majority rules only there).

Parliamentary sovereignty, understood in this way as being a system in which the voters' elected representatives make all the fundamental decisions for society (including moral decisions translated into the language of rights), has only one plausible rival in today's world; it is juristocracy, or kritarchy, or what you find when there exists a justiciable Bill of Rights in place in a jurisdiction. Under this rival system, a great number of moral and political line-drawing decisions (after being suitably translated into the language of rights) are handed over to unelected judges, to committees of ex-lawyers. In its least aggressive embodiment, it still gives the judges much more line-drawing power than they have under a parliamentary sovereignty set-up.

To assert, then, that parliamentary sovereignty is *not* compatible with federalism is to imply that a Bill of Rights regime *is* compatible, or at least is *more* compatible, with federalism.

I think that is wrong. Yes, in any federal system there will be tensions between the two levels of elected legislatures – the States and the Commonwealth. That in itself, however, does not undermine the basic justification and reality of parliamentary sovereignty, which is that the elected representatives (who are accountable on a regular basis to the voters by means of elections) make the fundamental line-drawing political and moral decisions – that, in a rough sense, the majority rules.

True, federalism amounts to a bargain. It may be the price needed to be paid to form a nation, or the

most sensible way to deal with vast geographical areas. Whatever the motivating causes, some broad areas of responsibility will get allocated to the centre, some (residually or explicitly) to the regions. Who is responsible for what will sometimes be clear – will fall into "the core of settled meaning".[31] Sometimes, though, it will be unclear – will fall into the "penumbra of doubt"[32] or "of uncertainty".[33] That is the very nature of any rule; all rules are destined (in some circumstances) to be under- or over-inclusive. Alas, it may even be true that sometimes who is responsible for what in a federal system will appear clear (on a plain meaning reading, say) to the vast preponderance of interested people, and yet the point-of-application interpreters – the top judges – will allocate the power contrary to that clear reading.

Federalism necessarily carries with it division of powers disputes of the second sort, those in which it is genuinely unclear which side (regions or centre) is to have the power. No amount of specificity, however fanatical, can prevent this in all situations. As I said, it is the nature of rules. And so it is the nature of federalism itself.

In such circumstances someone has to decide, and I see nothing wrong with it being the top judges. If not them, then who? And this remains true even though all of us might suspect that judges appointed by the centre will (on average, over time, in the really important cases) tend to favour the side that appointed them.

That seems to me to be part of the federalist bargain. But nothing in that bargain undermines parliamentary sovereignty. Judges here are acting as umpires. One of the two levels of elected government, of the sovereign Parliaments, will get to draw the lines. The unelected judges are merely deciding which it will be.

How is that incompatible with parliamentary sovereignty? It is only when one imagines judicial manipulations – handing the power to the side more likely to reach decisions the unelected judges themselves favour – that parliamentary sovereignty begins to be undermined. One such manipulation is of the sort I mooted above, where the judges allocate the division of powers contrary to what appears to be the clear reading or plain meaning (or, in their absence, arguably the manifest intent of the founders). This, though, is not a sin to be laid at the feet of the elected branches.

There is a price to be paid by parliamentary sovereignty when it makes the bargain for federalism. Yet that price is a very small one indeed in so far as taking power out of the hands of elected representatives of the people (of one level or the other) is concerned.

The point to make here, though, is that the price of the bargain will not go down, but will only go up, when judges are given greater powers (as they are when a justiciable Bill of Rights is entrenched or enacted). Federalism will be and is enervated far more than when no such instrument is in play.

In that sense, I would say that parliamentary sovereignty is more compatible with federalism than is any sort of Bill of Rights regime. Under the former, it is considerably easier to opt for and keep in place differential State-by-State outcomes than under the latter, where issues get characterised in terms of amorphous, indeterminate but nevertheless timeless moral truths. And, of course, that is just another way of making my main point in this paper – that Bills of Rights are centralising instruments.

Endnotes:

1. See, for instance, my *Bills of Rights and Judicial Power – A Liberal's Quandary?* (1996), 16 *Oxford Journal of Legal Studies* 337; *Sympathy and Antipathy* (Aldershot: Ashgate, 2002); *Rights, Paternalism, Constitutions and Judges*, in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002); *Paying for the Comfort of Dogma* (2003), 25 *Sydney Law Review* 63*; A Modest Proposal* (2003), 23 *Oxford Journal of Legal Studies* 197; *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century* (2006), *King's College Law Journal* (forthcoming, April issue); and *Thin Beats Fat Yet Again – Conceptions of Democracy* (2006), *Law & Philosophy* (forthcoming).

2. See *RJR MacDonald Inc v. Canada* (1995) 127 DLR (4th) 1.

3. See *Roe v. Wade* 410 US 113.

4. *R v. Morgentaler* [1988] 1 SCR 30.

5. See *Singh v. Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

6. See *Miranda v. Arizona* 384 US 436 (1966).

7. See *Sauve v. Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

8. See *Reference Re Remuneration of Provincial Court Judges* [1997] 3 SCR 3.

9. *Ghaidan v. Godin-Mendoza* [2004] 3 All ER 411, paragraphs [29], [30] and [32] per Lord Nicholls of Birkenhead. All their Lordships expressed broadly similar sentiments in that case.

10. See *R v. Pora* [2001] 2 NZLR 37. Three others on the court disagreed. The seventh judge decided the case on other grounds.

11. In the second *Sauve* case referred to above, the Chief Justice of Canada referred obliquely to countries that disagree with her court's 5-4 ruling, including Australia, the UK, the US and New Zealand, as "self-proclaimed democracies". (Paragraph [41]). It is impossible to exaggerate the moral self-assuredness, nay sanctimoniousness, of such a remark. And in the course of an official judgment too!

12. Justice Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, in (eds) G Huscroft and I Brodie, *Constitutionalism in the Charter Era* (Lexis Nexis, 2004), p. 337 at p. 342.

13. *Ibid*..

14. And isn't it ironic that the same people who push for a catalogue of rights, including the right to vote and "to participate in the conduct of public affairs" (s. 18 (1) of the draft Victorian *Charter of Human Rights*), these days avoid referenda? My view is that they do so because they know they will lose.

15. In New Zealand, with a statutory Bill of Rights, and despite the remedies provision having had to be removed to get the Bill enacted, the judges simply read back in such a remedy; they created a public law remedy sounding in the new Bill of Rights. See *Simpson v. Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, and my *Turning Clark Kent into Superman: The New Zealand* Bill of Rights Act 1990 (2000), 9 *Otago Law Review* 613.

16. See the main text to *Ghaidan v. Godin-Mendoza, supra*. For a New Zealand example, consider *Moonen v. Film & Literature Board of Review* [2000] 2 NZLR 9 (CA), in particular from p. 16:

> "Of necessity value judgments will be involved ..... [these will be] a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise".

Some readers might be surprised to find ex-lawyers claiming competence in many of these areas.

17. Hence, a Bill of Rights is relied upon in order to change (or if you prefer, "to develop" or "to update"), say, the law of defamation. See *Lange v. Atkinson & Consolidated Press Ltd* 3 NZLR 424. See too *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 for something similar using "implied rights".

18. See, for example, RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (Butterworths, 2004), ch. 5.81.

19. *Ibid*., chs. 4.13, 4.24, 5.76 and 5.77.

20. *Ibid*., ch. 5.79.

21. *Ibid*., ch. 4.35 and 4.36, and *Managing Justice: A Review of the Federal Civil Justice System*, Australian Law Reform Commission (2000), in particular ch. 5 and 5.62.

22. Consider the State policy guidelines and practices developed in response to the High Court's *Dietrich v. R.* (1992) 177 CLR 222. Admittedly, the variations are not pronounced here.

23. Justice Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, *op. cit.*, p. 341.

24. See *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106. See too my *Paying for the Comfort of Dogma* (2003) 25 *Sydney Law Review* 63.

25. For a fuller argument to this effect see my and Grant Huscroft's *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts* (2006) *San Diego Law Review* (forthcoming, March issue).

26. See my *Turning Clark Kent into Superman*, *loc. cit.*, pp. 617 *ff.*

27. See *Al-Kateb v. Goodwin* (2004) 208 ALR 124.

28. See my *'Do the Right Thing' Judging? The High Court of Australia in Al-Kateb* (2005) 24 *University of Queensland Law Journal*, No. 1, 1-34.

29. Consider the clear implications of Justice McHugh's comments in *Al-Kateb* (*loc. cit.*, paragraphs [73] – [74]) re Bills of Rights.

30. Note that this does not happen in the United States – or at least not easily – because there the interpretation of State Constitutions, just as with the interpretation of State common law, is *not* a matter for the US Supreme Court (making it different from Australia and Canada in that regard). That said, if the US judges are prepared to point to a Bill of Rights provision, this can be got round. So in *NY Times v. Sullivan* 376 US 254 (1964), for example, the US Supreme Court made the defamation law of Alabama a federal matter.

31. See HLA Hart, *The Concept of Law* (OUP, 1961), p. 140, *inter alia*.

32. *Ibid*., p. 119, *inter alia*.

33. *Ibid*., p. 131, *inter alia*.

Chapter Six
Who gets the Bill? The Lawyers' Bill of Rights in Victoria

Ben Davies

On May 2 the Victorian Labor government introduced to Parliament the *Charter of Rights and Responsibilities Bill* 2006. This purports to be the first Bill of Rights in an Australian State. It is also a landmark Bill in that it will give many lawyers (and more than a few judges) what they have always wanted – the ability to play politics with the lives of ordinary Victorians without ever having to face a ballot box.

The Charter largely incorporates the rights found in the *International Covenant on Civil and Political Rights* (*ICCPR*) but stops short of including rights in the *International Covenant on Economic and Social Rights* (*ICESR*). However, it provides that it should be reviewed in four and eight years time to consider whether those rights should be included, as well as other rights such as the right to "self determination" of indigenous peoples.

It also requires that every piece of legislation introduced to the Victorian Parliament in future must have an accompanying statement outlining its human rights impact; that every statute in Victoria must be interpreted in a manner consistent with the Charter; and that government decisions may be challenged on the basis that they are inconsistent with the Charter. It also establishes the office of Human Rights Commissioner to help facilitate and encourage these kinds of processes, and to work towards what has been described as a "rights culture" in Victoria.

The first and most straightforward objection to the *Charter of Rights* is that it does absolutely nothing to increase the capacity of Victorians to actually have legally enforceable rights to redress if their rights are breached.

Under this Charter, it is made abundantly clear that if your rights are being breached, there is:

- No right to have an oppressive statute over-ruled;
- No right to have an oppressive government decision overturned; and
- No right to damages or any other kind of compensation if your rights are found to have been breached.

All that a court can do under the Charter is issue a "declaration of incompatibility", stating that a particular government act or piece of legislation is inconsistent with the Charter. A court cannot strike down a law, and if a declaration of incompatibility is issued there is absolutely no obligation on the Government to amend the legislation.

On the day of the introduction of the Bill, Victorian Attorney-General Rob Hulls stated that:

> "Some important rights, such as freedom of speech and religion and freedom from forced work and degrading treatment, have no clear legal protection".[1]

Unfortunately for Mr Hulls, and all Victorians, they still don't. A government which passed the *Forced Work and Degrading Treatment Act* would have no problem in persecuting Victorians under its terms – no court could strike it down under the *Charter of Rights*, and does Mr Hulls seriously believe that a government which passed an Act allowing for such treatment would really take any notice if a powerless court issued a non-binding declaration that it breaches the *Charter of Rights*?

The fact that the *Charter of Rights* does not actually enforce or uphold rights is reason enough on its own for it to be rejected, but there are many more profound and complex reasons why it will significantly diminish both the political and legal systems of the State, and it is these reasons which deserve much closer scrutiny.

Our previous speaker, Professor James Allan once warned in relation to Bills of Rights that:

> "People sell Bills of Rights on the basis of these incredibly emotionally attractive phrases, 'freedom of expression', 'freedom of religion'…. But that is not what gets to court. You never get a court case where someone says, 'Are you for or against freedom of expression?' Everyone's in favour. You get court cases about things like hate speech, campaign finance rules, defamation, and what the judges are involved in

is narrow social policy line drawing".[2]

The Victorian *Charter of Rights* confirms this view. It is clear to anyone who has experience with similar Bills of Rights that in practice this Charter will be a vehicle to open up a second front in the political process, in which issues of public policy can be pursued through non-political forums, namely the courts. It will be a vehicle in which social policy agendas – in many cases dressed up as issues of "rights" – which could not be achieved through the parliamentary process will effectively migrate from the political realm to the legal. What it will mean is the legalisation of politics, and the politicization of the law, an outcome which will be highly detrimental to both.

Just as "Vote No to the Politicians' Republic" proved to be an effective campaign slogan in the 1999 constitutional referendum, "Vote No to the Lawyers' Bill of Rights" accurately sums up the reasons to oppose Victoria's *Charter of Rights*. The only problem is that Victorians won't actually get to vote on this issue. From the government's point of view, it seems, human rights are fine so long as they don't extend to the right to vote on the method by which they are to be upheld.

Unfortunately, there has not been a great deal of public debate about the Charter. But one should not equate a lack of fanfare with a lack of significance, for the Victorian *Charter of Rights and Responsibilities* will effect a fundamental change in the Victorian legal system.

We have heard few voices on the proposed legislation. This is because the change is being driven by only a few. Those who stand to benefit most are politically activist Victorians frustrated by their lack of popularity in the political process, and their activist lawyers who will hand out the bills.

This is the lawyers' Bill of Rights, made for legal stakeholders. At every stage they are present in the process, trying to implement what Kirby J once called "lawyerly conscience". At every stage the government has given them what they want. And they can be confident that, as a result of policies of judicial appointment by the present government, they will have a judiciary prepared to give them exactly what they want – a judiciary prepared to keep the wheels of "rights" jurisprudence ticking over for the benefit of every lawyer wanting to give voice to their social conscience.

The government's policy agenda

The government officially announced its intention to pursue a *Charter of Rights* in a "Statement of Intent" released in May, 2005, which stated that:

> "The commitment [to a Charter of Rights] also supported the Government's agenda to restore democracy in Victoria and strengthen its democratic institutions".[3]

The Government seemingly believes that democracy in Victoria had been lost and was in need of "restoration". That seems an interesting conclusion to reach, given that it was the same democracy that was kind enough to elect a Labor government in 1999 and then return it with a record majority in 2002.

Although the State Attorney-General Rob Hulls has claimed the *Charter of Rights* has "overwhelming community support",[4] the government's commitment to "restoring democracy" obviously does not extend to giving citizens the right to vote on it.

There is also a fundamental paradox in the government's support for the *Charter of Rights*. Whilst on the one hand it was assuring us of the need for such a Charter in order to protect the fragile freedoms of Victorians and restore democracy, its actual ambitions in practice turned out to be rather modest. The government's Statement of Intent told us that:

> "The Government will focus on prevention and dispute mediation rather than litigation by ensuring that its policies and programs reflect good human rights practice and are therefore not likely to be challenged as breaching human rights standards".[5]
>
> "The Government's approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation. It is through such mechanisms that acceptance and support of human rights will be promoted in the community".[6]

For those Victorians suffering heinous breaches of their rights, the outlook under a *Charter of Rights* appears bleak. Instead of enforceable rights, which individuals can seek to uphold against an authoritarian or uncaring government, these poor oppressed individuals are instead offered a "dialogue" with the government, in which the judiciary is encouraged to join in.

Attorney-General Rob Hulls has told us that the Charter "promotes a dialogue between the three arms of the government – the Parliament, the executive and the courts".[7] For everyone who has ever suffered from

actual repression and persecution, I'm sure there's nothing they would have loved more than a good "dialogue" with their oppressors to put things right.

The government's eager promotion of a *Charter of Rights* will ultimately have the result of ceding significant parts of its role in the political and public policy process to the courts. It is, of course, possible to dress up almost any philosophical position, or frustrated political agenda as a question of "rights", then go off to court and demand that these "rights" be upheld. This is much easier than the task of pursuing change through the political process. Yet the government seems to be blind to its actions. It is effectively dealing itself out of debates that it should be primarily responsible for.

The "consultation" process

Perhaps not wanting to appear too hasty in implementing its agenda, the government chose to delay the liberation of the Victorian community so that it could embark on a process of "community consultation". The words "community" and "consultation" are two of the most abused in the political language, and this process certainly did little to restore their credibility.

The government purported to seek the views of Victorians through what it repeatedly described as an "Independent Committee". This "Independent Committee" was charged with the process of consulting Victorians on "whether change was needed in Victoria to better protect human rights".[8]

As part of the consultation process the government invited submissions from interested Victorians, and produced several documents entitled "Human Rights for Communities", inviting input from various "communities" which it obviously considered most in need of the benefits of a *Charter of Rights*.[9]

Several such communities had information statements published for them:

- Human Rights and Disability.
- Human Rights and Faith Based Groups.
- Human Rights and Homelessness.
- Human Rights and Indigenous Peoples.
- Human Rights and Multicultural Communities.
- Human Rights and Older People.
- Human Rights and Sexual Identity.
- Human Rights and Women.
- Human Rights and Young People.

The document "Human Rights and Young People" makes for some interesting reading. Please forgive the stylistic aspects, for these are direct quotes, but they are instructive insights into the thinking of whoever drafted them. For example:

> "….under 18s can be discriminated against on the basis of their age when it comes to:
>
> …being treated as a threat, or being harassed *when hanging around shops or using public transport*". (emphasis added)

I am sorry to report that any concerned under 18s who may have read this document in the hope that they will receive greater protection when hanging around shops and using public transport, are destined to be sadly disappointed, as the *Charter of Rights* unfortunately does not include the right to loiter at train stations.

Young people who read this document may also have been interested in the following comment:

> "Human rights are also about your right to privacy. This means your right to have private letters and diaries not read by others, whether they be family members, teachers or other adults".

Unfortunately, such young people are again destined to be disappointed, given that the *Charter of Rights* does not include an Adrian Mole amendment to enshrine the right of dysfunctional adolescents to keep secret diaries. But as silly as it seems, the Adrian Mole human right is a symbol of a disturbing frame of mind which underpins such sentiments; namely, the idea that virtually every issue of interaction between humans – even within families – and every issue of social regulation – whether public or private – can be turned into a question of "rights", which can then be litigated through the court system.

The Independent Committee

We now move on to the actual process of consultation, which was a tale of two parties – the consulters and the consulted. On both counts the consultation process was an unrepresentative farce.

First, the consulters. The government appointed four people to undertake the consultation process, insisting on many occasions that it was an *independent* committee:[10]

> "The Government believes that the views of Victorians can best be sought by the establishment of a committee of independent persons who are eminent in their fields and respected in the community".[11]

It soon became apparent that the committee was "independent" only in the sense that it was most certainly independent of anyone who opposes a *Charter of Rights*. Consider for example the case of the Chairman.

Professor George Williams: The Chairman of the Committee was Professor George Williams of the University of New South Wales. Some Victorians may have been intrigued that an academic from New South Wales was appointed as Chairman of the Committee to consult with them about their rights. Some may have been even more surprised that Professor Williams could be passed off as in any way "independent".[12] A cursory search of his writings over the years reveals that, as of January, 2006 Professor Williams had authored or co-authored:

- Four books in favour of a Bill of Rights.
- Two Parliamentary Library publications in favour of a Bill of Rights.
- Seventeen journal articles (and five more with passing references) in favour of a Bill of Rights.
- Forty-seven opinion pieces in the daily press since 1994 in favour of a Bill of Rights.

Andrew Gaze: A curious appointment to the four person Committee was the basketballer Andrew Gaze. Without meaning any disrespect to Mr Gaze as a sportsman, one wonders whether a career spent in the professional basketball leagues of Australia and overseas has given him any particular insight into the plight of the downtrodden, or any appreciation of the sophisticated legal and political issues involved in a *Charter of Rights* to qualify him to be one-quarter of the Committee considering such a significant legal and constitutional change.

Apart from the shortcomings of its personnel, there are many other features of the Committee's work to convince us that its independence was lacking. Its recommendations, not surprisingly, were entirely in line with the Government's stated preferences (see over).

It is particularly noteworthy that the government expressed a desire for a *Charter of Rights* that was a mere Act of Parliament, in which courts could not invalidate legislation. Not surprisingly, the "Independent Committee" recommended exactly that. This may be surprising for a report of a Committee chaired by Professor George Williams. Anyone familiar with his book, *A Bill of Rights for Australia*, would be aware that his preferred model is a constitutionally entrenched Bill of Rights in the Australian Constitution, which would apply to both federal and State jurisdictions.

It would appear that Professor Williams himself is nothing if not a pragmatist. When the ACT *Human Rights Act* was introduced, albeit with no power for the judiciary to overrule Acts of Parliament, he declared it "just the first step in the right direction"[21] towards a constitutionally entrenched Bill of Rights. Similarly, his own report into the Victorian *Charter of Rights* assures us that "the Charter should be the start of incremental change, not the end of it".[22] This presumably means the first step on the path to a constitutional Bill of Rights which was, of course, his preferred model all along. From Professor Williams' point of view, the ACT and Victorian models appear to be just expedient devices to soften-up public opinion to accept a "real" constitutional Bill of Rights.

Government's preferences	The Independent Committee's recommendations
".....the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights. …The Government is interested in a model similar to that used in the United Kingdom, New Zealand and most recently, the Australian Capital Territory, in which rights are contained in an Act of Parliament".[13]	".....the Victorian Charter should be an ordinary Act of Parliament like the human rights laws operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament".[14]
".....it is attracted to the procedures used in the UK, New Zealand and the ACT whereby legislation being introduced into Parliament is certified as complying with the jurisdiction's human rights obligations".[15]	"The Committee is persuaded by the submissions, the Government's Statement of Intent, and the practice in the United Kingdom, New Zealand and the ACT, that there is a role for the Attorney-General to provide a statement to the Parliament indicating an opinion as to whether the Bill is compatible with the Charter".[16]
"does not wish to adopt a human rights model such as applied in the United States of America where the rights expressed in the constitutional *Bill of Rights* can be used to invalidate laws without recourse to the legislature".[17]	"This Charter would not be modeled on the United States *Bill of Rights*. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution".[18]
"Legislation for the protection of *International Covenant on Economic and Social Rights*, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are raised and debated".[19]	"Many Victorians said that the Charter should also contain rights relating to matters such as food, education, housing and health, as found in the *International Covenant on Economic Social and Cultural Rights* 1966 …. Whilst we agree that these rights are important, we have not recommended that they be included in the Charter at this stage".[20]

As Professor Williams' comments show, the campaign for the Victorian *Charter of Rights* is simply one step in a longer-term strategy. This is very much a political campaign, using what were once described in "Yes, Prime Minister" as "salami tactics", in which one small step into a "human rights culture" is taken at a time, in such a small way that hopefully nobody will notice too much, then gradually slicing off further slices bit by bit until eventually the whole salami is gone – an outcome which, if it had been attempted in one go, would have been met with fierce resistance.

Presumably the strategy is to put up a weak *Charter of Rights* to start off with, then in a few years time have it reviewed, perhaps by another "independent committee", who will no doubt tell us that it's working fine and we should now take the next step.[23]

The consulted

The consultation process was predictable in terms of who made submissions. It was a self-selecting process in which those who cared strongly enough to make submissions got consulted. In a process such as this, those interested in being consulted will invariably be those with vested interests in a certain outcome – activists wishing to pursue issues, and activist lawyers who will profit from them. Not surprisingly, of those who made submissions, lawyers figured prominently.

The consultation questionnaire was very broad, and included asking respondents, "If Victoria had a *Charter of Rights*, what rights should it protect?"[24] – effectively asking them to pick their favourite items from the human rights menu.

Asking activist lawyers what rights they want in their Bill of Rights is akin to asking tax accountants what additional loopholes they would like in the *Tax Act* in order to provide greater work and career development for themselves.

As outlined previously, the effect of the *Charter of Rights* will result in the government giving up its power over social policy issues to unelected judges and lawyers with agendas. It is effectively a ceding of political power from the political arm of government to the judicial. A government setting itself up in this way through a "consultation process" with activist lawyers is not just turkeys voting for Christmas, it is turkeys voting for Christmas after consulting all of the diners about how they would like them to be cooked.

The consultation process revealed that almost every conceivable interest group with any vague connection with "rights" sought to hitch its own agendas to the *Charter of Rights*. For example:

- The ACTU submission advocated that every International Labour Organisation Convention to which Australia is a signatory should be taken into account under the *Charter of Rights*.[25]
- The two-page submission by "Feminist Lawyers" assured us that "human rights should not always be expressed in gender neutral terms. There is a need for womens' human rights to be specifically addressed and this should be considered separately when drafting and implementing the Charter".[26]
- The one-page submission from the Australian Gay, Lesbian, Bisexual, Transgender, Intersex and Queer (GLBTIQ) Multicultural Council (AGMC) is typical of the kind of arguments used:
  "As Multicultural GLBTIQ individuals and groups our experiences whilst diverse due to our individuality has a common thread and this is what binds us. The common thread? The 'twice-blessed' nature of being non-heterosexual and coming from a Multicultural background. However our 'twice- blessed' nature is often 'overlooked' within our immediate families and 'mainstream' multicultural communities. This tendency to overlook creates within us a sense of belonging neither here nor there and leading us to lead a double life. *And for this reason a Human Rights Bill is required*". (emphasis added)

Descartes famously said, "I think, therefore I am". In this case, the view seems to be, "I am a Gay, Lesbian, Bisexual, Transgender, Intersex or Queer Multicultural Victorian, therefore I need a Bill of Rights". That is about the extent of the argument. There was simply no consideration of the adequacy of the *Charter of Rights* in actually upholding rights, nor any analysis of the process by which this would supposedly occur. I should emphasise that it is perhaps unfair to single out the AGMC, as the shallowness of its analysis was typical of dozens of other submissions from those in favour.

Submissions such as this seem to suggest that whenever the words "human rights" are mentioned, some people's critical faculties seem to switch off and see any concept related to them as beyond criticism. This misses the point that "human rights" on their own are simply aspirations which exist entirely in the abstract. It is impossible to adequately consider issues of "human rights" without considering the merits of the mechanisms proposed to uphold them.

Underlying so many of the submissions was the implicit view that there is no difference between supposedly desirable social objectives and how they will actually be achieved in practice. The submissions are fixated with worthy sentiments expressing people's love of rights, but show no appreciation of how those rights will work in practice, or exactly how they will result in more actual, tangible rights for people, as opposed to more opportunities for "dialogue".

The Judiciary

The current state of Victorian politics might be accurately summed up by Yeats' memorable line regarding the Russian revolution, that "the best lack all convictions, while the worst are full of passionate intensity". The current Attorney-General of Victoria, Mr Hulls, probably falls into the latter category. His own contribution to this process is worthy of particular attention, as the *Charter of Rights* appears to be but one half of a two-pronged strategy to substantially re-shape the legal culture of Victoria. The other half of this strategy is based on what could most charitably be described as a passionate pursuit of unorthodox judicial appointments.

On the subject of judicial appointments, Mr Hulls' passionate intensity seems to be focused on one

consistent target, as a small collection of some of his recent comments reveals:

> "We all want judges to be the best and the brightest, but this government certainly knows that the best and the brightest are not always white, Anglo-Saxon, middle-class males. This government wants to appoint judges on the basis of merit rather than on the basis of their *old school ties* or their membership of golf clubs".[27] (My italics here and following).
>
> "I want to head a legal profession in which the best and brightest are awarded on their merit, and not on the basis of their *old school tie*".[28]
>
> "It is important that government agencies engage the best and brightest to do legal work but we continue to kid ourselves if we think the best and brightest are just white, Anglo-Saxon males with an *old school tie*".[29]
>
> "We absolutely kid ourselves as a community if we think the best and brightest are just white Anglo-Saxon males with a newly pressed, freshly pressed *old school tie*, that's just not the case".[30]
>
> "I want to appoint people on the basis of merit, rather than on the basis of their *old school tie*. To the horror of the more crusty corners of the profession, I don't believe that private schooled, middle-aged men are the only ones who have something to offer our courts".[31]

The pre-occupation with school ties seems to be a curious choice of obsession for Mr Hulls, who is incidentally a Xavier College old boy himself. Yet his pet project of appointing a "representative" judiciary, not full of old school ties, hit a stumbling block last year when he appointed as President of the Victorian Court of Appeal, Mr Chris Maxwell, QC, who has the impeccable old school tie credentials of a Melbourne Grammar and Oxford University education.[32] Perhaps it helped that Justice Maxwell was once a staff member to Labor Attorney-General Gareth Evans and represented asylum-seekers in the *Tampa* case. For Mr Hulls and his government, an old school tie would seem to be no impediment to judicial appointment if an applicant can compensate with a sufficient ALP pedigree and commitment to left-wing causes.

In a conference dedicated to the memory of Sir Harry Gibbs, it is appropriate to cite his wise words at the sixth conference of this Society in 1995, words that in Victoria in 2006 seem amazingly prescient:

> "I am not at all sure, however, that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. *It is unlikely to prevent a political party which had secured the requisite majority in the Houses of Parliament from stacking the courts and the public service…".*[33] (emphasis added)

It is worth considering some of Rob Hulls' recent appointments to the Supreme Court and their likely approach to the *Charter of Rights*, since these are the judges who from 1 January next year will be entrusted with applying it, and their own previously expressed views are particularly revealing in relation to the sort of jurisprudence we can expect.

Justice Chris Maxwell

Justice Maxwell was appointed President of the Victorian Court of Appeal in 2005. Unlike Rob Hulls, I won't hold it against him that his parents chose to send him to a prestigious school. Prior to his appointment he was president of Liberty Victoria (formerly the Council for Civil Liberties), whose policies include "the enactment of *a Charter of Rights and Freedoms*", and he had commented extensively on his support for such a Charter.

A speech by Justice Maxwell, *Human Rights: A View from the Bench* in October, 2005 soon after his appointment provides a valuable insight into his likely application of a *Charter of Rights*. Even before the Charter is enacted, Justice Maxwell showed himself to be particularly eager to introduce international human rights jurisprudence to his Court as much as possible. In one particular case last year involving the question of whether medical records held by a hospital could be demanded by the Medical Practitioners Board which was conducting an investigation, Justice Maxwell informed counsel for both parties that the Court would be assisted by submissions dealing with the relevance of international human rights conventions, and the associated jurisprudence, to the question before the Court. This must have been a surprise to both parties, who had not prepared submissions on these points, and for which such issues had not been considered in the trial at first instance.

In Justice Maxwell's own words:

> "This example illustrates several important things:
>
> 1. The Court will encourage practitioners to develop human rights-based arguments where relevant to the question before the Court.

2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.

3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise".[34]

Clearly, under Justice Maxwell, we can expect "human rights considerations" to find their way into almost every conceivable case before him, but also some rather inconceivable ones as well. Justice Maxwell went on to cite other areas of the law where human rights jurisprudence may be brought to bear, for example:

"…..as the Ansett administration clearly demonstrated – quintessential corporate law issues such as insolvency and the associated sale of assets can throw up human rights issues concerning the fate of employees of the insolvent company".

It is likely to come as quite a surprise to corporate lawyers and insolvency accountants that they are now within the realm of human rights law. Even areas of the law that would be regarded as strictly commercial will now seemingly have to consider what tenuous relationship they can establish with human rights law, or at least, on the basis of this invitation to do so, they will if Justice Maxwell is presiding.

Justice Marcia Neave

Justice Neave is a fellow member of the Court of Appeal, appointed in 2006. Incidentally, she (metaphorically) wears the old school tie of Presbyterian Ladies College, which will no doubt be of great interest to Rob Hulls, but of complete irrelevance to everyone else. Neave was previously appointed head of the Victorian Law Reform Commission (VLRC) in 2001 by the State Labor government and described herself as a member "of the Charter Group which was involved in lobbying the government to establish this consultation process" for the *Charter of Rights*.[35]

Litigants seeking human rights outcomes before Justice Neave would be encouraged by her previous support for expanding the role of the judiciary to correct situations where the political process does not produce the desired outcome. For example, a report of the VLRC published by Professor Neave (as she then was) states that in relation to achieving access to IVF treatment for lesbian couples:

"It may be argued that the best way to achieve change is through litigation. It is independent of party and political processes. *It is also a way of achieving quite significant change, where the processes of revising legislation may become the subject of compromise through the political process*. It may also be regarded as potentially quicker than legislative change, as one case, when it is brought, can change the interpretation of legislation from that point on".[36] (emphasis added)

Some may argue that it is unfair to comment on views expressed by members of the bench before their appointment, and traditionally this has usually been the case. However, the legal paradigm in Victoria has now changed. In future, judges will not only be encouraged, but positively obliged to give expression to their own personal views on matters of public policy when *Charter of Rights* cases come before them. Given that they will be making policy – or at the very least contributing to a "dialogue" on public policy – consideration of their own political views will become paramount. From now on, it will go without saying that Victorians with a keen interest in controversial social issues will be scrupulously analysing the ideological disposition of every prospective appointee to the State's highest court.

In the normal course of events, one would not care less what the view of the average Supreme Court appointee was on the issue of IVF access for lesbian couples. Yet Bills of Rights generate an almost farcical interest in judicial nominees, given the enormous power which they vest in judges to engineer social outcomes.[37] Hence, the personal views of Hulls' appointees, far from being irrelevant, are now fair game, given the capacity that those views will now have to dramatically change the society in which we live.

Given that two of the members of Victoria's Court of Appeal are former heads of organisations which have the most to gain from a *Charter of Rights* (VLRC and Liberty Victoria) and have spent such a substantial part of their careers campaigning for a Charter, it is impossible to ignore their backgrounds and personal views, as these views now have the capacity to significantly re-shape the Victorian legal system and its new "culture of rights" for many years to come.

Even more concerning is the fact that despite Mr Hulls' claims that the judiciary needs to be "more representative", the public record demonstrates that some of his more prominent appointees possess personal and professional agendas that are anything but representative of a majority of Victorians.

Justice Kevin Bell

A third recent judicial appointment of Rob Hulls, Justice Kevin Bell of the Supreme Court, has also expressed strong views on a *Charter of Rights*.

Justice Bell is clearly a believer in the destiny of lawyers and judges to change society. At a recent graduation of law students he told them that:

> "You are law graduates now and your knowledge puts you in a special position to contribute to the development of the community.
>
> "As I speak, the rescuers in Tasmania are still boring through the rock to reach their comrades, to bring them back into their community,…… I wish them well, as I do you, especially those of you who are able, even in the littlest of ways, to use your knowledge to break through the rock of prejudice and discrimination that can create barriers between us".[38]

I spoke earlier about turkeys consulting diners. As far as the diners go, Justice Bell seems to have one of the biggest appetites. In December last year he gave a noteworthy speech to lawyers at Mallesons Stephen Jaques, where he literally ordered every human right on the menu.

His speech began by informing his audience of commercial lawyers that mandatory detention under the Commonwealth *Migration Act* must be over-ruled (despite the bipartisan support for that policy). Bell expressed disappointment with the "timidity" of those High Court Justices sitting above His Honour on the juidicial hierarchy who had failed to over-rule this practice,[39] and exhorted Australia to follow instead the enlightened British example of using the courts to achieve political outcomes that cannot be delivered by the ordinary political process:

> "The take-home message is clear. If you want the judges to better protect the civil liberties of the people, as the House of Lords did, you have to give them the necessary tools - you have to introduce a Bill of Rights".[40]

In other words, give us human rights judges the tools and we will finish the job.

Justice Bell then went on to state that:

- Australia now has a foreign-born population of 24.6 per cent.
- Economic inequality has grown in Australia during the past decade.
- Economic inequality exists in Australia.
- The quality of health in poor areas is significantly less than in wealthier areas.
- Women earn less than their male counterparts.
- Only two women head up the top 200 companies listed on the Australian Stock Exchange.

Unremarkable observations, you might think. Yet for Justice Bell, they prove the need for a Victorian *Bill of Rights*. To complete this rather circular argument, Bell concludes that:

> "For essentially these reasons, most countries with diverse populations, such as the United Kingdom and New Zealand, have seen comprehensive human rights protection as indispensable. Victoria, having an even more diverse population, should see it in the same way.
>
> "What could be the justification for Victoria not to introduce a comprehensive human rights framework, including a *Charter of Rights*, when it shares the social and economic conditions that have led to the establishment of such a framework in virtually every other comparable country?"[41]

So there you have it. We are a diverse community where wealth and opportunity is not perfectly distributed, therefore *ipso facto* we need a Bill of Rights, presumably so human rights lawyers and judges can use it to bore through "the rock of prejudice" and solve every social and economic problem. And by the way, the UK and New Zealand have one, so why shouldn't we? Who said the cultural cringe was dead?

I only hope that Justice Bell, for the sake of consistency, is a committed monarchist, for if New Zealand and the UK still have the House of Windsor, then that surely means that we should too.

