Proceedings of the Second Conference of The Samuel Griffith Society

Upholding the Australian Constitution Volume Two

The Windsor Hotel, Melbourne; 30 July - 1 August 1993

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Published 1993 by
The Samuel Griffith Society
P O Box 178, East Melbourne
Victoria 3002
Printed by: McPherson's Printing Pty Ltd
5 Dunlop Rd, Mulgrave, Vic 3170
National Library Cataloguing-in-Publication data:
Proceedings of The Samuel Griffith Society
Upholding the Australian Constitution
Volume Two
ISBN 0 646 15439 7

Foreword

John Stone

Since the formation of The Samuel Griffith Society early last year, and its Inaugural Conference in July 1992, events, as is their wont, have moved on.

Three areas of the Constitution in particular have taken on enormously increased importance. I refer to the republican debate; the Aboriginal question (Mabo and all that); and, particularly though by no means wholly associated with the latter, the increasingly crucial question of the High Court's perversion of the external affairs power, section 51 (xxix) of the Constitution.

Even a year ago, each of these issues was already, as they say, alive and well and living in Canberra. During the intervening twelve months, however, the debate on each of them has taken on a greatly enhanced urgency.

All three issues raise in the most pointed fashion the matter which lies at the heart of the formation of The Samuel Griffith Society – namely, the growing need not only to contain the further expansion of power in Canberra, but also to restore a balance between States and Commonwealth much more akin to that which the Australian people established in the 1890s.

Whether we are speaking of the increased powers for the Prime Minister which are inherent in all Mr Keating's calls for a Republic; or the massive downgrading in the role of the States, and the balance of our whole Federal system, which is inherent in the outcome of the Mabo judgment and its aftermath to date; or the remarkable recent behaviour of at least six of the members of the current High Court, which for the first time in our nation's history has brought that previously esteemed institution into serious public question, not to say disrepute – all these issues come back, in the end, to one simple question: do we, or do we not, wish to see more power being exercised in Canberra?

I have no doubt as to the answer of the Australian people to that question. Indeed, one can only wonder at the quality of the leadership in our non-Labor federal political parties (Labor is, after all, avowedly centralist) that the nature of that answer appears either to have escaped their notice, or worse still, that they may have chosen to ignore it, having in mind their own possible role in some future Canberra–centred scheme of things.

However that may be, the second annual Conference of The Samuel Griffith Society, held at the Windsor Hotel in Melbourne on 30 July – 1 August, 1993 has sought to address, inter alia, all three of these issues. That Conference, whose Proceedings are now recorded in what follows, comprised two major addresses (one by the Premier of Victoria, the Hon. Jeff Kennett, and the other by the Society's President, the Rt. Hon. Sir Harry Gibbs) and ten papers delivered on a series of themes, particularly those three above-mentioned. Those who were privileged to attend throughout were, if anything, even more enthusiastic about the quality of these offerings than their predecessors had been twelve months earlier.

Following that Inaugural Conference the Society caused its Proceedings to be printed in a handsome volume entitled "Upholding the Australian Constitution". In line with that precedent, the Proceedings of our second Conference are presented in what will now become Volume II of the series by that name.

In my Foreword to last year's volume, I expressed the view that the papers contained in it were "of such a generally high order, and without exception generated such enthusiasm among those who heard them...., that they will come to be seen as having had a seminal effect upon the debate which now lies before us." On the basis of those two tests, I hazard the opinion that the present volume may, if anything, prove to be even more significant in that respect.

It is to that objective, at any rate, that this Volume II is also dedicated.

The Crown and the States

The Hon. Jeff Kennett, MLA

Premier of Victoria

We live in exciting – if not frustrating – times. The excitement is in the potential we have as a nation to position ourselves for the twenty first Century and become a major economic player in the Asia Pacific region. The frustration comes from our seemingly chronic incapacity as a nation to take a longer term strategic view about our future.

A few weeks ago I attended a Premiers' Conference in Canberra. Most of the morning of the one day meeting was devoted to "set piece" presentations by the Prime Minister, Premiers and Chief Ministers.

I made the point to the gathering about the absurdity of sitting around a table making statements which appeared to be solely for the benefit of the assembled media scribes and television personalities.

I made the suggestion then – and repeat it now – that Australia would be better served if the Prime Minister, Premiers and Chief Ministers locked themselves away for a few days without all the officials and media hounds and got down to the business of finding workable solutions to our many national problems.

Of course my proposal received the response we've all come to expect from the seasoned and cynical Canberra political commentators.

Yet when one looks back to the first National Australasian Convention in 1891, one of the most notable events was when some of the key participants representing all the colonies of Australia, including Samuel Griffith, locked themselves away for several days on the Hawkesbury River on the Queensland Government steamer S.S. Lucinda, to negotiate the course which led to federation and, ultimately, the development of a nation of which we can all be proud.

The constitutional arrangements eventually agreed upon have served Australia well. They mirror a nation whose spirit is fiercely independent and whose people hold firmly to the ideal of freedom. They have assisted in the determination of Australia's destiny in the intervening years.

One of the architects of federation, Alfred Deakin, spoke of the Constitution as a lofty achievement.

"I venture to submit," he said, "that among all the federal constitutions in the world you will look in vain for one as broad in its popular base, as liberal in its working principles, as generous in its aim, as this measure."

Of course the relationship between the Commonwealth and the States envisaged by the founding fathers – particularly the fiscal relationship – has evolved and altered over the past ninety years. The outcomes have been mixed.

As we approach the twenty first Century we need to address and resolve a number of inefficiencies and difficulties that have developed within our federal system.

With goodwill and commonsense there is no reason why we cannot make changes that benefit all Australians while at the same time preserving our federal structure.

For example, duplication by the Commonwealth and the States in the delivery of government services and the question of fiscal equalisation are just two matters requiring resolution.

However these are issues better addressed another time and in another forum.

On this occasion my brief is more specific. I have been asked to canvass the issue of the Crown and the States.
In doing so it may come as no surprise that my remarks will relate in large part to the current debate on republicanism.
It is an issue that has captured a considerable amount of attention over recent months.
At the outset let me say that I welcome reasoned debate about Australia's constitutional future. I do wonder, however, why such an issue deserves the inordinate amount of attention it has received when our nation faces a level of unemployment above one million, a chronic trade deficit, a projected rate of economic growth that is nothing short of abysmal, and when national economic reform is moving with glacial slowness.
Most of the noise on the subject of a republican Australia has been generated by those committed totally to the cause, not by those who are prepared to listen and debate.
Of course, ever since the first National Australasian Convention there have been groups of ardent republicans whose popularity has waxed and waned over the years.
The 1993 version of the republic debate in Australia has been engineered primarily by the Prime Minister.
I have no difficulty with the Prime Minister arguing in favour of constitutional change. Any member of our community has a democratic right to espouse ideas which he or she considers should be accepted by the community as a whole. Arguments favouring constitutional change, however, require clear statements about the benefits which would flow from such change.
In a mature democracy, failure to provide citizens with the clear objectives and implications of proposed constitutional changes is unforgivable. To create a belief – deliberately or through misunderstanding – that what is proposed by those favouring an Australian republic is only a small, cosmetic, "minimalist" change to our Constitution, when in fact it is a fundamental and radical change to the legal framework in which our laws, judicial system and government operate, is deceptive and will prove divisive.
One of the main difficulties I have with the approach the Prime Minister has taken in arguing for constitutional change is his apparent obsession with symbolism and rhetoric, little of which matches up to the substance of our political, constitutional and social history.
As the Premier of one of the sovereign States in the Commonwealth I am certainly not fazed by necessary change. In the past nine months our reform programs in education, industrial relations, health and other areas of government activity have gone far beyond the efforts of our political opponents, who have long thought they alone held the monopoly on having a reformist agenda.
In times of recession, when political and social difficulties are most acute, it is essential that elected governments make and implement decisions on a day–to–day basis based on deliberations as to what will deliver the greatest long term benefit for the common good.
However there is a great difference between making the day–to–day decisions and proposing changes to the very fabric of our democratic structure.
Reform of the constitutional structures within which government operates must be made by the people, fully informed of the ramifications of the changes, conducted with caution and free of political manipulation.
There is something inherently sinister about those in government manipulating changes to the very structure of society without publicly canvassing the implications and consequences of any proposed changes.
There are two points to be kept in mind.
First, the federal system within which we operate provides the greatest protection against the abuse of power by a single government.

Second, without careful deliberation, it would be foolish to consider changing a system in which the checks and balances of federalism have ensured relative certainty and stability.
If by describing himself as a "minimalist" the Prime Minister wishes to convey that the change he proposes is not fundamental, nor fraught with difficulty, then he is failing to describe accurately the possible results of his proposed changes.
In a recent article in The Times newspaper, under the heading "No Charter For Revolution", William Rees-Mogg wrote:
"If human history teaches anything it is the difficulty and danger of changing the system of national authority and the extreme foolishness of doing so when it is working in a benign way."
With this warning in mind – and hopefully without lapsing into legal terminology – it is worthwhile canvassing some of the constitutional difficulties inherent in turning Australia into a republic.
First, to create a Republic of Australia the Constitution must be amended.
Section 128 of the Federal Constitution is a section which allows for such amendments. It requires the Commonwealth Parliament to pass an amending bill setting out the changes proposed, and then requires a majority of Australians and a majority of the States to agree.
Not for one minute do I believe the founding fathers of the Constitution contemplated this section would be a vehicle for removing the Monarchy.
It is not surprising therefore that it turns out to be entirely unsuited for the task, so much so that eminent constitutional lawyers of the calibre of Professor Lumb, Sir Robert Garran, HB Higgins, Professors Harrison, Moore, Sawer, Howard and Lane and Dr Wyres have all raised serious doubts about whether the Constitution could – or should – be amended in this way.
Even those who believe that it can be so amended regard it as problematic and likely to lead to High Court challenges.
The problem arises because "The Constitution" is not an Act but is contained within an Act. To be precise, "The Constitution" is in clause 9 of the Commonwealth of Australia Constitution Act 1900.
An examination of its development shows that this was deliberate. The problem is that without some imaginative interpretation section 128 may amend "the Constitution", but not the covering clauses of the Act – clauses 1 to 8.
These other clauses clearly envisage the continuation of the Crown. Whatever arguments are made about their continued relevance, clause 2 both provides for the continuation of the Monarchy and prevents indigenous monarchies being instituted.
A number of distinguished Australians versed in constitutional law, including Sir Zelman Cowen, Professors Howard and Lumb (and even Senator Gareth Evans) have referred to the words "indissoluble Federal Commonwealth under the Crown" which occurs in these covering sections, noting that it gives rise to serious problems facing the proposal to create a republic.
It was probably envisaged by the founding fathers that alteration of these provisions would have to be carried out in the United Kingdom. However the Commonwealth closed off that possibility when the Australia Acts 1986 were passed in both the United Kingdom and Federal Parliaments.
The effect of those Acts is to ensure that the United Kingdom cannot amend the Constitution, and any amendments to the covering clauses must be carried out under section 15(1) of the Australia Acts with "the unanimous participation" of State Parliaments.
As the Australia Acts could not, and do not, give any further powers to section 128, despite the obscure wording of section 15(3) of those Acts we are left in a position which appears to fit the original intention of the founding fathers to enshrine the Westminster system.
If this analysis is correct then the Prime Minister's proposals cannot be carried out without the agreement of all State governments.