These comments were made in December, 2005, when Justice Bell had recently been appointed to the bench. The "Independent Committee" had just finished its report and Cabinet had not yet met to consider what, if any, legislation it would approve. Yet this did not stop Justice Bell demanding that the *Charter of Rights* include all the rights in the *ICCPR*, as well as the *ICSER*. For Justice Bell, the concept of a human rights "dialogue" between government, judiciary and citizens appears to extend to sitting judges giving the Cabinet gratuitous instructions on the type of policies they should be implementing.

Unfortunately for Justice Bell, his wish list was far more extensive than what the Cabinet ultimately delivered. Yet His Honour may still have the last laugh. As a Supreme Court Justice, one shouldn't have to wait

long before Justice Bell's human rights agenda, which the Victorian public has never had a chance to accept or reject, becomes the law of the land.

The *Charter of Rights* in practice

In practice, the effect of the *Charter of Rights* will be profound for statutory interpretation, administrative law and the common law. Social issues will become legal issues. Legal issues require legal solutions. Legal solutions require legal practitioners, and that's where the stakeholders will cash in.

In introducing the *Charter of Rights Bill*, Rob Hulls claimed that it won't lead to more litigation.[42] As the lawyers and judges stand by, eager to re-shape society through the *Charter of Rights*, such a statement is either monumentally naïve or breathtakingly disingenuous. To return once more to the turkey metaphor to describe such a comment, in this case the turkey has walked into a restaurant insisting that the people in there aren't hungry and don't go there to eat anyway.

The likely effect of the Charter on legal proceedings will most likely be seen at two levels. At the higher level, we are likely to see numerous cases involving wannabe hero lawyers (and aspiring hero judges) looking to advance their careers and raise their profiles by involving themselves in high-profile cases, hopefully on the road to celebrity status as a "human rights" barrister, or maybe even a hero judge, for which the example of Mr Justice Maxwell will no doubt be of particular inspiration.

At the lower level, it will encourage new waves of self-represented litigants to pursue whatever gripe they have with the government through the courts as an issue of "rights". Of course, anyone who litigates their rights is always convinced of their success, so we can probably expect court rooms in Victoria full of Dennis Denuto types arguing that "it's the *Charter of Rights*, it's the vibe of the thing". Given that the Charter requires Victorian courts and tribunals to interpret all legislation, so far as it is possible to do so, in a way that is consistent with the Charter, they have every reason to feel confident of at least getting a good hearing.

Statutory interpretation: The *Charter of Rights* is now the fundamental basis for statutory interpretation in Victoria. It requires that all legislation before or after its enactment be interpreted in such a way that it is consistent with it. Professor James Allan has pointed out that:

> "Bills of Rights are usually accompanied by interpretive techniques which do not constrain judges to deciding in accordance with the original intent of the enactors nor to the original understanding at the time of their passage".

As overseas experience shows, this can often result in interpretations that differ greatly from, or are even contrary to, the legislature's intention. Although courts will not have the power to overturn legislation that is incompatible with the Charter, they will be able to bend and manipulate it in all kinds of ways in the name of ensuring it is "consistent".

Common law: The Bill makes clear that any jurisprudence from any jurisdiction that applies the *ICCPR* is now fair game for litigants in Victoria. After decades spent developing a consistent and settled Australian common law, the High Court is unlikely to be amused at the prospect of a State jurisdiction undoing its common law by importing international law jurisprudence. This wide-scale importation is likely to be the legal equivalent of one of those imported rug sales where "everything has got to go".

Administrative law: Under the Charter, all government decisions must accord with it, and any decisions can be challenged in the courts if one aggrieved party believes they are not. Justice Maxwell has indicated his enthusiasm for the doctrine of the High Court's decision in the *Teoh Case* and indicated his desire that Victorian courts follow this precedent in human rights cases involving administrative decisions.[43] In other words, one of the High Court's most controversial decisions, one which both sides of politics have attempted to overrule, and one which would be unlikely to survive challenge before the current High Court, is about to become the new cornerstone for judicial consideration of administrative law in Victoria.

Accounting: If Justice Maxwell's comments on the human rights of employees with unpaid entitlements mean what they appear to mean, then even insolvency practitioners are now operating in the area of human rights law. Every accountant must now be mindful of their human rights obligations, or at least they should quickly become so if they should find themselves involved in litigation in the Court of Appeal.

Conclusion

Given the shortcomings of the *Charter of Rights*, it is difficult to see what real benefits it can actually bring to individuals whose rights are over-ridden by a State Government.

It can't be about enforcing rights, since none of the rights is enforceable by a court, nor is there any scope for individuals to seek any legal remedies to ameliorate any violations of their rights.

It can't be to establish a comprehensive statement of rights, since it concluded that it was not appropriate to have social and economic rights – or, at least, not yet.

What it will mean is that discussion, debate and "dialogue" in relation to social policy will migrate from the political to the judicial arena – an outcome which a great many lawyers and certain judges seem to be eagerly anticipating. Every interest group and social activist now has the opportunity to ignore the elected representatives of the people, and try their luck before Victoria's new-look "representative" judiciary.

Unlike elected representatives, who are free to dismiss the entreaties of zealots, vested interests or unrepresentative minorities if they believe their cause is unworthy, the courts do not have such wide discretion, and will be obliged to provide a forum and a platform for even the most marginal of causes.

Forum shopping is a fact of life in the law. It will become equally common in relation to social policy, but instead become shopping between the political and judicial realms. Those with political agendas will no longer look to the political process to achieve them, but look instead to the courts. The Prime Minister, Mr Howard earlier this year encapsulated this concept well when he argued that:

> "I am a great believer in the practice of politics ... that is one of the reasons I am strongly opposed to a Bill of Rights".[44]

The practice of politics should remain exactly that – politics. Policy agendas that are essentially political should be determined through the political process – not through a quasi-judicial process. Politicians should not forfeit their rights to deal with social issues in favour of the judiciary.

The consequences of political abdication have been illustrated by Robert Bork in *The Tempting of America*, where he gave a first hand account of the ultimate effect of a Bill of Rights combined with a litigious "rights culture":

> " … the [anti-abortionist and pro-abortionist] demonstrators march past the Houses of Congress with hardly a glance and go straight to the Supreme Court building to make their moral sentiments known where they perceive those sentiments to be relevant. The demonstrators on both sides believe the issue to be moral, not legal. So far as they are concerned, however, the primary political branch of government, to which they must address their petitions, is the Supreme Court".

The outlook in Victoria appears to be one of pessimism, yet one should try to end on a positive note. The essence of federalism is that different State governments can embark on different reforms. They can experiment in one jurisdiction without adversely affecting the others. Or to use a metaphor, one little kid burns himself on the fry pan and the others then know not to do it themselves.

We can only hope that when it comes to Bills of Rights, other State governments do not follow the lead of the soon-to-be-devoured turkeys in Victoria, and instead heed the words of their former colleague Bob Carr, who has shown a lot more worldliness and insight than any of his Victorian colleagues have on this issue.

To conclude, it is appropriate to invoke the words of Justice Kirby in the Lionel Murphy Lecture of 1996. Kirby J issued words of caution to those who seek to abandon the established methods of the judiciary in favour of a new kind of activism in pursuit of human rights and other social agendas. Kirby spoke of his desire for an:

> "…..alternative theory of the judicial function which is needed to ensure that we do not replace the mythology of the declaratory theory with the uncontrolled, idiosyncratic opinions of unelected judges".[45]

In Victoria, the only theory seems to be a huge leap into the unknown, in which the theory is to import whatever "human rights" jurisprudence one likes, with no limit on the number of social issues which can be litigated. In response to Kirby J's warning, it is worth emphasising that the only things worse than the uncontrolled, idiosyncratic opinions of unelected judges are the uncontrolled, idiosyncratic ambitions of uncontrolled and unaccountable human rights lawyers.

Endnotes:

1. *Victoria on track for human rights protection*, Media Release, Office of the Attorney-General, May 2, 2006.

2. ABC Radio National, *The Law Report – The ACT's Bill of Rights*, 9 December, 2003.

3. Department of Justice, *Human Rights in Victoria – Statement of Intent*, May, 2005, p. 1.

4. Hulls, R, Hansard, Victorian Legislative Assembly, 2 May, 2006.

5. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

6. *Ibid.*.

7. Hulls, R, Second Reading Speech, *Charter of Rights and Responsibilities Bill* 2006, Hansard, Victorian Legislative Assembly, 4 May, 2006.

8. Department of Justice, *Human Rights Consultation*, at http://www.justice.vic.gov.au.

9. Department of Justice, *Human Rights Consultation: Information for Communities*, at http://www.justice.vic. gov.au.

10. *Human Rights Consultation*, *loc. cit.*.

11. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 1.

12. *Victoria on track for human rights protection*, Media Release, Office of the Attorney-General, May 2, 2006.

13. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

14. *Rights, Responsibilities and Respect*, Report of the Human Rights Consultation Committee, *Summary and Recommendations*, p. 1.

15. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

16. *Rights, Responsibilities and Respect*, *op. cit.*, p. 72.

17. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

18. *Rights, Responsibilities and Respect*, *op. cit.*, p. 1.

19. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 4.

20. *Rights, Responsibilities and Respect*, *op. cit.*, p. 2.

21. Williams, G, *The ACT Bill of Rights is just the first step in the right direction*, Online Opinion, 5 July, 2004, http://www.onlineopinion.com.au.

22. *Rights, Responsibilities and Respect*, *op. cit.*, p. 2.

23. [Editor's Note] Since this paper was delivered, it has come to public knowledge that Professor Williams

appears to entertain ambitions for pre-selection as a Labor Party candidate. See *Constitution expert wants Labor seat*, Andrew Clenell, *The Sydney Morning Herald*, 13 July, 2006:

> "The leading constitutional lawyer, George Williams is making a push for a federal Labor seat ..... [He] has confirmed that he had been told to get involved with the party ..... [He] was elected head of the party's legal and constitutional committee at its State conference last month ..... Mr Williams said ..... he was working to put his name forward .....
>
> "One left-wing source said although Mr Williams was in the party's Right faction, some 'in the Left would worship the ground he walks on' ".

All of this would appear to cast new light upon the claims both of Attorney-General Hulls and Professor Williams himself to bring an "independent" view to Mr Hulls' so-called "Independent Committee".

24. *Have your say about human rights in Victoria – Human rights consultation community discussion paper*, p. 6.

25. Australian Council of Trade Unions submission, p. 1.

26. Feminist Lawyers' submission, p. 2.

27. Hulls, R, Hansard, Victorian Legislative Assembly, 1 May, 2003.

28. Hulls, R, Address to the Women Barristers' Association Dinner, 23 August, 2001.

29. *The Age*, 15 November, 2003, *Time for unity on defamation, says Ruddock*.

30. ABC Television, *Stateline*, 28 November, 2003.

31. Hulls, R, *Law Reform: an agenda for Victoria*, speech at New Internationalist bookshop, 16 June, 2003.

32. *Victorian Bar News*, No. 134, Spring, 2005.

33. Sir Harry Gibbs, *Does Australia Need a Bill of Rights?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), pp. 143-144.

34. Maxwell, C, *Human Rights: A View from the Bench*, Address to the Annual General Meeting of the Administrative Law and Human Rights Section of the Law Institute of Victoria, 26 October, 2005, p. 2.

35. Marcia Neave and Spencer Zifcak submission, p. 2.

36. *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?*, Consultation Paper, Victorian Law Reform Commission, December, 2003, at http://www.lawreform.vic.gov.au.

37. Gisonda, E, *The Australian*, 11 January, 2006, *A fiasco best left in the US*.

38. Bell, K, Address to Monash University graduation, 4 May, 2006.

39. *Al-Kateb v. Godwin* [2004] HCA 37.

40. Bell, K, *Human Rights Day Address to Mallesons Stephen Jaques Human Rights law group*, 9 December, 2005, p. 5.

41. *Ibid*., p. 8.

42. Media Release, *Victoria on track for human rights protection*, Office of the Attorney-General, May 2,

2006.

43. Maxwell, C, *Human Rights: A View from the Bench*, *loc. cit.*.

44. Howard, J, press conference, 8 February, 2006, at http://www.pm.gov.au.

45. Kirby, M, *Lionel Murphy – 10 Years On*, Canberra, 21 October, 1996.

Chapter Seven
The Role of the Sovereign

Professor David Flint, AM

It is sometimes said, based perhaps on Matthew, that by their words shall ye know them.[1] The words of our Sovereign describe exactly her mission in life, a mission to which she has remained faithful. What is surprising is that it is only now that many in the media and in politics are realizing that The Queen means what she says. And unlike many in modern political life, The Queen believes that an oath sworn on the Bible is an act of considerable significance and should be honoured. She has always kept to the promises she made when she came of age and when she was crowned and anointed. An abdication merely because of age was always out of the question and never contemplated – except in media speculation.

On her 21st birthday, The Queen indicated how she intended to fulfil her role in life:

"I declare before you all that my whole life, whether it be long or short, shall be devoted to your service and the service of our great imperial family to which we all belong".[2]

More recently, she gave an indication of her strong faith when she said:

"For me the teachings of Christ and my own personal accountability before God provide a framework in which I try to lead my life. I, like so many of you, have drawn great comfort in difficult times from Christ's words and example. I believe that the Christian message, in the words of a familiar blessing, remains profoundly important to us all:

> 'Go forth into the world in peace, be of good courage, hold fast that which is good, render to no man evil for evil, strengthen the faint-hearted, support the weak, help the afflicted, honour all men…'

It is a simple message of compassion… and yet as powerful as ever today, two thousand years after Christ's birth".[3]

And again, after 9/11, she told the American people:

"Grief is the price we pay for love".[4]

The Queen, who has reigned over us for more than one half of the life of the Commonwealth of Australia, attracts, and rightly attracts, the admiration of the people of Australia. The reaction in Melbourne at the Opening Ceremony of the Commonwealth Games , when the 80,000 or so present joined with Dame Kiri Te Kanawa in singing not only Happy Birthday, but in standing to sing the few bars of the Royal Anthem the censorious organizers permitted, is testimony to that.[5]

We have been blessed with a Sovereign who has never put a foot wrong, who has never embarrassed us, who does her duty, and whom we do not pay and never will pay.[6] In brief, her service has been impeccable. The Queen is now as revered as she was when she first came to Australia.

And yet, it is a little appreciated fact that the Crown, the oldest institution in the nation, remains central to and permeates our constitutional system, which is one of the world's most successful. Nevertheless, the place of the Crown and therefore The Queen in our constitutional system remains under challenge, but certainly not to the degree the republican media claim and indeed crave.

The national newspaper, *The Australian*, has apparently decided that it will no longer be the standard bearer of republicanism, a role it feverishly pursued in the 1999 referendum campaign. That role has since passed to *The Sydney Morning Herald* and *The Age*, the latter ironically still published under some variation of the Royal Coat of Arms. Both claim a majority of Australians are in favour of a republic.[7] This is a view common in republican circles, but it does not accord with the sort of evidence normally considered persuasive.

For example, the Newspoll taken on 13-15 January, 2006 indicates that support for some unspecified republic has fallen to 46 per cent. The poll also purports to show the proportion of the respondents who are strongly in favour of a republic on this occasion falling to 27 per cent.[8] It is likely that a good proportion of even the latter would, in a referendum, vote against a specific republican model.

The reason is that in a contested referendum the people are by law furnished with a substantial document containing arguments from both sides in the Parliament on the detailed constitutional changes proposed

– provided there is a division of opinion there. Accordingly, the vote will be preceded by a wide-ranging debate in the media. The voters will by then have been exposed to discussion of such matters as the cost of change, the safety of the specific model, comparisons between that model and the present Constitution, and the difficulty (some would say the impossibility) of successfully grafting a republic onto a Constitution which is intrinsically monarchical.

In addition, the media forget that the decision to conduct an opinion poll on any subject is of course no indication in itself of the interest of the nation in that subject. That published polling on republicanism in Australia has hitherto almost always been commissioned by those with a republican agenda indicates where the interest in republicanism is strongest.

It is clear the rank and file Australian is probably not greatly interested in the subject. For this we have the testimony of none other than the erstwhile leader of the republican movement, Mr Malcolm Turnbull. During the 1999 referendum campaign, he lamented that at precisely the time when interest in it should have been high, it was low. He observed in his diary, just four months out from the referendum:

"We have Buckley's chance of winning. Nobody's interested".

Unfortunately, this information only became public after the referendum when the diary was published.[9]

Yet this was at a time when the nation was approaching a series of events nominated by the republicans as the most auspicious for substantial change to the Constitution and the Flag – the Centenary of federation, the new Century, the millennium and the 2000 Sydney Olympic Games.

The conclusion must be that an opinion poll posing a question on support for some undefined republic cannot be indicative of the way people will vote in any subsequent referendum.

At this point it is worth recalling that polling indicates that support for republicanism is strongest among the middle-aged. This contradicts a common assumption in the republican movement that the advent of some sort of republic is only a matter of time. The fact is that polling indicates support for republicanism declines among the young.

In November, 1999, the Morgan Poll found 54 per cent in favour of a republic, about 10 percentage points more than in the referendum itself. In February, 2005, in response to the question, "In your opinion, should Australia remain a MONARCHY – or become a REPUBLIC with an elected President?", 40 per cent of all respondents on the electoral roll were in favour of the monarchy, 52 per cent in favour of a republic and 8 per cent undecided. By way of contrast, 50 per cent of respondents aged between 14 and 17 years were in favour of the monarchy, 37 per cent in favour of the republic and 13 per cent undecided.[10]

The threshold for constitutional change in Australia is high, but not impossibly high. This was the carefully considered choice of the founders of our nation, one which was expressly approved by the people. Change must be approved by a double majority, both nationally and federally; that is, by a majority in a majority of States. Only Parliament, or in special circumstances, either House (but from a practical view only the House of Representatives) can institute a referendum – there is no provision for a citizens' initiative.[11] As this must be by way of a Bill, details of the precise changes are apparent before the vote. As the seminal constitutional text argues, these requirements are not to prevent change as such, but only to prevent change being made in haste or by stealth. Above all the intention is to encourage proper debate, and to delay change unless and until there is strong evidence that the change is "desirable, irresistible and inevitable".[12] Given that most proposed changes have been either to increase federal powers, or perceived to reduce the federal nature of the Constitution, it is not surprising that only eight out of forty-four referenda since Federation have been approved.

Republicanism in Australia is not a recent phenomenon. A 19th Century version involved a nationalist and racist campaign, which disappeared with the movement for Federation. In the mid-20th Century, the Communist movement planned that Australia become a people's republic in the East European style. The present republican movement only achieved political impetus when its agenda was espoused by a former Prime Minister, Paul Keating, as government policy.[13]

Notwithstanding strong media and political support, with the republicans given a free hand to draft the changes proposed, a referendum to graft a republic onto the federal Constitution was defeated in a landslide in 1999, both nationally and in all States. It is unlikely that another referendum, at least one held in the near future, would succeed.[14]

According to the former republican leader, Malcolm Turnbull, now a Parliamentary Secretary, another referendum:

"… should not be put up for another vote unless there is a strong sense in the community that this is an issue to be addressed NOW…In addition, in order to be successful a republic referendum needs to have overwhelming support in the community, bipartisan support politically and, in truth, face modest opposition. A republic referendum should not be attempted again unless the prospects of success are very, very high…… I do struggle to see how a republic referendum could get the level of support it needs to win during the reign of the present Queen".[15]

Turning Australia into a republic would be a more significant change than many believe. Some years before republicanism came onto the serious political agenda, an eminent constitutional lawyer, Professor P H Lane, argued that rather than attempting piecemeal amendment, that is the grafting of a republic onto the existing Constitution, republicans would be better advised to propose a new Constitution.[16] This advice remains ignored by most republicans.

This is not to say Australia could not become a republic. But those who propose change have a moral duty to understand what they are doing, and to propose change which will ensure that the constitutional system is not damaged. Unfortunately, the republican movement has a record of failing to ensure that it is always well informed on matters crucial to its campaign. During the 1999 referendum, it became clear that the republican Minister charged with advancing the republican change, and the republican leadership, were unaware of the process by which a member of the Commonwealth of Nations changing to a republic may seek to remain within that organization.[17] And again, it was surprising that in publishing an attack on the Governor-General, Major-General Michael Jeffery, a former head of not one, but two Commonwealth departments, demonstrated that he seriously misunderstood the role and function of the Federal Executive Council.[18]

In anticipation of achieving a republic, the republican agenda has been to minimize or even to hide the role of the Sovereign in the Constitution. Yet the Crown is the nation's oldest institution, and is central to the constitutional and legal system.

To an extent, any success in minimising or hiding the role of the Sovereign has been a side-effect of the debate over the Head of State, a debate which has been condemned by a prominent republican constitutional lawyer as arid and irrelevant.[19] The debate arose because the principal republican argument for a republic has been the need for an Australian Head of State.

This is not a term used in any of the constitutional documents of the nation, nor was it of general public usage when it was first introduced to the debate. Its origin is as a diplomatic term, the usage of which is governed by international law. The term "Head of State" gradually replaced the previous generic term" prince" which, with an increasing number of republics in the 19th and 20th Centuries, had become inappropriate. As such there can be no doubt that under international law an Australian Governor-General is undoubtedly a Head of State.[20]

The entirely separate argument that the Governor-General is the constitutional Head of State has been presented by Sir David Smith in a major work, which to date has gone virtually unanswered, and curiously, has been little reviewed by a media otherwise obsessed with republicanism.[21] A compromise view, one advanced by the current Prime Minister, is that the Governor-General is the "effective Head of State".

The effect of this debate has been to emphasise the considerable constitutional functions of the Governor-General, and to compare them with those of the Sovereign, whose principal constitutional functions are to appoint and remove the Governor-General and the Governors.[22] It would be a serious mistake to conclude that the exercise of these functions is the only involvement of the Sovereign in the Australian constitutional system.

The purpose of this paper is to attempt to provide an outline of that role.

The King's two bodies

The Sovereign is at the very centre of our constitutional system. Those great Commonwealth constitutional authorities, the Canadian Dr Eugene Forsey and the Australian Dr HV Evatt, long ago conclusively demonstrated the important and crucial role of the Sovereign's representative as a constitutional guardian.[23] This is but one aspect of the monarchy.

The organizing principle of government in Australia, and in the other fifteen Commonwealth Realms, is monarchical.[24] As in Canada, so in Australia, its pervasive influence has moulded and influenced her courts, her laws, her Parliaments, her executives at both levels of government, State or Provincial and federal, her armed forces, her diplomacy and her public or civil services.[25] Sir Robert Menzies put it succinctly: "The

Crown remains the centre of our democracy".[26]

The Sovereign is at one and the same time both a natural person, as well as being the office itself. This might have had its roots in classical antiquity.[27] This is expressed in the ancient maxims *Dignitas non moritur*, or *Le Roi ne meurt jamais*, and in the exclamation on the demise of the Monarch, "*Le Roi est mort. Vive Le Roi!*" ("The King is Dead. Long Live the King!"). The consequence is that immediately on a demise of the Monarch, in the twinkling of an eye, the successor becomes the Sovereign, and the Crown continues without any interregnum.

So, under our ancient law, the Sovereign has not one, but two bodies. The Sovereign has both a body natural and a body politic. We understand something of this in other places. There is a Minister for this or that, and the office continues whoever fills it. There is a Bishop of such and such, and the bishopric continues after the incumbent goes. It is even more so with the Sovereign, who will reign for life except in the most exceptional circumstances. The Sovereign is a natural person, but he or she is also the office.

An important point is that there cannot be a break, there cannot be an interregnum: the clearest example is in the reign of Charles II beginning immediately after the death of Charles I.[28] An interregnum would have been too dangerous. It could have led to doubt, to uncertainty and to instability on a demise of the Crown. It might even have led to insurrection and civil war. So the succession has to be immediate, and for that, the successor has to be known, either presumptive or apparent. Accordingly, the acclamation on the demise of the Monarch is: "The King is dead . Long Live the King!".

The doctrine of the King's two bodies is an ancient principle, well expressed in *Calvin's Case* in 1608:

> "For the King has in him two Bodies, viz., a Body natural and a Body politic. His Body natural…is a Body mortal, subject to all Infirmities that come by Nature or Accident, to the imbecility of Infancy or Old Age, and to the like defects that happen to the natural Bodies of other People.
>
> "But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People and the Management of the public Weal, and this Body is utterly devoid of Infancy, and Old Age, and the other Defects and Imbecilitities, which the Natural Body is subject to, and for this Cause, what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body".[29]

This is central to our constitutional law. It is perhaps more easily understood today if we refer to the King's body politic as the Crown.[30] We find this usage in the Preamble to the *Commonwealth of Australia Constitution Act*, 1900 (Imp.). This was the act of the Imperial or British Parliament which formally constituted the Commonwealth of Australia.[31] The Preamble recites that:

> "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:.....".

The use of the words "the Crown" to describe the Sovereign's body politic was, as Maitland says, of relatively recent use at the time of Federation.[32] While the word "Crown" is used in the Preamble, the Constitution then uses the word "Queen". But the many references to the "Queen", while referring at that time to Queen Victoria, also refer to her body politic. This is confirmed by the terms of section 2 of the *Constitution Act*, which provides that the provisions of the Act "referring to the Queen shall extend to Her Majesty's heirs and successors…".

Once it is understood that the references in the Constitution include a reference to the King or Queen in his or her body politic, that is the Crown, and now the Australian Crown, much of the mischief which has been made about that document evaporates. For example, if we take the key sections, section 2 and section 61, and read them using more current terms and in the light of the latest constitutional developments, the intention becomes crystal clear:

> 2. A Governor-General appointed by the Sovereign shall represent the Australian Crown in the Commonwealth….
>
> 61. The executive power of the Commonwealth is vested in the Australian Crown, and exercisable by the Governor-General. The executive power extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

(This is not a suggestion for any constitutional amendment. It would be foolish to amend a document to take into account transient and misleading interpretations. This is merely an explanation of the meaning of those sections.)

The conclusion is that the many references in the Constitution to The Queen are references to the Sovereign in his or her body politic, which today we would refer to as the Australian Crown. The Crown is more than the office of the Governor- General and the offices of the Governors. It is the ancient but evolved Leviathan which permeates not only the Constitution in the narrow sense – the federal Constitution – but also those of the States as well as the broader constitutional system under which we are governed.[33]

The need to understand that the Governor-General is the representative of The Queen's body politic, that is the Crown, is not limited to Australia.

As long ago as 1945, the private secretary to the Canadian Governor-General, Shuldham Redfern, observed:

> "It is often said the Governor-General is the personal representative of the King. It would be more correct to say that he is the official representative of the Crown, for there is a difference between representing a person and representing an office held by a person".[34]

This conclusion is understandable, given the phenomenon the Canadian authority, Professor David E Smith, refers to as the separation of the person of the Monarch from the concept of the Crown in Canada.[35] This not only involves the absence of the Monarch and her court, but also the more recent policy of the Canadianisation of the Crown.

This conclusion may go further than is necessary. It is one thing, and a correct thing too, to emphasise that a Governor-General is the representative of the Crown. But it is not "more correct" to say so. While it is clearer to modern ears, that does not make it "more correct". Indeed, it would be incorrect to deny or underplay the fact that the Governor-General is, constitutionally, as much the personal representative of the Sovereign as of the Crown. While we can distinguish the Crown from the person of the Sovereign, we can never divorce them. Not even demise in the Monarch, or an abdication, can do that.

Not only can we not have the Crown without the Sovereign, we cannot retain some sort of facsimile of the Crown if we remove the Sovereign from our Constitution. This is the fundamental flaw of republican minimalism.

This is why the many proposals for change to some form of a republic hitherto have all failed at the threshold. As Canadian Professor David E Smith observes, in any Canadian republic, some alternative concept would have to fill the void of the absent Crown, and none of the proposals attempts this.[36]

The most facile republican model in Australia has been the celebrated "tippex" solution advanced by the Australian Republican Movement and the Keating government.[37] The proponents argued that Australia could be converted into a republic by the simple act of whitening out the words "Queen", "Crown" and "Governor-General" and replacing them all with the word "President". But as Justice Lloyd Waddy pointed out, this attempted "overthrow of the entire theoretical basis of the law and practice of the Constitution is, to put it mildly, somewhat more complex".[38]

As seen from Canada, the case for substantial constitutional change advanced in recent years in Australia has been based on one simple *desideratum*: to get rid of The Queen.[39] Professor David E Smith asks the obvious question: "Why such an unsophisticated rejection?"[40] This of course is not the place to ascribe reasons, but it is the place to wonder why, outside of the ranks of Australia's constitutional monarchists, the extreme narrowness of the Australian republican *raison d'être*, and its likely consequences on the constitutional fabric, are ignored.

Although the "tippex" solution has been formally abandoned , the republican movement has advanced little further from this simplistic approach. Indeed the official position of the republican movement since the referendum is curious. It is that they now have no republican model. Yet they still demand what the republican leader and author, Mr Thomas Keneally, correctly indicated would be "the biggest structural change to the Constitution since Federation".[41] It is indeed unusual, to say the least, to demand change of such a proportion, but then to admit that the proponents of change, including a Senate committee, have absolutely no idea of what change is envisaged![42]

This refusal to focus upon a model is probably a tactic to paper over significant differences among republicans, and to encourage endorsement of the republican movement's campaign for a cascading series of plebiscites and a referendum at the federal and presumably at the State levels.[43] A leading republican politician, Senator Marise Payne, who originally endorsed this process, changed her position significantly in a Senate committee report after Professor Greg Craven had persuaded her that this would necessarily lead to the model in which the President is directly elected.[44] As a result, Senator Payne asks that the proposal for a second federal plebiscite be abandoned, but that the first federal plebiscite be retained.

Whether or not this further division between the republican politicians is resolved, the demand for major change, without specifying that change, is not only curious, it is worse. What is being demanded is that the Australian people cast a vote of no confidence in one of the world's most successful Constitutions, without knowing what, if anything, is to fill the vacuum. It is difficult to imagine a more irresponsible proposal.

The flaw in all this involves a refusal to countenance the existence of that vast institution at the heart of the constitutional system, the Crown. Hitherto all significant proposals for republican change have been based on this denial, and involve an attempt to graft a republic onto an intrinsically monarchical constitutional system. Note that I refer to the broader constitutional system, of which the Australian federal Constitution is but a part.

The point is that in the way it was drafted, in the way in which it was approved, and in the way it which it has allowed Australia to develop and to play a significant role in the world in the defence of freedom, the Australian Constitution must be counted among the world's most successful.[45] Nevertheless, change to a particular republican model is possible, if that were the considered wish of the Australian people. What is not possible is change to "a" republic. The Constitution, wisely in my view, does not permit this vagueness. Those who say they are republican but have no idea of the sort of republic they want have just not taken the first essential step in the debate – determining precisely what is to be changed, and why.

Nor is a republic inevitable. As we are famously informed , the only things inevitable are death and taxes. Those of an age will recall a view proclaimed by many, including those who did not wish it to be so, that some form of socialism was inevitable – if not Stalinism, then at least that brand of socialism that requires that the commanding heights of the economy be publicly owned. Those who propose a socialist future are now a small minority, and even fewer would say today that socialism is inevitable.

The essential aspects of the Australian Crown

The Australian Crown, the King or the Queen's official body, is, as it were, a Leviathan at the very centre of the Australian constitutional system. Yet not only do republicans almost fail to see it, but the Australian Crown is also treated superficially in the academy. This seems to be true even in those subjects offered in the nation's schools and universities which are relevant, such as civics, history, political science and constitutional law.

Even when the Crown is recognized, it is more often than not as an anachronistic historical curiosity, a jumble of separate and unrelated offices, each of which it is assumed could easily be converted into a republican sinecure having no relationship one with the other.

This approach is more erroneous than, and just as dangerous as, seeing an iceberg as only its visible tip. This is analogous to dividing the tip of that iceberg into seven pieces and then saying each is unrelated not only to the others, but also to the vast part of the iceberg under the waves which is being ignored. Whether we like it or not, the Crown remains the nation's oldest institution, above politics, central to its constitutional system, and with the High Court, the only institution which straddles the component parts of the Commonwealth, State and federal, and looking outwards through the personal union of the sixteen Crowns and across the Commonwealth of Nations. It was essentially under the Crown that Australia attained its full independence.[46]

So before we talk about its removal, we have to understand what it is.

Why is it that the Leviathan is not so much misunderstood, but not even seen? Is it just ignorance, or is it something more sinister? Rather than attempting an answer, let us look at certain important aspects of the Crown.

The Queen-in-Parliament

First the Australian Crown is part , and an inherent part, of each of the Parliaments. Each one is The Queen-in-Parliament. This is so even where the enacting formula has been twisted to remove any reference to The Queen.[47]

(This is yet another example of creeping republicanism where the politicians choose to ignore the peoples' clear decision in 1999 to remain with the constitutional system, and attempt to hide the Crown. Explanations for this behaviour could involve an obeisance to some nominal republicanism. Or it could constitute an Orwellian attempt to remove the Crown from the peoples' memory, thus making it easier to effect change in the future. Alternatively, and what is sinister, creeping republicanism could involve an attempt to neutralise the Crown as a potential check and exercise on power, as the eviction of the Governors from Government House in New South Wales was, according to its author.[48])

Royal Assent is normally given on advice that the Bill has passed Parliament, and not as one commentator, who headed two government departments, says, in the Executive Council.[49] This is an important point. It means that the "auditing" role the Crown plays in the executive government, discussed below, will not arise when bills have passed through Parliament and are presented for the Royal Assent. That said, the Crown will need to be assured that the Bill has been passed as required by the relevant Constitution. When it was proposed in some quarters in 1975 that the Appropriations Bills held in the Senate be presented to the Governor-General for assent without passing the Senate, there is no doubt that Royal Assent would have been refused. As a leading British constitutional authority observed:

> "The doctrine that the Sovereign is required to act on the advice of the ministers presupposes that ministers themselves act within the framework and presumptions of constitutional government".[50]

It seems inconceivable today that Royal Assent would ever be refused. But before 1975, it seemed unlikely that the Crown would ever withdraw the commission of a Prime Minister enjoying the confidence of the lower House. And we do know that as late as 1914, the Sovereign contemplated refusing assent to a Bill. In a letter to *The Times* just before that, the great constitutional authority, AV Dicey indicated that the power to refuse assent had a particular function:

> "Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth".[51]

It should be noted that this was in relation to the British Parliament, which is not constrained by a written Constitution.

Another aspect of the Crown as an integral part of each Parliament is the recognition by the Crown of an important office in any Westminster parliamentary system, that of the Leader of Her Majesty's Loyal Opposition. While opposed to much of what the government is doing, the Leader is not – at least until the recent outbreak of republicanism – opposed to the Sovereign. As leader of the largest party in the lower House not in government, he or she will normally be an alternative leader of Her Majesty's Government if the government loses office. The office of Leader is recognized, respected and supported, hence strengthening the essentially democratic nature of the polity, and the fact that the Crown is of no party.

The Crown as the executive

Unlike the Parliament, of which the Crown is a constituent part, the Crown is the executive. The Cabinet is an informal political body having no formal constitutional status. In the 1999 referendum, this was presented by the republican movement as some sort of constitutional flaw or oversight. It is nothing of the sort. That the Cabinet, consisting only of the leaders of the majority, has no executive power is a protection, and not a disadvantage. In the Westminster system, as the founders intended it to apply in Australia, its recommendations are subject to an independent audit.

While the Crown will normally act on the advice of Her Majesty's ministers, this does not mean the Crown is a mere automaton or rubber stamp. I shall leave to later those powers, the reserve powers, where the Crown may, at its discretion, act without or even contrary to advice. There are two other aspects of the Crown's role as the executive which are worthy of mention.

The first is that in receiving ministerial advice, the Crown may exercise any or all of the three traditional rights of the Sovereign famously identified by Bagehot: the right to be consulted, the right to advise, and the right to warn.[52] From this, Sir William Heseltine has laid down three propositions: that the Queen has the right, and the duty, to express her opinions on government policy to her Prime Minister, that the Sovereign must act on the advice of the ministers, and that the communications between them should remain entirely confidential.[53] As those communications are kept confidential, it is of course difficult to ascertain the extent of the influence of the Crown. We do however know from Australian experience of some occasions when vice-regal advice and warnings have improved subordinate legislation, for example the proclamation of the Royal and National Anthems in 1984.[54] Usually such instances never become public.

The second aspect of this role of the Crown as the executive involves an examination of this function as a check and balance on the exercise of power. Accordingly, Sir Guy Greene argues that it is wrong to declare the viceroy a mere rubber stamp, or a "mechanical idiot".[55] He points out that to say that viceroys should not take a certain action, unless they have been advised to do so, is not the equivalent of saying that they must always take that action when they are advised to do so. He writes that a tendency to gloss over the distinction between saying that a viceroy may not act without advice, and saying that a viceroy must always accept advice, has been productive of much confusion in discussions about this issue.

This does not require the viceroy in council making a legal determination of the lawfulness of what is proposed as if it were a court. Rather, the council should undertake what can be usefully described as an "auditing" role.[56] What is required is that it be demonstrated, to the satisfaction of the viceroy, that the question of legality has been addressed and satisfactorily answered. He suggests that this could be assured if each item on the agenda always includes:

- A clear statement of precisely what it is that the viceroy is being asked to do.
- A reference to the source of the power to take that action.
- Particulars of any conditions which need to be satisfied before that power can be exercised.
- Explicit assertions by a Minister stating how those conditions have been satisfied.

Should any one of these requirements not be satisfied, the consequence would be that the viceroy could not be satisfied about the legality or propriety of the proposed action, and would have a duty to postpone the item or even to refuse to accept the advice.

He adds that a viceroy should not refuse to accept advice unless the proposed action was clearly unlawful or there had been a failure by a Minister or the Executive Council to provide information about an aspect of the advice which was crucial to the determination of whether it was unlawful.

The Crown as the fountain of justice

No less an authority than Blackstone, probably revered more in the United States than elsewhere, explains that "justice is not derived from the king, as from his free gift; but he is the steward of the public…He is not the spring, but the reservoir…".[57]

In England, from time immemorial, this authority has been exercised by the King or his substitutes. The Crown has acted as the fountain of justice in Australia from the time of the first settlement in 1788.[58] Since the Glorious Revolution the judges are no longer appointed "at pleasure", rather they enjoy tenure during good behaviour as determined by the Parliament.[59] This, and the fact they are appointed by the Crown, assures their independence. This independence preceded the grant of responsible government to the Australian Colonies in the 19th Century.[60] Appointment of the judges is by the Crown – they are "Her Majesty's Judges", they are not the judges of the government in power at the time of their appointment. By their allegiance to their Sovereign – even if they inappropriately declare themselves to be republican, they cannot unilaterally dispense with their allegiance – their loyalty is clearly and publicly to the Crown as steward or trustee for the people.

Contrast that with, say, the United States, where election or Senate confirmation politicises the judge.

The Crown is the fountain of honour

The Sovereign is "the fountain of all honour and dignity" and enjoys the sole right of conferring all titles of honour, dignities and precedence. Formerly most honours were awarded on the advice of the Prime Minister and the Premiers. The Order of Australia was instituted not by statute but by Letters Patent under the royal prerogative, and has since replaced most imperial honours except those in the personal gift of the Sovereign.

From this concept comes the ceremonial role of the Crown which is an important part of the life of the community. This extends to the recognition of achievement, of service and of bravery, and the lending of the dignity of the Crown to important events in the life of the nation and its many communities. The important feature is that this comes from the institution which is above politics, and that the involvement of the Crown is in no way partisan, or subject to a perception that this is for some party political advantage. While there is a grey area between those ceremonial functions best left to the Crown, and those which the politicians may undertake, given the respect Australians notoriously decline to accord to their elected representatives, there is an advantage both for the people, and the nation, that the great national occasions be presided over by the Crown, the institution which so clearly provides leadership above politics.

Those who have attended an investiture at one of the Government Houses, or have been present at an event of considerable importance to Australians, whether in the great seaboard cities or in some distant community, will be well aware not only of the respect but of the warm welcome Australians will normally accord to a viceroy who is seen as above the political fray, and who is perceived as seeking no personal or political advantage by his or her participation. On these occasions Australians are united, and not divided by party politics, surely a desirable result. This is the Australian Crown at its most visible, which clearly enjoys the widest approbation.

It was surprising then that in 1996 the then Premier of New South Wales, the Hon Bob Carr, proposing that a new Governor be brought closer to the people, evicted him and his successors from Government House and announced a significant reduction in his ceremonial role. In addition, the Governor was to continue as the head of a statutory authority charged with giving the government advice on law reform, surely a constitutional heresy. This, and any reduction in the ceremonial role, was abandoned when the Opposition threatened a reference to the Independent Commission against Corruption. Mr Carr has since revealed that he evicted the Governors to demonstrate that they should see the position as only ceremonial, and to ensure that they would never use the reserve powers which he claimed no longer existed.[61]

The role of the Crown as the fountain of honour and in its ceremonial role emphasises and gives visual form to the allegiance which all owe to the Crown, and the reciprocal relationship which the Crown has with the people as the trustee of its powers and influence. In offering leadership beyond politics, the Crown is seen as intimately connected with those values and standards which are the essential context of a civilised society. One of the pillars of ours is in our Judeo-Christian values, which from the settlement in 1788 have set the context in which the nation has developed both internally and in its many involvements beyond the seas.[62] As Edmund Burke declared:

> "We know, and, what is better, we feel inwardly, that religion is the basis of civil society, and the source of all good, and of all comfort….".[63]

In the United Kingdom, The Queen is the Defender of the Faith, and the Supreme Governor of the Church of England, which is established in England and Wales. In Australia there is no established church, but it is worth recalling that the preamble to the *Constitution Act*, 1900 (Imp) recites that the people of the several Colonies "humbly relying on the blessings of Almighty God", had "agreed to unite in one indissoluble Federal Commonwealth under the Crown". When that was submitted to a wide consultation process before the referenda to approve the Constitution, this provision attracted very strong public and political support.[64]

This link in no way suggests the exclusion in any way of those who are of other religions or, indeed, of no religion; it is that the settlement was under the Crown, which was and remains intimately linked not only with the rule of law and in particular the common law, and with the English language, but also with our Judeo-Christian values, and that together these have formed the Australian nation.

The Crown as the employer of the Public Service

The Crown is the employer of the public or civil service, and not the ruling political party. The loyalty of the public servant must therefore be to the non-political Crown and not to the politicians. This enforces the obligation of the public servant to act within and according to law, and to provide advice not influenced by and indifferent to political considerations. The emergence of a non-partisan public or civil service coincided with the withdrawal of the Crown from political activity and the emergence of the constitutional monarchy as we know it. In advice which was equally applicable to Australia, Walter Bagehot argued that in 1867, to assure popular rule, there were only two constitutional models available to Canada: the British or the American constitutional model.[65] Not only did he think a non-partisan public service did not prevail in the US, he believed it was impossible.[66] The contrast between the public services of the Commonwealth Realms and those of the US remains, even if in Australia in recent years there has been some regrettable blurring in the higher echelons. Few would doubt that the ideal should remain of a public service beyond political influence, and that this has been one of the benefits of the emergence of the constitutional monarchy.

A constitutional monarchy is a fertile field for an independent public service because it is designed to allow an easy transfer of political power, the Prime Minister being untenured and at all times dependent on the confidence of the lower House.

The Command in Chief of the Armed Forces is vested in the Crown

Under the federal Constitution, defence is effectively a federal power.[67] The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General "as the Queen's representative".[68] Were this to be drafted today, the section might have provided that the command in chief is vested in the Governor-General "as the representative of the Australian Crown". But this would in no way change the meaning. It would however stress that the representation is that of the Sovereign's political body, the Crown as well as that of the Sovereign's natural body. That the loyalty of the armed forces is to their personal Sovereign is a benefit and maintains their purity from any party political taint.

The strength in separating the command in chief from both the operational command and questions of ministerial responsibility is threefold. First, the Governor-General must be assured that he has the power to act as advised, and that any conditions on the exercise of that power have been fulfilled. Second, the loyalty, the allegiance of the troops is to the Crown, and not to an ephemeral and transient party political power. Finally, in the extreme case where the civil or political power collapses, the Governor-General may, and as the sole repository of legal power would be bound to, act.[69] As the representative of a Crown which is above politics, he or she could be expected to exercise that power without the influence of political considerations.

The Crown as the ultimate constitutional guardian

According to Sir Zelman Cowen, the reserve powers of the Crown include the power to dismiss a ministry, to grant or refuse dissolution, and to designate a Prime Minister.[70] Few legal observers would deny the existence of the reserve powers, although in controversial cases there is a debate as to the manner and time of their use.[71] In Australia, these powers are exercisable at the federal level by the Governor-General. They are not reviewable by the courts, not being justiciable, nor is it for The Queen to review their exercise.[72] It is therefore inappropriate for a viceroy to discuss their exercise in advance with the Sovereign.

In addition, it is relevant at this point to recall that The Queen of Australia can alone exercise certain important powers of the Crown. These relate to the appointment and dismissal of the viceroys. This is normally done on advice tendered in writing in an original document, but there is argument that this too is in the nature of a reserve power.[73] Certainly there are indications that it would be an error to regard The Queen as an automaton, assenting without question to advice, particularly that relating to a dismissal.[74]

The existence of these powers is an important constitutional check and balance on the exercise of power.

But to the extent that the exercise of the reserve powers is controversial, could this imperil their future exercise? In other words, are they in the nature of a wasting asset?[75] Lord Byng's refusal of a request for dissolution of the Canadian House of Commons in 1926 was controversial, but this pales in comparison with Sir John Kerr's withdrawal of Prime Minister Whitlam's commission in 1975. Sir David Smith has demonstrated, beyond serious argument, that the withdrawal was a proper exercise of the reserve power, an action strongly and regularly advocated by Mr Whitlam himself while in opposition.[76] Indeed in 1975, Sir Garfield Barwick, the then Chief Justice of Australia, went so far as to advise that more than a discretion, the Crown has a positive obligation not to retain Ministers who could not produce supply.[77]

In this context it should be recalled that republicanism only came onto the serious political agenda in Australia because of the conjunction of two phenomena. First we had the interpretation the politicians and media were prepared to advance about the dismissal, and second, the strong antipathy Prime Minister Paul Keating displayed towards the monarchy.

As to the interpretation of the dismissal, not only the dismissed Prime Minister, but also the principal political beneficiaries of the event, sooner or later, joined in the extraordinary action of actually attributing blame to the constitutional monarchy for their very own actions. In relation to the beneficiaries, this was even more extraordinary as the action taken, the dismissal of the Prime Minister, was precisely the action which they had asked, and at times insisted, the Governor-General take.

While such behaviour is consistent with the modern trend of people seeking some way of divesting themselves of any personal responsibility for those actions which one may regret, it can only strengthen the disdain the community has concerning its elected representatives. In any event, all the leaders of the political parties in the House of Representatives at the time, the Honourable Edward Gough Whitlam, the Right Honourable Malcolm Fraser and the Right Honourable Doug Anthony campaigned vigorously in favour of the republic proposed in the 1999 referendum.[78] (More recently the former Premier of New South Wales, Mr Bob Carr, referring to Mr Whitlam's dismissal, went so far as to declare that the reserve powers do not exist. He admitted that his decision to expel the Governors of New South Wales from Government House in 1996 was to demonstrate to them that they were no more than ceremonial rubber stamps.[79])

In this re-interpretation of the dismissal, the politicians have been assisted by an agenda-driven media. Lord Deedes, the former editor of the London *Daily Telegraph*, wrote of the 1999 referendum, that he had rarely attended elections in any democratic country where the press had displayed "more shameless bias".[80]

Given this demonstrated propensity of the political and media establishment to come together to change historical fact found to be inconvenient, in this case to shift the blame for their own acts to the Crown,

it is little wonder that one constitutional scholar has asked whether the Crown could easily absorb another such crisis, "however justifiable the Governor's decisions might be from a purely legal point of view".[81]

This is in no way to deny the importance of the reserve powers, particularly the power to withdraw the commission of an errant Prime Minister. It would be an exaggeration to draw an analogy with the cold war nuclear deterrent and the phenomenon of mutually assured destruction. But the likelihood for mischief in its portrayal of any exercise by the political class must disturb constitutionalists, whether they want change or not.

The crisis in 1975, which Sir David Smith rightly categorises as a political and not a constitutional crisis, was the product of two politicians unwilling to compromise. It should be recalled that Mr Whitlam in Opposition had asserted that any Prime Minister refused supply by the Senate should resign.[82] Had he done this there would have been no crisis. And had Mr Fraser waited until the next election, he would have enjoyed a victory untainted by accusations that he had behaved shamefully.[83]

The Crown as the linchpin of the Federation

As the Dominions rose to equality with the United Kingdom, and moved from self government to independence, the impact on the Crown was fundamental, and probably not fully appreciated. The Imperial Crown, once indivisible throughout the old Empire, devolved into separate Crowns for each of the Dominions which became, in modern parlance, the Realms. It is unlikely that any other constitutional system would allow such an evolutionary development. As Professor David E Smith concludes, republics are created; monarchies, particularly the British ones, emerge and evolve through the sharing of power.[84] The move to independence was achieved more under the Crown than by imperial legislation.[85]

Under the *Constitution Act* 1900 (Imp.) the Colonies became the States of the new Commonwealth operating under their pre-existing Constitutions.[86] Unlike Canada, the Governors of the Australian States are not appointed by the Governor-General acting on the advice of the federal government. This is a role the Australian States were never prepared to grant to the federal government, preferring to live with the increasing anomaly of recommendations on such matters being formally made through the British ministers.[87] The States were not even prepared to accept a process whereby the Premiers' recommendations would be conveyed to The Queen through the Governor-General. They clearly trusted the British more than the federal government. It is said the impasse was only broken by The Queen indicating that she would not object to receiving recommendations on these matters from the Premiers. This process has now been given effect by the *Australia Act* 1986 (UK and Aus), which formally terminated the power of the Imperial or British Parliament to legislate with respect to Australia.[88]

An extraordinary feature of the proposal in 1999 to graft a republic onto the Constitution was that the Commonwealth of Australia would become a republic, but that for the time being at least, the States would remain constitutional monarchies. This was notwithstanding the fact that the Attorney-General, the Hon Daryl Williams, QC (and indeed a former Chief Justice, Sir Anthony Mason, who campaigned for an affirmative vote in the referendum) had earlier described this as a constitutional "monstrosity".[89] Notwithstanding the fact that the Republic Advisory Committee had concluded that the federal and State Constitutions could be changed by one referendum, the Committee recommended the piece meal approach of only grafting a republic onto the federal Constitution. This was no doubt based on the political calculation that a referendum was more likely to be passed if it did not compel all States to change, rather than on sound constitutional principle.

Strangely, no regard was had to the fact that the Australian Crown is one and indivisible. While the once indivisible imperial Crown had devolved into separate Crowns for each of the Dominions or Realms, there is no evidence that it had divided further into State Crowns. There is nothing akin to the *Balfour Declaration* or the *Statute of Westminster* which would give authority for such a further division.

But at the time of the republican campaign, the constitutional monarchy came to be occasionally described by republicans under the curious term, a "heptarchy". This is a term best known from the association of the seven English kingdoms from the fifth to the seventh Centuries. This derivation should have warned the politicians about the danger of proceeding to dismantle the entity to which they owed some duty of care, that entity presciently declared to be "indissoluble" in the preamble to the *Constitution Act*.[90]

How could this "Federal Commonwealth under the Crown" remain indissoluble if the Crown were to divide, or had divided, into seven Crowns, as the referendum model assumed? Could not the six State Crowns become, if they wished, independent countries, as the old Dominions had? Indeed, at the Constitutional

Convention in 1998, the Premier of Western Australia had warned of the danger of secession. And in August, 1999, Mr Robert Ellicott, QC cautioned that if the republic referendum were passed, "it could split the nation".[91]

In contrast with their predecessors, the State politicians were unusually trusting of one Commonwealth proposal concerning the 1999 referendum. Under the *Australia Acts*, the position of the Governor in each State is entrenched and can only be changed if all eight Parliaments agree.[92] In other words, any one State, as well as the Commonwealth, enjoys a veto over attempts to remove the representative of the Crown in any other State. At the request of the Commonwealth, all State Parliaments rushed through legislation, with little debate, and one suspects, little understanding, to remove the veto in the event of the referendum being passed.[93] There was of course no urgency for this legislation, which in any event proved to be superfluous.

As a Canadian constitutional authority notes, any transition to a republic would have immense implications for the States.[94] The late former Chief Justice, Sir Harry Gibbs, observed that the legal complexities involved go to the very heart of Federation.[95] On one view, the changes the subject of the 1999 referendum would not only have severed the constitutional link between the States and The Queen, they would have empowered the Commonwealth to reconstitute the tenure, powers and manner of appointment of the State Governors.[96]

Clearly, a transition to a republic would terminate the only Australian institution straddling the Commonwealth and the States, apart from the High Court. The existence of this venerable institution, the Crown, enables the States, through their direct access to the Sovereign, to ensure their Governors can not be reduced to mere federal officers. What, if anything, would have succeeded to the Crown in this respect under the referendum proposal in 1999 was not clear, but at some later stage would no doubt have needed to be clarified. Until then the position was not clear under the changes, perhaps deliberately so.

The personal union and the Australian Crown.

The Australian Crown is separate and independent from the Crowns of the other sixteen Commonwealth Realms.[97] The relationship is a personal union, well known in international law, and in the history of the British Empire. From the reign of George I to George IV, a personal union existed between the Crowns of Great Britain and Hanover.[98] Today, the personal union in our Crowns is one aspect of our very close relations with countries such as the UK, New Zealand, Canada and Papua New Guinea.[99]

In the '80s and '90s it was fashionable to downplay the links with the UK, a former Prime Minister even gratuitously insulting her in the Parliament.[100] As the fourth largest economy, one of the most powerful military powers, a permanent member of the United Nations Security Council, a major European Union power, and also favourably disposed to Australia, it was difficult to understand this action. The personal union keeps us close to the countries closest to us. This is not something we should lightly abandon.

The Head of the Commonwealth

The Queen is Head of the Commonwealth. No one has put her contribution in this role more clearly than the thirteen year-old Australian youth ambassador, Harry White did at the opening of the 2006 Melbourne Commonwealth Games:

> " Your Majesty, during the past 54 years of your reign you have been the glue that has held us all together in the great Commonwealth of Nations in good times and bad times. The love and great affection that we all hold for you is spread across one third of the world's population in our Commonwealth".[101]

The Commonwealth is one international organisation which maintains minimum standards as to continuing membership. While Zimbabwe remains suspended from the Commonwealth (it claims to have withdrawn), a glance at the membership and chairmanship of the defunct UN Human Rights Commission will indicate that different standards apply there. The Commonwealth brings together countries which are close legally, politically, linguistically and in sport, and which accept certain minimum standards of democratic governance and respect for human rights. Although occasionally disparaged in the media, Australia would be most unwise not to seek to play a significant role there.

It is true that the Commonwealth encompasses both constitutional monarchies and republics. But if there were to be another referendum, let us hope that the Minister responsible first understands the process whereby a member changing from a realm to a republic seeks to remain in the organization, but also ensures that there would be no objection from the other members, any one of which has an effective veto in the event of change.[102]

Our heritage

The Crown, our oldest institution, is thus at the very centre of our constitutional system, linking us to the other Realms and to the Commonwealth of Nations . It is part of the heritage handed down to us by the British, including the rule of law, the common law, our Judeo-Christian values, and responsible government under the Westminster system. This heritage allowed Australia to be the success story of the 20th Century.[103] This may offend the cultural relativists, but it is established that colonisation by the British, compared with that of other powers, has usually been of considerable advantage to the colonised. According to a study by researchers from Harvard and the University of Chicago, former British colonies rank among some of the world's best administrations.[104] Of the top ten, five were based on the common law, which strongly defends property and individual rights. Apart from Switzerland, there were four Scandinavian countries, whose constitutional systems have been influenced by Britain.

Constitutional monarchies, through their structure, avoid those four republican perils : excessive rigidity, as in the American system, which is reduced to near paralysis whenever the President is seriously threatened with impeachment; political conflict and competition between the Head of State, Prime Minister and Ministers , a hallmark of the French Fifth Republic (an inherently unstable model curiously followed in a number of countries); extreme instability, which often haunted the Latin versions of Westminster; and regular resort to the rule of the street to solve conflict, which permeates those systems which live under the shadow of the French revolution.

Another measure of relevance is the UN Human Development Index (HDI). This is a comparative measure of poverty, literacy, education, life expectancy, childbirth, and other factors in most of the countries of the world. It is a standard means of measuring well-being, especially child welfare. The HDI is contained in a Human Development Report which is published annually. In every year, constitutional monarchies make up most or all of the leading five countries, and a disproportionate number of the leading ten, fifteen, twenty and thirty countries. No constitutional monarchy comes into any of the corresponding lists at the other end. The results are so consistent it would be difficult to dismiss this as a mere coincidence. This corroborates the results of the research at Harvard and Chicago.

These matters are not of course conclusive against fundamental constitutional change in Australia. They do support the contention that those who would change are under a duty not to hide or ignore the Crown, but as a first step, to understand its role and function in our constitutional system. The behaviour of politicians who attempt to hide or suppress the symbols of the Crown is at best ignorant and ideologically driven, occasionally spiteful and, at worst, sinisterly indicative of a wish to remove these checks and balances on their exercise of power, as we have seen in relation to the eviction of the Governors from Government House in New South Wales.

Once those who propose change demonstrate an understanding of the role and function of the Crown, they are then under a duty to the Australian nation to develop sound reasons for change and, most importantly, to develop a model which is, in all respects, as sound as the constitutional system which has ensured the extraordinary success that is the Commonwealth of Australia. To seek change without understanding, and change without knowing what that change should be, is consistent with a view that the electorate is naïve, easily manipulated and gullible. It was precisely against such a campaign that the founders devised the procedure for change by way of a referendum under s.128 of the Constitution.[105]

Australianising the Crown

While Canadianisation of the Crown became formal government policy under the Trudeau Government, Australianisation has been a piecemeal process.[106] Indeed the Australian Constitution had, from its adoption, and almost unnoticed, made a significant step towards Australianisation. This was done by a measure unprecedented in the Empire – the placing of the exercise of the executive power of the Commonwealth in the hands of the Governor-General.[107] Another unprecedented measure was to grant to the new Commonwealth of Australia the power to change its own Constitution.[108]

In any event the trend over the years has been to move further down the path of Australianising the Crown, vesting more authority and status in the Governor-General, but still as representative of the Crown. An important measure has been to declare to foreign governments and international organizations that the Governor-General is the Head of State, and should be accorded that dignity.[109]

If Australianisation means that the Governor-General may do things in Australia and beyond the seas

which are consistent with his or her role of representing and exercising the powers of the Australian Crown, there can surely be no objection. This is after all consistent with the formula in the *Balfour Declaration* made in the early part of the 20th Century that:

> "…it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government".[110]

But this does not mean that the office should take on a character different from and inconsistent with the Crown in a constitutional monarchy. We are becoming accustomed to hearing from some in the vice-regal-elect that during their office their agenda will be to concentrate on some or other worthy cause. Too often this is dangerously close to a political agenda, however worthy. This is not an appropriate vice-regal vocation: that vocation is to provide leadership beyond politics. How can they provide this if their agenda is even tangentially political? The vice-regal-elect should first acquaint themselves with the office before announcing some or other agenda.

A former Governor-General, Sir William Deane, devoted much of his term to the advancement of the interests of Australia's indigenous people. At most times it was possible to conclude that this interest had not become political, that he was in no way challenging government policy but was engaged in taking a well intended interest in the indigenous people. On one occasion he was criticised by a national newspaper for arranging direct access to The Queen without referring the request to the government.[111] But after he left office, Sir William became openly critical of government policy, sometimes harshly so. The unfortunate result was that, retrospectively, he confirmed in the minds of many the criticism of those who said he had in fact crossed the line while in office.

This experience justifies the proposition that even after he or she leaves office, a Governor-General should be careful never to compromise the office. Speaking in favour of a republic seems inappropriate for one who has represented the Crown, but to do so in office is, at the very least, a most inappropriate entry into politics, apart from being an act of gross disloyalty to the Sovereign to whom the viceroy has sworn allegiance.

In Canada, in order to overcome what he saw as public indifference to the office of Governor-General, a former incumbent suggested that the Governor-General henceforth have greater freedom to express his personal ideas and even that he be made chairman of a new Senate. Another suggestion was that the Governor-General, outside of the extraordinary circumstances referred to above, should be able to refuse assent to legislation.[112]

Apart from a Governor-General being free to speak on matters clearly not on the political agenda, all of these proposals are inconsistent with the concept of constitutional monarchy. They may well flow from the mistake of seeing the office, consciously or subconsciously, as separate and autonomous from the Crown. This is not so – the office can have no existence apart from and independent of the Crown.

A viceroy is the representative of the Crown, nothing less – and nothing more. As Walter Bagehot observed:

> "We must not bring The Queen into the combat of politics or she will cease to be reverenced by all combatants; she will become one combatant among many".[113]

Obviously, this advice applies equally to a viceroy.

Governor-General and Governors without a Sovereign

While accepting the considerable, indeed central role of the Crown in our history and our constitutional system, it is sometimes argued that we could retain all the benefits of the Crown while dispensing with the Sovereign.[114] Many, if not most of the forms of republics proposed at the 1998 Constitutional Convention and since then purport to do this. This is particularly true of the minimalist models which may even go so far as to retaining the name of Governor-General. One model proposes that the role of appointing and dismissing the viceroys be the responsibility of a council of eminent persons, acting on political advice, instead of the Sovereign.[115]

The proposition that the Crown could effectively be retained without keeping the Sovereign is completely

fallacious. This is not merely because we would lose the impeccable standards set by Queen Elizabeth II, however fortunate we have been to know these during her reign.

Her Majesty's dedication, her personal standards and her sense of judgment are celebrated, and rightly so. Indeed, a viceroy in a quandary as to what behaviour would be appropriate could do no better than ask himself or herself: "What would The Queen do in a case like this?".

The fundamental, unavoidable and insoluble problem for such republican models is that without The Queen, there can be no Crown. And not only would the offices of the viceroys who are above politics disappear, so would the fountain of honour, the fountain of justice, The Queen in Parliament, the Crown as the auditing executive, the Crown (rather than the governing party) as the employer of the public service, the Crown as the Commander in Chief; in sum, the whole vast institution which is above politics and which has been with us since the settlement in 1788. This institution, under which we received self-government under the Westminster system, under which we federated and under which we became independent, would disappear forever. And all of this, in every aspect would fall to the politicians.

Neither the vice-regal appointments council of the eminent, consisting of gender balanced selected former viceroys and chief justices, as has been suggested in Australia, nor a college consisting of the 150 Companions of the Order of Canada, as suggested for that realm, could possibly replace the Crown.[116] Either would perform the functions of appointing or electing the President, and removing him – and there is no guarantee they would do either well. But they would not replace the Crown. The proponents do not, for example, propose that the Army should owe allegiance to the council or to the college, or that Her Majesty's judges should become their rotating eminences' judges, or the judges of the College of Companions.

These proposals recall that of the Abbé Sieyès, who wished to create a "grand elector" in the French 1799 Constitution for the Consulate. This was designed to replace the monarch he had helped first make constitutional, and later send to the guillotine. As Walter Bagehot observed, it was "absurd… to propose that a new institution, inheriting no reverence, and made holy by no religion, could be created to fill the sort of post occupied by a constitutional king in nations of monarchical history".[117] So in an Australian republic, the new republican office of the President, whether or not appointed by a council of the eminent, and whether or not elected, could never replace the Crown as an equally vast institution above politics. Indeed, this is not even suggested. Instead, the proponents choose to ignore the issue.

The question therefore has to be asked of all these proposals to graft a minimalist republic onto our constitutional system: where would all of the powers, and protections of the Crown – apart from the appointment and dismissal of the viceroys – fall? Into whose lap? The answer is, of course, the politicians' lap, the same politicians who are already concentrated in the closely linked and controlled executive and legislative arms of government. In the American republic, the politician in the executive and the politicians in the legislature are at least quarantined and isolated one from the other, the founders believing, rightly, that the resulting adversarial relationship would act as a check and balance against the abuse of authority. They were aware of the truth of Lord Acton's dictum before he enunciated it: "Power tends to corrupt and absolute power corrupts absolutely".[118]

As Canadian Professor David E Smith notes, in a minimalist republic a powerful executive would become that much more powerful.[119] And that was written before he had the opportunity to examine the specific terms of the model presented to the Australian people in 1999. This was famously criticised as offering the only known republic where it would be easier for the Prime Minister to dismiss the President than his cook.[120]

The alternative model, that of filling these offices by election, would merely turn the incumbents into politicians.

The consequence of the vice-regal offices being cast adrift would not therefore be that they would become Crowns. They would not have – and could not have – two bodies. We, and the judges, the armed forces and the public servants, would and could owe them no allegiance. They would become republican sinecures to be filled either by servants of the politicians or by even more politicians. In their ceremonial role, to the great loss of the nation, the public would know that they were either politicians or servants of politicians, and treat them accordingly.

Conclusion

The obvious requirement of any attempt to graft a republic onto the present Constitution is that the result

would have to be as good as, if not better than the present system, which is undoubtedly among the world's most successful.

Republican efforts so far must lead to the conclusion that not only is it difficult, it is impossible to graft a republic onto our constitutional system, which is a federal Commonwealth in the Westminster form, and maintain the benefits which flow from its subtleties, its sophistication and its elegant refinement.

The result will be flawed, and seriously so. The balance between the political and the non-political would be irretrievably lost.

This is not to say that Australia could not become a republic, if that were the considered and overwhelming wish of its people. Australia is after all one of the world's oldest continuing democracies. Any decision to become a republic would not of course be the result of a vague question put in an opinion poll commissioned by some organisation with a clear penchant and agenda for change , often only for the sake of change. Those who say the question in 1999 was the wrong question do not appreciate a fundamental principle of the Constitution – that constitutional change should not be made in haste or by stealth. Change to a republic would have to be by referendum, after a proper debate on what precisely was being proposed, and where the people had decided that the proposed change was desirable, irresistible and inevitable.

In fact, a transition to a republic would be so fundamental that it is arguable that the process chosen for the formation of the Commonwealth – the agreement of the people of each of the States, and not a majority of States, to unite in one indissoluble federal Commonwealth under the Crown – should be repeated. That said, the prospect of a referendum for change to some or other republic being approved with majorities in only four or even five States is most unlikely.

The point of this paper is that the republicans have not yet satisfied the threshold for obtaining change – knowledge of, and an understanding of the role, the function and the vastness of the Australian Crown, and a willingness to admit and discuss this. But that is only the beginning. They must then persuade their fellow citizens of the failings of this institution, and how, in all respects, the Australian Crown will be replaced in a republican model which is at least as good as, if not better than the present constitutional system.

Endnotes:

1. Matthew, 12,37: "For by thy words thou shalt be justified, and by thy words thou shalt be condemned".

2. Speech at Capetown , 21 April, 1947.

3. Christmas Speech to The Commonwealth, 2000.

4. *Daily Telegraph*, London, 21 September, 2001.

5. The Premier of Victoria asserted to Parliament that the Australian Royal Anthem, *God Save The Queen*, would not be played, but on the following day the organisers said eight bars would be played in a tribute, and that this had been long planned. This was in clear breach of protocol: *Proclamation* by the Governor-General, 19 April, 1984, *Commonwealth of Australia Gazette* No. S 142 dated 19 April, 1984.

6. No allowance is paid for services as Queen of Australia. The Commonwealth government absorbs the costs of Royal Tours, or Homecomings. These are significantly increased by the attribution of security costs. While there are regular attempts to create controversy over these costs, this is rarely repeated in relation to the numerous visits Australia receives from foreign dignitaries, and the security costs involved in protecting foreign diplomats. It should also be noted that The Queen is not "paid" for her services as Queen of the UK. The household receives grants to perform this role properly. At the commencement of each reign it is the practice of the new Sovereign to surrender certain revenues in return for this. The UK government profits substantially from this arrangement.

7. E.g., *The Sydney Morning Herald,* 26 January, 2006, Australia Day, *The Australian republic must rise again*; *The Age,* 19 March, 2006, *Let's not wait for King Charles. The republic matters now*. Neither paper appears to have published letters challenging this assertion.

8. http://www.newspoll.com.au/image_uploads/cgi-lib.14743. 1.0101_republic.pdf.

9. Malcolm Turnbull, *Fighting for the Republic,* Hardie Grant, South Yarra, 1999, p.111.

10. http://www.roymorgan.com/news/polls/2005/3835.

11. *Constitution*, s.128.

12. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted by Legal Books, Sydney,1995, p.11.

13. David Flint, *The Cane Toad Republic*, 1999, Wakefield Press, Kent Town (hereinafter "Flint, *Republic*") pp. 9-11.

14. No issue put to the people again – some up to five times – has ever succeeded, although judicial interpretation has made some further referenda unnecessary : Flint, *Republic*, pp. 160-161.

15. What constitutes "modest opposition" may be considered in the context of the 1967 referendum on the "nexus" between the House and the Senate. The only opposition came from the small Democratic Labor Party. The referendum was defeated, gaining an affirmative vote of 40.25 per cent and approved only in NSW. In 1999, the referendum was supported by a great part of the media, and most sitting politicians with the notable exception of the Prime Minister and a small minority of Ministers. The No campaign was led by the Vote No Committee consisting of constitutional monarchists and independent republicans, and chaired by Kerry Jones, the Executive Director of Australians For Constitutional Monarchy, which separately rallied over 50,000 supporters to work in the campaign across the nation: see http://www.norepublic.com.au; Kerry Jones, *The People's Protest,*2000, ACM Publishing, Sydney.

16. PH Lane, *Lane's Commentary on the Australian Constitution*, 1986, Law Book Company, North Ryde, p. 4.

17. Flint, *Republic*, 186-194; note that this was at a time when the then Malaysian Prime Minister had blocked Australia's involvement in other international groups.

18. Sir David Smith, *Head of State: The Governor-General, the Monarchy, the Republic and the Dismissal*, 2005, Macleay Press, Sydney (hereinafter "Smith, *Head of State*"), pp.83-84.

19. George Winterton, *Who is Our Head of State?*, *Quadrant*, September, 2004, p. 60.

20. Flint, *Republic*, pp 37-48.

21. Smith, *Head of State*, pp. 257-281; see also David Butler and DA Low, *Sovereigns and Surrogates*, 1991, St. Martin's Press, New York.

22. *The Constitution; Australia Act*,1986 (Cth.); note also the *Royal Powers Act*, 1953.

23. *Evatt and Forsey on the Reserve Power* (a complete and unabridged reprint of HV Evatt, *The King and His Dominion Governors*, 2nd ed, 1967, and E A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, 1968: reprint together with a new introduction by Dr Forsey), Legal Books, Sydney, 1990.

24. David E Smith, *The Invisible Crown: The First Principle of Canadian Government,* University of Toronto

Press, Toronto, 1995 (hereinafter "Smith, *Crown*"), p. 5.

25. *Ibid*..

26. Sir Robert Gordon Menzies, *Afternoon Light*, Cassell, Melbourne, 1967, p. 267.

27. Ernst H Kantorowicz, *The King's Two Bodies,* Princeton University Press, Princeton, 1957, Seventh Paperback Publishing, 1997.

28. This was not a lawful execution, the "trial" being by a "court" which was not lawfully established.

29. Edmund Plowden, *Commentaries or Reports* (London, 1816). The case is referred to by Coke, Rep., vii, 10 (*Calvin's Case*).

30. While admitting the word is convenient, FW Maitland warned against not so much using it, but not enquiring who may actually exercise the particular Crown power: FW Maitland, *The Constitutional History of England*, Cambridge University Press, 1950, p. 418. He also writes that the substitution of "the Crown" for "the King" is "much more modern than most people would believe": *The Crown as Corporation*, *Law Quarterly Review*, April, 1901.

31. 63 & 64 Victoria, chapter 12.

32. FW Maitland, *op. cit.*.

33. Lord Bolingbroke's definition is particularly useful:
> "By constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community has agreed to be governed".

34. *Records of the Canadian Governor-General's Office*, Redfern memo No. 4.7, referred to in Smith, *Crown*, p. 123.

35. Smith, *Crown*, p. 25.

36. David E Smith, *The Republican Option in Canada, Past and Present*, University of Toronto Press, Toronto, 1999 (hereinafter "Smith, *Republic*"), p. 232.

37. Lloyd Waddy, *The Republic: Will Blinky be the Only Bill?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), pp. 251-280.

38. *Ibid*..

39. Smith, *Republic*, p. 14.

40. *Ibid*..

41. David Flint , *The Twilight of the Élites*, 2003, Freedom Publishing, North Melbourne (hereinafter "Flint, *Élites*"), p. 105.

42. Senate Legal and Constitutional Committee, *The Road to a Republic*, 31 August, 2004 (hereinafter "*Road to a republic*").

43. *Ibid*., pp. 113-115.

44. *Ibid*., Additional comments by Senator Marise Payne, Deputy Chair.

45. *Ibid*., pp. 27-52.

46. Leslie Zines, in the Commentary to HV Evatt, *The Royal Prerogative,* 1987, Law Book Company, Sydney, pp. C1-C2.

47. E.g., the legislative formula currently used in WA is: "The Parliament of Western Australia enacts …".

48. See *The Crown as the Ultimate Constitutional Guardian*, pages 191-194 of this paper.

49. Smith, *Head of State*, pp. 83-84.

50. Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1999, p. 65.