Second, alongside the section 128 barrier there is another of equal height.
The Constitution was the product of an agreement between the then six colonies. The process began with proposals in the Legislative Council of New South Wales in 1846 and culminated with the National Australasian Convention in 1891 and the Federal Conventions which continued in three States between 1897 and 1898. These were followed by referenda in each of the six colonies, followed by the enactment of the Commonwealth of Australia Constitution Act in 1900. The colonies became States which had undertaken collectively to create a Commonwealth Government which would operate in a federal system with them.
Fundamental to the Constitution are three institutions: the Crown, the legislature and the judiciary. The Crown has remained the unifying influence. All judges, ministers and public servants are servants of the Crown, not in the sense of servitude but in the sense that each owes a duty beyond self to the nation as a whole.
The Crown is therefore implicit in the Constitution. It is argued that to remove the Crown is not to amend the Constitution but to change it for another. This cannot be done by section 128. Constitutional commentators such as Dr Wyres, A Cannaway, J Quick, Sir Robert Garran, D O'Connell and Professors Sawer and Lumb have also raised the problems and difficulties associated with this barrier.
Whatever the legalities of the argument to change Australia into a republic, instituting fundamental change of the same legal dimensions that was achieved by revolution in America requires much more than the support of fifty–one per cent of the population and four of the six Australian States.
A third legal barrier concerns the position of State Constitutions and State Governors.
While the Crown in right of the Australian Federal Government is the same as the Crown in right of each of the States, each is separate. Each State has a separate Crown, legislature and judiciary. There are seven separate parties to the Australian Federation.
The Commonwealth Government has defined and specific powers. The six State governments retain plenary unlimited power outside the specific areas reserved for the Commonwealth Government. I do not intend to delve here into a comparison of the arguments of those who favour the centralisation of power and those who prefer power to be decentralised, except to say that I belong to the latter camp.
The legal question is: can section 128 amend not only the Federal Constitution but also State Constitutions and remove the State monarchies and thereby State Governors?
Section 106 of the Federal Constitution preserves the Constitutions of the States, and section 7(1) of the Australia Acts preserves the monarchical system of the States.
The Chairman of the Prime Minister's Republic Advisory Committee has made off the cuff comments to the effect that, to get over the problem associated with amending State Constitutions, he might recommend that the Federal government becomes a republic and leave the State monarchies and State Governors intact.
Putting aside whether Her Majesty would be willing to place herself in such an embarrassing position, the general view of constitutional lawyers is that this would be highly undesirable and would certainly not achieve the Prime Minister's objectives. However as Professor Lumb points out:
"The republican amendment could do this directly or indirectly by requiring that the Head of State be an Australian citizen and not represent or be appointed by an official outside the country. This would be a demonstrable intrusion into the Constitutions of the States and will conflict with the Australia Acts...it should be seen...by the people of every State for what it is: not only an attack on the Crown but also an assault on our Federal system of Government."

On this particular point the eminent constitutional lawyer, Professor Geoffrey Sawer said "the answer is much disputed and without judicial authority even in the way of dicta".
Even those who support the republican case agree that despite the confusing wording of section 15(3) of the Australia Acts it would not be possible to remove recognition of State monarchies under that Act without the agreement of State governments.
States have their own constitutional restrictions on removing the Monarchy. Victoria requires an absolute majority in both Houses. Queensland requires a referendum. Western Australia has both such limitations.
These are the major legal difficulties facing those who are currently arguing that Australia should become a republic.
There are also other difficulties such as the possibility of express limitations on section 128 and whether this section can be used to amend itself.
Before leaving the legal difficulties facing the republicans I note that sub section 51 (xxxviii) may cater for radical change to the Constitution and covering clauses. It allows an amendment to any power under the Constitution that could only, at the time of the establishment of the Constitution, be exercised by the United Kingdom.
However the founding fathers restricted the use of this section to circumstances where all the States agreed.
A debate that pretends these problems do not exist is not an honest debate.
Claims of "minimalist" change without reference to the great deal of time consuming work, conflict and anxiety any attempted amendment would cause are misleading. Apart from those addicted to change at any price, Australians asked to agree to constitutional change cannot be expected to give a reasoned response unless they are in a position to balance the cost of the changes against the value of the benefits which are being alleged.
In fact there would be a minimum of thirty alterations to the Constitution to achieve the Prime Minister's so called "minimalist" amendments.
This brings me to the political costs. Changes of this magnitude should not be made unless the overwhelming majority of Australians in each of the States want the change.
To settle for anything less is to invite bitter division. What would happen if two of the six States voted against Australia becoming a republic and against their States losing the Crown? This is a possible outcome of a section 128 referendum. The governments of those States would be obliged to fight the proposed changes in the High Court. Win or lose, the prospect of deep division on State lines with Australian fighting Australian is deeply disturbing.
Even if every State voted for a republic, which on past indications is highly unlikely, it is still likely that a significant percentage of Australians would, on present polling, reject the proposed change. We could then face the unfortunate situation where an allegedly symbolic change, the sole benefit of which was to heighten national spirit, had caused a large minority of Australians to live under republican symbols which they opposed strongly, and could lead to continued bitterness and national division.
To add further insult and division, the final arbiter as to whether these Australians would have to accept their country becoming a republic would be a group of seven unelected judges sitting on the High Court.
Leaving aside the fact that dragging these eminent jurists into the middle of a national political dispute is unfair to the Court, Australians would never accept that such an issue should be solved by reference to legalities.
There are further costs and potential dangers that the republican lobby simply refuses to acknowledge.

Our constitutional structure is a living thing. It is constantly developing. Once we were a colony; then six colonies; then six independent States within a Federation; and now that Federation is constantly changing.

The territories have gained independence and today's relationship between the States and the Commonwealth Government is almost unrecognisable when compared with that which existed in 1901.

The relationship between Crown and State has evolved to the point where, following the Statute of Westminster and the Australia Acts, we are left with one of the finest democracies on earth; free from all monarchical restraint while retaining the Crown's unique capacity to act as a unifying influence and check on tyranny.

A Constitution must attempt to achieve two objectives.

It must equip government with sufficient power to run the State or country, while on the other hand providing checks and balances limiting that power to prevent its abuse.

The reason why modern constitutional monarchies have been so successful at achieving this objective and republics so unsuccessful is that the Monarchy, through tradition and convention, can provide a Head of State who is above politics but at the centre of national unity. On the other hand a president, no matter how chosen, can be enveloped in the politics of the day.

Whether by good fortune or design we have managed to evolve a system which delivers stable government without any of the risks and complexities faced by those less fortunate countries that have tried to manufacture such a structure.

The key to our good fortune is that although we have existed for only 200 years, we have been able to adopt a system which has taken 900 years to evolve. No amount of scholarly, intricate legislative drafting can ever hope to emulate the traditions and conventions which define the apolitical relationship between Crown and State, which is entirely independent of the person who occupies the position of Head of State, and which allows democratic governments which are the envy of the rest of the world to thrive.

Australia is not the only country to benefit from the calming and uniting security associated with such a system.

Along with Britain and Canada, the Netherlands, Denmark, Norway, Sweden and Spain are examples of the most free, most tolerant, stable and temperate societies in existence today. In fact half the 24 OECD countries have constitutional monarchies.

Any suggestion that Asian countries might think less of us because of our monarchical Constitution carries no weight, especially when it is remembered that Japan, Thailand and Malaysia all have constitutional monarchies.

Unfortunately many republics have not enjoyed the same stability and freedom from tyranny.

There is a particular reason for this. It is the hidden danger in the Australian republican kit bag that is kept firmly tucked away, and concerns the appointment of the president and the powers with which he or she is to be equipped. There has been a deafening silence by the republicans on this topic, which a cynic could interpret as a deliberate attempt to win popularity for the idea of a republican Head of State before revealing the dangers of that proposal.

As I have said, a president no matter how chosen can be enveloped in the politics of the day.

We should recall, for example, events in India in 1975 when the then Prime Minister, Mrs Gandhi, was convicted of breaches of electoral law. As a consequence her position was threatened. She immediately approached the President, whom she requested to make a proclamation of internal emergency. Given the politics of his presidency he did so, allowing Mrs Gandhi to imprison many of her political opponents. Hundreds were imprisoned. There was no time for constitutional court challenges.

The Queen's representative not observing the conventions and traditions of the office would be removed by the Queen upon the advice of the Executive. The Governor–General's responsibilities and loyalties are to the traditions of the Crown. They are not directed towards the Prime Minister of the day. Prime Ministers may come and go. A president, no matter how appointed or elected, is theoretically responsible to no one but himself or herself.

The theoretical power possessed by Governors and the Governor–General are extensive. The key to the limitation on their power is the convention binding them, through the Crown, in the use of those powers. The same powers conferred on a president would be disastrous. A president would not be bound by those conventions. Lawyers agree unanimously that any attempt to legislate those conventions would be fraught with conflicting legal interpretation and doomed to failure.

Some conventions have not yet surfaced. They are brought to bear as each unpredictable situation arises and is dealt with in accordance with the traditions and existing conventions of the Crown. Given that a president would be bound to act on the advice of the Executive, and would be obliged to do so without the limitations of conventions and traditions and without the constraints of the Crown, the Executive's power would be expanded dangerously.

There have been discussions about a number of possible methods of electing a Head of State.

The American system of an electoral college is not widely favoured by commentators; nor is the election by an Australia–wide constituency. The reason is that such a process would immediately politicise the Head of State.

A two–thirds majority of both Houses has been proposed. I am simply amazed to hear some republicans proposing that this would ensure the choice would retain the apolitical independence of the present Governor–General. Where have these people been living all these years? The Australian legislatures are highly political institutions. For those in doubt, may I recommend viewing the ABC documentary, "Labor in Power".

To obtain a two–thirds majority, political deals would have to be made.

Which eminent Australians of politically non–partisan, non–adversarial backgrounds would allow themselves to be the subject of political manoeuvring and lobbying, with the possibility of having their unsullied past achievements and private life publicly examined for the purpose of finding fault?

One of the enormous benefits of the monarchical system is that it does not matter who is appointed Governor–General — no matter how political a person was prior to their appointment.

The unique feature of this system is that once the office has been assumed, the traditions and conventions combine with the proximity and permanency of the Crown to produce an effect on both the incumbent and the public. The incumbent's past is as though it had never been.

Under our system, the Governor–General has the independence, the power and, by convention, the obligation to prevent the illegal abuse of power by the Executive. On the other hand, reserve powers without the convention and traditions emanating from the Crown are dangerous.

Simply the knowledge that the Crown is in that position is enough to prevent such abuses. Recent examples of the simplicity, efficiency and stability of this legislative system include the recent Tasmania Greens deadlock in 1989 and the Bjelke–Petersen political crisis in Queensland in 1987. Without reserve powers in a crisis, where responsible government is threatened a country could grind to a halt. Even worse, democracy could be defeated.

It is embarrassing to watch the republican movement wringing its hands in anguish as it labours to arrive at a way of delivering a truly apolitical figure to replace the Governor–General. They fail to see that history has fashioned for us a constitutional system unaffected by current voting patterns and guarding democracy by means of conventions and traditions shaped and fashioned over 900 years.