51. Letter to *The Times*, 15 September, 1913; Bogdanor, *op.cit*., p. 112.

52. Walter Bagehot, *The English Constitution*, 1867.

53. Letter to *The Times* on 28 July, 1986; see Bogdanor, *op.cit*., p. 71.

54. *Proclamation* by the Governor-General, 19 April, 1984, *Commonwealth of Australia Gazette* No. S 142 dated 19 April, 1984; *The Australian Constitutional Defender*, No.3, Autumn, 2006.

55. Sir Guy Greene, *Governors, Democracy and the Rule of Law*, *The Sir Robert Menzies Oration*, University of Melbourne, 29 October, 1999; see also *FAI Insurances Ltd v. Winneke* (1982) 151 CLR 342. For convenience, the term "viceroy" is used to indicate either the Governor-General or a State Governor or both, as appropriate.

56. Flint, *Republic*, p. 51; Flint, *Élites*, p. 32.

57. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, Chicago: University of Chicago Press, 1979, 1:257.

58. *The New South Wales Charter of Justice, Letters Patent*, 2 April, 1787, UK.

59. Not at the beginning of the Glorious Revolution in 1688, but by the *Act of Settlement* 1700, 12 and 13 Will 3 c 2 (UK).

60. Because of public statements made by politicians and others on the 150th anniversary of the Eureka Stockade in 2004, it is appropriate to point out that the process of granting responsible government had begun before and had nothing to do with that event.

61. See *The Crown as the Ultimate Constitutional Guardian*, pages 191-194 of this paper.

62. Flint, *Élites*, chapter 2: *The Success Story of the Twentieth Century: The Australian Federation.*

63. J Quick and R Garran, *op.cit*., p. 287.

64. *Ibid*., pp. 287-290; but see s. 116 of the Constitution.

65. Smith, *Crown*, p. 156. It is arguable that these remain the only two options feasible today for either Canada or Australia. The others are the French Fifth Republic, which has been adopted extensively, notwithstanding its obvious flaws, and republican versions of the Westminster system which are invariably inferior and do not seem to prevail in periods of stress, e.g., the French First, Third and Fourth Republics.

66. Walter Bagehot, *The English Constitution* (1867), Oxford World's Classics Edn, Oxford University Press, Oxford, p. 44.

67. The Constitution provides that a State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force: s. 114.

68. The Constitution, s. 68.

69. In 1983, the Governor-General of Grenada, Sir Paul Scoon, found himself in this situation. He exercised his authority to invite forces from other Caribbean states and the United States to restore order.

70. Evatt, *op.cit.*, p. xv.

71. Cf. the opinion of the Hon Bob Carr, former NSW Premier, at page 193 of this paper.

72. Flint, *Republic*, p. 93.

73. Bogdanor, *op.cit.*, p. 286; Flint, *Republic*, p. 142.

74. *Ibid.*; see also Brendan Sexton, *Ireland and the Crown*, Irish Academic Press, Dublin, 1989.

75. Smith, *Crown*, pp. 30, 31.

76. Smith, *Head of State*, ch.10.

77. Smith, *Crown*, p. 129.

78. Mr Whitlam and Mr Fraser even joined together in television advertisements based on the Labor Party's "It's Time" advertising in 1972.

79. *The Sydney Morning Herald,* 8 November, 2005, *Whitlam leaves past behind with gifts from high time and low*; see also Smith, *Head of State*, pp. 174-181.

80. *Weekly Telegraph*,10-16 November, 1999.

81. Smith, *Crown*, p. 32.

82. Smith, *Head of State*, ch. 10.

83. Perhaps there is a solution which is consistent with the Westminster system. Such a solution might lie in allowing a recall election. This is typically a three stage process, with the final two stages taken simultaneously. The first stage is a petition signed within a prescribed time by a minimum percentage of electors, say, 10 or 12 per cent. (For example, the 2003 California recall resulted in voters replacing sitting Democratic Governor Gray Davis with Republican Arnold Schwarzenneger. The percentage required for the petition is based on the number who voted in the last election. The recall of representatives is permitted in some other US States and in British Columbia.) This is followed by a vote open to all electors to determine whether an election should be held. For convenience, a ballot for the election is held at the same time, although this could subsequently be found to have been unnecessary.
The recall election has been adapted to a Westminster parliamentary system, that of the Canadian Province of British Columbia. In practice, successful recall elections are rare, but it is arguable that if this mechanism had been available in Australia in 1975, the Opposition would have concentrated on investigating its availability rather than in refusing supply. The legitimacy of its use, successful or not , would be difficult to challenge. This is in no way a proposal to remove, amend, codify or reduce the reserve power to withdraw the Prime Minister's or Premier's commission. This power would still exist and would remain available for use against an errant Prime Minister or Premier.

The attraction of the recall election is that it is not inconsistent with the Burkian concept that democracy under the Westminster system is not direct but representative. Edmund Burke expressed this principle succinctly:

> "Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion". (Edmund Burke, 3 November, 1774, *Speeches at His Arrival at Bristol* (1774), in *The Oxford Book of Political Quotations*, ed. Anthony Jay, Oxford University Press, Oxford, 1996.)

This proposal for a provision for recall elections may thus be distinguished from other proposals for direct democracy and which involve initiatives by the citizenry, usually known as CIRs (Citizen Initiated Referenda). As these are intended to have direct legislative effect, they involve an exception to the Burkian principle.

84. Smith, *Republic*, p. 95.

85. Leslie Zines, *loc. cit.*, pp. C1-C2.

86. Section 6; *The Constitution*, sections 106-109.

87. Flint, *Republic*, pp. 181-182.

88. Sub-section 7(5).

89. Flint, *Republic*, p. 180.

90. The kingdoms were Kent, Essex, Wessex, Sussex, Northumbria, East Anglia, and Mercia.

91. Flint, *Republic*, p. 184.

92. Sections 7, 15.

93. *Australia Acts (Request) Act*, 1999.

94. Smith, *Republic*, p. 220.

95. *A Republic: The Issues*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), 1.

96. Smith, *Republic*, p. 221.

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

98. As women could not succeed under the Salic law, this personal union ended on the accession of Victoria as Queen in 1830.

99. Indeed, the Preamble to the *Constitution Act* leaves open the possibility of the entry of New Zealand and other Pacific territories into the Commonwealth of Australia.

100. *The Australian Constitutional Defender*, No 3, Autumn, 2006.

101. ABC Radio, AM, Thursday, 16 March, 2006. "Who authorized this tosh?", demanded Mark Baker, opinion editor, *The Age*, 17 March, 2006.

102. Flint, *Republic*, pp. 186-194.

103. Flint, *Élites*, pp. 27-52.

104. *The Daily Telegraph*, Sydney, 4 November, 1998.

105. J Quick and R Garran, *op.cit.*, p. 287.

106. Smith, *Crown*, p. 45.

107. Smith, *Head of State*, pp. 85-116. Other unprecedented aspects of the Constitution were that it was approved by the people and that the power of amendment was vested in Australians.

108. *Constitution*, s.128.

109. *Ibid.*; Flint, *Republic*, pp. 37-48. Unlike Canada, the Australian government does not appear to have requested The Queen to act as Queen of Australia in any foreign country.

110. Imperial Conference, 1926, *Inter-Imperial Relations Committee: Report, Proceedings and Memoranda*, E(IR/26) Series (the "Balfour Declaration").

111. Smith, *Head of State*, pp. 326-327.

112. Smith, *Crown*, pp. 110-115.

113. Bagehot, *op.cit.*, p.54.

114. Richard E McGarvie, *Democracy: Choosing Australia's Republic,* Melbourne University Press, Carlton South, 1999.

115. *Ibid*..

116. In 1992, an editorial in the Canadian newspaper, the *Globe and Mail*, proposed that The Queen be succeeded by a Head of State elected for life by the 150 Companions of the Order of Canada: Smith, *Crown*, p. 5.

117. Bagehot, *op.cit.*, p. 45.

118. Lord Acton, letter to Bishop Mandell Creighton, 3 April, 1887, in *The Oxford Book of Political Quotations*, ed. Anthony Jay, Oxford University Press, Oxford, 1996.

119. Smith, *Republic*, p. 219.

120. Flint, *Republic*, pp. 137-149.

Chapter Eight
An Australian Bill of Rights by Stealth?

Dr Janet Albrechtsen

Giving a dinner address is a rather daunting task. Like the mother-in-law who comes to visit, the trick is not to overstay your welcome – and that can be hard, even for a former lawyer, given that we are, as Kafka pointed out, trained in legal infancy to write a 10,000 word document only to give it the quaint title of a "brief". Donning my other cap as a columnist, I shall try to be brief as I speak tonight about the cunning stealth strategy behind those advocating a Bill of Rights for Australia.

As a child of Danish immigrants who loved nothing more than to make their own sausages, I can provide first hand confirmation that laws are indeed like sausages: it's best not to see them being made. The current push for a Bill of Rights in Australia is an equally unedifying sight – it is a first-class lesson in how to boil frogs.

You recall the theory. If you dump a frog in boiling water, he'll hop out. But put him in cold water and slowly raise the heat and he won't notice he is being cooked. The Bill of Rights strategists are doing the same. We're being dipped into something that has a nice, warm feel to it. But like a colony of frogs marked for execution, the temperature has gone from tepid to warm to hot to boiling. If you haven't noticed it, that's because the advocates pushing a Bill of Rights on us are trying to trick us into quiet submission.

In his book *The Jealous Mistress*, Robert Traver described the law as the difference between a debate and an alley fight. But pick up George William's little book, *A Bill of Rights for Australia*,[1] and you'll find a more under-handed game in play.

Rather conveniently, our high priest of the Bill of Rights movement laid down his stealth strategy in that small book some years ago. The game plan goes like this. Introduce baby Bills of Rights into the States first. But don't call them Bills of Rights because that might scare people away. Call them Charters or Human Rights Acts because that sounds more benign. Then, once people are used to all this new talk about "rights", up the heat and move on to the main game – entrenching a Bill of Rights into the federal Constitution.

And that is precisely how it is panning out. The ACT already has a Bill of Rights – officially called the *Human Rights Act*. Victoria is planning to have a Bill of Rights – called a *Charter of Rights and Responsibilities* – up and running by January next year. WA and Tasmania have also put one on their agendas. Even in NSW, the Attorney-General Bob Debus is pushing for one now that former Premier Bob Carr, who was a long-time critic of a Bill of Rights, is off the scene. In Queensland, too, the Queensland Law Society is putting pressure on Premier Peter Beattie to keep up with other States and begin community consultation with a view to introducing a Bill of Rights.

It's all being done under the guise of listening to the people, as Tasmanian Attorney-General Judy Jackson said a few months back.[2]

But going by the experience in the ACT and Victoria, listening to the people means setting up something called an "independent committee" stacked with the most ardent admirers of a Bill of Rights. The consultative committee in the ACT was headed by Hilary Charlesworth. In Victoria, it was overseen by George Williams, with basket-ball player Andrew Gaze thrown in for good measure. Once that committee was established the result was a *fait accompli*. And, as Williams happily reminded us recently, the Victorian Charter is only the start of incremental change, not the end of it.[3]

It goes without saying that the current process is not so much about listening to the people. You'll notice that a referendum was not called in Victoria – it seems "rights" don't extend as far as voting for radical changes. And these changes are radical. Handing judges a Bill of Rights is like putting them on an extended dose of slow-release judicial steroids: it fundamentally alters the traditional separation of powers by creating a pumped up judiciary and leaving us with a neutered Parliament.

Of course, these matters are never mentioned by those preaching about a Bill of Rights. Instead they talk endlessly about educating the ignorant masses, drowning them in what Williams calls a "rights culture" by way of State-based Bills of Rights before pushing for, and I'm quoting him, "a more robust proposal for a

Bill of Rights in the [federal] Constitution".[4]

And Williams has plenty of support from the big end of town. Former High Court Justice Michael McHugh wants a Bill of Rights. So does former High Court Chief Justice Sir Anthony Mason, who claims that a "Bill of Rights would bring us in from the cold". Notice how a Bill of Rights is being sold to us as a cloak to keep us warm. Similarly, the Chief Justice of the NSW Supreme Court points to "Australia [being] threatened by a degree of intellectual isolationism" because we have not introduced a Bill of Rights. Yesterday we learnt that David Malcolm, the former Chief Justice of Western Australia, is mystified that we don't have a Bill of Rights.

And most lawyers also seem to want one. At least that's the impression one gets by reading *Lawyers' Weekly*, which devotes page after page to articles telling us why we simply must have a Bill of Rights. Of course, the motives of lawyers have an altogether different ring to them – the ring of a cash-register. You may recall the story about Clarence Darrow, ranked in 1925 as one of the most famous lawyers in the United States. After Darrow resolved the legal troubles of a female client, she gushed, "How can I ever thank you?". "My dear woman," replied Darrow, "ever since the Phoenicians invented money there has been only one answer to that question". For much the same reason, soon enough we should expect to see law firms setting up "rights" departments sitting alongside their commercial litigation practices.

So if you get the feeling this is an élite agenda driven, at least in some cases, by self-serving motives, you'd be right. And like a general leading his élite band of troops, Williams' manifesto on how to boil a frog helpfully points to the failure of other élite agendas to ensure the same mistakes are not repeated.

He writes:

> "The outcome to the referendum on the republic suggests that Australians are alienated from the political process and that they lack the necessary information about how the system works".

"The debate", says Williams, "has exposed a lack of confidence in Australian democracy".

Notice how a "No" vote on a republic is fobbed off as a sign that the electorate is not smart enough to vote "Yes"? Not wanting to risk a "No" vote when it comes to the main game – entrenching a constitutional Bill of Rights at the federal level – Williams and company are intent on teaching us about this "rights culture".

The "rights" seduction

And so the rights seduction has begun. And that involves peddling this myth that rights are things to be bestowed on people by gracious governments and interpreted (read "expanded") by well-meaning judges. However, that is not the history of rights in Australia. To put it in the vernacular, each of us has the right to do as we damn well please, with this caveat. As part of the social compact, we agree to abide by those restrictions agreed upon by the people as laid down by Parliament. That's the democratic deal.

Alan Anderson sums it up like this.

> "Rather than having to petition government for particular rights, I hold an absolute, unlimited general right. Government must petition me, as an elector, for permission to restrict that general right".[5]

But Bills of Rights activists are intent on re-educating us into believing that without the protection of a Bill of Rights, we live in a "rights-free" nation. They invariably point to administrative stuff-ups as evidence that a new approach to rights is needed – one where judges get to call the shots.

Susan Ryan, the chairwoman of the New Matilda Human Rights Act Campaign, says:

> "Those children detained cruelly behind barbed wire, the imprisoned stateless asylum seeker Al Kateb, Cornelia Rau and Vivien Solon would not have been damaged so badly by Australian authorities if our *Human Rights Act* had been in place".[6]

But episodes of human failing are hardly evidence of complete system failure. They simply point to the fact that no system is perfect. And handing power to judges via a Bill of Rights leads us towards a far more imperfect system. At least it does if you're a democrat. And I hasten to add that's a democrat with a small "d", lest I be confused with being one of those ever decreasing number of capital "D" Democrats, in which case I'd be off singing the praises of a Bill of Rights at a forum to be held at the ANU next month.

Dipping into their bag of tricks, Bills of Rights enthusiasts also argue that a Bill of Rights is needed to ward off the evils of the new laws enacted to confront the scourge of terrorism. The Queensland Law Society – along with just about every other gaggle of lawyers – says a Bill of Rights is needed to stop these new "intrusive" laws, which "trample over" long accepted human rights as part of the war against terrorism.[7]

They appear to have already decided that our new terrorism laws will be abused by government and

that judges must be given the power to stop them. But this argument simply highlights the fact that the Bills of Rights brigade is driving an élite agenda. You'll notice there has been no uproar from mainstream Australia over the new terrorism laws. No demand that judges be allowed to file the edges off these laws. On the contrary, surveys suggest overwhelming support for the new laws.

It seems that the uneducated masses understand that in a democratic society we need to trust that the government is working to protect our interests. Whether you voted for the Howard Government or not, in a liberal democracy there needs to be an underlying level of loyalty to the very idea of a popularly elected government. If politicians get it wrong, we can boot them out of office. Judges, on the other hand, are there to stay.

But here again, the Bills of Rights enthusiasts revert to a familiar stealth strategy. The aim is to make you feel like a philistine – someone who does not believe in human rights – if you are against a Bill of Rights.

What the devotees don't tell us is that a Bill of Rights completely changes the nature of our democracy. They draft up lists of rights that are full of fine sounding sentiments in the abstract. But in practice these lists are first and foremost powerful weapons for judges. Those judges intent on jurisprudential immortality get to mould new laws under the guise of applying a Bill of Rights. Power shifts from our elected representatives to a very small group of unaccountable and unelected judges.

The UK experience

While Bills of Rights advocates argue that such claims are the ravings of the paranoid, you only have to scan the British newspapers to learn that the British are only now waking up to the way such Bills transfer power from Parliament to the courts – and what it means for their ability to govern themselves.

Tony Blair's Labour government proudly enacted the *Human Rights Act* with the aim to "bring rights home" – as if somehow, up until then, Britain had been devoid of human rights. Equally nonsensical was Blair's promise that the sovereignty of Parliament would be preserved under the new Act.

Blair is now singing a different tune. The man who brought human rights home to Britain has, since the London bombings, threatened to send them packing. He has canvassed the possibility of amending the *Human Rights Act* and is threatening judges with, and I quote, "lots of battles in the months ahead". Blair said, "Let's be quite clear – because of the way that the law has been interpreted over a long period of time, ...I am prepared for those battles in the months ahead".

The battle is one between the British Parliament and the British courts. As columnist Melanie Phillips said in Melbourne last year:

> "It was the judicial rulings under human rights law, both in Britain and in the European Court of Human Rights in Strasbourg, which had made Britain a soft touch for radicals seeking a hospitable berth".
>
> Phillips said:
>
> "These judges had effectively torn up British border controls by making it impossible to police asylum claimants through an elaborate system of hearings and appeals; thwarting government attempts to limit welfare benefits to immigrants to deter widespread abuse of the system; and, above all, preventing the deportation of those thought to be a danger to the state if they were to be returned to countries where they might be ill-treated – and then preventing those foreign terror suspects who ... could not be deported from being locked up either".
>
> "Radical imams such as Abu Qatada, Omar Bakri Mohammed, Abu Hamza and Mohammed Al-Massari were allowed to use London to preach incitement to violence, raise money and recruit members for the jihad. UK-based terrorists have carried out operations in Pakistan, Afghanistan, Kenya, Tanzania, Saudi Arabia, Iraq, Israel, Morocco, Russia, Spain and the United States. And because of the chaos over asylum and immigration, which meant that the authorities had no idea who was in the country and who was out, the job of the intelligence service in tracking terrorist recruiters and recruits from abroad was made almost impossible".

It's worth pointing out that, when it comes to a Bill of Rights, operating in the shadow of judicial creativity is as problematic as confronting the real thing. In other words, the threat of what judges might do, given half the chance, is having real consequences. London's *Daily Telegraph*[8] recently reported that detectives in the United Kingdom are refusing to issue "wanted" posters for missing criminals because to do so may infringe the right to privacy under the UK *Human Rights Act*.

An over-zealous application of the *Human Rights Act* is seeping into every aspect of life. Twelve year-old

Ben Syms and his mother threatened to sue his school for trying to prevent him from attending school with his hair dyed red, claiming that the ban on hair dye would infringe his right to free expression. Needless to say, the school backed down.

Returning to more serious matters, the Association of Chief Police Officers has stopped the practice of secretly taking suspects' boot prints, which might have proved useful in future investigations. Prior to the *Human Rights Act*, police asked suspects to remove their boots before entering a cell, giving them an opportunity to record the boot prints. Once the new laws were in place, lawyers advised police that the practice could infringe the prisoners' right to privacy. So police were told they must first ask a suspect's permission to take the boot prints. As one newspaper points out, this kind of defeats the purpose, since the suspects would simply slip on a different pair of boots next time they went out to commit a crime.

It's getting so bad in the UK that a few weeks ago the Lord Chancellor admitted to genuine public fears that there was a problem with Labour's attempt to bring human rights home. Lord Falconer said:

> "I think there is real concern about the way the Act is operating. The deployment of human rights is, often wrongly, leading to wrong conclusions about issues of public safety. There needs to be political clarity that the *Human Rights Act* should have no effect on public safety issues – public safety comes first".[9]

The tricks of the Bill of Rights trade

But we don't hear about these concerns from those pushing a Bill of Rights. Instead, they try to placate the critics – who are written off as legal nitwits – by pointing to clever clauses that apparently ensure that power is not shifting to judges.

They point to Canada's so-called "notwithstanding" clause. Section 33 of the Canadian *Charter of Rights and Freedoms* allows Parliament to declare that legislation "shall operate notwithstanding" certain provisions in the Charter. The Victorian Bill has a similar provision in section 31, where Parliament may issue an override declaration in "exceptional circumstances".

As the room is filled with great constitutional minds, let me flag this issue. It strikes me that such a clause raises very real constitutional questions. The normal rule is that one Parliament cannot fetter the discretion of a later Parliament; when a later law is inconsistent with an earlier law, the later law automatically repeals the former, without the need for formal action of any kind.

But provisions like section 31 in the Victorian Bill appear to set up a completely new regime that moves the goalposts. Now, unless you issue an override declaration, later laws do not repeal earlier inconsistent laws. On the contrary, earlier laws override the later laws unless you issue such a declaration. I wonder whether that is constitutional?

But quite apart from that constitutional issue, going by the Canadian experience, the real problem with the "override" provisions is that they are useless. In Canada, the "notwithstanding" clause has never been used – not once since the Charter was introduced more than twenty years ago. This clause was the clincher when a Charter was being proposed to Canadians. It was meant to ensure that Parliament was not neutered by a galloping judiciary, because it suggested that the elected legislature had the power to override the Charter in certain circumstances. But it has been politically untouchable for a government to draft legislation which apparently infringes the "rights" of Canadians as set down in the Charter.

Bills of Rights enthusiasts also point to section 4 in the UK *Human Rights Act* which, they say, allows a court to do no more than issue a declaration of incompatibility. Parliament is free to ignore that declaration or act upon it. And that is true. Since its introduction, British courts have used section 4 to issue a number of declarations of incompatibility. Rather like Margo Kingston's book, *Not Happy, John*, these "Not Happy, Tony" judicial sledges, packaged up as judgments, have often been ignored by the British Parliament.

Back in Australia, Bills of Rights crusaders promise that we, too, will have no more than a "modest" little charter because courts will be able to do no more than issue declarations of inconsistency. When the ACT *Human Rights Act* was introduced, Hilary Charlesworth assured listeners to ABC radio that the new law will be "an ordinary, common, garden [variety] piece of legislation", just like the UK Act.[10]

But there is nothing ordinary or garden variety about these laws. The real power handed to judges is found in the interpretation clauses. Section 3 of the UK *Human Rights Act* says that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given

effect in a way which is compatible with the Convention rights".

It goes without saying that anything is possible. Judges, like painters, can easily change white into black. And judges are using their new-found power to re-shape society to suit their own vision of what is fair and just.

For example in *Ghaidan v. Godin-Mendoza*, the House of Lords extended the meaning of "spouse" in the 1977 *Rent Act* to include homosexual spouse, despite very clear language in the Act that defined "spouse" to mean a person "living with the original tenant as his or her wife or husband".

That was no barrier for the testosterone-fuelled House of Lords. They described the interpretation obligation set down in section 3 as "unusual and far-reaching in character".[11] As one judge noted, if Parliament's intent was to bring rights home, then section 3 is the linch-pin of that objective as the "prime remedial measure".[12] And as this case illustrates, armed with such a provision courts can, when interpreting domestic laws, read words in, read words down, up, inside out, in fact, any which way they please.

As Lord Steyn notes, while the drafters of the UK *Human Rights Act* had before them the NZ Act which requires that the interpretation must be "reasonable", the British Parliament specifically rejected any requirement for a reasonable interpretation when applying the *Human Rights Act* to domestic legislation. Similarly, the Victorian Charter and the ACT *Human Rights Act* have no requirement for reasonableness in their interpretation clauses.

Various members of the House of Lords talk in abstract terms about "a Rubicon which courts may not cross". They point to a distinction between "judicial interpretation" and "judicial vandalism". But as the *Ghaidan* decision reveals, when crunch time comes, the court indulges in the equivalent of judicial graffiti by leaving their own distinctive mark on even the clearest of Parliament's expressed intentions. With impressive legal sophistry, they classify their decision as a case of "robust interpretation" rather than legislative amendment.

The ability to socially engineer their preferred outcomes has proven to be, as the dissenting judge in *Ghaidan* pointed out, "dangerously seductive".[13]

In 2004, the UK Court of Appeal ruled that gypsy families who had set up home on land they bought in Chichester, West Sussex in contravention of planning laws should be allowed to stay because human rights law gave them "the right to family life".

As one commentator noted at the time:[14]

> "The ruling effectively gave the green light for illegal gypsy camps the length and breadth of the land to become legally untouchable, in flagrant breach of the planning laws. It thus legitimised widespread law-breaking".
>
> "How can unlawful behaviour suddenly be deemed lawful, even though the law that prohibits it is still on the statute book? The answer is that the *Human Rights Act* has become the law that subverts the rule of law itself".

The ACT *Human Rights Act* and the Victorian *Charter of Rights and Responsibilities Act* have similar clauses, so we can expect the same kind of judicial law-making. Here, the Bills of Rights brigade will no doubt say we should just trust judges to do the right thing. That might be a safe bet when you know that activist judges tend to have the same world view as yourself.

American columnist Charles Krauthammer has noted that, in a few short years, the US Supreme Court had cemented into constitutional law abortion on demand, racial preferences, and most recently gay rights. It was, said Krauthammer, the "liberal trifecta" – "just about their entire social agenda save shutting down the Fox News Channel".[15] Another American commentator has remarked: "If the American courts started interpreting the Second Amendment the way they interpret the First, we'd have a right to bear nuclear arms by now".[16]

But when judicial activism goes the wrong way, just wait for the outcry. A few weeks ago Philip Adams sniffed at the George W Bush versus Al Gore contest as a reminder that "the outcome [was] left to the voters on the Supreme Court".[17]

That, of course, is the problem in a nutshell. If we are to count votes when it comes to implementing major social change, let's count the votes of the people rather than those of a few judges.

Where to now?

Having traversed the tricks of the Bills of Rights trade, the next question is, where to now?

Winning the intellectual argument is one thing. The real battle is winning the political one. Williams would have us believe that the public is uneducated and disconnected on these issues. I'm not so sure. The general public may not be able to cite sections of the Australian Constitution but their understanding of the judicial role is impressive.

When I first started writing opinion columns, judicial activism was one of the first topics I covered. Some friends working in the law suggested that this was a narrow topic for the legal in-crowd. They were wrong. I received mountains of mail – and still do – from laymen concerned about the transfer of power to unelected judges.

Like Williams, I'm all in favour of educating the public, but if we are to have an informed decision on a Bill of Rights for Australia, then let's ask some meaningful questions. Not just, "Do you want Australia to have a Bill of Rights?", but also a question that asks, "Do you understand that a Bill of Rights transfers power from Parliament to the Judiciary?".

If we are to have a Bill of Rights to bed down the social compact that Williams and Co are so keen to educate the public about, then let's talk not just about rights, but also about responsibilities. It's a neat trick to draft up, as Victoria has, a *Charter of Rights and Responsibilities* but then make no mention of responsibilities in the Act.

So let's talk about what we might have on the other side of the ledger – on the obligations side. We might want to draft those obligations in the same ethereal language of rights to ensure that if rights are to breed freely, then obligations will too.

Let's be truly avant-garde and give conservatives on the bench something to work with so they too can engineer a better world. This might flush out the not-so-true-believers. Will supporters of a Bill of Rights be quite so supportive of conservative activist judges who play policymaker with a long shopping list of fine-sounding obligations?

So let me finish by suggesting that we should *not* respond to the heat with our own stealth strategy. Instead, we need to work towards a more honest and open debate about a Bill of Rights. The trade of lawyers is, as Thomas Jefferson once said, to question everything, yield nothing and to talk by the hour. I hope I have fulfilled only the first two of those three criteria.

Endnotes:

1. George Williams, *A Bill of Rights for Australia*, UNSW Press, 2000.

2. *Tasmania, WA join push for bill of rights*, *Australian Financial Review*, 13 January, 2006.

3. *A clear right of way for people who cherish their freedoms*, George Williams, *The Sydney Morning Herald*, 21 December, 2005.

4. *A Bill of Rights for Australia, op. cit.*, at p. 54.

5. *The Rule of Lawyers*, Alan Anderson, *Policy*, Volume 21, No 4, p. 36.

6. *Safe rights: why not?*, Susan Ryan, letter to *The Australian Financial Review*, 5 December, 2005.

7. *Queensland calls for human rights charter*, *Lawyers Weekly*, 12 May, 2006 at 6.

8. *Human rights fears mean police refuse to issue wanted posters for foreign criminals*, London's *The Daily Telegraph*, 14 May, 2006.

9. *Ibid.*.

10. *The Law Report*, Radio National, 9 December, 2003.

11. *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 at para 30.

12. *Ibid.*, Lord Steyn at para 44.

13. *Ibid.*, Lord Millett at para 61.

14. *A caravan and horses through the rule of law*, Melanie Phillips, *Daily Mail*, 1 October, 2004.

15. *Courting a crisis of legitimacy*, Charles Krauthammer, *The Washington Post*, 4 July, 2003.

16. *Annie's Got Her Gun*, Ann Coulter, *George Magazine,* December, 2004.

17. *Polls fail to detect apathy*, Philip Adams, *The Australian*, 28 March, 2006.

Chapter Nine
The Republic Referendum – Issues and Answers: An Historical Note

John Stone

In the lead up to the 1999 referendum on the proposed Republic, Australians for Constitutional Monarchy formed "No" Campaign Committees in each State under the general guidance of the central (Sydney) organisation. The Victorian committee was headed by Mr Rick Brown, who in turn asked a number of people, including myself, to assist him in such tasks as fund-raising and more general administrative matters. He also established a so-called "intellectuals group" (a term which still bring blushes to my countenance) to generate ideas for the prosecution of the campaign, to be passed on to the Sydney office.

As a member of that group, it seemed to me that it might be helpful if a small "kit" could be developed, focusing on a number of questions which frequently arose in general discussion of the Republic issue, and providing comments thereon. I therefore undertook to prepare such a "kit", which I termed *Speakers' Notes on Arguments to be Addressed*. The idea was that it might be used by ACM speakers in public debates, in radio talk-back calls, in framing anti-Republic letters to newspapers (or responding to pro-Republic articles therein), and so on.

A copy of those Notes is attached. In their original form they comprised:

- An Index.
- Part A: "Arguments" against the *Status Quo*, addressing some 13 such "arguments".
- Part B: "Arguments" in favour of the Proposed Republic, addressing four such "arguments".
- Part C: Arguments for the *Status Quo*, listing 10 such arguments.
- Part D: Some General Arguments, addressing half a dozen issues of a more general kind which might arise in debating the specific topic of the Republic.

In their original form, each of these 33 Items was set out on a separate page (or pages). The argumentation in each Item was deployed in a series of "dot points", in double-spaced typescript for ease of reading, and with divider pages separating each Part. They were thus designed to be easy to assemble in (say) ring-binder form, easy to distinguish from each other, and above all, easy to read.[1]

In looking through each Item for the purposes of this Note I have, naturally, considered whether the arguments advanced in them have stood up to the passage of the seven years since they were originally framed. Readers must make their own judgments, but with one significant qualification, and a few other small ones, I believe they have passed that test well enough.

The significant qualification relates to the now better defined view of who constitutes Australia's Head of State (a term nowhere mentioned in our Constitution in any case). In 1999 I had already accepted that the Governor-General was our *effective* Head of State, but was still describing the Queen as "our symbolic Head of State". Since then, of course, we have had the benefit of Sir David Smith's further research demonstrating conclusively, in my opinion, that the Governor-General is also *legally* our Head of State (while the Queen remains our Sovereign).[2] Arguments in a number of the Items therefore refer to the Governor-General as our "effective Head of State", whereas today I would delete the word "effective".[3]

The smaller qualifications are:

- Item 8 addresses the "argument" that "Our Head of State can only be an Anglican". Re-writing this today, I would begin with a dot point (akin to that which, in 1999, was included in Item 7), along the following lines: "Since Australia's Head of State is our Governor-General (see Item 1), this 'argument' addresses a non-issue".[4]
- Item 9 addresses, similarly, the "argument" that the "Succession to our Head of State discriminates in favour of males". Since the "succession" to the office of Governor-General is clearly not by inheritance, this "argument" also addresses a non-issue; and re-writing it today, I would begin with a dot point to that effect.
- In Item 29, there is a reference (third dot point) to Mr Lindsay Fox's "reportedly large financial

contributions to the republican cause". Although that reference was accurate at the time, we subsequently learned that Mr Fox's largesse did not, in the event, materialise.

- In the same Item 29 (fourth dot point), I have since been given to understand that Marie Antoinette's famous remark has, like so much other history written by the victors (particularly, as in this case, republican ones), been wrenched out of context and, in the process, greatly distorted.
- Item 21 ("Appointment of a politician as President is not ruled out") and Item 22 ("The Appointment Process Farce") both address, *inter alia*, the *Presidential Nominations Committee Bill* 1999. That Bill, put forward at the time by the Attorney-General, Mr Daryl Williams (himself a notable republican), was not *per se* part of the referendum question, and even if the referendum had been approved, would not therefore itself have become part of the Constitution. Since it was directly related to the Republic model at the time, it might no longer be relevant to any future debate on a Republic.[5]

One final point is raised in Item 1 (eighth dot point), namely:

"And if the Governor-General carries out all those actions as our Head of State, why do we need the Queen at all?"

Although this question is answered (in part) in the 10th and 11th dot points in that Item, it remains in some degree extant. It is therefore interesting to note that this is the very topic to be addressed by Professor David Flint in his paper to this conference.

Conclusion: These *Speakers' Notes on Arguments to be Addressed* were duly given to Rick Brown to be passed on to the Sydney ACM headquarters. What (if any) use may subsequently have been made of them, I do not know. They are now, obviously, largely of historical interest. Yet they still encapsulate, I believe, most of the issues in the continuing – though now faltering – debate on the Republic matter. For young readers in particular – and notably for students – they may still serve some useful purpose in displaying what the 1999 referendum was all about.

Endnotes:

1. However, for the purposes of the Attachment to this Note, I have run them together sequentially on space-saving grounds.

2. See Sir David Smith's fine book on that and other issues published last November: *Head of State: the Governor-General, the Monarchy, the Republic and the Dismissal*, Macleay Press, Sydney, 2005.

3. This point occurs in Item 1 (sixth dot point); Item 7 (second dot point); Item 14 (third dot point); Item 20 (first dot point); and Item 32 (third dot point).
   A related point occurs in Item 1 (fourth dot point), where the words "may once have had (or been thought to have had)" – referring to the powers of the Queen – should now simply read "may once been thought to have had".

4. In other words, since the Governor-General is our Head of State, and since there is certainly no religious qualification applied to his (or her) selection – consider the disparate cases of, for example, Sir Isaac Isaacs, Sir Paul Hasluck, Sir Zelman Cowen, and Sir William Deane, among others – there is no point to answer.

5. Note however that the Report of the Senate Inquiry into an Australian Republic, which has essentially been adopted by the Labor Party, provides that one of the Republic options to be considered in the plebiscites proposed in that Report would in fact be the same 1999 "model".

ATTACHMENT

REPUBLIC DEBATE

Speakers' Notes

Arguments to be Addressed

INDEX

PART A

"Arguments" against the *Status Quo*

1. Need for "a resident for President"

- This slogan seems to be almost the sole republican "argument" for change - although Malcolm Turnbull no longer seems anxious to mention the word "President" at all.
- It is based on the view that the Queen (of Australia) is our Head of State. (Note that the term "Head of State" nowhere appears in our Constitution.)
- In fact, the Queen of Australia today has no powers whatsoever, other than to appoint (and if necessary, dismiss) the Governor-General, on the advice of our Prime Minister of the day.
- Whatever other powers the Queen may once have had (or been thought to have had), those powers certainly no longer exist.
- They did not exist even in 1953, when, in preparation for the Queen's first visit to Australia, the *Royal Powers Act* had to be passed *by our own Parliament* in order to enable her to undertake even some formal regal actions during that visit.
- Australia's effective Head of State today (and for many years past) is the Governor-General. Ever since the appointment of Lord Casey in 1965, all our Governors-General have been, and will certainly continue to be, Australians.
- After all, just think about it. Who opens our Parliament? The Governor-General. Who confers our Honours? The Governor-General. Who represents us (at Head of State level) abroad? The Governor-General.
- But, you might say, in that case, why is the Governor-General described (in s. 2 of the Constitution) as "the Queen's representative"? And if the Governor-General carries out all those actions as our Head of State, why do we need the Queen at all?
- The only sense in which the Governor-General is now the Queen's "representative" is that he or she "represents" the Crown.
- By the same token, the continuing presence of the Queen in our Constitution endows the office of our own Head of State (the Governor-General) with a tradition, and a history of constitutional convention, that it would otherwise not have.
- It is that tradition, and that history of constitutional convention, which influence the advice of the Prime Minister when, today, he recommends a new Governor-General to the Queen for appointment. In the end, she must accept his advice. But it is the continuing presence of the Crown which ensures, so far as possible, that that advice will always be given responsibly, on a non-political basis.
- The republicans themselves argue that a President would possess exactly the same powers as the Governor-General now does - no more, no less. (In fact, the dismissal provisions now proposed - see Item 24 - would mean that the President would simply become "the Prime Minister's poodle", and that in particular the "reserve powers" would effectively become extinct.)
- On the republicans' own arguments, however, we already have "a resident for President"; the only difference is that we now call him (or her) the Governor-General.

2. No Head of State "to represent us abroad"

- According to republicans, we presently have no Head of State "to represent us abroad" - unlike, they say, the United Kingdom, which is frequently represented in other countries by the Queen (or other members of the Royal family).
- There is no truth in this statement.
- The Governor-General travels abroad from time to time - on some 51 occasions (to 33 foreign countries) since 1971 - and is everywhere received with the full honors accorded to a Head of State.
- Of course, it must be conceded that few Heads of State - including our own Governor-General - can excite the same "public relations" interest as does the Queen, with over nine centuries of monarchical tradition of the British Crown behind her.

• That, however, is an obstacle which cannot be overcome merely by changing the name of the Governor-General to "President" (see Item 1).

3. Need for "independence from Britain"

• In the early years of the republic debate, spokesmen such as Paul Keating and Malcolm Turnbull used to argue that we had to "get rid of the Queen" in order finally to attain our "independence from Britain".

• Like all the other Keating / Turnbull debating points, this one too has no substance.

• It is true that in 1901 Australia was not (or at any rate, was not seen *by its own leaders* as being) wholly independent of Britain.

* That independence was however fully acknowledged in 1931 by the British Parliament in the *Statute of Westminster*. (So little did Australians then care, by the way, that the Australian Parliament did not even bother to enact that Statute into Australian law until 1942.)

• The final dotting of i's and crossing of t's was completed, by legislation of the British Parliament, the Australian Parliament and our six State Parliaments, in the *Australia Acts* of 1986.

• As the High Court recently ruled in the *Heather Hill Case* (June, 1999), "Britain is now a foreign power".

• The fact that, notwithstanding that, we still retain the Queen of the United Kingdom as our [Australian] Queen, merely recognizes what is called "the divisibility of the Crown". As well as being Britain's Queen, Elizabeth II is also Queen of a number of other British Commonwealth countries, including Canada, New Zealand, Papua-New Guinea, Fiji, etcetera - and of course, Australia.

• There is nothing new in this concept of "the divisibility of the Crown". In Australia itself we have always had - and under the *Australia Acts* 1986 still retain - seven separate Crowns : the Crown in right of the Commonwealth, and the (6) Crowns in right of each of the six States.

• But as for that depriving us in any way of our independence from Britain, nothing could be further from the truth.

• If Mr Keating had spent as much time worrying about our growing loss of real independence through his Government's surrender of Australian sovereignty by entering into treaties with the United Nations and its agencies on everything under the sun, on the one hand, or our ever-growing list of foreign creditors, on the other, as he did talking about this non-issue, perhaps he would be more fondly remembered than he is.

4. Foreigners " don't understand our system".

• Some republicans (e.g., the former head of our Department of Foreign Affairs and Trade, Mr Richard Woolcott) have argued for getting rid of the Australian Crown because diplomats and other foreigners "don't understand our system".

• Even if this were true, so what?

• This cultural cringe is characteristic of many (though not all) Australian diplomats, whose attitudes often seem to be more directed towards "apologising" for Australia than standing up for it.

• In fact, foreigners "understand our system" perfectly well when it is explained to them by knowledgeable observers. It is simply a pity that so many of our diplomats do not appear to qualify for that description.

• Did anybody ever seriously suggest that Australians should stop playing cricket (another of our oldest and most valuable institutions) because (most) foreigners "don't understand the game"?

• That such a poverty-stricken argument should be advanced at all, let alone with apparent seriousness, simply indicates the quality of the republican case.

5. Immigrants have "no loyalty to Britain".

• Some republicans, such as Mr Jason Yat-Sen Li, have argued that in recent years particularly, when so many of our immigrants have come from Asia, such people "have no loyalty to Britain". We should, therefore, amend our constitutional arrangements so that they may feel more at home here.

• Even if the first statement were true, would the second one follow?

• Has anyone seriously suggested that because most of our immigrants *in recent years* " have no loyalty to cricket", we should all give up that great national institution also? Of course not.

• Let us assume a "worst case" scenario, in which all the immigrants who had ever come to Australia

(and are still living here) had "no loyalty to Britain". Why would that matter for our *Australian* constitutional arrangements?

- Isn't there something quite objectionable in the concept that visitors who have first of all asked to be allowed to enter your home, and whom you have then permitted to stay for good, should start complaining about what they see as the old-fashioned furniture, or your photographs of old friends and former acquaintances?
- We would feel justifiably resentful at such behaviour – as most people clearly did when that Kosovo refugee family in June this year refused to accept the accommodation they had been offered at Singleton by our Department of Immigration and Ethnic Affairs.
- In any case, even if it were true that all our immigrants had "no loyalty to Britain", that would be totally irrelevant. We ask that they be loyal to Australia (including the Queen of Australia), not to Britain.
- Fortunately, there is very little hard evidence (as distinct from élitist chatter) that *most* of our immigrants reject our constitutional arrangements. Those individuals who do, appear to be chiefly interested in carving out careers for themselves in our multiculturalism industry (including, in a few cases, furthering the political careers with which that industry, as distinct from their own talents, has endowed them).
- By definition, immigrants have sought entry to Australia because they believed that their lives, if spent here, would be better and more satisfying than if they continued to live in their countries of origin.
- One of the reasons for that generally well-justified expectation is to be found in the *stability* of our constitutional arrangements, which have served us well for 98 years and, in doing so, have made Australia one of the most successful, and longest-lived, democracies in the world.
- Why would our immigrants generally (as distinct from a small number of self-promoters and other malcontents) wish to put that at risk? The answer is, of course, that most of them don't.

6. The misdeeds of the junior "Royals"

- Like so many other republican "arguments" (see, for examples, Items 3, 4 and 5), this one is totally irrelevant to the topic.
- While it is obviously true that some of the junior "Royals" have behaved badly - just as it is true that the Queen's own behaviour, and that of her parents before her, has always been exemplary - that has nothing to do with the matter.
- The Crown (including the seven Australian Crowns - see Item 3) is an institution, *not* a person (good or bad).
- The history of the *British* Crown is replete with examples , over the centuries, of behaviour which makes the indiscretions of its present junior members look positively trivial. While that behaviour from time to time rendered its perpetrators unpopular - and may consequently have been instrumental in rendering the behaviour of their successors much more circumspect - it did not change the functions of the Crown, or alter its place in Britain's constitutional arrangements.
- The supreme irony of this point is that it is most frequently advanced by a category of Australians (i.e., journalists) who, in the latest Roy Morgan Research survey of the regard in which Australians hold the "ethics and honesty" of a range of different professions, were rated at 9 per cent - even lower than the standing (13 per cent) of our politicians, State or federal!
- That such an "argument" should even be advanced indicates how thread-bare is the quality of the case for a republic.

7. Non-democratic nature of hereditary succession

- Republicans have sometimes argued that, because the Queen of Australia (or her likely successor, King Charles) come to their posts as a result of hereditary succession processes, our Head of State embodies a non-democratic flavour.
- Since Australia's effective Head of State is now, and will continue to be, our Governor-General (see Item 1), that argument misses the point.
- To the extent that hereditary succession governs the choice of the person wearing the [Australian] Crown - that is, the person whose sole role is to appoint, and if necessary remove, our Governor-General on the advice of our Prime Minister of the day - it would hardly seem to matter how that person is chosen.
- All that matters is that, once that person has been chosen, he or she represents the Crown, and all the centuries of tradition that go with that.

• That is to say, what matters is that that person can be relied upon to stand above politics, to do his or her duty without fear or favour at any time when called upon, and to stand aloof from the often squalid manoeuvrings and manipulation of our political process. This the Queen (of Australia) can be relied upon to do.
• However that person may be chosen, that seems a pretty satisfactory outcome.

8. Our Head of State can only be an Anglican.

• There is genuine room for debate, *in Britain*, whether the British Monarch should also be the titular head of the Church of England. Prince Charles himself has appeared to express doubts on that score.
• Most Australians would, probably, instinctively feel that it would be better *for Britain* if those doubts were resolved via the disestablishment of the Church of England - that is, the severance of the link between the Church and the Crown, first established (formally) by Henry VIII.
• That, however, is a matter for the British people, not for Australians, to concern themselves with.
• Insofar as the continued "establishment" of the Church of England *in Britain* results in the (seven) Australian Crown(s) being represented by a member of that Church, the point is as immaterial as other similar such points (see, for example, Items 6, 7 and 9).
• In short, the gender, lineage, religion or any other characteristic of the holder of the Crown is not in itself material.

9. Succession to our Head of State discriminates in favour of males.

• Republicans have sometimes argued that, because the succession to the British Crown favours, wherever possible, the (direct) male line (e.g., Prince Charles over his elder sister, Princess Anne), this is some kind of affront to Australian feminists insofar as that mode of choice then also "rubs off on" the Australian Crown(s).
• As it happens, in the 98 years since the Australian Constitution came into being, the Crown has been represented by a Queen (Victoria, and Elizabeth II) for more years than it has been represented by a King.
• All of us might have our own views as to such traditions, but again, they are matters for the British people, rather than Australians, to concern themselves with.
• All that matters for us is that, once the occupant of the (British) Throne has been chosen, he or she represents the Crown - that is to say, that person can be relied upon to stand above parties, to do his or her duty without fear or favour at any time when called upon, and to stand aloof from the often squalid manoeuvrings and manipulation of our political process. There is no doubt that the Queen (of Australia) can be relied upon to do so.
• However that person may be chosen, that seems a pretty satisfactory outcome.

10. The need to "clarify Australia's identity"

• Early in the republic debate it was frequently said by its proponents that Australia needed to become a republic in order to "clarify our identity".
• This suggestion was usually allied with such equally silly "arguments" as the "need to become independent of Britain", or that "foreigners don't understand our system" (see Items 3 and 4 respectively).
• The truth is that almost all Australians are perfectly clear about our national identity - namely, that of a nation with 98 successful years of achievement under the aegis of our present constitutional arrangements, thereby making us one of the six most long-lived democracies in the world.
• Messrs Keating, Turnbull and others (e.g., Mrs Janet Holmes a' Court, "Australia's richest woman", as she is always described) should try walking into the public bar of any pub in Australia and asking those assembled there whether they are labouring under some problem of "lack of Australian identity".
• If they managed to emerge with their clothes still on their backs, they might talk less such élitist nonsense in the future.
• The truth is that Mr Keating and others who originally advanced this "argument" probably didn't believe it themselves. To the extent that they, or anyone else, is still silly enough to do so, we can only say that that's really their problem, not ours.

11. Our "subservience": The Queen's head on all Australian coins

- One of the republicans' favourite debating tricks has been to take a coin from their pockets, flourish it before the audience, and claim that the Queen's head on one side of it demonstrates our continued "subservience" to Britain.
- Like most of the republicans' other such debating tricks, this one has no substance.
- Australia's coins are produced at the Royal Australian Mint in Canberra, which operates within the Commonwealth Treasury portfolio, under the *Currency Act* 1965, an Act of the Australian Parliament.
- The design of all Australian coins is approved by the Treasurer or his delegate. The customary presence of the Queen's head on one side of them honours the symbolic importance of the Crown in our Constitution, and appropriately so.
- However - and this is the point - the presence of the Queen's head on our coins *results from decisions of the Australian Government*, not from any "order from the Palace", or other such silly assertions. If we were so churlish as to want to change that at any time, we would be quite free to do so.

12. "A Republic is inevitable".

- In the early stages of the republican debate we were told, *ad nauseam*, that "a republic is inevitable". Even people who might otherwise have been regarded as quite sensible were heard to voice this piece of foolishness.
- A century ago the then Prince of Wales was reported to have said that "we are all socialists now". At that time, and for many decades thereafter, the British equivalent of Australia's chattering classes today were all convinced that "socialism is inevitable".
- Karl Marx's "iron laws of history" were said to lead "inevitably" to "the dictatorship of the proletariat". A century or so later, that prediction is buried under the rubble of (*inter alia*) the Berlin Wall.
- One reason why things that are widely said to be "inevitable" don't actually come to pass world-wide is that the scheme in question (in that last example, Communism) is tried, and found not to work. That has certainly been the case with a lot of Republics all over the world – including a good many from which a lot of Australia's post-War immigrants have fled in their search for freedom.
- Another reason is that the very mouthing of such slogans produces a reaction from the people - who, having considered the prediction and found it wanting, set out to ensure that it doesn't actually happen.
- In fact, that is very much what has happened in the case of the prediction about the "inevitability" of the republic in Australia. The more the slogan has been mouthed, the more people have begun to question it, and to react against the smugness of its proponents.
- The next time you hear someone telling you that "a republic is inevitable", just ask them what odds they are offering (if they really believe in their "inevitability" claim, they should be prepared to offer you really long odds - say, 1000 to 1), and by what date, and challenge them to put their money where their mouth is. Just one tip, though: be sure to get a trustworthy independent stakeholder to hold the money!

13. The need to "mark the new millennium"

- Perhaps the most light-weight of all the republican "arguments" has been that we need to change our present constitutional arrangements in order to "mark the new millennium".
- On any common-sense view of the matter, of course, the year 2000 (or 2001, depending on your view as to which year actually ushers in the new millennium!) will be no different from the year before it, or the year after it; people will still have to get on with their lives exactly as before.
- Millenarian madness aside, however, it is true that 1 January, 2001 will be a date worth celebrating - a date marking the completion of 100 years of successful, internally peaceful and *stable* government in Australia under one of the best Constitutions the world has ever seen.
- On that basis, perhaps we *do* need to "mark the new millennium" - by asking Australians (particularly the younger ones) to dedicate themselves to preserving the essentials of a Constitution from whose great virtues we have all benefited so much.
- The "keystone in the arch" of that Constitution (as Ben Chifley's biographer, the late Professor Fin Crisp, described it) is, of course, the Crown.

PART B

"Arguments" in favour of the Proposed Republic

14. "Nothing significant will be changed".

- If it were really true that "nothing significant will be changed" by the passage of the proposed Republic Referendum, one would have to ask why the Government should have spent, by the time it is all over, roughly $120 million of taxpayers' money to achieve so little.
- In fact, the change proposed is of very great significance - so great as to alter the way in which our whole constitutional system operates.
- One highly significant change will be to alter the office of our present effective Head of State (the Governor-General) from being non-political to becoming highly political (see Item 22).
- At the same time, because of the standing threat to his (or her) position implied by the proposed new dismissal power (see Item 24), the President will simply become a constitutional cypher - "the Prime Minister's poodle".
- For the same reasons, the power of the Prime Minister of the day will be enormously enhanced (see Item 25).
- Yet another *major* change will result from the fact that the "reserve powers", which presently enable the Governor-General to intervene in the very rare cases when a real constitutional crisis is upon the nation, will in practical terms have been abolished (see Item 23). This change will have been effected by the back door, without the people ever having been asked specifically whether they wish that to happen.
- It is astonishing that the "no significant change" claim could ever have been uttered by a Commonwealth Attorney-General (the present one, Mr Daryl Williams).
- But after all, as someone sadly said, "he's just another politician" – and a self-confessed republican one at that.

15. This is "a bipartisan model".

- There is some truth in the claim that the proposed republic model is "bipartisan". It enjoys official support from the Labor Party (whose members have no "conscience vote" on the issue), and varying degrees of support from individual Liberal Party parliamentarians (despite all members of that Party having subscribed to the view in its Federal Platform that "the basic elements of Australia's free, democratic political system are: Constitutional monarchy as a symbol of unity and continuity .....").
- What these politicians fail to understand, however, is that political "bipartisanship" of this kind is not so much a plus, as a minus, so far as the people are concerned.
- For experience has shown, over and over again, that when the two sides of politics come together in agreement in Canberra, it is usually in order to conspire against the people.
- Just think of the "deals" done, time and again over the years, to increase the size of parliamentary pensions (or other benefits for parliamentarians) via legislation ushered into the Parliament at ten minutes to midnight on the last day of sittings, and rushed through all stages without effective debate, by prior "bipartisan" agreement between both sides!
- Is it any wonder that a model which would:
    - produce a need for the politicians to "wheel and deal" over the actual choice of President;
    - reduce the role of the President (compared with present Governors-General) to merely being the Prime Minister's poodle; and
    - increase (enormously) the already too great power wielded by the Prime Minister of the day,

would attract "bipartisan" support from both sides of politics?
- As with all such "bipartisanship", the real losers would be the people.

16. "Even if you don't agree with it, just regard it as Round One".

- Some proponents of the coming Referendum seek to justify their support for it by saying that, although they agree that the "model" proposed is basically flawed, nevertheless they will vote for it in the belief (hope?)

that in (say) five years' time they will be able to effect a further constitutional change to something more to their liking.

- Such a view is, at best, foolish. A less charitable view would be that it is totally irresponsible.
- It is rather like advising people to walk off firm ground into quicksand, because you believe (hope) that at some future time someone will come along, throw them a rope, and haul them out onto the "promised land" on the other side.
- The truth is that, whichever way the Referendum vote goes in November, there won't be another on this general topic for decades - perhaps even a century - to come. Meanwhile, Australians will be destined to live under either our present (proven and successful) Constitution, or the new "model" now proposed, with all the dangers that will assuredly bring (see, for example, Items 21, 23, 25 and 26).

17. "It will be better than the likely alternative".

- Perhaps the most extraordinary argument advanced by some republicans (of whom Professor Greg Craven is the most prominent) is that we should vote for the republic "model" now proposed because, unless we do, a "real republic" model (i.e., involving the direct election of the President) will subsequently be forced upon us.
- This, of course, is precisely the opposite of the other republican argument (see Item 16) that "even if you don't agree with it, just regard it as Round One".
- It recalls the old rhyme: "Be sure and keep a hold of nurse, for fear of meeting something worse".
- In this case, however, we are not urged to *keep* a hold of our present very comforting constitutional "nurse", but to *take* hold of a new "nurse", whose potential behaviour looks pretty suspect (to the point of being a likely child abuser).
- Professor Craven, it may be worth noting, was originally a self-described "conservative constitutional monarchist" – that is, a supporter of the s*tatus quo*. Then, just prior to the February, 1998 Constitutional Convention (to which he was an appointed delegate), he switched sides to support the so-called "McGarvie model". When that "model" failed to gain much support at the Con Con, Professor Craven then refused to vote for the so-called "bipartisan model" – the one he is now urging us all to vote for in November.
- It really is quite remarkable that someone should be urging us now to take *this* leap in the dark for fear that, unless we do, an even deeper shade of darkness will certainly descend upon us.
- It is rather akin to those fairy stories in which the medium-sized tiger calls on the family sheltering in their perfectly safe home to come out and be eaten. "If you don't come out and let me eat you", he says, "there'll be a much bigger tiger coming along shortly who will *really* devour you!"
- As that suggests, urgings of this kind are not so much serious arguments, as tales told to frighten children. The Australian people are not children, and don't deserve to be treated as such by the republicans. They are, on the contrary, grown-ups, as they will demonstrate by voting "No" to the Politicians' Republic in November.

PART C
Arguments for the *Status Quo*

18. 98 Years of Successful Constitutional Democracy

- Since our federal Constitution was proclaimed on 1 January, 1901 Australia has seen 98 years of successful constitutional democracy.
- Along with the U.S.A., Britain, Canada, Switzerland and Sweden, Australia has thus become one of the six most long-lived democracies in the world.
- During this time our constitutional arrangements have evolved peacefully and (for the most part) with the general consent of the people. (The qualification derives from some of the High Court's actions in bringing about, in effect, constitutional change without reference to the people; but that is a separate topic.)
- We have achieved total independence from Britain (see Item 3); developed a national identity of our own (see Item 10); welcomed millions of new immigrants from all parts of the world to our shores (see Item 5); and done all this, and more, without any of the undying bitterness and internal civil strife which, during this time, has beset so many other nations - particularly Republics - throughout the world.
- Rather than spending time, as the republicans do, "knocking" this historical record - including the symbols associated with it, such as the Crown, or our Australian flag - shouldn't we be *proud* of these achievements? Isn't *that* what we should all be hoping to celebrate on 1 January, 2001?

19. "If it ain't broke, don't fix it".

- It is quite clear that Australia's present Constitution "ain't broke".
- On the contrary, even (most) republicans accept that it has operated very successfully over the 98 years of its existence (see Item 18).
- Even if the deficiencies - and worse than deficiencies, *dangers* - in the proposed republic model were not as obvious as they are, there would still be a good case for saying that "if it ain't broke, don't fix it".
- Given those deficiencies, and those dangers, why on earth would any reasonable person want to run the risks involved in the change?

20. Need for a *non-political* Head of State

- The overwhelming merit of our present constitutional arrangements is that they provide us automatically with both a symbolic Head of State (the Queen) and an effective Head of State (the Governor-General), who are above politics.
- The Crown has evolved, over nine centuries or so, to that non-political state; and the post of Governor-General, to which the Queen appoints the Prime Minister's nominee on the latter's advice, is equally regarded as only being open to a person who is either non-political in the first place, or who is absolutely prepared to discard any political inclinations on assuming the post.
- During the post-War period Australia has in fact had Governors-General of both those kinds. We have had ex-politicians such as Sir William McKell and Mr Bill Hayden from the Labor side of politics, and Lord Casey and Sir Paul Hasluck from the other side, all of whom have resolutely set aside their previous political inclinations in the discharge of their duties. We have also had non-political appointees in Sir John Kerr, Sir Zelman Cowen and Sir Ninian Stephen.
- When our present Governor-General, Sir William Deane (appointed on the advice of Mr Keating) began to venture into politics in some of his early speech-making after taking office, there was an immediate public (and no doubt also privately expressed) outcry, since which time Sir William has become noticeably more reticent.
- By contrast, the proposed "model" provides for the choice, as President, of someone who will have to be agreed between the Prime Minister and the Leader of the Opposition. Anyone with any knowledge of the way our political system works knows that such a situation immediately provides the basis for a political "deal". The Leader of the Opposition will agree to the Prime Minister's "political" nominee if, in return, the Prime Minister will do some significant favour for the Opposition - more staff for the Leader's office, the right

to nominate the next Justice of the High Court, etcetera - the possibilities for such "deals" are endless.

- And above all, when the "deal" is done, whatever name is finally agreed between the two politicians will no longer be subject to that final test of suitability which presently derives from the scrutiny from the Crown itself.

21. Appointment of a politician as President is *not* ruled out.

- Proponents of the present republican "model" argue that it won't be possible, under the appointments process involved, for a politician to become President.
- It is true that the *Constitution Alteration (Establishment of Republic) Bill* provides that State or federal parliamentarians, or other members of any political party, will not be eligible to be chosen by the Parliament to fill the post of President.
- In turn, the *Presidential Nominations Committee Bill*, which has been introduced also by the Attorney-General, provides for a "short list" of names to go forward to the Prime Minister from the Committee established under that Bill. Superficially, this might be seen as implying that the persons excluded cannot be put forward to that Committee for consideration, and cannot therefore become President.
- However, this "protection" is effectively meaningless. For one thing, the *Presidential Nominations Committee Bill* itself does *not* contain the exclusions laid down in the Referendum Bill. A candidate must state whether he or she "is qualified to be chosen"; but, so long as that person made it clear that he or she would be prepared to resign their political affiliation before being "chosen"(by the Parliament), there would seem to be nothing to prevent the Nominations Committee from considering their nomination.
- Note also that the *Presidential Nominations Committee Bill* will not itself be part of the Referendum process and, even if the Referendum were to be approved, would not therefore itself become part of the Constitution. (The Bill will not even be further debated in the Parliament until the outcome of the Referendum is known.)
- At this stage, therefore, the nominations process itself is not settled. After the Referendum (if the Republic is approved), it could conceivably be changed even on first operation so as to render choice of a politician as President even easier.
- Moreover, so far as the long-term *future* is concerned, there is no assurance whatsoever. Since the nominations process will be laid down simply in an Act of Parliament, that Act can be amended at any time by any future Parliament.
- But even if the exclusions laid down in the Referendum Bill itself were to be effectively carried through into the nominations process (which, as noted above, they are not), there would be nothing to prevent a Prime Minister, knowing that a Presidential appointment was approaching, from "tipping the wink" to one of his most trusted colleagues that he proposed to choose him (or her) for that appointment and that, accordingly, the latter should resign from the Parliament in order to allow his (or her) name to go forward. (This of course would involve the need for the required "deal" with the Leader of the Opposition to be also negotiated in advance; but in the end, such "deals" are always achievable.)
- In short, under the provisions of the two Bills now before the Parliament, there are at least three ways in which a politician *can*, after all, become President.
- Did anyone seriously believe that legislation drafted by politicians, for a Politicians' Republic, would ever provide otherwise?

22. The Appointment Process Farce

- The processes for appointment of the President are laid down in the *Presidential Nominations Committee Bill* - that is, they do *not* appear in the Bill to alter the Constitution itself.
- Thus, those processes are not now settled and could in any case be altered by the Parliament at any future time. (See Item 21).
- Let us however consider the processes now provided for in the present Bill.
- The whole purpose of these ponderous processes is (ostensibly) to provide for "the participation of the people" in choosing the President. As such, they are a joke.
- Consider the structure of the Nominations Committee:
- A Committee of 32 members is far too large to work together sensibly.
- Of those 32, no less than 16 are to be personally appointed by the Prime Minister.

• Of the remaining 16, 8 will be from the Commonwealth Parliament, of whom at least 4, and perhaps 5, will be members of the governing Party (or Coalition parties) - in other words, another 4 or 5 Prime Ministerial nominees.
• Of the final 8 (one each from the legislatures of the six States and two major Territories), some at least can also be expected to be from the Prime Minister's political party.
• So that, of the 32 Committee members, the Prime Minister's nominees will number at least 20 and up to about 29.
• Finally, the Convenor of the Committee will also be personally appointed (from among its 32 members) by the Prime Minister .
• Consequently, whoever "the people" may nominate (assuming that anyone would even bother in the face of this stacked deck), the Prime Minister can confidently rely on the Committee providing him with a "short list" of possible appointees *which will certainly contain the name he has had in mind all along*.
• Having "considered" this list (which is all he is required to do), the Prime Minister will then put his preferred choice (which need not necessarily be on the list, though the Prime Minister could – and no doubt would – easily ensure that it was) to the Leader of the Opposition. The "dealing" will then begin (unless, that is, the "deal" between the two has been done already in advance – see Item 21).
• And this, mark you, is supposed to be a process "involving the people".
• Abraham Lincoln said that you can fool all the people some of the time, and some of the people all the time. The framers of these appointments processes clearly believe that, contrary to Lincoln's final dictum, you *can* fool all the people all the time.
• On 6 November, 1999 the people will show them that they're wrong.

23. The threat to the Reserve Powers

• The so-called "reserve powers" of the Australian Constitution enable the Governor-General to act on his (or her) own initiative in cases where such action is essential if a situation of political deadlock, with a potential to lead to crisis, has to be resolved.
• These powers are, in their nature, rarely invoked; normally the Governor-General acts on the advice of the Executive Council (i.e., the government of the day).
• The most famous example of the use of the Governor-General's reserve powers was in 1975 when, with the Senate refusing to pass the Appropriation Bills and the then Prime Minister, Mr Whitlam, refusing to call an election to resolve the issue, the Governor-General (Sir John Kerr) dismissed Mr Whitlam's Government and appointed Mr Malcolm Fraser as "caretaker" Prime Minister on condition that he immediately call an election. By a resounding majority, the Australian people in that election endorsed the Governor-General's action.
• Few uses of the reserve powers are as dramatic as on that occasion. Less dramatically, but still importantly, circumstances can arise where an election results in such a close outcome that there can be doubt as to who should be called on to form a government, in which case (as in Tasmania a few years ago) the Governor-General (or in that case, the State Governor) must exercise his own judgment after listening to advice from all parties.
• The essence of the "reserve powers" question is this:
    • The powers, by their nature, cannot be defined, as has been acknowledged by such republicans as Mr Keating and Mr Gareth Evans.
    • Nevertheless, their existence in the Constitution is essential, for use on those rare occasions when, without them, crisis would eventuate.
• The *Constitution Alteration (Establishment of Republic) Bill* provides that the President in the proposed Republic "may exercise a power that was a reserve power of the Governor-General", provided that he does so "in accordance with the constitutional conventions relating to the exercise of that power".
• That provision itself - particularly the final qualification - is of dubious constitutional merit. In 1975 Mr Whitlam said that Sir John Kerr's action was not "in accordance with the constitutional conventions". Had we been operating under the proposed republican Constitution, Mr Whitlam would have rushed off to the High Court to have that determined, leaving the country in chaos. (See Item 26).
• Even more significantly, the proposed dismissal provisions (see Item 24) would enable a future Prime Minister to dismiss the President without notice, thus depriving the latter of any opportunity to exercise the

reserve powers.

- Thus, on those rare occasions when our Head of State may need to exercise reserve powers to forestall a political crisis, the Prime Minister of the day will, under the new dismissal provisions, be able to close off that safety valve.
- In effect, by this back door route, the proponents of this Referendum are seeking to expunge (in practice) the reserve powers provisions from our Constitution.
- This alone is a recipe for future political disaster.

24. The Dismissal Procedures Farce

- The *Constitution Alteration (Establishment of Republic) Bill* provides that "the Prime Minister may, by instrument signed by the Prime Minister, remove the President with effect immediately".
- The Prime Minister "must seek the approval of the House of Representatives" within 30 days. However, in the extremely unlikely event that that House (where any Prime Minister necessarily enjoys a majority) fails to approve his action, such failure "does not operate to reinstate the President who was removed".
- These must surely be the most bizarre provisions ever proposed for a Constitution of a genuinely democratic country.
- They are akin to having rules for a football game in which one side, if it sees it is losing, can send off the umpire.
- Essentially, they render the proposed President a mere cypher - "the Prime Minister's poodle". (The almost equally farcical appointments process - see Item 22 - already tends towards that outcome.)
- What President, knowing that he or she can be dismissed at a snap of the Prime Minister's fingers, is going to raise questions about, say, the propriety (or even the legality) of some action that the Government of the day proposes?
- What worthwhile persons will allow their names to be put forward for a post from which they can be dismissed without warning, *and with no reason given*?
- Whatever happened to the republican élite's concern for natural justice?
- Is Australia to be a country in which the only person to be denied natural justice is our Head of State?
- In the last Parliament the Labor Party twice refused to pass the Government's legislation on unfair dismissal. Why is their attitude towards the clearly "unfair dismissal" provisions for the Head of State so different?
- The truth is that under the Referendum proposals it will be easier for the Prime Minister to dismiss the President than it would be for him to dismiss his driver!
- Republicans sometimes claim that these provisions are no different from the existing situation, where the Prime Minister may advise the Queen to dismiss the Governor-General and she must act on that advice.
- There is, in fact, all the difference in the world. Today, if the Queen received such advice, it would certainly have to be accompanied by full reasons. She would then have the right to enquire into the validity of those reasons (including obtaining her own legal advice about them), to question the Prime Minister about them, perhaps even to warn the Prime Minister against the action proposed.
- It is true that, in the end, she would be bound to accept the latter's advice; but there is a vast difference between such a deliberative process, on the one hand, and the delivery of a two-line letter to the President by the Prime Minister, on the other.
- All observers agree that one increasingly valid criticism of the Westminster system of government, even in London but more particularly in Australia, is that it already confers *far too much power* on the Prime Minister of the day. (See Item 25).
- These proposed dismissal provisions would represent a quantum leap in that already excessive Prime Ministerial power.

25. Making our Prime Minister even more powerful

- Most Australians today think that our politicians generally - particularly those in Canberra - already have far too much power, and that that power is far too often exercised in the interests of the politicians themselves rather than in the interests of those who elect them.

• There was a time when, within any government, the Prime Minister was simply said to be "first among equals". That however was a very long time ago. Nowadays Prime Ministers frequently speak arrogantly of "my Government", when in fact it is the Government of the Governor-General who appointed it and swore it in.

• Nearly twenty years ago Lord Hailsham said, of the British Cabinet, that it had, in effect, taken on the overtones of "a Prime Ministerial dictatorship".

• If that was true in Britain even then, it is even more true in Australia today.

• Thus it is nowadays quite common for our Prime Ministers to make policy "on the run" rather than by consulting with their Cabinets; and even more common for Prime Ministers to create small cabals, or "kitchen Cabinets", whose support for the Prime Minister can usually then be relied upon.

• We can all recall the many essentially dictatorial actions of recent Prime Ministers, such as Mr Whitlam, Mr Fraser and Mr Keating.

• The farcical proposed provisions whereby the Prime Minister would have the power to dismiss the President of the Republic at any time, and without reason given, would massively enhance the Prime Minister's power even further. (See Item 24).

• Is this what we really want? If not, vote "No" to the Politicians' Republic.

26. Risks bringing the High Court into Politics

• The farcical procedures proposed to govern the dismissal of a President (see Item 24) risk bringing the High Court of Australia into politics.

• So do the clumsily drafted provisions purporting to endow the President of any future Republic with "reserve powers" (see Item 23).

• Under these proposed new provisions:
  • The President will have the power, in certain circumstances, to use his (or her) "reserve powers" to dismiss the Prime Minister.
  • The Prime Minister will also have the power to dismiss the President.

• Imagine the scenario in which both of them meet in the President's study at Government House; after some discussion, it is then a matter of who "draws" first.

• If the President hands his letter of dismissal to the Prime Minister before the latter can do the same to him (or her), then the Prime Minister is (or ought to be) dismissed and matters proceed from there. If, however, the Prime Minister "draws" first on the President, then the latter is dismissed and matters proceed very differently.

• There are normally no witnesses to such meetings. What then if a formally dismissed Prime Minister emerges from Government House swearing and declaring publicly that he served his letter of dismissal on the President *before* the latter sacked him?

• We could have a President, or a Prime Minister, or both, rushing off to the High Court of Australia seeking an injunction against the other. And if they are the only witnesses, who is the Court to believe? (Perhaps future meetings may need to be recorded on video camera, so that a future High Court can call on "the third umpire"!)

• More seriously, whichever way the Court rules on such a matter is bound to call down a political storm upon its head.

• The proposed new formulation of the "reserve powers" says that the President "may exercise a power that was a reserve power of the Governor-General", provided that he does so "in accordance with the constitutional conventions relating to the exercise of that power".

• In fact, the *practical* consequence of the proposed new dismissal procedures will be to render the "reserve powers" null and void. (See Item 23).

• However, if the "reserve powers" were exercised by a future President to dismiss a Prime Minister, the latter could then seek a High Court ruling on the meaning of "in accordance with the constitutional conventions relating to the exercise of that power".

• *No such words occur in our present Constitution*, and there is (some) argument as to what the conventions governing use of the reserve powers are today. The point is, however, that *today* the powers are not justiciable; under the new proposals, they would be. So here again the High Court runs the risk of being dragged into a political dogfight.

- The High Court is not without its faults; but nobody with any regard for its central role in our constitutional arrangements would wish to see it subjected to the damage likely to flow from these proposals.

27. A Republican Commonwealth but (some) non-Republican States?

- The Constitutional Convention (February, 1998) agreed *inter alia* that:
  "Any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of state [i.e., State Governors] should continue to be determined by each State".
- It would be possible for the Republic Referendum to be passed (by a majority of voters nationally, and majorities in at least four of the six States), but for people in one or two States to have voted against the proposal.
- Unless, subsequently, those latter States changed their collective minds (either by a State referendum, or by acts of their Parliaments, depending on the respective State Constitutions), we would be left with a republican Commonwealth, under a President, but with one or two States retaining the Crown – including their Premiers' direct access to the Crown, as now provided for under the *Australia Acts* 1986.
- It is even possible (though probably unlikely) that one or more States where majorities were obtained for a *Commonwealth* republic might decide to retain their own (State) Crowns – particularly if those majorities had been small.
- All in all, a recipe for a possible great big mess.