I hope we do not have to learn, to our everlasting regret, that we are simply unable to reproduce that priceless piece of our history. It should not be discarded through the whims of particular passing politicians with no convincing reason for such change.
To date convincing reasons have not been offered.
A crisis of government can occur at any time. Our present system works better than any other manufactured scenario so far designed. If the Australian people are to consider change from this system, it is imperative that they realise that a republican system tries to emulate the existing system, but cannot be achieved no matter how carefully engineered. The dangers such change carries must be understood clearly before the public can make a considered choice.
An argument put in favour of Australia becoming a republic is that because allegiance is owed to a Queen who does not even reside in Australia, we have not really achieved true nationhood. Such a proposition is demonstrably wrong and smacks of politics rather than reality. Our national sentiment and identity at home and abroad – whether in the world of sport, business or just when Australians meet Australians overseas – is not eclipsed by any other country.
The Governor–General, the Government and Australians are fulfilling their roles entirely independently of the Queen. Today the sole contribution of the Queen is the assurance that the role of our Head of State retains the benefits that our monarchical system has evolved.
Professor Whyte, recently of Queens University Law School in Canada, points out that one of the reasons why Canada makes no move to republicanism is that Canadians regard the Queen's place as vestigial, and have no difficulty with their Governor–General being a truly Canadian Head of State. It is hard to see Canada's success as one of the world's economic leaders being hampered by lack of national spirit. They have something special and are not about to give it up.
Neither should we give it up. If the Prime Minister wants Australians to give it up he should substantiate his case.
In discussions on republicanism I have detected a tendency to suggest that, given our rich multicultural society, our past connection with the United Kingdom is best forgotten or, at least, set to one side. The history of a country is not the prerogative of one particular group who draw curtains to hide those bits they did not like. Even if a nation could pick and choose its history (and the concept is absurd), any confident nation guards jealously its history and tradition.
From the good we gain pride; from the bad we learn; and from the totality of our past we gain our identity.
Our inheritance has shaped our institutions, and its history is treasured. Our continued growth as a diverse community is not served by rejecting European settlement and development in this country. To fail to capitalise on the extremely useful constitutional structure we have inherited is to cut off our nose to spite our face.
Regrettably, the work of the Prime Minister's Republic Advisory Committee will not advance the quality of public debate on constitutional change in Australia.
It is not, as the name suggests, a committee to advise and assist the Australian people in forming a view about the need for a republic. It is a committee whose members were picked for their republican sentiments, which has been asked to decide on the best options to implement the Prime Minister's desire for a republic.
There is no justification for putting the question of "how" before the question of "why".
A change to a republic can come only from an overwhelming desire of the Australian people. The nature of this committee and its terms of reference give the appearance of a desire to politicise the process by manipulating the Australian public through the republican gate before they have had the opportunity to make a reasoned decision on whether or not they wish to change constitutional paddocks.
In conclusion:

1. If the Prime Minister believes that to direct resources to the question of how Australia can become a republic is the proper choice of priorities at this time, then he simply does not appreciate the problems facing Australia.
2. It is perfectly proper and desirable that Australians continue to examine their constitutional institutions. However, if debate is to be reasoned it must include all relevant matters. It must be honest, not orchestrated for political purposes. Before a system which is working so well is changed, there must be compelling reasons for making change. The benefits and costs of moving to a republic must be examined in detail.
3. A change in our Constitution deals with the heart of our democratic society and therefore must be treated with caution. It should not be rushed or pushed by those who happen to be in political power at that time.
4. There are real costs and dangers associated with becoming a republic. Save for attempts at emotional calls to "nationalism" there has not been any benefit offered so far that carries sufficient weight to convince me the benefits outweigh the costs.
5. The irreplaceable benefits of our present system, that are the product of its history and inalienable from it, cannot be denied. More to the point, our present system needs to be preserved and nurtured.
6. We are a Federation of seven governments. Whether or not it is legally possible, it is politically delinquent and morally repugnant not to seek the agreement of all six States to a change which so dramatically affects the Federation they engineered, and in which they operate. Not to reach such agreement, and to proceed without including them at all stages, is to introduce bitter division within the Federation of States and the people of Australia.

I am more than happy to go out and argue the case for the retention of our constitutional monarchy. In doing so I think no less of those who disagree with me and argue in favour of Australia becoming a republic.

Those who wish to see new constitutional arrangements are no more or no less patriots than myself. However, I will remind those who seek change that the onus is on them to provide substantive arguments as to why Australia should forfeit a constitutional system which has served the nation with distinction.

Our current system of constitutional monarchy does not have to justify its continuing existence. It has served – and continues to serve – this nation well. As we approach the twenty first Century Australia is a proud, independent, thriving democracy. We enjoy political stability and a strong social fabric.

The challenge facing our nation as we approach the next century is not whether Australia should become a republic.

What we need to focus on is the real challenge of delivering a better quality of life for all Australians; preserving our vibrant democratic traditions, which have successfully buttressed the rule of law; and harnessing the human talent and physical resources of Australia to achieve greater prosperity.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome.

Last night we had from the Premier of Victoria an address on "The Crown and the States" which not only did great honour to this Society, but also – and more importantly – struck a firm and significant blow in the battle to uphold the role of the Crown in our constitutional arrangements.

On both counts we are indeed indebted to Mr Kennett, and I know that your Board of Management will take an early opportunity to express, on your behalf, our appreciation to him both for the manner in which he approached the task we had set him, and for the great deal of work which, clearly, he had obviously put into the preparation of his address.

If I may digress for one moment, I may also hazard the guess that, from a more purely partisan political viewpoint also, the Premier's address will be seen to do neither him nor his Government any harm politically – indeed, quite the contrary.

Later today the Society will hold its inaugural Annual General Meeting, and our President, Sir Harry Gibbs, will be reporting to you then on our activities over the past twelve months or so. Accordingly, I shall say nothing further about those matters at this time.

Today, we can look forward to the rest of our Conference team building upon the great innings played last night by Mr Kennett. To begin with, we shall continue the Republican debate with two papers dealing with particular aspects of it.

Then, as you know, we shall move to consider what we have called "the Aboriginal question" – or rather, two particular aspects of that enormous field for debate. I have read both the papers to be given under that head of the program, and I can promise you, Ladies and gentlemen, that you have a veritable feast before you.

After luncheon we shall have two papers on another topic of very great moment to all Australians at this juncture in our constitutional history – namely, the role of the High Court, both generally (in Peter Connolly's paper), and specifically in the Mabo judgment (in the paper by Mr S E K Hulme).

It would be tedious to go on to enumerate the full program in extenso. Suffice to say that the other five papers, including our President's address to us at Dinner this evening, will not suffer by comparison with their predecessors.

Ladies and gentlemen, there is a good rule that introductory remarks of this kind are best kept short, and to the point; and particularly since I shall personally be chairing our first session this morning in any case, I think it is time to pay due heed to that good rule.

As noted earlier, that session will deal with two aspects of "The Crown v. The Republic". The first of our speakers under this topic will be a very distinguished – and very courageous – Australian, Dr Frank Knopfelmacher, whom it is now my privilege to introduce.

Chapter One

The Crown in a Culturally Diverse Australia

Dr Frank Knopfelmacher

It is more helpful in a paper such as this, to alter the title from "Crown" to the more verbose expression "English system of government", for this is what we must be, essentially, dealing with, unless we desire to regurgitate trivialities, and eventually confirm Karl Marx's famous quip, that it is the mark of fools to analyse social and political systems on the basis of their formal constitutions.

It would be also both tedious, and by now vacuous, to repeat in a paper such as this the long history which culminated in the present English system of government (in which Australia also participates) and which is generally known as "The Queen in Parliament". Also, it must be firmly asserted that not only the word "Crown" but the very term "English" is now inaccurate and "foreign" in use. Continental Europeans use it for all inhabitants of the British Isles and often also for their clearly identifiable overseas offspring (eg. the German term "Englander"), irrespective of whether they refer to Cockneys, Glaswegians, Dubliners or, indeed, Melburnians, without being aware of possible ethnic slights. Among those slights, the linguistic annexation of Celts to Englishmen appears to some particularly obnoxious.

To avoid such naming issues, not without importance in a paper on ethnic culture and politics, we have coined the term anglomorph for all native inhabitants of the British Isles and their overseas descendants. Anglomorphy thus refers not only to the institutionalized population of a few offshore European Islands, but also to the more or less powerful "antipodean" and otherwise distant colonial offspring of those Islands, whose men, guns and ships exported anglomorphy – both the human stock and the cultural and political structures – to form a mighty global "colonial" set of establishments. The present Australian state ("Commonwealth") is one such anglomorph establishment ie. politically and culturally "English".

A more realistic title of this paper would, therefore, become a query: "Can ethnically diversifying Australia remain anglomorph?"

Before analysing the problem as it looks at present, an important empirical distinction has to be made. The most notorious and culturally influential factor in Australian politics, historically linked to ethnicity, has been the presence of the Irish in this country. And yet in the light of present analysis the Australian Irish are "anglomorph". Their politics, culture, religion, etc. are colonial co– importations from the plural mother country to Australia. Without their contributions, "English" literature, religion, and, yes, warfare would shrink to little. And this applies, of course, very much to "trade unions" in the often proudly self–proclaimed "most unionized" country in the world. The Anglo–Irish conflicts, seminal to Australian politics, are, therefore, not locally generated provincial problems but co–imported mother–country issues, along with football, cricket, pudding and almost all varieties of grog. And, of course, religion – yes, particularly Catholicism.

The Irish Catholics of anglomorphy may share with baroque Continentals their trust in the mysteries and invisibles, but anything that can be seen, sensually appreciated and socially assessed is of a different world. Sceptics are advised to visit, say, Prague, for testing this pseudo–heretical proposition.

The overall conclusion about the effect of Irishness on Australian ethnic diversity is only seemingly paradoxical: the presence of a powerful Irish element in Australia not only does not enfeeble this country's homogeneity, but it decisively strengthens its cultural and political unity by bringing into Australian politics and culture the decisive formative influence of home–country rooted organic Irishness, almost totally linked to this colony's distant origins. Few things are more anglomorph than an Anglo–Irish conflict within an anglomorph Commonwealth. It is, therefore, essential to separate Irish politics from other ethnicities, such as they are.

Until the end of World War II, the more or less unspoken population policy of Australia was the retention of anglomorphy. The term "white Australia" was a partial misnomer of this policy, the underlying assumption being that coloured Asians such as the Chinese must be more different from anglomorphs than, say, Slovaks and Serbs. Yet the emotive impetus was the proposition that colours cannot mix, that those who look like colonial "natives" ("coolies") cannot co–exist with Sahib material, however well disguised. The underlying economic motives of "white Australia" were perhaps not more but equally important.

The policy of exclusive anglomorphy as a necessary condition for immigration was given up in stages, and after a period of admitting growing quotas of European whites, the "white Australia policy" was given away, at first verbally and eventually, at least in part, seemingly altogether.

The differences thereby visibly generated to the character of the country seemed greater than the reality. Before the post–war immigration programme was launched, Australia was about 90 per cent anglomorph. By 1975 anglomorphy dropped to 77 per cent, the principal "intruders" being Southern Europeans. The "coloured" quota remained virtually unchanged. At present there seems to be a shift from anglomorphy to "ordinary" Europeans and a distinct shift to Asians.

The "racial origin" of immigrants – any immigrants – is overrated. The real question is this: Can and will the offspring of non–anglomorphs, both Asian and European, coloured and white, become "normal" Australians, that is anglomorphs?