PART D
Some General Arguments

28. "The Politicians' Republic"

- Ever since Paul Keating initiated the republic debate, there have clearly been two quite distinct republican camps – those favouring direct election of the President (usually described as "real republicans"), and those at least purporting to favour only "minimal change" (Mr Malcolm Turnbull's Australian Republican Movement).
- It has always suited the A R M to confuse the issue by talking generally about "the need for a Republic", while carefully refusing to specify the details.
- In November this year, however, we shall be called on to vote on the specific model which (more or less) emerged from the February, 1998 Constitutional Convention, and which reflects the wheeling and dealing entered into there by Mr Turnbull to try to scrape up enough votes to have his horse declared the "winner".
- To try to mislead the people into believing that the model provides for them to have a real influence on the outcome, it provides for an appointment process which can be described as at best farcical and at worst duplicitous (see Item 22).
- Whereas present Governors-General are nominated by the Prime Minister and appointed (on his advice) by the Queen, future Presidents would, under these procedures, be effectively the product of a process of political "dealing" between the Prime Minister and the Leader of the Opposition.
- The cumbersome processes of public nominations, etcetera, leading to a "short list" which would certainly contain the name of the person whom the Prime Minister had intended to choose from the outset, would be merely an expensive "cover up".
- Moreover, once the Prime Minister and the Leader of the Opposition had done their "deal", that would be that. This is a formula not for a real republic, but for a politicians' republic.
- The dismissal procedures (see Item 24), which enormously enhance the Prime Minister's powers (see Item 25), merely make that even clearer – as does the likely effect on the present "reserve powers" of the Governor-General (see Item 23).
- No wonder that the proposal is officially referred to as "bipartisan". Why wouldn't a Politicians' Republic be supported by politicians?
- In November this year, however, the people will finally have a chance to show those politicians what they think of such "bipartisanship".

29. "The Republic of the Rich"

- There is a nice irony in the contrast between the concept of a republic – "people power" and all that – and the fact that, ever since Paul Keating got the present republic push under way, it has been largely in the hands of some of Australia's richest people.
- Mr Keating himself, of course, is not exactly poor.
- But even Mr Keating's wealth, or that of Mr Wran (another wealthy Labor Party republican luminary), is far surpassed by that of such people as:
    - Mr Malcolm Turnbull, whose wealth (in $ millions) is reported to exceed three figures;
    - Mrs Janet Holmes a' Court, regularly described by the republicans themselves as "Australia's richest woman". (A good deal of this wealth was originally contributed by Western Australian taxpayers via the "deals" entered into between the late Robert Holmes a' Court and various elements in WA Inc at the time. It is thus particularly piquant to have the republicans now putting Mrs Holmes a' Court forward in the role of public benefactor – even to the point of freely speaking of her as Australia's first President!)
    - Mr Lindsay Fox, the trucking magnate, whose reportedly large financial contributions to the republican cause of "the people" appear somewhat at odds with his determined efforts to keep "the people" off his patch of personal foreshore in Port Phillip Bay!
- During the French Revolution in 1789, it was the Queen (Marie Antoinette) who contemptuously

said, of the hungry people demonstrating outside the gates of the Chateau of Versailles, "Let them eat cake". Today, a very similar sentiment seems to imbue the attitude of the rich republican élites towards the real concerns of the people about the grotesque constitutional model which these "aristocrats" are now seeking to foist upon us.

30. The Republic of the Chattering Class Élites

- Ever since Paul Keating first launched it, the republic has been the plaything of the chattering classes – particularly the Sydney ones; those very "basket weavers of Balmain" to whom, in an earlier incarnation, Mr Keating had often referred so contemptuously.
- These "chardonnay socialists", as they have also been called, are the same crowd generally (and often the same people) as the "Bollinger Bolsheviks" of yore – people who prattle on about "the people" while maintaining personal lifestyles totally unrelated to those of mainstream Australia.
- They include such people as the author, and notable public windbag, Tom Kenneally, to whom we are indebted for his depiction of Queen Elizabeth II as "a colostomy bag on Australia" – a depiction in turn carried on the airwaves all over Australia by his fellow chatterers at the ABC.
- The truth is that most of these people, including a significant number in what used to be called our academies of higher learning, are consumed with hatred of Australia as it has evolved today – a nation with 98 years of *stable* democratic life already behind it, and a people who have steadfastly refused to be bullied by the chattering classes into the adoption of the latter's Politically Correct pronouncements.
- The response of the chattering class élites has been, quite simply, to set out to break the idols of the people – to undermine the institution of the family, to sneer at real achievement, to decry the virtues of our armed forces, and martial valour more generally, and most recently, to "get rid of the Queen".
- Would any sensible person really buy a new Constitution from such people?

31. What's next? The flag?

- In his first flush of British-bashing eloquence, Paul Keating not only saw himself leading Australia to a republic, but also to changing the Australian flag so as to rid it of the hated (in his eyes) Union Jack which now adorns one corner of it.
- To add insult to injury, Mr Keating chose to make his first major pronouncement on this subject while visiting his powerful friends in Indonesia.
- As it became clear even to such bigots that the Australian people retain a genuine love for what a former Labor Party leader, the late Arthur Calwell, called "the most beautiful flag in the world", the anti-flag push among the republicans died away.
- However, many of the most high-profile republicans, including Malcolm Turnbull and Mrs Janet Holmes a' Court, have been directors (and strong financial backers) of Ausflag, the principal body working to replace our present Australian flag.
- There is no doubt that, if the Republic Referendum should succeed, our national flag will be the next item on these peoples' agenda.

32. The importance of having a real Head of State

- There is a view, sedulously fostered by the republicans, that the role of the Head of State is (or should be) "purely ceremonial".
- Even as applied to the Queen, in her sole function of appointing the Governor-General on the advice of the Prime Minister, this view is erroneous – see Item 24.
- More importantly, as applied to our effective Head of State (the Governor-General), this view is even more erroneous.
- True, the Governor-General does perform many largely or purely ceremonial duties.
- In addition, however, in presiding over the Executive Council, he acts as a "check" on the executive government of the day, and a safeguard against improper, or even illegal, actions by the government.
- It is precisely when papers are being prepared for the consideration of the Governor-General in Council that Ministers of the Crown, and their public servants, are forced to consider whether everything has been

done “according to Hoyle”.

• These activities of the Governor-General, which go on week in, week out, but which naturally receive very little public attention, are of great importance in preserving our constitutional system of checks and balances – in particular, in preventing Executive Government from taking even more power than it already has.

• In rarer circumstances, occasions can also arise when the Governor-General may need to exercise his “reserve powers”, to grant (or deny) a dissolution of one (or both) Houses of Parliament to hold an election, or in exercising his (or her) discretion in other ways when the course to be chosen may not be totally clear.

• In all these circumstances (and particularly those of the “reserve powers” kind) it is supremely important that the Head of State be “above politics”, and that he (or she) exercise authority in a wholly non-political manner.

• That is why we need above all a *real* Head of State – as we now have – and not someone who, under the republican “model” now proposed, will simply be destined to be a politically appointed “Prime Minister’s poodle”.

33. “If you don’t understand it, don’t vote for it”.

• During the 1993 federal election campaign, which was fought essentially on the topic of Dr John Hewson’s proposal to introduce a Goods and Services Tax (GST), one of Paul Keating’s slogans was: “If you don’t understand it, don’t vote for it”.

• Of course, Mr Keating was using that slogan politically – and in the event, successfully – to defeat Dr Hewson and his GST.

• Nevertheless, it was true that a large majority of the electorate did not understand how the new tax would work. Indeed, during the election campaign, Dr Hewson’s famous “birthday cake” TV interview revealed that he didn’t either!

• Mr Keating and his fellow republicans are now urging us to vote for their Politicians’ Republic whether we understand it or not, and despite the fact that they too don’t understand their own “model” (see, for examples, Items 2, 3, 11, 14, etcetera).

• Even worse, the whole republican campaign now centres around an attempt to *prevent* Australians from understanding the real nature of the proposed “model” – in the hope, presumably, that if they don’t understand it, they *might* vote for it.

• In early July, this attempted republican cover-up saw Mr Malcolm Turnbull urging the Joint Select Committee on the Referendum Bill to *remove* the words “Republic” and “President” altogether from the title of the Bill (and hence from the Referendum question on which we shall be asked to vote).

• One newspaper put it aptly in its front-page headline the next day, depicting Mr Turnbull’s view as being, “Don’t mention the Republic” (shades of Basil Fawlty’s “Don’t mention the War”!).

• Or as another newspaper headline summed it up, “The Republic that dare not speak its name”.

• The republicans often seek to persuade us that the changes proposed are “minimal”, both in their legal extent and in their constitutional implications.

• The truth is quite otherwise. Indeed, one of the most prominent republicans, Mr Tom Kenneally, let that cat out of the bag when he said recently that we would be saying “Yes” in November to “the biggest structural change to the Constitution since Federation”. Oops!

• It is the aim of the No Republic Campaign (both A C M and the “real republicans” such as Ted Mack, Clem Jones and Phil Cleary) to provide people with as much information, over the weeks ahead, as possible. By contrast, the republican aim is, clearly, to shy away from all that and focus instead on trivialities, or wilfully misleading slogans such as “a resident for President”.

• Hopefully, these efforts will succeed in informing the Australian people. But, to the extent that they don’t, and you *still* don’t understand the proposal in all its manifold complexities, then remember Mr Keating’s own advice: “If you don’t understand it, don’t vote for it”.

Chapter Ten
The High Court chooses: Will *Work Choices* work?

Stuart Wood

Almost 15 years I was invited by Ray Evans to present my views on the constitutionality of the federal Coalition's Jobsback policy to the HR Nicholls Society. I had just completed my honours thesis on that topic, and Professor Greg Craven had presented a paper[1] to that Society's 1991 Conference which I thought was in need of challenge.

To say I was invited, overstates things somewhat. I had written to Mr Evans, asking him to invite me to speak on the topic. He rang me very promptly and, with much enthusiasm, asked me to speak. Unfortunately he did so without obtaining the consent of the Board. Then John Stone found out. He sent me a letter, on behalf of the Board, explaining that I was uninvited.

It was therefore with some surprise that I received a call from Mr Stone a few months ago asking me to speak at this conference on the topic of the constitutionality of the federal Coalition's *Work Choices* legislation.[2] He told me that he would send me a letter. It was with some trepidation that I opened it. But I needn't have been concerned. It stated that I was invited, that John Stone was writing "on behalf of the Board", and that Justice Michael Kirby would be speaking by video.

I have not been able to find that letter of many years ago, or indeed my honours thesis. And I am glad I was not asked to speak. There are enough undergraduate views. In any event, SEK Hulme, QC spoke on the topic at the HR Nicholls conference.[3] Hulme introduced his speech, as follows:

> "[Craven] came to the view that legislation 'will be attended by major constitutional difficulties', which might not be insuperable, but which 'are undeniably grave'. I have been invited to revisit that area for you tonight. Your organisers having rejected my suggestion that this was not a very gentlemanly thing to do to people who have worked hard all day and have just had a very pleasant dinner, I fear that I must do as I was asked".

His conclusion was that Jobsback was constitutionally sound. His criticism of Professor Craven's paper is worth re-reading. For those who have not read it, it concludes with a little story about Sir Owen Dixon. Since that time there have been many academic papers on this question. Nearly all of them support Hulme.[4]

The latest paper worth mentioning is that of Dr Chris Jessup, QC.[5] Dr Jessup is the leading industrial lawyer in the country. He looked at the question of the constitutionality of *Work Choices* a couple of months ago, and came to a similar view.

What is *Work Choices*?

It is not possible in a paper of this nature to give a comprehensive overview of *Work Choices*; however, I can mention three aspects which are relevant to the question of constitutionality.

First, *Work Choices* abandons direct reliance upon the industrial power.[6] The point of this change is to replace, over time, the award system with a system of minimum "fair pay and conditions". This new fair pay and conditions standard is anchored by a cocktail of powers: the public service power, the Territories power, the trade and commerce power and, most relevantly for this paper, the corporations power.[7] For the purposes of this paper, I intend to ignore these other heads of power, and refer only to the corporations power.[8] Thus, in simple terms, the power to resolve interstate industrial disputes, by arbitration to create federal awards, has been removed. The death of the industrial dispute is something about which, I am sure, some people might feel some nostalgia. No more s. 99 dispute notifications; s. 101 findings of industrial dispute; and no repeat of the types of challenges to those findings that have littered the law reports.

The second change is related to the first. *Work Choices* attempts a takeover of the State award system. By applying the federal minimum pay and conditions standard to all corporate employers, the State

award system is rendered largely irrelevant. By this I mean that State awards are converted into federal instruments,[9] and the capacity to make new and effective State awards is made more difficult by operation of s. 109 of the Constitution.[10] The power which is relied upon to do most of this State industrial system-breaking work, is the corporations power.

Third, bargaining on an individual and collective basis is emphasised. I don't think it is accurate (or at least it is too early) to say that it is made easier; it is simply that the front-end hurdles associated with certification have been replaced with big back-end penalties. These new bargaining provisions are now based exclusively on the corporations power, rather than, as has been the case since the Keating reforms, partly on the industrial power and partly on the corporations power.

There are many, many other changes which have been made. For example, the new rules concerning protected industrial action (including the secret ballot provisions), the new regime for penalising unlawful industrial action, and the new provisions governing the regulation of trade unions, are all areas upon which one could focus much attention. Indeed, one could devote a paper entirely to the transitional provisions. But, for the purpose of this paper, it seems fair to concentrate on the three I have mentioned, and to conclude that without the corporations power, this *Work Choices* created regime of individual and collective bargaining, and the national system of fair pay and conditions which underpins it, would be extremely ineffective.

Indeed, even with the corporations power, about 15 per cent of employers may stand outside the national system. It is worth remembering that most of the century-old law concerned with the industrial power was generated by a desire to escape the clutches of the federal regulators. Depending upon how the system develops over time, that desire may remain, and much of the energy previously devoted to devising ways of slipping out of "industrial disputes" may instead be turned to escaping the orbit of "trading corporations". Without the corporations power, it would be back to the drawing board for the government. And this would probably mean, back to the industrial power.

The High Court challenge

I am lucky to be speaking to you this Sunday morning, because the High Court challenge to the legislation wound up just over two weeks ago. One of the wonders of modern times is the Australasian Legal Information Institute. Transcripts of all High Court proceedings are available on the austlii.edu.au site, free of charge, within a day or so of the hearing.

The High Court proceedings ran for six days,[11] and anyone in Australia (or indeed the world) can click on and follow the proceedings. The most interesting parts are the answers by counsel to interjections by the Justices. The argument in the High Court, and particularly the interchanges between bar and bench reflect, to some extent, the debate between Hulme and Craven over a decade ago. It is a debate between those who simply took the constitutional law as they found it, and those who did not like where this took them. Indeed, there is a respectable argument that the challenges of each of the (Labor) States to *Work Choices*, are grounded more in policy than in law (in particular Victoria, which ceded legislative power to Canberra in this area, and yet still joined in the challenge).[12]

It is not possible in a paper such as this to do more than touch on the legal arguments. For those who want to look at these questions more closely, it is perhaps most convenient to start with Dr Jessup's paper, then the High Court transcripts, the articles to which I have made reference, and of course the cases themselves.

The modern law concerning the corporations power starts with the Barwick High Court's decision to uphold (after some minor re-drafting) the Barwick-inspired trade practices legislation in *Strickland v. Rocla Concrete Pipes Ltd*,[13] and stretches over the last 35 years. Unfortunately much of the debate concerning this question ignores this fact: the long-standing jurisprudence concerning this subject. This is a point to which I will return, after mentioning the legal arguments.

The legal arguments

Bearing in mind Hulme's suggestion that it is not a very gentlemanly thing to require a group of people who should be enjoying a day of rest to listen to constitutional arguments concerning *Work Choices*, I will deal with this part of the paper as quickly as possible.

As to the three aspects of the legislation that I have identified as important, the legal questions seem

to be fairly straightforward. Dr Jessup has identified the question raised by the minimum standards and agreement-making provisions as follows:

> "The constitutional question presented by [the minimum standards] provisions, then, is whether a law which obliges a s. 51(xx) corporation to pay its employees at least a rate of wage specified in a defined manner is a law with respect to such a corporation….The constitutional question presented by [the agreement making] provisions in turn is whether a law which permits a s. 51(xx) corporation to make industrial agreements with its employees, or with trade unions representing its employees, and provides for the content and enforcement of those agreements, is a law with respect to such a corporation".

Dr Jessup concluded as follows:

> "The position remains, therefore, that, if the law is as stated by Brennan, Toohey and McHugh JJ in *Re Dingjan,* one might confidently give an affirmative answer to the [agreement making] provision. If so, there seems no reason why one might not likewise answer affirmatively the [minimum standards] question, namely, whether the Parliament has power to make a law imposing an obligation upon a s. 51(xx) corporation to meet certain minimum employment standards".[14]

The questions, said by the High Court to be raised by the minimum standards and agreement-making provisions, were couched in similar terms to those which were said to be raised by Dr Jessup. Perhaps they can be summarised in this interchange between Justice Gummow and one of the Commonwealth's counsel:

> "Gummow J: Can I just put this to you, Mr Burmester. I do not think it cuts across what you are saying but it will help me. The critical provision is 6(1)(a),[15] is it not?
>
> "Mr Burmester: Yes, your Honour.
>
> "Gummow J: That postulates and takes as a given, if you like, a constitutional corporation.
>
> "Mr Burmester: Yes.
>
> "Gummow J: There are not any at the Bar table as it happens, but as time goes on I imagine it would be possible that a corporation will put its hand up at some stage and say, 'I am not a constitutional corporation. This Act has nothing to do with me and I want prohibition'.
>
> "Mr Burmester: Quite likely.
>
> "Gummow J: But that is not today's argument because this is a demurrer.[16] So we posit a constitutional corporation, whatever that phrase means, but we posit there is such a creature and then we ask: is it employing or usually employing individuals?
>
> "Mr Burmester: Yes.
>
> "Gummow J: Then we take the next step and we look at various legislative norms that are then imposed on that relationship in one way or another and then we ask: are those particular norms which bear upon this employment relationship, are they laws with respect to the constitutional corporation?
>
> "Mr Burmester: That is correct, your Honour.
>
> "Gummow J: Is that not it?".

Indeed to me, that does seem to be it. And the answer, based upon the last 35 years of authority, seems to be that the minimum standards and agreement-making provisions constitute a valid exercise of the corporations power. That these provisions are constitutionally valid seems to be implicit in the following interchange, between the Chief Justice and one of the Commonwealth's counsel (and note Justice Gummow's contribution at the end):

> "Gleeson CJ: Let us confine it to trading corporations. If it is not a trading corporation, end of story.
>
> "Mr Burmester: Yes.
>
> "Gleeson CJ: If it is a trading corporation, its relations with all its employees, regardless of what particular activity they perform, are a matter of business, are they not?
>
> "Mr Burmester: Yes, quite likely, your Honour, in this context.
>
> "Gleeson CJ: A contract of employment between a municipal council and a health inspector is a business relationship, is it not?
>
> "Mr Burmester: Yes, your Honour, and we would say …..
>
> "Gleeson CJ: Just as much as is a contract of employment between a council and the man who sells refrigerators.
>
> "Mr Burmester: Yes, your Honour, and it may be that all your Honours need to decide for the purpose of upholding the provisions in this case is that particular provisions operate on a business activity or relationship with a constitutional corporation … and on that basis the law is valid.

"Gummow J: So it may be encapsulated by the last sentence of paragraph 83 of Justice Gaudron's reasons in *Pacific Coal* 203 CLR 346 at 375. What she is doing I think in that paragraph is giving content to, as you are attempting to do here, I think, … what will be with respect to this given of a trading corporation, and that 'laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations' will be laws with respect to the corporation".

Turning then to the third aspect of the legislation, upon which I have focused attention, the view of Dr Jessup was that the attempt to exclude State industrial tribunals was constitutionally sound. Like the interchanges I have referred to above concerning the constitutionality of the minimum standards and the agreement-making provisions, the ease with which the Commonwealth's submissions were treated, on the question of the exclusion of State laws, might contain some clue as to the likely result on this inconsistency point:

"Mr Burmester: We accept there has to be a head of power. It clearly links back to the heads of power that support the definitions of 'employee' and 'employer' in sections 5 and 6. We say that the principle in *Wenn* has not been contradicted in later cases, but in cases like the *Native Title Act Case*, *Western Australia v. Commonwealth* (1995) 183 CLR 373 particularly at 464 to 468, and in the *Botany Municipal Council v. Federal Airports Corporation* (1992) 175 CLR 453 at 464 to 465, one finds statements that, in our submission, are consistent with those in *Wenn*, and which indicate that there is an ability to exclude State laws even though the Commonwealth may not have made its own detailed provisions on the subject.

"The issue is one of power – is it a law with respect to a head of power? – rather than whether there is a prohibition on excluding State law. In our submission, one cannot characterise section 16, given the way in which it is drafted, the laws to which it applies, which confine it to section 5 employees and section 6 employers, as a bare attempt to prevent State law making……

"Gummow J: Can we just go back to the *Native Title Act Case* for a minute?

"Mr Burmester: Yes, your Honour.

"Gummow J: Do you rely on the passage at 467 in 183 CLR?

"Mr Burmester: The passage from *O'Reilly* that has been quoted, your Honour?

"Gummow J: The first paragraph, 'The critical question.....'.

"Mr Burmester: 'The critical question is the scope of Commonwealth legislative power. Provided the power supports a Commonwealth law making its regime exclusive and exhaustive, the law may validly exclude in terms the application of State law to the subject matter'.

"Yes, your Honour. Then there is a reference to the *Botany Municipal Council* that I also referred to.

"Gummow J: *Botany* is a useful illustration of that, is it not?

"Mr Burmester: Yes, your Honour. We exclude the State environmental law and particular planning approvals and so on and put our own limited regime in place".

It seems likely, in my view, that the three central aspects of the legislation that I have identified will survive this challenge. Other parts of the legislation might not survive, and indeed these three central parts (like the trades practices legislation post-*Rocla Concrete Pipes*) might have to be slightly re-cast. However, one would think that the legislation looks to be on fairly safe constitutional ground.

There is nothing particularly controversial about this conclusion. It is similar to the conclusion that Dr Jessup came to a couple of months ago, and to the conclusion that Hulme (and I) came to over a decade ago. Moreover, the first academic paper suggesting that the Commonwealth had power to regulate the contract of employment, through the corporations power, is now almost 30 years old.

It may have been because the legal position is seemingly so strong, that much of the debate in the High Court was concerned with policy issues. Indeed at times, as I have stated above, the debate seemed to be between those who simply took the constitutional law as they found it, and those who did not like where this led them. The reason of those who did not like the legal conclusions was, of course, the impact that this would have on the federal / State balance.

The federal / State balance arguments

It is submitted that the following extract of the interchange between the Commonwealth Solicitor-General and Justice Kirby, with the Chief Justice and Justice Gummow joining in the debate on the side of the

Commonwealth, best captures the argument and the counter-argument on this federal / State balance point. The Solicitor-General starts by explaining how changes in the make-up of a society might impact upon the federal / State balance (by referring to the Commonwealth's bankruptcy,[17] quarantine[18] and defence[19] powers), as follows:

> "Mr Bennett: … the examples of bankruptcy in the Depression, quarantine during a pandemic, defence during a war.
>
> "Kirby J: But it is a tricky argument because, at least on one view, it runs so far that the corporation and the corporations power on your theory has expanded so greatly that its very expansion causes one to think, what effect do we give to this power within the context of a federal Constitution, and within the context of a power that is directed to persons and in a constitutional document that requires us, both by its character and form and by its words, to have regard to what is elsewhere provided in the Constitution.
>
> "Mr Bennett: Your Honour, that is the necessary consequence. If Australia came to be populated 99 per cent by people who were aliens who chose not to become citizens, the same thing would apply…..
>
> "Gleeson CJ: …With these developments it appears the position of the Commonwealth, the federal government has waxed; and that of the States has waned.
>
> "Mr Bennett: Yes: that the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.
>
> "Kirby J: Yes, but at least a responsible constitutional court, when the waning comes to the point of almost extinction, has to then ask, is this the sort of waning that the Constitution had in mind in its text?
>
> "Mr Bennett: Your Honour, in my submission, it does not have anything like that effect.
>
> "Kirby J: If you could affect every trading corporation by name and everything it does and everything everybody associated, or certainly its employees and those who trade with it, who deal with it, who contract with it, who have come within its physical boundaries, who have any association with it in your list of constitutional powers, then the waning has gone to a point, that at least if you adhere to a federal notion of our polity, you have to pause. At least that is the role of this Court, as I can see.
>
> "Mr Bennett: Your Honour, the effect of the Constitution was that certain powers were given to the federal Government. They were powers which even at the time had a very significant effect on the economic life of the community. If one takes a world in which only economics are looked at, the Federal Compact was one which was very largely one-sided in that respect. It is not as if section 51 said (a) economic matters. It did not go as far as that, but in many ways it did, and the quantitative analysis your Honour puts to me limits the world to the world of economics. In the world outside the world of economics the dramatic effect is not as great…..
>
> "Kirby J: I am not so sure about that. Music is performed and art is performed by corporations. Increasingly the business of government is privatised and sent out so it is done by corporations.
>
> "Mr Bennett: Yes.
>
> "Kirby J: I am just saying that that is the importance of this case, that what began in a sense in the *Engineers' Case* and led to the waxing of the Commonwealth in its hey day and was very important for the building of the nation, has come to the point that the waxing has overwhelmed the States and we have to, as it were, pause and say, is that what the structure and purpose of the Constitution and the text subject to this Constitution mean? That is the importance of this case.
>
> "Mr Bennett: Well, your Honour, it does. Another example of how it has occurred is in the area of income tax, where the changes in the way tax has been levied over the years has resulted in a growth in the economic significance of the Commonwealth at the expense of the States. Now, that has happened, that has been upheld, and it was always inherent in the Constitution that it could occur as, we say, is this development. The issues that are being debated are issues. But we submit, the mere fact that the effect of changes that have occurred in society is to make a power more significant is not a reason for reading down that power.
>
> "Gleeson CJ: If you want to look at the way the relationship between the Commonwealth and the States was envisaged 100 years ago, you do not need to go past section 94 of the Constitution.
>
> "Mr Bennett: No, precisely, your Honour. The original idea was that a sum of money was levied by the Commonwealth, was spent on certain things, and the surplus was returned to the States. That provision

is still in the Constitution but changes…..

"Gummow J: Unhappily it says "may".

"Gleeson CJ: Yes. It was originally envisaged that the surplus that we saw being dealt with yesterday would be given back to the States to spend.

"Mr Bennett: Yes, it was, your Honour. Modern accounting methods have rather dealt with that fairly effectively.

"Kirby J: I know these jocular examples. All I am saying is that we have reached a point where the joke is beginning to become a bit of a worry. There are great arguments for Federation, as the federations of the world demonstrate. They divide power and that is a very important protection for liberty.

"Mr Bennett: Yes, and one fairly standard consequence of Federation, which one sees in the United States, one sees in Australia and no doubt sees in other federations, is that where one starts with a division of powers, in many ways the federal powers are going to become more important, and what is either left to or granted in some Constitutions to the States is going to become less important. That is part of, if one likes, a local aspect of globalisation. It is a natural trend. It is what Justice Windeyer was referring to, and referring to, we would respectfully submit, with great accuracy, in *Victoria v. The Commonwealth*.

"Kirby J: It is a natural trend, but when it comes to the point of threatening viability and relevance of the States, then you have what we see before us: every one of them here objecting to what is being done. We have to resolve it. Anyway, I think these are generalities, and though it is proper that they be exposed because they, as it were, lie at the bedrock of the reasoning that one uses to approach specific constitutional problems, they do not solve the problem. They merely expose the concern that lies behind the search.

"Mr Bennett: Your Honour, at the end of the day we submit this case does not really go any further than a wealth of existing authority in this Court, including *Tasmanian Dam, Dingjan, CLM*…..

"Kirby J: My point is they were written in earlier times and, ultimately, lawyers who follow logic have to ask where it has led them and where it is leading them and, more importantly, where it is leading the Commonwealth.

"Mr Bennett: Most of those cases, your Honour, are not very much earlier times. Most of the cases on which we rely, unlike *Huddart Parker*, which some people attempt to resuscitate, were decided in the last 30 or 40 years and some in the very recent past. We submit there is no giant step here from the legal point of view.

"Kirby J: A giant step is not now needed. It is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it, you often do not notice it.

"Mr Bennett: Your Honour, that is the process of the development of the law and particularly the development of constitutional law".

Though I am quite sympathetic to his concerns regarding the federal / State balance, I think that the approach to legal reasoning suggested by Justice Kirby is quite improper. I hold this view for four reasons. First, one cannot pretend that the *Engineers' case*[20] was never decided, and that *Rocla Concrete Pipes* and the 35 years of jurisprudence which has built upon it, does not exist. As Justice Gummow observed during the argument:

"Gummow J: …. When we are talking in this context about the Constitution, we mean the Constitution as it is operating, as it is construed from time to time by the Court. That is what the Constitution explicitly recognises in Chapter III. When you talk about the Constitution requires this, that or the other, you cannot just look at the text at any point of time; you have to know what the Court doctrine is in construing it from time to time".

Secondly, the judicial method requires proper respect to be provided to the reasoning and thus the received wisdom of the judges who have gone before. Justice Kirby is not entitled to dismiss the "wealth of existing authority in this Court" on the basis that "they were written in earlier times". The prevailing Court doctrine constituted by these cases cannot be air-brushed away, because they "were written in earlier times". The fact that they "were written in earlier times" means that they constitute the relevant Court doctrine. The current judges are not entitled to arrogate to themselves a blank slate and commence interpreting the Constitution as if they were the first judges to be set that task. As Gibbs J said in *Queensland v. The Commonwealth*:[21]

"No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision

did not survive beyond the rising of the Court".

Thirdly, ideas such as constitutional originalism (which I understand is a form of interpretation with some adherents in the United States), are simply a way of by-passing the collective wisdom of the 10 former Chief Justices and 34 Justices to have sat on the Court, over the last century.

I agree with Justice Kirby's views, when he states:

> "There are great arguments for Federation, as the federations of the world demonstrate. They divide power and that is a very important protection for liberty".

However, I don't agree with Justice Kirby's next step: using the so-called "original" (federal) nature of the Constitution as a means of avoiding 35 years of jurisprudence. By lifting himself onto a plane upon which he does not have to dirty himself with the prevailing law, he can more easily get to a result that is inconsistent with the prevailing Court doctrine. The result is that, under the guise of applying the law, the decision-maker simply ignores it. While such an approach is no doubt very liberating, it is hardly consistent with administration of justice according to law. David Marr caricatured Sir Garfield Barwick's views as: "no case is a precedent unless I agree with it".[22] The "originalist" approach to the corporations power proceeds from a similar assumption.

Fourthly, Justice Kirby's implied criticism of the traditional judicial method, of approaching matters on a case by case basis, is strange. In *Rocla Concrete Pipes*, Barwick CJ noted:

> "We were invited in the argument of these appeals to set as it were the outer limits of the reach of the power under this paragraph of s. 51. This for my part I am not prepared to do: and indeed I do not regard the Court as justified in doing so. The method of constitutional interpretation is the same as that with which we have been long familiar in the common law. The law develops case by case, the Court in each case deciding so much as is necessary to dispose of the case before it.
>
> "The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example".: *R v. Burgess; Ex parte Henry* (1936) 55 CLR 608, at p 669 per Dixon J (at p 490)…..
>
> "Of course frequently in order to dispose of a case the Court must state and discuss general principles or express concepts which are of value in subsequent cases. But that is a very different thing from setting out to decide at one blow the full ambit of a constitutional power".

You will recall the Solicitor-General suggested that "there is no giant step here from the legal point of view". You will also recall Justice Kirby's response:

> "A giant step is not now needed. It is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it, you often do not notice it".

This seems to me to be a manufactured concern. What is small, gradual, step by step reasoning, in which the law develops case by case, with the Court in each case deciding so much as is necessary to dispose of the case before it, to be replaced with? A giant step of course, presumably in a direction of Justice Kirby's choosing; unanchored by the "little steps" that have led away from the chosen direction.

In this case, the Chief Justice indicated that he was not interested in doing anything other than simply deciding this case and nothing more (despite Justice Kirby's suggestions to the contrary):

> "Heydon J: … do we have to bother with the ambitious submission?
>
> "Mr Bennett: Your Honours do not, probably. It is a convenient way of dealing with much of the Act but it is not…..
>
> "Gleeson CJ: It is a convenient way of arguing the next case.
>
> "Kirby J: It is what we always have to keep our eye on.
>
> "Mr Bennett: Yes.
>
> "Gleeson CJ: And what we have always said we will never decide".

In my view, in a case such as this, the Court should try to keep its collective eye on the judicial questions which arise for decision, and nothing more. The Court should decide the questions asked of it by reference to the application of (and if necessary the development of) the prevailing law with the benefit of focused argument. It should do so by carefully considering the arguments made and (not least) the legislation under challenge. To try to imagine the battle lines which might next be drawn in some federal / State contest, and to attempt to head off those battles even before the lines are drawn or the battles fought, is a task which is more appropriately left to politicians and the political process.

Thoughts on the federal / State balance in industrial affairs

As I have discussed, many of the concerns expressed about the impact of the corporations power upon the federal / State balance are directed to the possible future use of the power. Some, however, are directed to the impact on the federal / State balance of this particular legislation. I believe these more narrow concerns are overstated. Indeed, I think they will prove to be unfounded. The reason is two-fold. Firstly, while it is likely that charities and other non-trading corporations will fall outside the scope of the new legislation, the federal industrial power has captured such bodies since the *Social Welfare Union Case*.[23]

Secondly, employers who take the form of, for example, partnerships, trusts and natural persons, have been roped into "paper" interstate industrial disputes for almost 100 years, even though they are not corporations. Under the previous regime it was fairly easy to manufacture such a dispute and thereby to obtain an award. What may change over time is that employers may incorporate to try to bring themselves within the scope of the federal law, and one might surmise that in order to facilitate this, the cost of incorporation has been reduced to $400.

I accept that, as a matter of practice, it is likely to be easier for an employer to incorporate than to become party to an interstate industrial dispute. However, even bearing this in mind, I think it likely that the national coverage of the corporations power will remain less comprehensive than that potentially afforded by the industrial power.

Indeed, the federal industrial power was used in this broad way to emasculate the Kennett Government's *Work Choices* style industrial reforms, by allowing traditionally State-regulated workers to "escape" to the federal system. Many were *Social Welfare Union Case*-type employees. After five years of fighting and upon the election of the Howard Government, the Kennett Government ceded its industrial powers to the federal government. The lesson from those events was that even a State government, spending millions, could not escape the clutches of the interstate industrial dispute.[24]

The Commonwealth could and did, with relative ease, use the industrial power to suppress labour market deregulation in a State, just over a decade ago. This fact does not appear to have attracted the attention in this latest debate about the impact of the corporations power upon the federal / State balance in industrial affairs that, in my view, it deserves. Indeed, the Commonwealth government could have used its industrial power to do what Senator Cook did to Jeff Kennett – but in reverse. It could have legislated to allow employers to "escape" to the federal system but it is using the corporations power instead.

Presumably it chose not to use the industrial power, because it prefers the "Canberra club" to the "industrial relations club"; the Fair Pay Commission to the Industrial Relations Commission. It is true that the use of the corporations power allows a more direct form of regulation than that afforded by the industrial power. The use of the industrial power invariably brings with it a third party arbitrator.

Ultimately, I think the point remains. The federal / State balance in industrial affairs will not be significantly altered if the High Court gives the all-clear to the use of the corporations power, because the Commonwealth could have achieved its national system by use of the industrial power. Indeed, the reach of the corporations power might prove to be slightly smaller than that which may have been possible had the Commonwealth chosen to employ the industrial power.

Conclusion

As I have stated above, for my own part, I think the constitutional challenge will fail (at least in relation to the main parts of the legislation). However, the use of the corporations power does not, in my view, significantly alter the current federal / State balance in industrial affairs. Although I accept (in general terms) that this development will probably present opportunities for the Commonwealth to further degrade the federal nature of our constitutional compact, I would much rather see these problems addressed through political action than through the courts.

Working in close contact with lawyers, I fear (undemocratic) judicial activism much more than I fear (democratic) centralism. The courts should simply apply the law as they find it, and leave questions as to the federal balance for the politicians and the political process.

I have drawn attention to Justice Kirby's interjection, that it "is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it you often do not notice it". I think the Solicitor-General's response: "Your Honour, that is the process of the development of the law and particularly the development of constitutional law", encapsulates, in one sentence, the points I have tried to make in this

paper.

Endnotes:

1. G Craven, *Voluntary Industrial Agreements: You Agree, I Agree, But Will The High Court Agree?*: http://www.hrnicholls.com.au.

2. The post-*Work Choices* workplace relations legislation is (still) the *Workplace Relations Act* 1996 ("the Act"), albeit amended and renumbered. The changes to the Act were introduced by the *Workplace Relations Amendment (Work Choices) Act* 2005 (No 153) (hereinafter "*Work Choices*").