This writer strongly believes that they "ought to" for the alternatives are, inevitably ghettoized cultures, permanent strife and eventually civil wars. This writer is one who does not "theorize" (in the pejorative sense of the word, for many theories are necessary and some are good) on matters of "multiculturalism". A (sole) survivor of a holocaust family, a mature witness of the Sudeten crisis and the outbreak of World War II in Germany, with subsequent months in the Palestine Police under British rule and for years as a front–line combat soldier in Libya and Normandy under Montgomery, he literally knows what he is talking about, in the English sense which traditionally since Hume links the term "knowing" with "perceiving". A near miraculous survivor, now of declining years (past three score and ten), he has only one remaining duty: to warn.

So far there is no evidence that the post–World War II intake of non–anglomorph immigrants generates opposition to our hegemonially anglomorph culture and political system. The occasionally ethnic islands such as those of Greeks in the Victorian ALP are ethnic "accidents" sometimes exploited or exploitable by ethnic operators who might actually not clearly belong to the culture which they claim to represent. And then there will always be the "Wiener Schnitzel" symptom (already Australianly misspelt by virtually all butchers), linked to the vanishing palates of the founder generation, and hopefully improving globally for ever the notoriously frightful gustatory appetites of the anglomorphs.

Love of old country does not vanish with emigration, induced by poverty, general disadvantage, and persecution as almost all of our immigrations are. Some deviant ethnicity is bound to remain, passing itself on with the young generations and forming more or less attractive regional fashions. They are minor culture innovations quite independent of the major culture–political system.

Occasionally such ethnic diversions can be exploited to subvert our general system. Such attempts ought to be opposed prudently and intelligently. The main supporters of "multiculturalism", ie. the desire to disrupt the anglomorph structure of Australia, are our own, mostly ethnically anglomorph self–haters (Blainey's "Black armbanders"). They must be fought, politically, to the death.

With our victory in the Cold War against Communism (and like all victories this one bears also bitter fruits), the strategic situation of our Continent may become precarious in hitherto not fully predictable ways. And for that kind of contingency there is only one, the oldest, device of statecraft: military power, the sword enmeshed in flexibly intelligent alliances.

Let us, by all means, subject to economic inevitabilities, take any immigrants we can. Let us not discriminate against the best and the ablest ones (I mean, of course, the Chinese) in the tradition of our bogus egalitarianism. Let us admit as many refugees from Indochina, and in the near future from Hong Kong, for our honour (and not only or even mainly our interests) dictates it. If they come as political resistance fighters, the otherwise strict requirement of induction into anglomorphy may be relaxed, balanced by interests of the Australian State.

A good symptom of a correct policy is that it is being enacted before becoming official. A destructive policy is usually being urged by bogus elites in places such as the world of certain Arts faculties. This simple fact makes Patrick Moynihan's celebrated phrase "benign neglect" for the optimal way of assimilating strangers such a powerful, for so obviously truthful, phrase.

Our non–anglomorph intake breeds Australians. It has done so in the past and it will continue to do so in the future. No threats or bribes from ethnic fuehrers can alter it. There can be no reason for de–anglifying a country such as this, and this includes the bogus striving for a "true Australian culture". There is no such a thing and cannot be. Anglomorphy as a dominant way of life is good enough where a country is marked or Crowned by it.

Chapter Two

The Republic and Our British Heritage

John Hirst

In October last year an Aboriginal member of the Northern Territory Legislative Assembly died. With the concurrence of the House, his Aboriginal constituents mourned his passing by performing a sacred smoking ceremony in the chamber. Men and women wearing white ochre body paint burnt leaves and wailed in anguish around the spot where the dead legislator had sat. A Catholic priest who works with these Aborigines told the press: `These people are a bit more reflective because their culture is much older and more sophisticated than ours'.

Why is it that as we acknowledge the richness of Aboriginal culture we must denigrate our own? So frequently we are now depicted as the savages, moved by a few base instincts, with an uncomplicated and shameful history which can be adequately described as a continuous flouting of the Equal Opportunity Act.

If we look not at the Aboriginal mourners, but at the Northern Territory Assembly, what do we find? A miniature replica of an ancient English institution. The English Parliament dates from the thirteenth century and the principle that a monarch should take counsel is very much older. This Assembly takes decisions by the counting of votes; the majority rules and the minority accepts the legitimacy of its defeat.

This is not a natural or universal system of decision making. It had to be invented. We first hear of it in the ancient Greeks over two and a half thousand years ago. The most amazing feature of this Assembly is that it contains a Government and an organized, official Opposition to it. Have we lost altogether our capacity to be surprised at this ingenuity? Is not this complex and rich beyond measure?

The members of The Samuel Griffith Society don't need me to remind them what a precious inheritance we have in English constitutional practice. You may not be so ready to recognize that we republicans are as committed to the preservation of our Constitution as you are. Our dissatisfaction is not with the working of our present Constitution. Our dissatisfaction is with the British monarchy as a symbol of the Australian nation. We need to deal with the Constitution only as a consequence of the removal of that symbol. Our task is to make those changes to the Constitution which are necessary to keep it the same when the Queen no longer plays a part in it. In essence we have to create from within Australia the office of Head of State, and so set it within the Constitution that its holder will act like a British constitutional monarch.

The rejection of the Queen may seem radical; the constitutional task is essentially conservative. Our patron saint is not the republican Tom Paine, but his great antagonist Edmund Burke.

Recently I have been travelling the country with the Prime Minister's Republic Advisory Committee and hearing the views of the people on what sort of president they want. These impressions are my own and you will understand that the views I express here are likewise my own and not the Committee's.

There is unanimity on the qualities presidents should possess – they must be eminent, worthy of respect, and above all free from party political associations. On this last point the people have been determined and emphatic. The great fear is that a former politician will be elevated into the position of Head of State. To exclude this possibility our informants have suggested that former politicians should be ineligible for the office, either permanently or until three or five years have

elapsed since they left the political arena. The most comprehensive prohibition was worded in these terms: the president should have had no connection `with any party at any time from birth right up to the tenure as President' .

There have, of course, been good Governors-General who have moved from politics to the vice-regal office. In the light of this, the passion to avoid politicians might seem merely a prejudice. But this overlooks the fact that the Governors-General have been deputies for the Queen, whose position above politics and whose absolute impartiality have been the corner-stones of her success and that of her immediate predecessors. The removal of this element from our Constitution plainly worries many Australians. Republicans who are looking for a Head of State completely free from political associations are paying the monarch the tribute of wanting a president to imitate her.

How then should the president who is to be above party politics be appointed? The public opinion polls indicate a clear preference for popular election. Popular election can be defended on the grounds that citizens in a democracy should directly participate in the choice of the person who is to symbolise the nation. The people, we have been told, should feel they `own' their president. However, it is my impression that the desire for popular election does not arise from these concerns; it is another expression of the determination to keep a politician out of the presidency. The suspicion is that reliance on any part of the present political structure for the election of president will inevitably produce an unsatisfactory result. To get the result they want, the people think they will have to take charge of the procedure themselves.

Paradoxically, popular election is the method which will guarantee that a politician or someone endorsed by a political party will be elected. At a nation–wide poll, only the political parties would have the organisation and resources to run a campaign . Political parties would be eager to secure the presidency, even though its functions are chiefly ceremonial, as a demonstration of their strength and a boost to party morale. A party may also consider that it does no harm to have one of their own in the presidency in case there is a constitutional crisis.

Apart from candidates brought forward or endorsed by the political parties, the only other candidates likely to succeed at a popular election would be wealthy people or candidates backed by them.

Several countries hold popular elections for a non-executive president of the sort we plan here. Their experience confirms that the political parties are very active in the election. The danger of popular election is that it would produce presidents who might consider they had an independent mandate from the people as strong or better than the Prime Minister's. This difficulty can be met by carefully stipulating the powers of the president – a matter I will deal with shortly. The countries which elect presidents by popular vote – I'm thinking in particular of Austria and Ireland – have experienced no problems with their presidents as rivals to the Prime Minister.

My own preference is for the president to be elected or endorsed by a two–thirds vote in a joint sitting of the federal Parliament. The two–thirds vote would ensure that a successful candidate would have to enjoy bi–partisan support. But I would be reluctant to see nominations for the president coming without restriction from within the Parliament. One can readily imagine how in this situation the presidency might become a matter of horse trading between parties. A minority party, for example, might offer to support the governmental candidate on condition that the government agree to accept its amendments to some piece of legislation. Or alternatively a minority party might give full support to the government's legislative program in return for governmental support for its own presidential candidate. This danger could be avoided by the nominations for the presidency coming from outside the Parliament.

Two sources of nominations suggest themselves. The first is the Prime Minister, who of course at the moment nominates the Governor–General for appointment by the Queen. Nomination of a

single candidate by the Prime Minister and endorsement by a two–thirds vote at a joint sitting is the nearest approximation to the present system of all the options usually canvassed and the simplest to implement. Since Prime Ministers would not want the embarrassment of having their candidate rejected, they would choose a candidate with bi–partisan support. To check on this before the parliamentary consideration they might well sound out the Leader of the Opposition. Such confidential consultations have sometimes occurred with the present system of prime ministerial nomination.

The second source of nominations might be a special nominating commission. During our consultations a good deal of interest has been shown in such bodies. Suggestions on how they might be composed include:

(a) State Governors

(b) Chief Justices of the High Court and State Supreme Courts

(c) Presiding Officers of all Houses of Federal and State Parliaments

(d) members of the highest rank of the Order of Australia.

Sometimes these bodies are proposed as electoral colleges which would actually elect the president rather than as nominating commissions, which is the role I'd prefer to see them play. I can understand the interest in taking the election of the president away from existing political institutions, but I believe the process of electing the president will carry sufficient legitimacy only if it involves the people themselves or their representatives in Parliament.

The disadvantage of an open election either in the electorate at large or in the Parliament is that good candidates would be deterred from offering themselves. Why should a person eminent in his or her field risk having their reputation besmirched in a contested election and then perhaps suffer the ignominy of a rejection? A nominating commission might produce one candidate for endorsement (or rejection) by Parliament, or a short list of candidates from which either the electorate at large or the Parliament would choose one. Candidates would not have to put themselves forward; they would be nominated by the commission. To be placed on such a short list would be an honour in itself – as it is with book and film prizes – and no dishonour would attach to those finally not chosen.

We want a system which will produce presidents of the calibre of Sir Zelman Cowen and Sir Ninian Stephen. That is the sort of president which the people want. The challenge for us is to establish the constitutional mechanism which will find and endorse such candidates.

The other chief task for republican constitution – makers is providing for the powers of the president. It is here that our critics consider us most vulnerable.

Firstly, we have been told that a minimalist approach to constitutional change would open the way for a president to assume dictatorial powers. The term `minimalism' is now confusing rather than assisting our understanding. It was coined by republicans for good purpose. When we were in the wilderness we needed to explain that a republic could be established in Australia without a fundamental change to our structure of government. What impeded us then was the widespread assumption that to become a republic we would have to adopt an executive president of the American sort. Some republicans in their zeal to show how simply the change to a republic could be effected may have said that you only needed to create a president and then insert the word president for the words Governor–General in the Constitution. None say that now. The paradox of minimalism is that in order to keep the system of government the same a good deal of the Constitution needs to be changed.