3. SEK Hulme, *A Constitutional Basis for the Federal Coalition's Industrial Relations Policy and Related Matters:* http://www.hrnicholls.com.au.

4. The Parliament of Australia, Parliamentary Library contains the following references at http://www.aph.gov. au/library/intguide/law/workchoicesbill.htm, under the heading "Journal articles on the constitutionality of a national employment law":
   - A Gray, *Precedent and Policy: Australian Industrial Relations Reform in the 21st Century Using the Corporations Power*, *Deakin Law Review*, vol. 10, no. 2, 2005, pp. 440–59.
   - R McCallum, *The Australian Constitution and the Shaping of Our Federal and State Labour Laws*, *ibid.*, pp. 460–9.
   - G Williams, *The Constitution and a National Industrial Relations Regime*, *ibid*, pp. 498–510.
   - A Stewart, *Workplace Relations: The Revolution begins here*, *New Matilda*, 1 June, 2005.
   - L Johns, *National IR system is logical*, *HR Monthly*, April, 2005, pp. 36–7.
   - D McCann, *First head revisited: a single industrial relations system under the trade and commerce power*, *Sydney Law Review*, 26(1), March 2004, pp. 75–106.
   - G Williams, *The first step to a national industrial relations regime? Workplace Relations Amendment (Termination of Employment) Bill 2002*, *Australian Journal of Labour Law*, 2003, 16(1), May, 2003, pp. 94–8.
   - G Williams, *Submission to the Senate Employment, Workplace Relations & Education Committee Inquiry into the Provisions of the Workplace Relations Amendment (Termination of Employment) Bill* 2002, 6 February, 2003.
   - N Williams and A Gotting, *The interrelationship between the industrial power and other heads of power in Australian industrial law*, *Australian Bar Review*, 20(3), February, 2001, pp. 264-82.
   - S Eichenbaum, *What chance a single industrial relations system in Australia?*, *Law Institute Journal*, 76(6), July, 2002, pp. 66-9.
   - P Lane, *Commonwealth control of corporate industrial relations*, *Australian Law Journal*, 75(11), November, 2001, pp. 670-2.
   - A Stewart, *Federal labour law and new uses for the corporations power*, *Australian Journal of Labour Law*, 14(2), September, 2001, pp. 145-68.
   - W J Ford, *Using the corporations power to regulate industrial relations*, *Employment Law Bulletin*, 6(9), January, 2001, pp. 70-7.
   - W J Ford, *Reconstructing Australian labour law: a constitutional perspective*, *Australian Journal of Labour Law*, 10(1), March, 1997, pp. 1-30.
   - W J Ford, *The Constitution and the reform of Australian industrial relations*, *Australian Journal of Labour Law*, 7(2), August, 1994, pp. 105-31.
   - S E K Hulme, *A constitutional basis for the federal coalition's industrial relations policy – and related matters*, *Economic and Labour Relations Review*, 4(1), June, 1993, pp. 62-76.
   - A Stewart, *Federal regulation and the use of powers other than the industrial power*, in ACIRRT Monograph No. 9, *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, Proceedings of a Conference, 30 April, 1993.
   - G Lindell, *The corporations and races powers*, *Federal Law Review*, 14(3), March, 1984, pp. 219-52.

- D Rose, *Comment on the corporations power and the races power*, *Federal Law Review*, 14(3), March, 1984, pp. 253-7.
- J O'Donovan, *Can the contract of employment be regulated through the corporations power?*, *Australian Law Journal*, 51(5), May, 1977, pp. 234-46.

5. C N Jessup, *Work Choices and the Constitution,* (unpublished paper 2 March, 2006, given to the Law Council of Australia, 5 March, 2006).

6. The industrial power is s. 51(xxxv) and states that the Commonwealth Parliament shall "have power to make laws … with respect to: .....(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

7. See section 6 definition of "employer" at Endnote 15 (below).

8. The corporations power is s. 51(xx) and states that the Commonwealth Parliament shall "have power to make laws … with respect to: .....(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

9. Known as a "notional agreement preserving State awards" ("NAPSA").

10. See also, *supra*, Dr Jessup's paper, at paras [40-5], especially last sentence in para [45].

11. High Court Proceedings: 4, 5, 8, 9, 10 & 11 May, 2006:
4 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/215.html.
5 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/216.html.
8 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/217.html.
9 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/218.html.
10 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/233.html.
11 May: http://www.austlii.edu.au/au/other/HCATrans/ 2006/235.html.

12. See Part 21 of the Act, which is headed "Matters referred by Victoria".

13. [1971] HCA 40; (1971) 124 CLR 468.

14. Para [19] of Dr Jessup's paper states:
> "The judgments of Brennan, Toohey and McHugh JJ in *Re Dingjan* would probably provide a reasonably solid base upon which one could conclude that the central provisions of Part VB of the Act are valid. Although their Honours held that the operation of s. 127C(1)(b) was outside s. 51(xx), their reasoning would support the view that a law which operated upon agreements entered into between constitutional corporations and their employees (or unions representing, or potentially representing, those employees) would be within power",

but is then qualified by paras [20-1].

15. Section 6 is headed "Employer" and states as follows:
> "Basic definition
> (1) In this Act, unless the contrary intention appears: *"employer"* means:
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual". (Emphasis added).

16. These days, a more common name for a "demurrer" is a "strike out" or "summary dismissal".

17. The bankruptcy power is s. 51(xvii) and states that the Commonwealth Parliament shall "have power to make laws … with respect to: .....(xvii) Bankruptcy and Insolvency".

18. The quarantine power is s. 51(ix) and states that the Commonwealth Parliament shall "have power to

make laws … with respect to: .....(ix) Quarantine".

19. The defence power is s. 51(vi) and states that the Commonwealth Parliament shall "have power to make laws … with respect to: .....(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".

20. *Amalgamated Society of Engineers v. Adelaide Steamship Company Limited* (1920) 28 CLR 129.

21. *Queensland v. The Commonwealth* (1977) 139 CLR 585 at 599.

22. D Marr, *Barwick,* George Allen & Unwin Australia Pty Ltd, Sydney, 1981, at 218.

23. *The Queen v. Coldham; Ex Parte Australian Social Welfare Union* [1983] HCA 19; (1983) 153 CLR 297.

24. I have not ignored the impact of *Re AEU*. But that principle would apply to legislation under s. 51(xx) as well. The full title of the case, *Re Australian Education Union and Australian Nursing Federation and Others, Health Services Union of Australia and Others, Re Australian Liquor, Hospitality and Miscellaneous Workers Union and Others, Re State Public Services Federation and Another, Re Printing And Kindred Industries Union of Australia and Another, and Australian Federal Police Association and Another; Ex Parte The State of Victoria and Others* [1994] HCA 26; (1995) 128 ALR 610; (1995) 69 ALJR 451, gives some clue to the extent of the federal takeover of the Victorian system. As does the reasoning in (e.g.) para [49]:

> "To say that the limitation protects the existence of the States and their capacity to function as a government is to give effect more accurately to the constitutional foundation … [To go further] would protect a substantial part of a State's workforce from the impact of federal awards, notwithstanding that the operation of those awards in relation to school teachers, health workers and other categories of employees would not destroy or curtail the existence of the State or its capacity to function as a government".

Chapter Eleven
Aboriginal Policy at the Turn

Hon Dr Gary Johns

It is very important when policy is at the point of an historic shift, as I believe Aboriginal policy is, to set out clearly the new program, including possible winners and losers. It is important so that those who resist change do not blame old ills on new policy. It is also important to overturn some of the accepted truths upon which old policy was built.

Economic integration

The shift in Aboriginal policy and Aboriginal practice is from self-determination (including land rights and separate administration of public programs) to the economic integration of Aboriginal people. The reason for the policy shift is that self-determination has failed too many Aboriginal people. It is also true that integration has been taking place; after all, no Aborigines live a traditional lifestyle, many Aborigines are fully engaged in the economy and live in cities and towns, and indeed, are intermarried with non-Aborigines.[1]

For at least thirty years, however, policy has been sympathetic to the idea that Aborigines would remain in another economy. There were two mutually reinforcing sources for this, from very different sides of politics. The first was the mainly southern intellectuals' romance with the "culture cult" (a cult that holds that primitive culture is not inferior to modern civilization).[2] The second was the mainly northern settlers practice of "not-in-my-backyard" (Aborigines are best kept away from the city). Each was ignorant and prejudicial to the interests of Aborigines. In hindsight, the period 1970-2006 will be viewed as an interruption to the long–run process of absorption and integration of the Aboriginal people, which commenced at European settlement.

Self-determination harms the prospects of economic integration because it prevents Aborigines from moving to where opportunities exist. These same people are also welfare dependent and therefore are unable to take advantage of the few opportunities that exist where they live. The problems of integration are thus the problems of transition.

The magnitude of the task of integrating Aborigines is best illustrated in demographic and geographic terms. In the State capitals, 87 per cent of couples with an Aboriginal member are intermixed. Outside the State capitals, 60 per cent of all couples with an Aboriginal member are intermixed. Within the Northern Territory (other than Darwin), the great majority of families – 86 per cent – are purely Aboriginal. But these couples amount to just 10 per cent of all "Aboriginal couples" in Australia. What one may regard as an "Aboriginal couple" is a very small minority of all couples with an Aboriginal member. There are fewer than 50,000 Aboriginal couples in the whole of Australia living outside of the capital cities, and many of these couples may be part-Aboriginal.[3]

There are 1,216 discrete Aboriginal communities with a total population of 108,085. Of these, 889 communities contain fewer than 50 persons and 327 more than 50 persons (of which, 145 reported a usual population of 200 or more).[4] The settlements over 100 are the mission and government settlements, of which there are 225, and the remainder are the outstations or homelands. The problems of each vary: for example, there are considerable problems of inter-group rivalry in the larger settlements, as is observable at present in Wadeye in the Northern Territory, and there are the abiding problems of drug abuse and what Karl Marx would call the "idiocy of rural life"[5] in the smaller (if not all) of the settlements.

The purpose of economic integration is not to demand Aborigines leave their land, but rather to be economically independent. In becoming independent, they may remain or they may move. Many, however, are experiencing a range of problems that may not be solvable *in situ*. For example, there may never be sufficient suitable employment, both for adults and for children who, if education policy is successful, will have higher expectations than their parents. Consequently, the transition to an integrated Aboriginal community will have its casualties, particularly among those who cannot learn sufficient skills to survive.

In this category are tens of thousands of Aboriginal men. They live in remote communities, in fringe town camps, and to a lesser extent in urban ghettoes. They will find it difficult to cope, for example, with the

removal of remote area exemptions that make receipt of welfare payments conditional on entering training or job search or Community Development Employment Programs (CDEP). The winners will be women, if they can escape the violence of remote settlements and fringe dwellings, and children if they can attend schools regularly, probably away from their communities. The front line troops in the transition will be Centrelink offices and officers, who will be under enormous pressure to let applicants move on to disability or other such pensions. The front line places will be regional centres in the far north and west, including the Alice Springs camps, about which much has been written in recent days.

As an aside, the European Union has designated 2006 as *The Year of Workers' Mobility*. The last thirty years of Aboriginal policy could be designated *The Years of Staying Put and Ignoring Work*.

Resistance

The path to economic integration will not be smooth or unchallenged; indeed, the struggle for intellectual dominance over Aboriginal policy and public opinion continues. Media debate in the last week provides a number of reminders.

The future of Wadeye in the Northern Territory, where gangs of Aboriginal youths have run amok, has the national broadcaster ABC, specifically Tony Jones of *Lateline* and Kerry O'Brien of *The 7.30 Report* as ready as ever to blame government for not doing enough for Aborigines. In his interview with the Northern Territory public prosecutor Nanette Rogers on child sexual abuse, Jones worried that the revelations might be used by "rednecks" to diminish Aboriginal people. By this we may interpret that he meant that no blame could attach to Aborigines as responsible and autonomous people, only that they should be free of white society and its ills! Kerry O'Brien was at pains to convince the Minister for Indigenous Affairs, Mal Brough that cuts to the Aboriginal and Torres Strait Islander Commission (ATSIC) Budget in 1997, especially funding for women's refuges, was a cause of the violence in the Northern Territory in recent times.[6] The same mind set as Jones.

Jones followed up the Rogers' interview and reports of the strife in Wadeye with an interview with Archbishop Barry Hickey, the chairman of the Catholic Bishops Commission for Aborigines and Torres Strait Islanders. Jones was angling to reintroduce the notion of a government apology to Aborigines, and asked Archbishop Hickey about recent comments made by the Pope "asking for forgiveness and granting forgiveness". Jones seized his chance:

> "The issue of an apology – there's no doubt in your mind I take it that the Pope is literally calling on the government to deliver an apology?".

But the Bishop disappointed:

> "He [the Pope] is not getting political, he's not buying into the fight as to whether this Prime Minister should say sorry or not. He's just talking about the principles of reconciliation …".
>
> Jones had stumbled into unfamiliar ground. He asked:
>
> "It's clear there's not going to be that kind of apology, though, isn't it already clear from the Prime Minister's response and also from the Liberal MP Wilson Tuckey today in your own State?
>
> "Hickey: Oh Wilson, yes, well he thanked the sisters [of Mercy], and I'm very grateful that he did … The comment about the sisters was a good one.
>
> "Jones: Can I just interrupt you just to point out to those who didn't hear what he said or read what he said, he said, 'If there's any apology, it should be to the Catholic nuns who took in the so-called', as he says, 'so-called stolen generation with utmost compassion …'. Do you have sympathy with that sort of statement?
>
> "Hickey: Oh I certainly do. The sisters and the priests and the brothers didn't steal any children. They opened their doors to accept children because they believed that they had nowhere to go. The government made them all wards of the state and they shouldn't have done that, but they did, they're still doing it, and they asked their missions to take the children in, which they did, in a spirit of compassion".[7]

As delicious was the shock expressed by Phillip Adams on *Late Night Live* when he interviewed Dr Sue Gordon, Chair of the National Indigenous Council. Adams worried about accusations of another "Stolen Generations" were children to be taken for their protection. He wondered if the current violence and abuse was "a legacy of a stolen generation". Gordon answered, "Often it's used as an excuse, we can't blame the stolen generations for what's happening now". The atheist Adams also tried to invoke the Pope's remarks as per Jones above, but Gordon was having none of the "Sorry" business, suggesting it was irrelevant. Gordon was able to

call on the *UN Convention on the Rights of the Child*, that the "best interests of the child [are] served by taking them out of home". Adams was aghast at the affront to Aboriginal mothers, to which Gordon answered, "Half the mothers are so drunk they would not know". [8]

Patrick Dodson, chairman of the Lingiari Foundation wrote recently:

> "The 1997 report *Bringing Them Home* highlighted the infringement of the UN definition of genocide and called for a national apology and compensation to those Aborigines who had suffered under laws that destroyed indigenous societies and sanctioned the biogenetic modification of Australian people".[9]

The worry with this is that our children at university are being fed this nonsense, and forced to toe the ideologically correct line.

Other pockets of resistance appear in the legal fraternity. A Melbourne-based "public interest" law partner with the firm Arnold Bloch was last week reportedly headed to the community of Wadeye to investigate whether under-funding of basic services is racially discriminatory. He says that if he finds the Territory government has breached the *Racial Discrimination Act*, he will lodge a case with the Human Rights and Equal Opportunity Commission.[10] Tom Calma, the ATSI Social Justice Rights Commissioner was also touting for business, trying to find a discrimination issue to "solve" the problem at Wadeye. Heaven save the Aboriginal people from the human rights lawyers.

And of course, there were the infamous Chief Justice Brian Martin's sentencing remarks at Yarralin, Northern Territory on Thursday, 11 August, 2005 in *The Queen and GJ*. The case concerned the deprivation of liberty, rape and beating of a 14 year-old girl by her 55 year-old grandfather. The result was a conviction for one month of assault and unlawful sexual intercourse. The Chief Justice had this to say to the guilty man:

> "The accused and the child's grandmother decided that you would take the child to your outstation. The grandmother told you to take the child and the grandmother told the child that she had to go with you. The child did not want to go with you and told you she did not want to go. The child also asked her grandmother if she could stay. Rather than help the child, the grandmother packed personal belongings for her, including her school bag, and insisted that the child go with you. The child was forced to get into your car, where she sat with your first wife and two other persons. The child was crying and shaking.
>
> "In these circumstances, while I might have misgivings about your state of mind, I do not have before me proof that the objections by the child made you realise that she was not consenting. At the least, it is a reasonable possibility that your fundamental beliefs, based on your traditional laws, prevailed in your thinking and prevented you from realising that the child was not consenting. In these circumstances I have no choice but to sentence you on that basis. I must sentence you for unlawful sexual intercourse. I am not sentencing you for the crime of rape.
>
> "During the evening you took the child by the leg and dragged her into the first bedroom. Your first wife took the children and went to another room. The child kicked and screamed and resisted you. You lay [sic] her on a bed in the room and asked her for sexual intercourse. She told you that she was only 14 years old. You hit her on the back. You then lay next to the child and remained there throughout the night. No act of sexual intercourse occurred.
>
> "The child spent the next day in the company of your first wife. That night you told her to go into the bedroom. She obeyed and you followed her into the bedroom, where you removed all your clothes except your T-shirt. You then pushed the child onto the mattress. The child was lying on her stomach. She told the police that you had a boomerang in your hand and that you were threatening her with it …..
>
> "While the child was laying [sic] on her stomach you had anal intercourse with her. During intercourse the child was frightened and crying. She was in pain. You injured the child …..
>
> "Mr GJ, I have a great deal of sympathy for you and the difficulties attached to transition from traditional Aboriginal culture and laws as you understood them to be, to obeying the Northern Territory Law.
>
> "Mr GJ, that means that you must go to gaol for one month and I hope that you will be able to come out of gaol after one month and return to your community and to your family".[11]

These views are not isolated to a few in the profession. The recent report of the Western Australian Law Reform Commission is a concern. For example, it recommended that the relevant criteria for an application for an extraordinary driver's licence as set out in s. 76 of the *Road Traffic Act* 1976 (WA) be amended to include:

"That where there are no other feasible transport options, Aboriginal customary law obligations be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.

"In making its decision whether to grant an extraordinary driver's licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.

"That the *Fines, Penalties and Infringement Notices Enforcement Act* 1994 (WA) be amended to provide that an Aboriginal person may apply to the registrar of the Fines Enforcement Registry for the cancellation of a licence suspension order on the additional grounds that it would deprive the person or a member of his or her Aboriginal community of the means of obtaining urgent medical attention, travelling to a funeral or travelling to court".[12]

The effect of these recommendations, apparently favourably received by the WA Attorney-General Jim McGinty, would be to cause more deaths through traffic accidents as unlicensed drivers attend funerals associated with deaths from traffic accidents.

The public response to the plight of Aborigines has been overwhelmingly sympathetic and generous. In 1975, the Commonwealth government spent $200 million on Aboriginal people, rising each year until this year 2006-07, when it will spend more than $3.3 billion.[13] The reason why policy is at the turn though is because the public expected a bit more for its money than rape unpunished, declining levels of literacy and numeracy, the wilful destruction of property, and the creation of a generation who will never work, and may have to be cared for until the day they die.

Overturning truths

Added to the overwhelming evidence of the damage done by the self-determination policies of the last thirty years, and to the intellectual denials, is the damage done by some major propaganda exercises of the last decade, the legacy of which may be to prevent the economic integration of Aborigines.

Between 1991 and 2000 three major episodes added weight to the separatist agenda. These were *The Royal Commission into Aboriginal Deaths in Custody Report* (1991), The Human Rights and Equal Opportunity Commission Report, *Bringing Them Home* (1997) (and its court sequel *Cubillo*), and *The Hindmarsh Island Royal Commission* (1997) (and its court sequel *Chapman*). The first two are especially important because they may well constrain the hands of policy-makers and public servants in the new policy era.

The Royal Commission into Aboriginal Deaths in Custody was established in 1987 in response to a growing public concern that Aboriginal deaths in custody were too common, and that public explanations were too evasive, to discount the possibility that foul play was a factor in many of them. Between 1980 and 1989, 99 Aborigines and Torres Strait Islanders died in the custody of prison, police, or juvenile detention institutions. Many members of the Aboriginal community assumed that many of the deaths would have been murder committed by officers of the state.

The Commission produced 110 volumes, totalling over 12,000 pages at a cost of almost $30 million. At the time, it was the most expensive inquiry in Commonwealth history.[14] For all this, the Commission stated:

"The conclusions reached in this report will not accord with the expectations of those who anticipated that findings of foul play would be inevitable … Commissioners did not find that the deaths were the product of deliberate violence or brutality by police or prison officers".[15]

It also found that while Aboriginal people were in custody overwhelmingly more frequently than the general community, "Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody".[16] Indeed, the Commission noted that, at least for those Aborigines who had encountered the law, "the death rate of those Aboriginal people on non-custodial orders is approximately twice that of Aboriginal prisoners";[17] in other words, the risk of death might actually be greater outside custody.

Further analysis of the Commission data and published later reconfirmed the conclusions, although using slightly amended terms:

"Young adult Aboriginal males have almost exactly the same probability of dying when they are in the community as when they are in prison. The risks of death in custody experienced by Aboriginal people and non-Aboriginal people are similar … The finding that both Aboriginal and non-Aboriginal people have risks of death in police custody that are far higher than they have in the community would not be

surprising to many, but the finding that, in both groups, the risk of prison death is similar to that in the community is perhaps more novel".[18]

There are at least three disturbing aspects of the Commission. First, the Commissioner and the Commonwealth government were made aware of the primary conclusion, that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody, *just six weeks into the Inquiry*. My parliamentary colleague Senator Bob Collins of the Northern Territory conveyed this to me some short time after. The fact was confirmed in 1992 by the author of the research, who wrote:

> "The hostility towards the work of the Criminology Unit reached a climax only a few months after the work started, when it became clear that the research showed that Aboriginal persons in either police or prison custody were no more likely to die than were non-Aboriginal people. This general finding was interpreted by some significant elements of the staff as undermining the very foundations of the Royal Commission. To even hint that such a conclusion was possible was seen as disloyal, misguided and obviously wrong. At one stage the very existence of the Criminology Unit within the Royal Commission was threatened. It was able to continue its work, however, albeit with a smaller staff".[19]

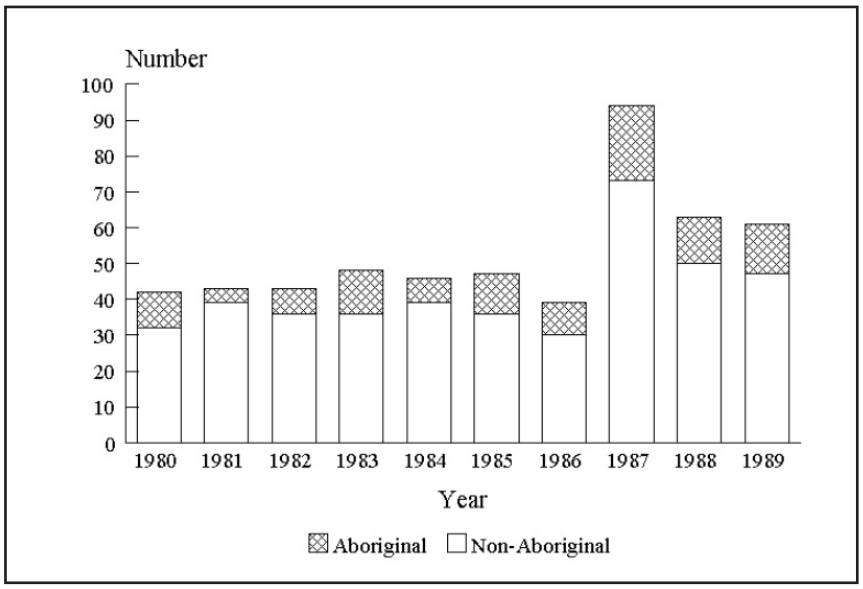
The response by the government was not to reveal this fact, but to set the Commissioner another, altogether different task. The initial task was to inquire into the deaths and into "the conduct of coronial, police and other inquiries". The new task declared "you are authorised to take account of social and cultural and legal factors which, in your judgment, appear to have a bearing on those deaths".

The Commission turned from a "super" coronial inquiry into a grand social science exercise into the causes of Aboriginal disadvantage. Much of this exercise was not at all new to the policy community. For example:

> "Of the ninety-nine, eighty-three were unemployed at the date of last detention; they were uneducated … only two had completed secondary level; forty-three of them experienced childhood separation from their natural families through intervention by the State authorities, missions or other institutions; forty-three had been charged with an offence at or before aged fifteen and seventy-four at or before aged nineteen; forty-three had been taken into last custody directly for reasons related to alcohol, and it can safely be said that overwhelmingly in the remaining cases the reason for last custody was directly alcohol related".[20]

The Commission started on a narrow inquiry for which it was well qualified. When its terms of reference expanded, it embarked on a study for which it was not well qualified. It simply jumped from evidence of deaths to preventive social policy. In so doing, it took up the policy fashion of self-determination in the hope that this would stem the flow of incarceration and deaths in custody. Moreover, it made great claims of the impact of children's removal from their parents, and this stimulated a second grand inquiry.

Deaths in Custody Australia 1980-1989[21]

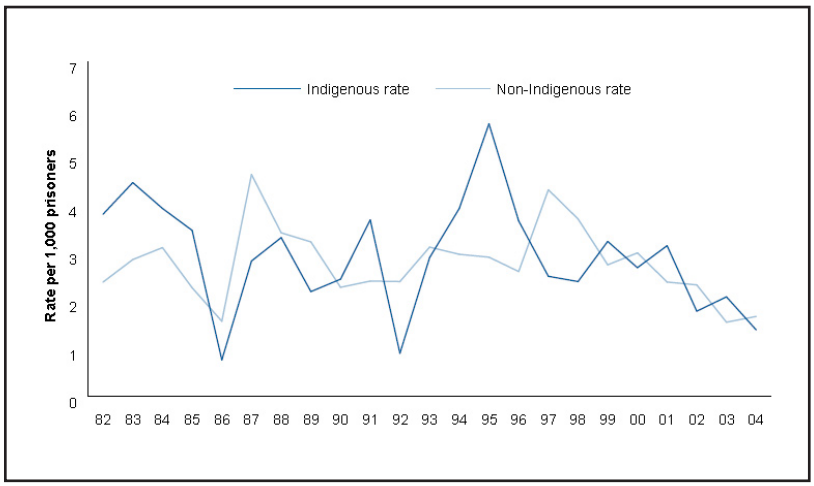


The second disturbing aspect was the interpretation of the evidence that led to the Inquiry. The graph above, *Deaths in Custody Australia 1980-1989*, shows two trends. The first is a spike in the number of deaths in custody in 1987; the second is that the spike occurred for non-Aborigines as well as Aborigines. There was no inquiry into non-Aboriginal deaths in custody following the rise in those deaths. Clearly, the government was discriminating based on race. Deaths in custody are a matter of great concern, but on the evidence before the government, there was no basis for an inquiry into Aboriginal deaths in custody alone.

The third disturbing aspect of the Inquiry was its impact on deaths in custody, not in terms of its recommendations, but in terms of the possibility that the massive publicity associated with the Inquiry could have caused deaths in custody. The graph opposite, *Prison Custody Deaths by Indigenous Status 1982-2004* shows a major lift in the rate of *prison* deaths in custody for Aborigines in 1993 to 1995, shortly following the Inquiry. Indeed, apart from a sharp drop in 1992, the trend was increasing for Aborigines, although more stable for non-Aborigines, for the entire period 1989 to 2005. That is, from the commencement of the Inquiry into Aboriginal deaths and a period which was largely filled with public discussion of the Inquiry, its recommendations and the political battles over their implementation, Aboriginal prison deaths alone rose substantially.

What caused the jump in Aboriginal prison deaths in the period 1992-1995? The research indicates that "self-inflicted deaths and deaths due to natural causes have consistently been the two most common manners of death since 1980".[22] These causes were apparent in the spike of 1992-1995. No explanation for the spike has been provided. The figures for the rate of death are likely to be more stable than the crude number of deaths, and the figure for Aboriginal deaths may be more volatile because the numbers of Aboriginal prisoners are fewer, but in the various reports following the Inquiry there is no accounting for the significant lift in the rate of Aboriginal deaths in prison custody, many of which are suicide. Is it possible that the enormous media coverage given to the Commission and the reports of the implementation of its findings could have had a social contagion effect – labelled the Werther effect?[23] (The sociologist David Phillips coined the term "the Werther effect" to describe imitative suicidal behaviour operating as contagion transmitted via the mass media). The copycat explanation never rated a mention in reports by the Australian Institue of Criminology.

Prison Custody Deaths by Indigenous Status 1982-2004



Source: Australian Institute of Criminology, NDICP 1982–2004.[24]

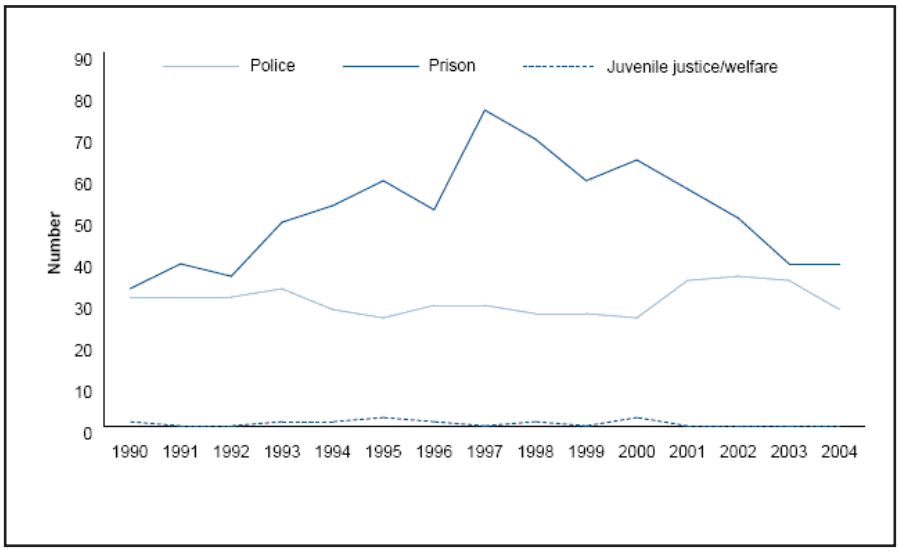
The graph, *Trends in Deaths by Custodial Authority 1990-2004* reinforces the trend in the rise in prison deaths following the Inquiry, and the relative lack of change in deaths in police custody. (Figures were not available by rate). Fortunately, the rate of prison deaths has declined for Aborigines and non-Aborigines, which may have been as a result of the implementation of the recomendations of the Royal Commission. The decline in the rate of deaths in *police custody*, however, has been heralded as a triumph of the Royal Commission and self-determination, but it could not explain the increase in the rate of deaths in prison other than by *absence* of implementation of Commission recommendations. Of course, an absence of change would not cause a rise in deaths in custody.

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their

Families was conducted by the Human Rights and Equal Opportunity Commission and produced the report called *Bringing Them Home*. It was commonly referred to as "The Stolen Generations" report for reasons that will become clear.

The Inquiry arose from the observation in the Report of the Deaths in Custody Inquiry that a number of the dead were "taken" into care as children. That Report also mentioned that all 99 people who died had very little education, but more of that later. The National Inquiry commenced in 1995 aiming to "trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies".[26] It was a most serious topic, and there was little doubt that many Aborigines had been removed from their families in earlier generations, in some cases with devastating results. Unfortunately, the report was seriously flawed. It was, as a colleague described it, "one of the most intellectually and morally irresponsible reports to be presented to an Australian government in recent years".[27]

Trends in Deaths by Custodial Authority 1990–2004



Source: Australian Institute of Criminology, NDICP 1990–2004.[25]

A crucial fallacy of the report was that it treated all separations as forced, including those that were voluntary or where there was a clear need for the sake of the welfare of the child to be taken. Such all-encompassing definitions enabled the Inquiry to conclude that, "between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970".[28] This, despite evidence that many removals were in the interests of the child and in many instances, children were fostered with Aboriginal families, thus undermining the charge of assimilation as the purpose of removals.[29] It also failed to give the context of removals, for example, the considerable pressure exerted on unmarried mothers, Aboriginal and non-Aboriginal, to give up their children for adoption. Further, the method of the Inquiry was seriously flawed, as it did not test any allegations, but simply accepted all stories as valid.

The most offensive aspect of the Inquiry was its finding that the forcible removal policy constituted "genocide" and "a crime against humanity" in the terms of the *United Nations Convention on Genocide*.[30] In the view of the Commission, even assimilation, that is, an attempt to give people a choice to escape poor circumstances, could be genocidal:

> "The Commission maintained this view despite the fact that, post WWII, the International Labour Organisation considered bringing indigenous people into the modern world to be 'desirable and just'. ILO Convention 107 on *The Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations* suggests that at the end of the period of the so-called stolen generations in Australia, the most 'enlightened' international policy was assimilation".[31]
>
> Take as an example this evidence before the Commission:
>
> "In a letter to the West Australian Commissioner of Native Affairs in November 1943, Inspector Bisley

of Port Hedland wrote, 'I recommend that this child [4 years of age] be removed when she is old enough as she will be probably handed over to some aged blackfellow at an early age'. With respect to the same child, Inspector Neill in Broome wrote to the Commissioner in December 1944, '[t]here may perhaps be an objection to the children being removed from the Hospital without first returning to the Station from which they came as it means breaking faith with the mothers".[32]

Judged by contemporary standards this behaviour was appalling, but there was an interest in saving the child from a then widely known practice among tribal Aborigines of giving young females to older men. Nevertheless, the child was not reported to be in actual danger and the mother's permission for removal was not sought.

Unfortunately, the tendency to replay the past as if later policy had not adjusted to earlier excesses makes the problem of the need to enforce standards of care just as difficult today. The contemporary difficulty is that the state is too reluctant to intervene in Aboriginal families for fear of allegations of racism being levelled. An Aboriginal advocate for Aboriginal children and women recently stated:

"Departments of community services don't want to create another stolen generation so we find a lot of Aboriginal children are left in a dangerous situation because some white or black worker doesn't want to be called racist".[33]

The sequel to the Stolen Generations report and its attempt to press a genocidal claim has been severely dented by the Federal Court of Australia. The Aboriginal leadership ran a test case[34] on the Stolen Generations, which was comprehensively dismissed. For future cases to succeed there will have to be proof that Commonwealth actions were not in the best interests of the child. The question of judging a concept like "best interest", not by contemporary standards, but in the light of the policy and custom of the day was raised:

"[T]he events that I am being asked to judge and evaluate commenced in 1942 and finished in 1960. Thus in 1999 I am asked to judge that which took place 39 to 57 years ago … these are events that occurred in a different Australia, a society with different knowledge, and with different moral values and standards".[35]

The judge noted that the *Bringing Them Home* Report did not inquire into separations that were effected with the consent of a child's family. "Nor did they require a consideration of cases where a neglected, destitute, sick or orphaned child might have been removed without the consent of the child's parents or guardian". HREOC, and the federal Government that set the terms of reference, left out the crucial matter of the context within which children were removed. The judge in this case did not make that mistake; he remarked that alcoholism and violence became larger social problems for part-Aboriginal people after they achieved drinking rights, and that it often had welfare implications for their children.

The two major Inquiries of the last decade in Aboriginal affairs reinforced an ideology that cried out for retribution and compensation, for separate rules for Aborigines and a different contract between an Aboriginal citizen and the state and any other citizen. The damage done to policy by these Inquiries is not just their inaccuracies, but in their blinding policy makers to the root cause of Aboriginal strife – the lack of economy in remote Aboriginal communities and the lack of education among their children.

Mapping the future

The turn of events in recent months is that the Australian Government in particular is beginning to understand that Aboriginal people are not much different from others. They have been behaving badly for good reason. They have responded to perverse economic incentives and an ideology of payback. They learned to gain a living by not working, and by insisting on living on land on which their ancestors may have walked and asking for rent – a not overly intelligent or noble basis for deriving an income.

To help turn the corner I have a research proposal, the object of which is to impress upon all concerned that there is a new direction in Aboriginal policy – Aboriginal people must search for the real economy, it will not come to them. The proposal aims to generate a scenario of Aboriginal society in the next twenty-five years, with particular emphasis on the post-land rights, post-welfare era and the impact on Aboriginal communities.

As remote area exemptions for welfare benefits are being abolished, and CDEP is being wound down or converted to training and job brokering, Australia will witness, as it did until the 1960s, a movement into town. There is ample evidence already that the movement has started and is growing. The scenario will make

the event more concrete, so that when the difficult issues of the abandonment of remote settlements and the growth of town camps arise, policy-makers will be able to remain focused on the principal job, which is adjustment.