The reason for this is that the Constitution vests huge powers in the Governor-General . Full executive power is given to the Governor-General together with the command of the armed forces. The Constitution provides that the Governor-General will choose ministers, but is silent on what principle shall govern the choice. Now if we created a president and left to him or her all

the powers of Governor-General, and if a president chose to use them, we would have a very different system of government. Arguably a president would be free to use them because he or she would no longer be constrained, as the Governor-General is, to use the powers according to the British constitutional conventions.

This problem can be very readily solved. The simple solution has been laid out by Professor George Winterton in his draft republican constitution published in The Independent Monthly of March last year. Wherever the Constitution gives a power to the Governor-General which in practice is exercised on the advice of ministers, Winterton makes the constitution read: `President and Executive Council'. In addition he provides a new clause which reads in part:

"The President shall exercise and perform his powers and functions in accordance with the constitutional conventions which related to the exercise and performance of the powers and functions of the Governor-General, but nothing in the section shall have the effect of converting constitutional conventions into rules of law."

Such a provision would have the effect of carrying over the reserve powers of the Head of State into the new regime, but without defining what those reserve powers are.

Regrettably in my view, Professor Winterton also provided that the Parliament henceforth should be able to define and amend the president's powers by the normal processes of legislation. This in effect gives to the Parliament (and any government which controlled it) the power to alter the Constitution. I am pleased to note that in the next edition of his constitution Professor Winterton proposes that Parliament should only be able to exercise this power by two–thirds majority.

The alternative approach to the reserve powers is to codify them in the Constitution. The argument for codifying them is that their use would involve less controversy if they were clearly stipulated and widely understood. The argument against codifying is that it is difficult to define in detail all the circumstances in which the reserve powers might have to be used. To codify the powers as they are presently understood would inevitably freeze them and make them less serviceable in the future, which we can with certainty say is unpredictable. The reserve powers, it is alleged with some force, are a general power to protect the Constitution and no–one can say from what quarter threats to it might come. Codification of the reserve powers is one option which our committee is examining. The achievement of a republic does not depend on it.

On the reserve powers, our critics allege that we are embarked on a process which will either reduce the reserve powers or increase them. There is no prospect, we are told, of their remaining the same.

On the first count, the critics allege that the Labor Party is opposed to the reserve powers, and in particular to the power in the Head of State to dismiss a Prime Minister. They say that Labor's support for a republic is a disguised method of stripping the powers of the Head of State and taking revenge for the Whitlam dismissal of 1975.

I cannot of course speak for the Labor Party. I can speak of the terms of reference of our committee as laid down by the Labor Prime Minister. They read in part: `How the powers of the new Head of State can be exercised and be made subject to the same conventions and principles which apply to the powers of the Governor-General'. In all the options for dealing with the reserve powers, we are retaining the power of the Head of State to dismiss a Prime Minister.

The second criticism is that, if we codify the reserve powers, inevitably we will entrench them and so make the president more powerful than the Governor-General has been. This mistakes the nature of the powers under discussion, namely they are reserve powers which are used only in exceptional circumstances. Most of our Governors-General have never once acted without the advice of ministers. If the politicians manage things properly a Head of State does not have the opportunity to use the powers. Stipulating the powers does not make it more likely that they will be used.

But let me concede that the move to a republic may make some change in the relation between Head of State and Prime Minister. I would predict that if there is a change it will be in the direction of more power to the president, who will have a more secure tenure than the Governor-General . This is not inappropriate given the removal from our Constitution of the stabilizing force of the monarchy. Of course, no guarantee can be given that the relationship between Governor-General and Prime Minister will remain unchanged under our present Constitution.

If there is a change to this relationship under a republic, it will be minuscule compared to the change in the Constitution effected by the federal government's financial dominance and the High Court's use of the external affairs power. Given the limits on your time and resources, may I suggest you concentrate on these issues and leave the republic alone. As a force for constitutional change, we are very small beer.

As we plan the transition to a republic, we have many precedents to draw on. In every quarter of the globe there are British parliamentary systems which have transformed themselves into republics. Recently I have been reading the Irish Constitution and have been impressed by the elegant and concise way it deals with the reserve powers of the president. Take the example of the calling and dissolving of Parliament. First it declares the normal state of affairs:

"The President shall summon and dissolve the House when so advised by the Prime Minister."

Then it provides for the exceptions, the use of the reserve powers:

"The President may summon the Parliament on his own discretion.

"The President may refuse a dissolution to a Prime Minister who has lost the confidence of the House."

Refusal of dissolution is a vexed matter. A full codification of the circumstances in which a Head of State should and should not grant a dissolution is a complex exercise, which involves specification of the intricacies of parliamentary procedures. The Irish wisely avoided this and gave the president a broad discretion. In most circumstances no doubt the President would grant a dissolution to a Prime Minister even though he or she had lost the confidence of the House. The bias should be in the direction of following the advice of the Prime Minister. But in some circumstances it would not be appropriate to do so. The Constitution leaves the President to decide what those are.

We are accustomed to think of the Irish as anti-English, as rebels. And yet after their fight for independence was over, they recreated the English parliamentary system and established a president who was to act like an English constitutional monarch. This suggests how primitive is much of our thinking about the preservation of British heritage. Republicans in Australia are accused of denying our British heritage. But as the Irish case shows, British practice can be preserved when formal links are broken and even when they are broken in enmity. We will part from Britain on good terms, and in becoming a republic we will complete the process of making our British constitutional heritage our own. There will be an Australian Head of State who reigns but does not rule, a perpetual tribute to the British original.

Chapter Three

Australia's Aborigines and Australian Civilization: Cultural Relativism in the 21st Century

Jack Waterford

I would like to begin by reading to you an editorial written by my own newspaper some 45 years ago. It has the title: Not the Chosen people of Australia.

"Widespread public misgivings in Australia at the entry of Jewish refugees into this country are not without a justification that should command a more conservative attitude from the Ministry of Immigration. This public objection to Jewish refugees is not because of any lack of humanity or sympathy for European refugees, but because Australian experience of the flow of Jewish refugees from Europe immediately prior to the outbreak of war has not been wholly happy. In the large metropolitan areas of Sydney and Melbourne, Australians are finding themselves being brought into a state resembling economic servitude to Jewish interests. Where black markets and illegalities flourish, the experience is that Jewish refugees are plentifully in evidence. Australians, particularly ex-servicemen, are finding themselves elbowed away by the money power which the refugee class exercises, and Australians find themselves being exploited by all manner and class of snide business tricks which have been introduced to this country. Moreover, the historically proven experience that Jews are incapable of governing others and unwilling themselves to be governed is being repeated in the lack of Australian sentiment by this class of immigrant.

"The overwhelming feeling of the Australian people today is that much more discrimination should be shown in the selection of this class of immigrant, and that their number should be strictly controlled in relation to other classes and nationalities of new arrivals.

"Apparently, much more care is exercised in selecting British migrants than in the case of Jewish immigrants, and there is no comparison between the two if or when regard is had to their relative capacity to become good Australians."

I have chosen this appalling specimen from our own files, because a number of points about it could be relevant in a modern debate about what can and cannot be said in discussion of topics that involve people's sensitivities.

I cannot find any evidence that its publication caused a flood of condemnatory letters to the Editor, or calls for his resignation, even from a number of public offices he held, not least of the ACT Advisory Council, or from the YMCA, Rotary or the Canberra Chamber of Commerce. The Prime Minister of the day did not abuse or chide him. No bodies barred his entry, and no noises drowned him out if he went anywhere to speak.

There was then no racial vilification law, no Human Rights Commission or Office of Multicultural Affairs. There was a law capable of dealing with such a sort of utterance: the sedition laws then, as now, purport to forbid the excitement of disaffection against any classes of Her Majesty's subjects, but I should not think that anyone gave even a passing thought to using it. Sentiments like that were unexceptionable in those days.

I should not for a second like to suggest that Arthur Shakespeare, the Editor of the day, condoned or advocated the use of violence against Jews. I do, however, think that it is entirely fair comment to say that the manipulation of sentiments of the sort he expressed, in a different place but around the same time, led to the greatest ethnic genocide of the history of Western man.

One can believe, as I more or less do, in perfect freedom of political discourse, including discourse of the most absurd or hurtful bunk, believing that the best antidote to bad ideas is their exposure to public debate: that the sunlight is the best disinfectant for them.

But it would be quite wrong to think that the only sanction against the expression of views is the law, or, if there is one, that the only exercise of expression which can be condemned is that which breaches it. Far from it. There are manners too, and there are conventions about what can be said and where. There are even laws of logic.

Indeed, the more that the law permits open debate even of silly or pernicious ideas, the more vigorously should people exercise the option to use it to repudiate them.

We are living in an age where, as some of us are becoming too painfully aware, some are seeking to rewrite both the manners and the conventions – in some cases for improper purposes. There are, nonetheless, quite legitimate sanctions against those whose views clearly breach any acceptable limit.

I think anyone would find the words I quoted offensive today. Even those who might think that the author had a right to say them would agree, I hope, that they should be allowed to be repudiated with at least an equal amount of vigour, even if it included abuse of the writer as much as of his ideas. One might even shun and avoid him or encourage others to do so. Some people with associations with him might reasonably wonder whether the mind–set revealed, or the wisdom displayed, raised far wider questions about the man's mind or sense of judgment: whether, for example, he was either fit to hold a public position or whether he was the sort of person one would prefer to have representing one. These sorts of consequences can flow – indeed they quite reasonably do flow – in vigorous debate, without there being any necessary element of proscription of what is said, or feeling that one should not be allowed to say things.

In an article this week, P P McGuinness defended the right of Henry Bosch to say what he thought about Aborigines. Padraic, I think, accurately characterised the Bosch view as "objectionable and repellent". He said that he would not tolerate in his house anyone who engaged in filthy, abusive or bigoted speech against Aborigines, Jews or any other group commonly abused, nor would he maintain social contact with such people. But he vigorously defended Bosch's right to say what he did. And he vigorously disapproved of the Government's effective sacking of him, regarding it as an assault on principles of free speech.

To my mind, however, his argument was weakest in suggesting that government had no right to choose not to have as its representative, in a purely grace and favour position, a person whose broad social outlook it found objectionable and repellent. That is not quite the same thing as prosecuting. Padraic went on to suggest, with a typically McGuinness flourish, that what had happened was censorship, spelled the end of free debate or independence of mind in public service.

In any event let me get back to Arthur Shakespeare. By all accounts he was a decent, well–respected person regarded in his time as being on the small `l' liberal side of social issues.

Perhaps I should not be so condemnatory of him. Perhaps I can only judge him by the standards of his time. It would, of course, be highly culturally relativist for me to do so – there is no difference in principle between the insistence of the relativist that one can only judge a culture in its own terms and the argument that one can only judge it in its own time.

Six months ago, I spoke at a conference on the media and Aboriginal affairs about how I, and the media generally, had reported on Aboriginal issues over the years. Most of the conference was, as I had expected, the usual sort of finger–pointing by Aborigines, and the usual sort of breast–beating by those of the media who put in an appearance.

I am sick of this sort of nonsense. I make no secret of my broad sympathy for Aborigines and their aspirations – and I have worked in and for Aboriginal organisations. But I think that many

trends in Aboriginal affairs are quite disastrous, and that some of the blame–allocating, and some of its meek acceptance, is an obstacle to making hard analysis, hard choices and hard politics.

Moreover, I said that some of the blame for this situation lay with liberal journalists like myself, who had acquired a bit of a habit of ignoring or excusing the bad things which were occurring. They were doing Aborigines no favours by their well–intentioned suppressions, I argued: indeed they were often helping to perpetuate a failed and failing system by their failure to do their job. I instanced a host of things which no one was willing to have discussed. I might, briefly, summarise some of them.

I said that Aboriginal concepts of religion and social organisation were treated these days, often, even by professional sceptics and agnostics, with a degree of reverence nowhere accorded to fundamental ideas in Western society, and going well beyond what was required by concepts of respect for other cultures. Half–understood and half–baked and often flatly wrong descriptions of such cultures were often reported uncritically. The tendency to romanticise Aboriginal life, a tendency to blame any deficiency on others or to deny any Aboriginal responsibility for things which had gone wrong, and a sullen public silence about issues such as family breakdown, violence and dishonesty did not help Aborigines, though it did help some of those, Aboriginal and non–Aboriginal, who oppressed them.

Statistics were routinely abused to draw the wrong conclusion. The most obvious example is the use of State imprisonment rates to prove how the criminal justice system consciously discriminates against Aborigines. It does not: it reflects a more serious problem – the fact that poor, frustrated and powerless people are more likely to commit crime.

I spoke of how many imagined solutions to problems in economic affairs operated without regard to laws of economics, and of how we were sustaining communities dependent upon a high technological base where there was no real work to be had, and no prospect of it, but where we had played a part in creating expectations that someone would indefinitely pay the bill. One cannot have economies based on everyone taking in each other's washing.

I spoke of the addiction of welfare bureaucrats to petty cooperatives and participatory structures which had everywhere failed to work, and which often led to major bureaucratic tyranny. And of how the system actively discouraged petty capitalism, personal initiative and the discipline of risk or the pride of personal possession.

My argument was not that my analysis was necessarily correct. Rather it was that issues of this sort ought to be being discussed, but that Aboriginal sympathisers feared to discuss them lest they inadvertently harmed Aboriginal interests, and that no one else dared to. Those few who did ran the risk of being torn apart, either as wittingly racist and divisive, seeking to advance their own interests by attacking the helpless, or as foolish for failing to realise how they were playing into the hands of the former.

I actually thought I was being quite provocative and politically incorrect to say this. Yet I must say that the reaction has been generally very positive. Many Aborigines have made it quite clear that they agree with me. I have been asked to discuss my comments at a number of other Aboriginal gatherings. I have had my hand warmly wrung by a number of quite unexpected people. And, even outside of Aboriginal affairs, I do not think I have said or done a thing for quite a while which has produced such a response – from critics of directions in Aboriginal affairs as well as people who simply want things to be better. It, or at least the extracts of it published in The Independent Monthly even, I think, got me invited here.

I believe that the interests of Aboriginal Australians, individually and collectively, are best promoted by public debate, in which all members of the public can participate, and in which public opinion and the national will can have some impact on policy and administration.

There are many people who disagree with that. Some say that it is for Aborigines themselves to decide what the problems are and what should be done. That may be so, at least in the sense that how Aborigines organise their lives is only a wider public issue if the way they do so puts their rights and interests into collision with those of others. But the public is involved nonetheless because public money and resources are involved and all citizens have a keen interest in ensuring that they are well used.

Some others resist the idea of an open debate because they fear the people. They fear deep racism running through Australian society; they fear, they fear a witting or unwitting stirring up of tensions, to the great disadvantage of Aborigines.

They fear, no doubt, that a debate may incite some meanness in tough times which might tighten the tap; they fear that some of those with interests which are in definite conflict with Aborigines may dominate the debate, and manipulate some of the tensions within the community to the disadvantage of Aborigines.

There is a very elitist principle at the root of this problem. Those who support the current status quo captured the rhetoric and the dogma of Aboriginal affairs after a long struggle 20 or so years ago; their canon is now generally accepted in the higher halls of government, of political parties and amongst the political intelligentsia, even if it has not been successfully sold to the population at large. They do not trust the good sense of the population at large, and they either do not trust that their arguments will win on their merits, or do not believe that we live in a society where arguments are won on merits.

The fear that the consensus cannot be sold is deep. Moreover, the consensus was won both at a time when there was a more generous impulse within the Australian community, when confidence in the capacity of government to achieve results was higher, and in better economic times. An open debate, some fear, might go rather differently now.

I have a rather more optimistic view. That optimism is, however, in the best solutions being those which are honed in debate, which are under continual review, and which are open to and capable of dealing with criticism. It is not necessarily in an affirmation of the current status quo. Indeed, I profoundly doubt that much of what now occurs can be defended on its merits.

What I do suggest, however, is that many of the counter–models in much of the current criticism could not win the debate either. What is missing in the debate is a middle, the reasonability of ordinary Australians being brought to bear. So heavy are the social and political proscriptions for getting involved in the debate at all that only the most foolish, the most brave, or the most extreme, or those with very great stakes in different outcomes will trouble themselves to get involved. And even then, often, they have to speak very loudly and very provocatively to get a hearing.

I think, for example, that one could expect that the sentiment of most Australians is that they want to see programs which improve the material wellbeing of Aborigines, which allow them to live in dignity and to make their own choices as citizens about how they face the world.

Whether as some function of guilt about an old history, or some recognition of the actual and material disadvantage under which Aborigines live, I think that most Australians accept that the material advancement they want for Aborigines can only be achieved with special programs which redress some of the current disadvantage, whether in education, in health, or whatever.

A good debate does not necessarily mean that there are not ritual exchanges of abuse, least of all when vested interests on either side are under attack. Nor does it mean that remarks will not be trivialised, or that some important things said will not be heard if the speaker is silly enough to say silly things as well – Abo for example – or uses words which suggest some fundamental lack of respect for, or hostility towards, Aborigines.

The observer of such a debate can easily make the appropriate discounts. The press, which is usually conscious of the baggage people carry, and which in any event regards it as its duty to comfort the afflicted and to afflict the comfortable, is often more interested in reporting the gaffe than the substantial, but often predictable, remark.

But it is not as if Australia lacks the tradition of vigorous debate into which such a discussion about Aboriginal affairs can fit.

But some things fall outside the limits. That which is thought to will produce a heightened level of abuse, far more explicit calls for social, or perhaps legal sanctions against those who say it, and far more explicit questioning of their motives.

In this respect, the two gravest social sins are fairly clear. The first minefield is in ascribing to groups of people, on the basis of some secondary characteristic such as race, negative generalised characteristics, particularly of some intellectual inferiority or disqualification from some consideration. Frank racism, simply, is out. I think most people agree about this, even if they cannot quite agree on exactly what is or is not racist.

The second minefield falls into the cultural relativism area. Holding a universally optimistic view of every person's potential does not mean that one has to accept as intrinsically worthy, or reasonable, or unjudgable, everything which they may think or believe. It certainly does not mean that one has to accept that things can only be judged from within their own lights.

Ideas are fair game. But there is a difference, however subtle, between attacking the idea and the sense of self–worth of the person who, however foolishly, believes in the idea. Respect for others is a rule of good manners which has little of itself to do with any notion of cultural relativism.

It is not even particularly culturally relativistic to say that good manners require that this respect be more assiduous when one is dealing with sensitive issues, or with minorities. The things which people hold most sacred, in short, are particularly the field in which one must play the ball and not the man.

There is no shortage of people who will cock their ear and very carefully parse every utterance made when it is clear that someone is straying into the minefield. In this deconstructing age, it is also quite clear that every nuance will be caught and seized upon, and that some will find implications which are said to cross the line, even when the actual words are incapable of bearing them out.

It is, incidentally, not even true to say that the spiritual home of such parsing is the women's movement, the gay movement or any other self–defined oppressed subset of the middle–class. In fact it is Phillip Street, in Sydney. Anyone who has had any experience of the NSW defamation law, and of the ingenuity of its practitioners in drawing up lists of imputations, would not accept for a second that word fascism is a purely American product.

It would be idle to deny the success of such groups, both for good and, more than occasionally, for bad. We have all had our fun with political correctness. It would be silly, however, to be too intolerant about it. Political correctness has always existed, not least at the service of the State. It was once enough to demolish enemies by calling them witches; we have lived in times when it was almost enough to label them Bolsheviks.

Moreover, however boring, tedious or oppressive we may find some of the outpourings of some feminists or some other groups, we have as a society, I think, immensely benefited by acknowledging that women, say, are full operating members of our society and are not to be casually demeaned. That the commonplace ignorances or stupidities of a decade ago are no longer regarded by many people as tolerable is no necessary bad thing, even if a few people or a few things have been monstered in the process.

I say this because I think that some of the counter–reaction to these trends borrows too freely from the analyses of other places, particularly the United States.

The US is not only the spiritual home of political correctness and cultural relativism, but of its counter–reaction. It seems to me that in Australia we have only rarely reached the peaks of the trends, having as we do, stronger factors holding us together than pushing us apart. Equally not all of the counter–claim is applicable. We have had our own absurdities in Australia but are by no means under serious siege here.

Moreover, whatever we might imagine to be the desire of some of the sillier proponents of multiculturalism, the Australian experiment in it, which began of course long before the word was invented, is still largely a success. It has neither atomised our society nor led to unsatisfiable clamours for group rights and separatisms. The mainstream culture has acquired far more than it has lost.

Going back to Aboriginal affairs, it is too much, of course, to demand of every person who wants to participate in the debate that they be motivated only by a sincere desire to advance Aboriginal interests. Even within my good manners parameters, there is nothing wrong with anyone joining in for the simple reason of defending their own interest.

It does not, however, follow from that that their contribution must focus on demeaning or belittling Aborigines to build themselves up. It does not follow that one can only advance the remorseless logic of one's claim by denying any legitimacy whatever to the counterclaim. It is not even good debating or good politics.

This is not, in short, an invitation to get out of the debate or to withhold from it a vigorous denunciation of error. There never was an issue, and hardly ever was a time, in which a debate was more needed, and in which the widest possible contribution was not demanded. Most of all, frankly, the debate needs some exposure to some radical ideas – ideas which, for some time, have been coming from the right rather than the left of politics. The ideas are particularly needed in defining a role for the individual as well as for the State, and in defining the field in which State aid can actually help improve things, rather than, as it all too often does at the moment, further entrap people in their poverty and their powerlessness.

But the chance of those ideas getting an airing, or to mix the metaphor, of their taking root, may require a climate in which those who would have to hear such ideas would not think that they were being belittled or abused.

There is evidence to which I could point which indicates that many Aborigines are anxious and eager that a wider debate occurs.

Even official government reports occasionally evidence some fundamental anxieties. Not all are as repetitive in their descriptions of the problems, or as complacent in the assumption that these problems will go away if only there is more money for the same programs, and more peace and goodwill as, say, the report of the Royal Commission into Aboriginal Deaths in Custody. Could I commend, for example, a reading of the 1985 Miller Report into Aboriginal Employment. Or ask that some take note of a strong line of assertion from a number of Aboriginal leaders, not least Charles Perkins, that only Aborigines can liberate themselves, and that dependence on government and a culture of complaint is positively standing in the way.

It is, of course, now argued that the resolution of the Mabo issue is the perfect springboard for redressing everything which is wrong. If Mabo is a solution, it is not entirely clear what the problem was. I do not myself believe that the writ of Mabo runs very wide, or that it has any great capacity, of itself, to upset settled legal relations between citizens, or to create long–term uncertainties about the ownership of private property.