Government policy has been biased towards remote settlements. The contention is that the incentive to remain in remote locations will change substantially. The Commonwealth and the States/Northern Territory have provided income and infrastructure support as if permanent settlements could be made on the foundation of government expenditure alone, that is, in the absence of a real economy. Even when there was real economic activity, such as a mine, local Aborigines did not necessarily have the skills to apply, nor could these skills necessarily be acquired *in situ*. In short, there is limited scope for most remote settlements to thrive.

Because of the removal of the bias in policy towards remote communities, there will be enhanced internal migration: greater numbers of Aboriginal people will move into town. Others may not, but their circumstances will change because of family members leaving. In either case, the consequences for policy will be significant. Who will require assistance, and where they will require it, as well as the nature of the assistance, will change.

Adjustment and mobility are, once again, fast becoming the dominant themes in Aboriginal policy. Periods of resistance to adjustment – the protection era and the land rights era – had some positive elements, but ultimately they were destructive and costly for many Aboriginal people. Land rights was always a minor story, and yet it has taken up much of the intellectual energy and too many of the resources. It is expensive because it is artificial. When the props of the artificial economy are kicked away, adjustment will once again become the dominant theme, and the dominant reality.

The Minister should prepare the rhetorical and policy ground for the next 25 years, and a scenario would be one tool in the policy arsenal. The scenario would consist of two sets of data:

- A map of Aboriginal communities, with likely internal migration destinations and magnitudes; and
- A map of places where internal migration is likely to have most impact.

There will be a discussion of the options for places experiencing loss of population and for places experiencing gains in population. The discussion will be based on evidence from regional centres experiencing influx and those experiencing outmigration.

Some work, based on the Census, is available, and suggests some drift.[36] The studies, however, reflect flow to cities and regional centers under present incentives. It is likely that flows will be greater under the new incentives. The conclusions, therefore, understate the situation, as the Census reflects movement in an historic period of policy settings that privilege remote locations.

Policies aimed at stabilising communities *in situ* will, all things being equal, lessen the impact of the change drivers, but in the race between economic development on Aboriginal lands and the incentives to search for work and services away from those lands, the latter will win.

Change drivers:

- The artificial labour market will unravel, driven by the removal of Remote Area Exemption on Centrelink programs, and the shift in CDEP to delivery of employment services.
- Education authorities are beginning to re-impose authority to ensure attendance and the teaching of literacy and numeracy.
- Changes to the *Northern Territory Land Rights Act* may encourage some people to sell their land and leave.
- Chronic poor health is driving people to seek long-term medical attention, which is available only in regional centres.
- Women are seeking physical protection, and hostels are more likely to be available in regional centres.
- Economic development is unlikely to be realistic for more than a handful of communities.
- Where economic development has taken place the local population does not necessarily have the skills to take advantage of it. Acquiring the skills is unlikely to take place in the community.

Stabilising programs:

- Alcohol and substance abuse programs – e.g., dry communities.
- Service agreements for utilities – telephone, sewerage.

- Shared Responsibility Agreements – no school, no pool.
- Infrastructure programs – housing.
- New settlements that result from Native Title claims.
- The investment in school facilities and staff.
- Investments by the Indigenous Land Fund and Indigenous Business Australia.
- The investment in law and order.

The 2006 Census will provide some guide to changes, in as much as the changes between 1996 (and earlier Censuses) and 2001 indicate growth and decline of numbers of people. They also indicate changes in vital characteristics such as education levels. The Census will not, however, be useful to demonstrate changes that are beginning to show only very recently as a consequence of government policy on welfare to work, and the failure of land rights to provide a satisfying existence for other than a few in remote communities.

The data most useful and most available will be from sources such as Centrelink client lists, State/Territory housing department lists, itinerant lists, and school records. For example, Aboriginal families are progressively filling the Northern Territory Department of Housing waiting lists in Darwin, and the Northern Territory Department of Harmony notes an increase in the number of itinerants in Darwin. Clearly, the camps at Alice Springs are growing. Experience is a vital teacher in this exercise. There is a string of regional centres in Australia that have experienced Aboriginal influx in previous generations. These will suggest the likely direction of change, the whereabouts, and the problems associated with the change.

The scenario will put some numbers on the changes. It will make estimates of the magnitudes – for example, how many people will move, where they are likely to go, and their educational/age/health profiles. The characteristics of those who leave are often different from those who stay. Depending on the reasons for leaving, the most enterprising are most likely to leave, and the least enterprising or least mobile are likely to stay. This change to the character of communities will have profound implications for both receiving and leaving communities.

This is not to prejudge outcomes, but to realistically assess what is likely when individuals and communities face changed incentives. There will be three sorts of movement: short term "walkabout" movement that is part of peoples' community activity; "orbiting" in the sense in which Noel Pearson means, children who leave their communities for education, and perhaps to return on graduation; and internal migration.

Internal migration will substantially transform Aboriginal society. More Aborigines will live in regional towns or the cities. How people will adjust and how their needs are to be met will be a challenge, as will the management of the communities they leave behind. If Aborigines are not to become, once again, refugees in their own land, governments and citizens must prepare for the next chapter in the Aboriginal story.

Endnotes:

1. In 2001 intermixed couples made up 69 per cent of couples with an Aboriginal member: Birrell, R and J Hirst, 2002, *Aboriginal Couples at the 2001 Census*, *People and Place*, 10(3): 27.

2. Sandall, R, 2001, *The Culture Cult: Designer Tribalism and Other Essays*. Boulder: Westview, viii.

3. Birrell, R and J Hirst, *op. cit.*.

4. Australian Bureau of Census and Statistics, 2001, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities, Australia*, Catalogue 4710.0.

5. Marxists: Marx & Engels: Library: 1848: *Manifesto of the Communist Party*: Chapter 1 http://www.marxists. org/archive/marx/works/1848/communist-manifesto/ch01 .htm.

6. O'Brien: "It was cuts of 20 per cent to the ATSIC budget in 1997 by the Howard Government that led to 37 women's refuges, nine family support and violence centres plus youth and children's services and other crisis centres around Australia being closed in Aboriginal communities. I guess we'll never know what violence may have been prevented by those measures?", The 7.30 Report transcript, May

23, 2006. http://www.abc.net.au/7.30/content/2006/s1645722. htm.

7. Lateline transcript, May 24, 2006. http://www.abc. net.au/lateline/content/2006/s1645758.htm.

8. May 24, 2006 http://www.abc.net.au/rn/latenightlive /stories/2006/1646563.htm.

9. *The Australian,* May 26, 2006, *Why a Short-term Fix Demeans our Nation*.

10. As reported May 24, 2006. http://www.abc.net.au /news/newsitems/200605/s1645846.htm.

11. Transcript of proceedings at Yarralin on Thursday, 11 August, 2005: The Supreme Court of The Northern Territory, SCC 20418849, *The Queen and GJ* (Sentence), Martin CJ.

12. Law Reform Commission of Western Australia, 2005 Discussion Paper, *Aboriginal Customary Laws Publications*, 106.

13. This does not account for expenditure by State and local governments. http://www.atsia.gov.au/Budget/budget06/ PDF/media_release.pdf.

14. Brunton, R, 1993. *Black Suffering, White Guilt: Aboriginal Disadvantage and the Royal Commission into Deaths in Custody*, Melbourne: Institute of Public Affairs, *Current Issues*.

15. Royal Commission into Aboriginal Deaths in Custody, 1991. *National Report*, Volume 1.2.2. http://www. austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html.

16. *Op. cit.*, Volume 1.3.1.

17. *Op. cit.*, Volume 3, 60.

18. David Biles and David McDonald, *Overview of the Research Program and Abstracts of Research Papers*, Research Paper No. 22, 631. http://www.aic.gov.au/publications/other /dic1992/22.pdf.

19. David Biles and David McDonald (eds), *Deaths in Custody Australia, 1980-1989 : The research papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody*, Canberra : Australian Institute of Criminology, 1992, Foreword.

20. *Deaths in Custody*, *op. cit.*, Volume 1.2.17.

21. David Biles and David McDonald, *Overview of the Research Program and Abstracts of Research Papers*, *op. cit.*, 627.

22. Jacqueline Joudo and Marissa Veld, *Deaths in Custody in Australia : National Deaths in Custody Program Annual Report 2004*, Australian Institute of Criminology, 2005 Technical and Background Paper Series, no. 19. http://www.aic.gov.au/publications/tbp/tbp019/05_prisonCustodyDeaths.html.

23. In the mid-1770s a peculiar clothing fashion swept across Europe. For no immediately apparent reason, young men started dressing in yellow trousers, blue jackets and open-necked shirts. This mildly eccentric fashion spread from region to region in a manner strangely similar to the epidemics that were continuing to plague the Old Continent. It turned out that these 18th Century fashion victims all had one thing in common; they had all been exposed to the first novel of Johann Wolfgang von Goethe, *The Sorrows of Young Werther*. Goethe's novel recounted the desperate plight of Werther, a young man hopelessly in love with a happily married woman called Charlotte. In this intense and romantic tale, Goethe describes Werther's rather peculiar penchant for wearing a colourful mélange of blue jackets, yellow trousers and open-necked shirts, and for having shot himself. http://pespmc1.vub.ac.be/Conf/MemePap/Marsden.html.

24. Joudo and Veld, *op. cit.*, 13.

25. *Ibid.*, 9.

26. Human Rights and Equal Opportunities Commission (HREOC), 1997, *Bringing Them Home*, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.* http://www.austlii.edu.au/au/other/IndigLRes/stolen/part1.rtf.

27. Brunton, R, 1998, *Betraying the Victims: The Stolen Generations' Report*, *IPA Backgrounder*, Melbourne: Institute of Public Affairs, 3.

28. HREOC 1997, Part 2, 10.

29. In a 1994 survey, over 10 per cent of Aboriginal persons aged 25 years and over reported being taken away from their natural family. Of these, 32 per cent were raised by non-Aboriginal or Torres Strait Islander adoptive or foster parents, 31 per cent by missions, and 28 per cent by orphanages or children's homes. *Year Book Australia 2002, Population Special Article – A Profile of Australia's Indigenous People*. Australian Bureau of Statistics. http://www.abs.gov.au.

30. HREOC 1997, Part 4.

31. Brunton, 1998, *op. cit.*, 11.

32. HREOC, 1997, Part 1.

33. Pamela Greer, quoted in *The Weekend Australian*, 3-4 May, 2003, 8.

34. *Cubillo v. Commonwealth* [2000] FCA 1084.

35. O'Loughlin J in *Cubillo*, quoting a fellow judge.

36. John Taylor, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, A Report to the Ministerial Council on Aboriginal and Torres Strait Islander Affairs, March, 2006; Taylor J and N Biddle, *Indigenous People in the Murray-Darling Basin: A Statistical Profile*. Discussion Paper No. 264/2004, CAEPR, ANU; Sanders W, *Indigenous People in the Alice Springs Town Camps: The 2001 Census Data*, Discussion Paper No. 260/2004, CAEPR, ANU.

Chapter Twelve
Federalism and the Liberal Party

John Roskam

Thank you to John Stone and The Samuel Griffith Society for the opportunity to present this paper. As someone who attended the first meeting of the Society in Melbourne in July, 1992 I welcome the opportunity to reflect upon what has occurred since that first meeting – even if such a reflection provides little cause for joy.

It is entirely appropriate that this topic be considered, given that at a previous meeting of the Society the subject of "Federalism and the Australian Labor Party" was examined (although some might argue that such a juxtaposition of "Federalism" and the "ALP" is as bizarre as the conjunction of the words "economic management" and "Gough Whitlam").

It is *not* the purpose of this paper to examine *what* has happened to federalism in Australia. This has been well-documented and it has been an important theme in the work of the Society.

Instead I will ask the question *why* federalism has been weakened by successive Liberal governments. I will argue that there are three key reasons for this:

1. The Liberal Party is above all pragmatic, and at times it has been willing to compromise its philosophical principles.
2. The Liberal Party defines itself, and its success, primarily around its policies on economic management and foreign affairs. Both economic management and foreign affairs require "national" approaches, and this attitude has been translated into other areas of policy that would not normally be regarded as "national".
3. The Australian business community, which is a source of policy influence on the Liberal Party, is more likely to favour centralist rather than federalist models of governance.

(Throughout this paper, whenever the Liberal Party is referred to it will usually be taken to mean the party as it operates at the federal level.)

The pragmatism of the Liberal Party

Let me begin by providing two quotations:

> "Now, I am a Federalist myself. I believe, as I am sure most of you do, that in the division of power, in the demarcation of powers between a Central Government and the State governments, there resides one of the true protections of individual freedom".

And:

> "...how true it is that as the world grows, as the world becomes more complex, as international affairs engage our attention more and more, and affect our lives more and more, it is frequently ludicrous that the National Parliament, the National Government, should be without power to do things which are really needed for the national security and advancement".[1]

The import of each sentence is quite different. However, in fact, both sentences are from the same paragraph, and the second sentence follows directly from the first. These are the comments of Robert Menzies, in one of a series of speeches delivered in 1966 after his retirement at the University of Virginia and subsequently published as *Central Power in the Australian Commonwealth*.

Menzies' remarks demonstrate his ability to pay lip-service to the idea of federalism while purporting to acknowledge the reality that federalism might run counter to the requirements of a national government.

From its very beginnings, the Liberal Party's rhetorical commitment to federalism was strong. But once the party had achieved government, that commitment in practice was weak.

The Liberal Party's policy for the 1949 federal election had a very explicit view of federalism:

> "As we believe in the division of power, so we believe that the States must be preserved as real governing bodies and not as the mere dependants of the Commonwealth. We shall therefore take an early opportunity of convening a special conference with the State Premiers to reconsider the problem of the

financial relations between the Commonwealth and the States".[2]

Of course the "reconsideration" that was promised never occurred. After winning government in December, 1949 other matters took priority for Menzies and debate about uniform tax was deferred. By 1958 he was acknowledging the frustration that many in his party felt about the lack of progress towards reversing the process of centralisation of the war years under Labor:

> "There are, naturally, complaints about Uniform Tax. The sound general principle is that each Government should raise its own taxes. This principle cannot be strictly applied to Australia".[3]

The idea that this "sound principle" and, more broadly, that federalism might not be able to operate in Australia was a point often made by Menzies as he cited the need for national coordination to fully develop the country's natural assets.

Menzies' pragmatism is easily demonstrated in his approach to federalism. It must be noted however that, notwithstanding his reluctance to disturb traditional arrangements, he was always careful to at least acknowledge the *theory* of federalism. A different Liberal leader, John Gorton, who spoke the truth when in 1968 he talked about the need to face the reality that Australia was hardly "federal", and who suggested that more powers could be centralised, incurred the wrath of his own party and Liberal State Premiers.[4]

The pragmatism of the Australian people (which implicitly the Liberal Party reflects) was recognised in a significant speech the Prime Minister, John Howard delivered in 2005 to The Menzies Research Centre. He said:

> "Australians are a non-ideological, pragmatic and empirical people. They want governments to deliver outcomes and not make excuses. They want governments that take responsibility, not states of denial".[5]

In that speech the Prime Minister enunciated what he believed were the weaknesses of Australia's federal system. In contrast to Menzies, who stressed that action by central government was required for the purposes of national development, John Howard put forward the case that federalism, by allowing State governments to obstruct "reform", was unsuited to the needs of modern Australia. He argued that the best custodian of individual rights was the federal government, not State governments. The Prime Minister used the case of industrial relations as an example:

> "The desire to have a more national system of industrial relations is driven by our wish that as many businesses and employees as possible have the freedom, the flexibility and the individual choice which is characteristic of the Government's philosophy in the area of workplace relations. And this can only be achieved at present by removing the dead weight of Labor's highly-regulated State industrial relations systems. *In this area the goal is to free the individual, not trample on the States*". [emphasis added]

Like Menzies forty years before him, the Prime Minister considered the benefits of federalism but at the same discounted their practical application:

> "Like other Liberals, I am a strong constitutionalist. The dispersal of power that a federal system promotes, together with its potential, and I stress potential, to deliver services closer to peoples' need, are threads of our political inheritance that I have always valued and greatly respected".
>
> But at the same time as he said this, John Howard also commented that:
>
> "I am, first and last, an Australian nationalist. When I think about all this country is and everything it can become, I have very little time for vestiges of State parochialism".

The Liberal Party and "national" issues

Ever since its formation in 1944 the Liberal Party has regarded itself as the custodian of the principles of responsible economic management and as the guarantor of a foreign policy that promoted Australia's status as a liberal democracy in alliance with the United States.

These two positions have a prominence above all else, and they are the province of the national government. This phenomenon has had a significant impact on the party's attitude to federalism. Social policy, for example in the areas of health or education, have traditionally been thought of as policies which provide a political advantage for the Labor Party, with the Liberals, at best, being able to neutralise this advantage. However, it is in areas of social policy that some of the benefits of a federal system are the most obvious, in that such a system allows for differentiation and experimentation.

A feature of the debate in the Liberal Party about federalism has been the clear division between the parliamentary party and the party's own membership. There have been few occasions when federal Liberal MPs have resisted the urge to centralise (the offer of Malcolm Fraser to the States for them to collect their own

income tax being a rare exception).

The Liberal Party was deliberately established by Menzies in such a way that the parliamentary party would determine policy. The party organisation could determine the "platform" but the parliamentary party determined "policy".

In the 1950s, after some years of the experience of government, Liberal Party members began to be frustrated by what they felt was the slow pace of change to federal arrangements under Menzies. So, for example, at the party's Federal Council in 1956 the following motion was passed:

> "That this Federal Council re-affirms its unswerving belief in the Federal system of Government. In so doing it stressed that the Federal system, which is based on the sovereignty of the individual States, is incompatible with uniform taxation.
>
> "Accordingly, this Council asks the Federal Government to take the initiative to ensure the earliest possible termination of uniform taxation, and in the interim, to resist all actions conducive to further unification".[6]

This was a direct challenge to the Menzies Government – but in response Menzies did nothing.

But while some of the party's membership were railing against uniform taxation, there were larger issues at stake, which dwarfed any concerns about federalism. In 1956 the Federal Council passed another motion which neatly captures the feelings of the time:

> "That this meeting, representative of the great Liberal organisation in all States, congratulates the Australian Government on its immediate and spirited support of the Hungarian people.
>
> "It affirms its admiration for the undying heroism of the Hungarian patriots, who were actuated by a deathless courage, by hatred of tyranny and devotion to the great Human Rights. It recognises that the USSR has been exposed as a ruthless Imperialist aggressor, and the Communist 'peace' sham has been destroyed. The Hungarian massacre is the admission of Russia's failure.
>
> "This Council sees in the Hungarian struggle, not a matter for bleak and hopeless despair, but the start of a great spiritual drive for the democratic liberation throughout Europe".[7]

A year later the Federal Council again urged the government to remove the burden of uniform taxation. By the end of the 1950s, after years of attempting to have Liberal MP's change their position, the party membership resigned itself to what appeared to be an inevitable future.

The next bout of rebellion on federalism from the Liberals' membership came in the 1960s in the wake of John Gorton's various pronouncements on the need to centralise the activities of the Australian federal and State governments. This prompted many angry responses, including this one from the State Executive of the Victorian Division of the Party in 1969:

> "The philosophy, approach and policies expressed by the State Parliamentary wing of the Party are at variance with the philosophy, approach and policies expressed by the Federal Parliamentary wing of the Party".

It said that the longer the issue remains unresolved the worse it gets – how can the Federal Government retain the support of the Victorian membership?

> "The ordinary Party member is being asked to support opposing viewpoints – as if he is above or incapable of the schizophrenic results of endeavouring to reconcile opposites".[8]

Liberals in Victoria feared that the party could split over the issue of federalism in the same way that the Labor Party split in the 1950s over Communism. The attitude in Victoria was shared around the country, with many State divisions coming to the conclusion that the only way to resolve the question of federalism was to return to the States direct income taxing powers, and have the Commonwealth abandon section 96 grants. It was these pressures, prompted by the actions of Gorton, that later encouraged the Fraser Government in some of its tentative and ill-fated moves to restore a degree of federalist balance.

As questions of economic and foreign policy are mainly determined by the actions of the Executive, another consequence of the Liberals' attention to these issues has been to neglect political institutions other than the Executive. Liberals have been quick to criticise the centralising tendencies of High Court judges, and more broadly the desire of judges to accrue to themselves more power at the expense of a democratically-elected Parliament, but Liberals have done little to reverse this trend. Similarly, a decade of Coalition government has had little impact on the prevailing bias of the nation's cultural institutions.

Business and federalism

The links between the business community and the Liberal Party are nowhere near as close as is commonly represented, or as critics of the two would claim. However, it is true that the views of business are influential upon the Liberal Party, and to a certain extent the Liberal Party believes itself to represent the interests of employers.

Generally speaking, business leaders have little time for notions of federalism. To them different State and federal regimes are a cost burden that they must bear (and which is then passed on to the consumer).

The attitude of business to federalism and diversity within a country such as Australia is in stark contrast to its calls for "international competitiveness". Diversity of laws is apparently acceptable between countries, but not within countries.

The rush to endorse the federal government's takeover of industrial relations has been endorsed by much of the business community. However, what few have paused to ask is, what will the situation be when (not if) Labor eventually returns to power? One of the points of federalism is that it disperses power – it is a sort of "insurance policy". The complications of differing State regimes on some issues are a small price to pay for such an insurance policy.

Conclusion

In his Menzies Research Centre speech the Prime Minister explained that his own attitude to federalism has changed over the years. Chief among the things driving his shift in approach were the forces of globalisation, and what he called the "nationalisation of both our economy and our society".

As an example of change, he cited the example of Menzies' defence on centralised wage fixation and arbitration – a position which he acknowledged few Liberals would hold today. He went on to say that issues in health, education, water, and indigenous policy might lend themselves to further Commonwealth interventions. In this regard the future for federalism under a Liberal government is not bright.

In defence of his policies, the Prime Minister cited the example of State governments many of which are hardly "decentralist":

> "At various times, State governments of both persuasions have found occasion to trample over local government decision-making. Without passing judgement on particular cases, it does expose the selective indignation of the States when it comes to the virtues of decentralisation. And a State education bureaucracy can appear pretty remote if you are a parent in Mount Isa or Kununurra struggling to make sense of your child's unintelligible report card".

This might be true. A bureaucracy in Brisbane or Perth certainly is remote from parents in Mount Isa or Kununurra. But imagine how much more remote parents in those places are from the bureaucracy in Canberra.

Endnotes:

1. Robert Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth power in the Australian Federation*, Cassell, London, 1967, p. 24.

2. *Joint Opposition Policy, 1949*. Speech delivered by Robert Menzies, 10 November, 1949.

3. *Joint Policy 1958*. Speech delivered by Robert Menzies, 29 October, 1958.

4. Speech, John Gorton, Mornington, 14 October, 1968.

5. *Reflections on Australian Federalism*, Speech delivered by John Howard, 11 April, 2005.

6. Liberal Party, Minutes of Federal Council Meeting, 1956.

7. *Ibid.*.

8. Liberal Party (Victorian Division), State Executive Minutes, 7 February, 1969.

Concluding Remarks

Sir David Smith, KCVO, AO

As I stand here attempting to follow the tradition established by our founding President, Sir Harry Gibbs, in closing our conferences with some concluding remarks, I am conscious of a number of factors.

The first is that I have been greatly honoured by this Society in being invited to succeed the late Sir Harry as your President. The second is that Sir Harry left some enormous footprints on this Society, its conferences and its publications. The third is that I have no hope of filling Sir Harry's shoes, so I shall not attempt to do so – I can only promise to do my best.

We were privileged to have not one but two High Court judges address our conference. Justice Dyson Heydon delivered the inaugural Sir Harry Gibbs Memorial Oration on Friday night, and he was followed next morning by Justice Michael Kirby (by video); the Honourable Tom Hughes, the Attorney-General who had recommended Sir Harry's original appointment to the High Court; Mr David Jackson, QC who had served as associate to Mr Justice Gibbs, then of the Queensland Supreme Court; and Mr Julian Leeser. Each spoke about different aspects of Sir Harry's life and work as lawyer, barrister, friend, judge and Chief Justice: together they gave us a wonderful word picture of a courteous and gentle man, an exemplar in the law, a judge of high principle, and a stout defender of the nation's Constitution and its institutions.

Our second conference theme – a Bill of Rights – was also one that was dear to Sir Harry's heart. Professor James Allan drew on the Canadian experience, and Mr Ben Davies on the experience in Victoria, to remind us of the difficulties in drawing the line between competing rights of individuals, of the dangers to parliamentary sovereignty at the hands of unelected judges, and of the risk to federalism from centrally-appointed judges. We also saw a whole new meaning has been given to the words "independent chairman".

On Saturday night Dr Janet Albrechtsen drew this section of our conference to a close by reminding us of the pernicious strategy that has been set in train to slowly give us State and Territory charters of human rights that would induce us to accept the ultimate goal – an entrenched Bill of Rights in the federal Constitution. It is my earnest hope that this Society and its members will respond to this latest threat to our system of parliamentary democracy and to our individual rights as citizens.

The rest of our conference programme was devoted to other causes that were of special interest to Sir Harry – Professor David Flint on the constitutional role of the Sovereign; Mr John Stone with a post-script to the constitutional referendum; Mr Stuart Wood with some spirited observations on the *Work Choices* case currently before the High Court, and on the judges hearing it; Dr Gary Johns on the emerging and very welcome changes in Aboriginal policy; and Mr John Roskam with a reminder of what, if anything, remains of the notion of federalism within the Liberal Party, and why.

I have commented somewhat more briefly than Sir Harry would have done on the papers presented to us because I want to use the rest of my allotted time to say something about one of his responsibilities as Chief Justice that has so far not been mentioned. I refer to his role as Chairman of the Council for the Order of Australia – the body that is charged with recommending the half-yearly honours lists of awards in the Order to the Governor-General, who is also Chancellor and Principal Companion of the Order.

The Council consists of members nominated by the Australian government, members nominated by the State and Territory governments, and *ex-officio* members – the Vice-President of the Federal Executive Council, the Chief of the Defence Force, and the Deputy Secretary of the Department of the Prime Minister and Cabinet.

When the Queen established the Order in 1975, the Chief Justice of the High Court was also an *ex-officio* member of the Council and served as its Chairman. Sir Garfield Barwick was the first Chairman, and he was succeeded in turn by Sir Harry Gibbs and Sir Anthony Mason. As Official Secretary to the Governor-General I was also Secretary of the Order of Australia and Secretary to the Council for the Order, and in that capacity it was my privilege to work closely with those three Chief Justices in their respective roles as Chairman of the Council.

I have no wish to make comparisons. All three of them devoted much time and energy to the task, and it was a demanding task which each of them discharged diligently and conscientiously. The success of the Order of Australia owes them much. Sadly, their successors on the High Court have been unable or unwilling to accept this additional burden, and I believe that, as a consequence, the honours system is the poorer.

As I have said, I make no comparisons, but as this conference has been organised as a tribute to Sir Harry Gibbs, I wish to add to what has already been said about him and to place on record his work as Chairman of the Council for the Order of Australia.

He always treated me and the members of my staff in the Australian Honours Secretariat with great courtesy. Whether we sat alongside him during meetings of the Council, or called on him in his chambers at the High Court to settle final details of a list of recommendations to go to the Governor-General and, in those days, to the Queen, he listened patiently and gave us whatever time we needed.

He obviously spent many hours reading the several hundreds of nominations and in preparing for each meeting of the Council. At each meeting he guided the Council gently and politely, steering a course through the competing interests of the Commonwealth, State and Territory representatives – indeed, it was an example of co-operative federalism in action.

But above all, he was determined to see that each nomination was considered on its merits. If the discussion around the table suggested that full credit was not being given to some aspect of the nominee's achievements, he would draw the Council's attention to it. If the discussion looked as if it was heading off at a tangent, he would bring the members back gently but firmly to the issue at hand. If the level of award being considered was out of kilter with past awards for similar or like services, he would bring this to the Council's notice. If the decision was to defer or reject a nomination, he wanted to be sure that that was the right decision.

In all of this Sir Harry's main concern was to ensure that each case was considered justly and fairly and properly. To him, each nomination was a pen picture of the achievements of a fellow Australian and of their contributions to our society, and he took great pains to ensure that every one of them received a fair go.

As always, we are indebted to John and Nancy Stone for yet another interesting, timely and enjoyable conference, and on your behalf I thank them most sincerely.

I wish you all safe journeys home.

Appendix
Contributors

1. Addresses

The Hon Justice Dyson HEYDON, AC was educated at Sydney Grammar School and the University of Sydney (BA, 1964). As NSW Rhodes Scholar for 1964 he took further degrees (MA, BCL) at University College, Oxford (1964-67), where he was Vinerian Scholar for 1967. Admitted to the Bar in 1971 (Gray's Inn, London) and 1973 (NSW), he became Professor of Law at Sydney University (1973-81) and Editor of the Australian Law Reports (1980-2000) and the NSW Law Reports (1981-2000). After practising at the Sydney Bar (QC, 1987) he was appointed a Judge of the NSW Court of Appeal (2000) before appointment as Justice of the High Court of Australia in 2003. As well as many articles in the law journals, he is also the author, either in his own right or with other distinguished legal scholars (former Justice Roderick Meagher, Justice William Gummow, Sir James Gobbo and others), of numerous books on the law.

Dr Janet ALBRECHTSEN was educated at Seacombe High School, Adelaide and the University of Adelaide (LLB Hons, 1987). After admission to the NSW Bar in 1988 she worked as a solicitor with Freehill, Hollingdale and Page (1988-91), and as a tutor at the University of Sydney Law School while studying for her PhD in Law which she completed in 2000. Subsequently, as a journalist, she has written for *The Sydney Morning Herald*, *The Age* and *The Australian Financial Review*. Nowadays, she contributes a regular weekly column to *The Australian*. In 2005 she was appointed to the Board of the Australian Broadcasting Corporation.

2. Conference Contributors

Professor James ALLAN, a Canadian by birth, was educated at WA Porter Collegiate, Scarborough, Toronto and at Queen's University, Ontario (BA, 1982; LLB, 1985), the London School of Economics (LLM, 1986) and the University of Hong Kong (PhD, 1994). After working at the Bar in Toronto and in London, he has since taught law in New Zealand, Hong Kong, Canada and the United States before appointment as Garrick Professor of Law at the University of Queensland in 2004. The author of numerous articles in professional legal journals, he says that, since moving to Queensland, he "has been revelling in a country not burdened with a Bill of Rights".

Ben DAVIES was educated at Melbourne High School, at the University of Melbourne (BA, 2001) and at Monash University (LLB, 2005). In 1996 he won the Australian Universities Debating Championship, and represented Melbourne University in the 2000 World Universities Debating Championship. A man of widely diverse interests (film-making, car restoration), he has been an adviser to two federal Ministers (Hon Tony Abbott and Hon Kevin Andrews), as well as being a member of the Victorian "No" Campaign Committee for the 1999 Republic Referendum. A member of the Board of The Samuel Griffith Society since 2003, he was the inaugural winner, in 2005, of the Governor-General's Prize for essays on the Australian Constitution. He is currently completing his articles in a Melbourne law firm.

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (BScEcon, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociale, Paris (DSU, 1979). After admission as a Solicitor of the NSW Supreme Court in 1962, he practised as a solicitor (1962-72) before moving into University teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. In 1987 he was appointed Chairman of the Australian Press Council, and in 1992 Chairman of the Executive Council of the World Association of Press Councils. In October, 1997 he became Chairman of the Australian Broadcasting Authority, resigning that post in 2004. He is the author of numerous publications and in 1991 was honoured by the World Jurists Association. During the 1999 Republic Referendum campaign he played a prominent part in the "No" Case Committee, and remains today National Convenor of Australians for Constitutional Monarchy.

The Hon Tom HUGHES, AO, QC was educated at St Ignatius College (Riverview), Sydney and the University of Sydney (LLB, 1948). After service in the RAAF (1942-46) he was called to the NSW Bar in 1949 and practised there (QC, 1962) before becoming the Liberal Member for Parkes (1963-69) and Berowra (1969-72) in the federal Parliament. In 1969, as Attorney-General in the Gorton Government, he recommended to Cabinet, and subsequently to the Governor-General, the appointment of the then Harry Gibbs to the High Court of Australia. Today, he remains heavily engaged at the Sydney Bar. In 2005 he was created Chevalier in the French Legion of Honour.

David JACKSON, QC was educated at the Marist College, Ipswich and the University of Queensland (BA, 1963; LLB, 1964). After serving (1963-64) as Associate to Justice Harry Gibbs in the Supreme Court of Queensland, he was called to the Queensland Bar in 1964 and practised there (QC, 1976) until 1985 before becoming a Judge of the Federal Court (1985-87). Following his resignation from that office he moved to the Sydney Bar in 1987, where he has since practised as the leading silk on constitutional issues. In 1985-87 he was Chairman of the federal Constitutional Commission's Advisory Committee on the Australian Judicial System, and in 1995-98 a member of the Judicial Commission of NSW. A Major in the CMF Australian Intelligence Corps (1959-71), he was also created (1979) Knight of the Sovereign Military Order of Malta. He has published numerous articles on constitutional and other legal topics.

The Hon Dr Gary JOHNS was educated at Flemington High School, Melbourne and at Monash University (BEc, 1973; MA, 1977) and the University of Queensland (PhD, 2001). As the Labor Member for Petrie in the federal Parliament (1987-96), he served as Special Minister of State (1994-96) and as Assistant Minister for Industrial Relations (1993-96). Since leaving Parliament in 1996, he has completed a PhD, while also serving as a Senior Fellow at the Institute of Public Affairs (1997-2006) and as an Associate Commissioner of the Productivity Commission (2002-04). He is currently a senior consultant with ACIL Tasman, President of the Bennelong Society and a regular contributor to the Opinion pages of Australia's leading newspapers and magazines.

The Hon Justice Michael KIRBY, AC, CMG was educated at Fort Street High School, Sydney and the University of Sydney (BA, 1959; LLB, 1962; BEc, 1966; LLM, 1967). After a brief career in NSW as a solicitor (1962-67) and barrister (1967-74), he became Chairman of the Commonwealth Law Reform Commission (1975-84) and a Deputy President of the then Australian Conciliation and Arbitration Commission (1975-83), before becoming a Judge of the Federal Court (1983-84). In 1984 he became a Judge (and President) of the NSW Court of Appeal (1984-96) before being appointed to the High Court of Australia in 1996. Among a wide range of other interests, he was President (1987-89) of the Australian Academy of Forensic Sciences (in succession to Sir Harry Gibbs), and in 1992 was a founding member of Australians for Constitutional Monarchy. A prolific writer and speech-maker, he has been involved in numerous causes both in Australia and overseas.

Julian LEESER was educated at Cranbrook, Sydney and the University of New South Wales (BA Hons, 1999; LLB, 2000). He was an elected delegate for Australians for Constitutional Monarchy at the 1998 Constitutional Convention, and subsequently served as a member of the "No" Case Committee for the Republic referendum. He has since served as Associate to High Court Justice Callinan (2000) and as Adviser to the then Minister for Employment and Workplace Relations, Hon Tony Abbott (2001) as well as, more recently, Special Adviser to the Attorney-General, Hon Philip Ruddock (2004-06), with responsibility for constitutional law and court administration. A solicitor, he has recently been appointed Executive Director of the Menzies Research Centre. He is currently working on a biography of the late Sir William McMahon.

John ROSKAM was educated at Xavier College, Melbourne and the University of Melbourne (LLB, 1990; BCom, 1991). After working for the then Victorian Minister for Education, Hon Don Hayward (1990-96) he also worked for Hon David Kemp, then federal Minister for Education, Training and Youth Affairs (1996-98). Having been Manager, Corporate Affairs with Rio Tinto (1998-2000) and Executive Director of the Menzies Research Centre (2000-02), he is now Executive Director of the Institute of Public Affairs, and is

completing his doctorate at the University of Melbourne on Liberalism and the Liberal Party. He is a regular columnist in *The Australian Financial Review*, and also writes for *The Age* in Melbourne.

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 1998 he attended the Constitutional Convention as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Republic referendum. He is now a visiting Scholar in the Faculty of Law of the Australian National University, where his researches, culminating in his book *Head of State* (2005), have greatly clarified the role of the Governor-General in Australia's constitutional arrangements. In early 2006 he became President of The Samuel Griffith Society.

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 the Executive Boards of both the International Monetary Fund 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. He has since 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 (1987-90) and Shadow Minister for Finance. In 1996-97 he served as a member of the Defence Efficiency Review, and in 1999 he was a member of the Victorian Committee for the No Republic Campaign. A principal founder of The Samuel Griffith Society, he has served on its Board since its inception in 1992, and is the Editor and Publisher of its Proceedings.

Stuart WOOD was educated at Scotch College, Melbourne and the University of Melbourne (BSc, LLB, 1992). After briefly working as a solicitor (1993-95) he was called to the Melbourne Bar in 1995, where he has since practised almost exclusively in the field of employment and labour law. He writes and speaks, from time to time, about industrial and legal matters.