Indeed Mabo, as a High Court decision, is more about dead ends than it is about legal opportunities for Aborigines: without a doubt, the clear thrust of the High Court's decision was to reject the idea that the overwhelming majority of Aboriginal Australians had any continuing claim, based on law, to land.

In doing so, the High Court made new law, and unsettled old law, by affirming that the rights which Aborigines had to land at the time of settlement was recognised by the law, and that, in certain very narrow circumstances, those rights could persist up to the present day. There are some remote parts of Australia, which have never been colonised by, or alienated by government, and where there may be some possibility of continuing rights. Indeed, in Western Australia, I expect that there are. Almost by definition the only problem which this causes, however, is to miners. Their problem is not insurmountable, provided that they know who they have to deal with, and provided they can negotiate agreements with certainty and expect contracts to be honoured. It is not a fundamental problem.

When Mabo was decided, I wrote that whilst it seemed to open no legal doors for most Aborigines, it provided them with political opportunities to reopen broad issues of land rights and compensation. The decision, I must say, was always welcomed by many ordinary Australians, including myself, for righting a historical untruth, albeit in a way with few continuing legal implications.

I adhere to my view that the Mabo decision, by itself, is a very narrow decision of limited effect, and that much of the abuse currently being directed at members of the High Court will prove to be nonsense. This interpretation of its width was, in fact, the view of most legal advice going to Aboriginal interests after the decision was handed down.

It was alarms sounding from the mining industry, not logs of claims filed by Aborigines, which persuaded government that Mabo bristled with problems of public policy, and which put it on the political agenda.

Somewhere along the line people became persuaded that only complete alienation of land, explicitly overriding Aboriginal interests, might be proof against Aboriginal claim, raising the spectre that all interests in land falling short of freehold were now in doubt.

Moreover, possibilities explicitly rejected by the High Court – for example, that a reversion of land to the Crown on a resumption or the expiry of a leasehold reopened issues of title – were to gain sway.

The most absurd interpretations of the decision have been allowed to circulate unchallenged.

Coupled with some absurd claims – for example, by Aborigines to the Brisbane central business district or to the Australian Capital Territory – some perfectly reasonable and not in the least racist Australian citizens were given ground for serious concern about the security of their possessions.

The hysteria which has occurred was not whipped up by extremists – even if some have benefited from it. The Federal Government, indeed, owes a considerable share of the responsibility for the alarm. It is to be noted that at no stage has it ever published its own view of the breadth of the decision. Even allowing for some areas of uncertainty, it has at all times been open to it to make a clear statement about what was clearly out, what, if anything, was clearly in, and what fell into the zone of uncertainty.

Not only has it not done that, but there have been times when the Commonwealth has had a clear political interest in seeing the potential effect of the decision exaggerated – at whatever risk, particularly to Aborigines, of stirring up some undesirable community passions. The Commonwealth's initial approach to the Premiers, for example, was based on panicking them into combined action.

The political problem of Mabo is that the Commonwealth has picked up the occasion of the judgment to decide to make policy of its own, policy which may or may not be desirable, but is not mandated by the High Court, however much it has suited the Government to have it thought otherwise.

Paul Keating showed no interest in Aboriginal affairs until he became Prime Minister. Even now, he has very little direct interest or involvement, let alone passion, in what is actually happening. He has come, however, to that time of a political life where he wants to make a personal mark on our history, to be seen as statesmanlike, and to seek to harness some common ideals which fit in with his broad philosophy of our nationhood and ourselves.

I do not think his impulses are unworthy; there is, in fact, a certain nobility in them which it would be wise to recognise.

Mabo itself cannot serve as the vehicle of his generous impulse to solve the problems of Aboriginal affairs in one fell swoop; it gives no land and no rights to most Aborigines, and rejects the idea of compensation for those who miss out. Mr Keating has, however, seized the occasion to say that dealing with Mabo provides the opportunity to solve the wider problems, picking up on the way an agenda of compensation, of needs–based land claims, and of a formal reconciliation process, whatever that may be.

He genuinely believes that the doing so will be a mark of Australian political maturity and coming of age: it is no coincidence that he has wrapped Mabo, and aboriginal reconciliation, in the republican flag.

But the nature of Australian politics is not such that change occurs once a Prime Minister becomes morally convinced of the necessity of it. That might be a starting point, but change has to be sold, the press has to be squared, the middle–class prepared, and so on. There has to be a debate. It has to be based on information. Any debate can be expected to bring into the field those whose interests may not be served by change, and their views have to be dealt with.

But Mr Keating has shown a marked reluctance either to take the nation into his confidence or even to consult with Aboriginal interests, other than those whom he himself has appointed to represent them. Sincere or not, those people have no power to deal with him. Mr Keating has resented any suggestion of debate, and attacked anyone who has put their head up. His calls for statesmanship from his ordinary political opponents are either calls for silence or for applause.

The Tim Fishers, Marshall Perrons, Richard Courts and Hugh Morgans – even Henry Boschs – of the world can look after themselves, but Mr Keating has even attacked ordinary citizens who have expressed concern or alarm, even though their ignorance, if they have displayed it, has been a result of impressions he himself allowed to be created.

For all of his manifest political abilities, not least some courage and capacity in promoting difficult points of view in debate, he has been too impatient or too lazy to do the real hard work on this one.

My mention of Tim Fisher, Marshall Perron, Richard Court and Hugh Morgan reminds me that one does not have to be a cultural relativist to find many of their contributions unhelpful to a real debate on directions in Aboriginal affairs.

This is for two reasons. First, they often, to my mind, posit an Aunt Sally to attack – the idea that most Aborigines are pushing for separatism and that their demands for some respect and dignity, or economic improvement will, if granted, in some way, undermine our own sense of culture and civilisation, or diminish our own estates. I cannot see that that is generally true.

Allied with this seems to be an assumption that the moral claim which Aborigines make is based upon history, and that, if one can upset their version of that history, the claim disappears. Thus we have people setting out either to disprove the history, or to personally absolve themselves of any role in it, or to argue that even if the history is somewhat unpleasant it followed some deterministic rule of dominance by stronger cultures.

I am not a cultural relativist. I believe myself quite capable of judging cultures – my own as much as others' – by my own lights. That does not mean, however, that one cannot appreciate other cultures, or appreciate the significance of what other cultures do, within their own lights, or

that appreciation cannot strengthen my capacity to judge them within my own. Still less do I see the intersection of cultures either as some competition for supremacy in which there can only be one winner, or as some necessary clash of ideas by which only one can be right, and by which, by definition, each other is a heresy to be identified and eradicated.

Let's take Stone Age culture as a phrase, for example. Now there is no argument that the culture of pre–contact Aborigines was a Stone Age culture.

Those who wince when they hear the phrase – it is a cue political correctness phrase these days – do so not because of its reference to a state of culture, social organisation and use of tools, but for an implication that is sometimes present that those who come from such a culture have by definition some continuing diminished cranial capacity or incapacity to make it in the world.

I think that that was an implication which was actually contained within the words which Henry Bosch used eight days ago. I do not accuse Hugh Morgan or Tim Fischer of this – although what they have said is not beyond criticism – but the thought police are not necessarily drawing an enormously long bow in worrying both that some of the audience will make this inference and that, whether or not the speaker intended them to, he cannot but be alive to its possibility.

Any politician or important person in public affairs who plays in that game is going to find themselves attacked – not necessarily in a way that denies their right to say, if they want, anything they like, but for their wisdom, their judgment and their motives.

Since it is so often easy to make an attack, it is worth noting that those who benefit from doing so have in fact little to gain by actually being seen to suppress the words. The words themselves provide a wonderful platform for reaction and for comfortably restating tired platitudes.

They are also, of course, assisted by the fact that most observers do not see anything which such people say as being likely to be disinterested or motivated by simple desire to assist Aboriginal Australians, to correct a historical record for the sake of history alone, or simply to hold a bad idea up to the sunlight. The National Party may not be racist, but it is a party which has long represented interests at odds with Aboriginal interests. The interests of Hugh Morgan are reasonably transparent. The records of the Northern Territory or Western Australian governments in Aboriginal affairs have long been deplorable.

It is not unnatural, accordingly, that many people will discount much of what they say, and question motive – that they will even read into instant pronouncements things which have not been said at all. One does not have to be a cultural relativist to do that.

I have found many of the contributions which have been made by Hugh Morgan to be thoughtful and well–considered. I have found them to contain propositions which have enough of a basis of truth to make me squirm.

It is not the idols which he wants to tear down which excite my resentment, so much as the ones he would install in their places; not his rejection of cultural relativism, and his insistence that we can ascribe virtue to civilisation, so much as that concept of civilisation which he sees as its highest pinnacle.

I expect that he has to be extra–provocative even to get into the debate; he cannot, however, be surprised if people do not want to engage him on his own terms. One might be willing to die for his right to say something, but one itches to disagree.

One of the problems about Aboriginal affairs, of course, is that many of the problems of Aboriginal Australians are remote from most Australians. Until, moreover, some people became hysterical about Mabo, the advancement of Aboriginal interests had not been seen, by most Australians, as being at the expense of their own. Though it is true that in rural Australia there are some active resentments based on beliefs that Aborigines are thought to have rights or benefits not shared by others in the community – resentments which, on the whole, ebb and flow

with the economic situation, and which are, accordingly, running rather more strongly at the moment.

In the Aboriginal context, when Aboriginal spiritual values are posited to conflict with something like mining development, the automatic support that the Aboriginal claim will get in some quarters does not necessarily flow from nature–worship or cultural relativism per se. It sometimes comes from something within our own society – some feeling of spiritual emptiness and yearning for meaning which, for one reason or another, our own society is failing to satisfy. For some, the void created by the loss of triumphalism and self–confidence in the Christian Churches is filled by attraction to eastern religions or astrology. For many more, I think, the void creates some hard–to– shake respect for people who seem to have something to hang on to.

In this context, I think any attempt to demean Aboriginal spirituality is doomed to be counter–productive, not least for attacking one of the few assets Aborigines are seen to have. Theologically or evangelically based refutations, at least coming from without the Aboriginal community, are particularly bound to fail.

But it would be quite wrong to think that there is something especially odd or unfair about a political debate in which not all of the participants share common values, or agree about what is important and what is not. Surely that is of the essence of politics – arguing what weight has to be attributed to this or the philosophical significance of that. It is not even unknown for one to have to tread carefully: ask John Stone about sensible discourse on veterans' affairs.

In any political debate, Aborigines have both advantages and handicaps. On the one hand, they are relatively few in number and political clout and, of course, many live quite remotely from where most Australians live. Their capacity to organise even at the regional level is quite restricted and, often, quite compromised by the relationship of virtually all of their organisations with the State.

On the other hand, Aborigines benefit from a general goodwill from most Australians, and some degree of community willingness to put resources at their disposal.

Hugh Morgan has been known to ascribe some of the current ideas and their acceptance to some sort of Bolshevik agenda, but the beginning of the era of change in Australia owes more, I think, to a generational change which was occurring in the mid–1960s. The ingredients were a combination of material prosperity, some focus on rights and tolerance coming more from the United States than Russia, and some reaction against what was perceived as the spiritual aridity of the times, and the meanness of the State in deploying resources for those not benefiting from the general prosperity.

But until Mabo, public interest in and support for Aboriginal affairs had been waning. It has been for about a decade – since the election of Hawke. One of the reasons was deliberate. Many programs in Aboriginal affairs plainly had not been working as well as was hoped. The major reason which had been given was lack of proper or sufficient consultation with the affected Aboriginal people.

The response was that Government dropped out of many of the formal processes of Aboriginal development, appropriating instead a large sum of money to a body which is notionally Aboriginal– controlled, the Aboriginal and Torres Strait Islander Commission.

This has led to a number of problems. ATSIC is entirely a white artefact: in no way does it reflect the nature or structure of Aboriginal organisation, which is in any event very locally, not regionally or nationally focused. By any standards, the structure of ATSIC is very unwieldy and not adapted to efficient and effective action.

Establishing ATSIC put a focus on decision–making and control by Aborigines at some expense to another function – effective service delivery. Yet, whatever the manifest deficiencies in Aboriginal participation in the past, the abiding problem in Aboriginal affairs has been in service

delivery. This is not necessarily an issue of corruption, incompetence or mismanagement, as some of the critics would suggest, even if these are problems enough: some of the problems are welded to the structures of delivery.

The new structures are, if anything, now even more unwieldy and inefficient – even if, as I doubt, they better reflect the priorities of the recipients themselves.

Much more significantly, however, creating ATSIC has tended to depoliticise Aboriginal affairs. Government got what it wanted. Once all the applicants were clamouring at its door. They would appeal to public opinion if they could not get their way. Now, instead, they fight amongst themselves. The Government can say "not our problem: how the cake has been shared out is up to you". Even the size of the cake has not been an important issue. Outcomes are even more remote.

I think that all Australian citizens have a right to aspire to all of the goods and services, material and spiritual, which this society is capable of producing. Aboriginal individuals, their families, and their communities have a right, the same as all citizens, to live as they want to live, the only issue arising when the exercise of their rights or responsibilities comes into conflict with those of others.

The State has a role to play in providing resources and arming people with power to ensure that those who are disadvantaged within the system can compete on fair terms. But the State cannot liberate Aborigines. Only they can do that themselves. Assistance from government and the community can assist that process, but that assistance is not itself the liberating force. Indeed, at the end of the day, shrugging off some of the protective blanket which the State puts around them is the very beginning of the liberation process.

A lot of well–meaning sympathy for Aborigines has helped many Aborigines think themselves purely passive victims of oppression, relief from the suffering inflicted by which can only be achieved by the infusion of a massive flow of external resources.

It is right for the media and others to point to systematic disadvantage of Aborigines, to ways in which the political system handicaps their capacity to improve their situation, even to chide or monster some people who stand in their way. But it is frankly racist to deny that Aborigines are themselves actors in where they are now and where they are going.

As non–Aboriginal Australians, we too have a stake in that liberation, we have interests too, some of which may be in conflict with some Aboriginal interests, and all of which deserve to be heard, and weighed, in an ordinary political process.

Frankly, however, it is unlikely that consciously hostile contributions are going to be accorded much weight by those who must make some of the critical decisions.

This is not an appeal for political correctness, but for some sense of strategy. This does not mean that unpleasant truths need to be suppressed. It may mean, however, that those who cannot advance their views with courtesy may actually cement the status quo – a status quo which is disastrous for Aboriginal Australians, and which may be for all of us as well.

Chapter Four

Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty

The Hon. Bill Hassell

"Aboriginal peoples wish to participate more fully in the development of Canada. The current constitutional discussions provide an historic opportunity to address and resolve the constitutional concerns of Aboriginal peoples, especially the right to self-government ... Aboriginal leaders continue to identify the constitutional recognition of their right to self-government as their highest priority and seek to give effect to that right within the framework of the Canadian Constitution ... Recognising the right of the Aboriginal peoples to self-government reflects two essential principles of Canadian society: (1) Self-government in various forms as basic elements of Canadian democracy; and (2) The unique place of the Aboriginal peoples in our society. This recognition is critical to the support of a strong community base from which Aboriginal peoples will both contribute to, and benefit from, a renewed Canada."

"Aboriginal peoples take the position that they have an inherent right to self-government that is not dependent on recognition by non-aboriginal governments."

"Aboriginal Peoples, Self-Government, and Constitutional Reform", Minister of Supply and Services, Canada, 1991.

A common and almost desperate theme of the proponents of Mabo is that we all must accept the legitimacy of the High Court decision.

The Prime Minister has said that the High Court has decided it, therefore it is. He forgets that countless Court decisions are reversed by legislative enactments.

The Federal Opposition Issues Paper (June 1993) says two things:

"Any solution to Mabo should proceed on the basis that all Australians should be treated equally under the law, and so be seen,"

and

"The Coalition accepts that the High Court has determined that Native Title exists .... It will be necessary to establish a fair and efficient procedure for determining whether or not Aboriginal people can establish a claim for Native Title ..."

I am not sure what this says about the Opposition position, but I have noticed no questioning of the legitimacy of Mabo, and it was suggested that there could be no referendum on Mabo as that may be "divisive". Apparently the decision itself is not divisive.

Once the legitimacy of Mabo is accepted, all else follows – the development of Mabo through countless cases, over many years, the uncertainty, the shift in power to Canberra from the States, and the open–cheque liability for compensation.

Much more follows, as we head down the Canada path to separate, sovereign, Aboriginal government.

I am intrigued by a simple question : Why is it that anyone is in favour of the High Court's Mabo decision creating native titles?

It seems to me that a number of things stand out:

Mabo, and the legal rights it creates, are based on race. Generations of Australia's leading thinkers have argued against racism and educated the Australian population that distinctions based on race should not be made in rights accorded by law.

Mabo creates privilege – legal privilege based on race. No Australian who is not an Aboriginal person or a Torres Strait Islander is eligible to make any claim for native title.
The likely consequence of a legally enshrined, racially based privilege in favour of a minority group, especially when the privilege is a very large one and the minority is a very small one, is a backlash of anger and irritation and a renewal of prejudice against the minority, in this case the Aboriginal minority.
Mabo flies in the face of several generations of change to thinking in Australia, change which has seen the removal of discriminatory laws against Aboriginal people, and the partial removal of discriminatory attitudes, and progress towards the acceptance by wider society of Aboriginal people as Australians of equal rights and responsibilities, with their own particular cultural history and background.
When I went to school in a country town in Western Australia in the 1950s, the local Aboriginal community lived on a reserve behind a hill out of town, and that is where the rest of the population wanted them to be – out of sight and out of mind. Australians were taught and accepted that that approach was wrong, and that Australia would be better for everyone if we all lived as one people within the limits of our own desires, capacities and ambitions.
Mabo has decided that Aborigines may go back to land which they may now own as of right, where they will enjoy all the rights and privileges of Australian society, and others besides.
Mabo represents judicial legislation. No amount of legal nicety, sophistic posturing or other casuistry alters the fact that the High Court has moved from the area of judicial interpretation and judicial application to legislative creation. It is a fact that before the High Court decision there was no native title known to Australian law. There is now at least one recognised native title and endless potential for the "identification" of others.
When I went to Law School at the University of Western Australia in the early 1960s and was taught the law of real property by the then Mr John Toohey, now the Honourable Mr Justice Toohey of the High Court, I was taught nothing about native title – because there was nothing to teach.
As Mr Justice Roderick Meagher said at earlier proceedings of this Society (1):
"... a close reading of the leading judgment in the Mabo case, the judgment of Brennan, J., His Honour said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authority. One would be pardoned for thinking that a lawyer would find such a course attractive, particularly if it was his duty to apply the law. But His Honour spurned such a course and thought it more palatable to invent a new law".
Professor Brian Galligan (2) concedes that the High Court has invented a new law, but says that is in order: "The High Court is indeed making law, but that has always been the case". Right, then wrong.
Or, to put it another way, as was done by Dr John Forbes (3), "the High Court in its legislative jurisdiction, has done what no single House of Parliament can do; it has passed an open–ended money Bill".
The legislative role adopted by the High Court under its purported, and one might say usurped, legislative jurisdiction has, and will increasingly, put at risk the respect hitherto held for the High Court. Its recognition as an independent judicial arbiter of the law will die, with as yet unknown consequences for the Court. However, it is certain there will be consequences, because in a democratic society, however slow, inefficient and seemingly ineffective the process may be, the organs and institutions of government are all eventually accountable to the people. For a tiny group of unelected, unrepresentative judges to seize unto themselves a legislative power, as the

majority has done in the Mabo case, will eventually bring its own form of justice upon the High Court. (4) Unfortunately that will be to the detriment of us all. (5).

In the meantime the High Court has been plunged into political controversy.

The Chief Justice, Sir Anthony Mason was prominently reported (6) defending the Mabo judgment. He said that the rejection of terra nullius was entirely consistent with a decision of the International Court of Justice in The Hague.

A strange approach indeed from the head of Australia's supreme judicial authority, which is bound to uphold Australian law, and which but a few years ago was so anxious to remove all rights of appeal to the Privy Council, then part of our legal system.

Sir Anthony reportedly said that the fact that in Mabo the High Court had considered Government policy did not indicate that the Court was trespassing beyond its judicial function or what Courts had done in the past. Astonishing, to say the least.

The report quotes Mason, CJ:

"To put Mabo in perspective, I should say that in its decision the Court has done no more than the courts have done in the United States, Canada and New Zealand".

My understanding is that in all of these cases the decisions were based on nineteenth Century treaties made with indigenous people; the legal foundation of native land claims was to be found in those treaties. In Australia, there were no treaties of that kind.

In a radio broadcast following a speech at Cambridge, England (7) Sir Anthony went further – much further – into direct political comment:

" .... criticism on the part of interest groups, such as the mining and pastoral industries, and to a lesser extent politicians, has been the most sustained and abusive that I can recall in my career as a lawyer.

"More disconcerting has been the concerted campaign run by the mining interests, supported by the pastoral interests, to discredit our decision in relation to the Aboriginal land rights case, Mabo. Now, that campaign has been conducted with a view to discrediting the decision and to persuading the Government to, in effect, repeal it, and if need be even to initiate the constitutional processes that would result in an amendment of the Constitution".

How extraordinary that Australians should want democratically elected parliaments rather than unelected judges, or even have their own vote at a referendum, to decide their laws and the values reflected in them!

How damaging and dangerous to our future that the Chief Justice of our highest Court should dismissively dispose of Australia's greatest wealth producing industries as mere "interest groups".

How indicative of the isolation and insularity of the High Court that its Chief Justice should be surprised at the anger generated by a decision which threatens the economic and long term social stability of the nation; and how much does his attitude display the disqualification of High Court Judges to measure and apply our alleged contemporary moral values – the very foundation of Brennan's, J. judgment at least.

Finally, the Chief Justice raised grave questions on the status of the decision by saying it was secured "by recourse to a technicality". The full meaning of that significant comment is yet to be explained.

. It goes almost without saying that the Mabo decision further undermined the structure and substance of Australia's federal constitutional system. There has of course been no vote of the people at a referendum in relation to this most fundamental change in our land law and the constitutional control of land.

The issue of the effect of the decision on the federal system has barely been raised in the public debate, no doubt because the High Court has treated federalism with such scant regard for such a

long time. Without venturing into another field entirely, it is abundantly clear that the foundation of federalism as a division of sovereign powers, the balance of which may be changed by the will of the people expressed at referenda, has been destroyed already by successive decisions of the High Court. These decisions have allowed certain powers, the external affairs power in particular, to gain such predominance that they have consumed the structural foundations of the Constitution, much as white ants might consume the bearers under a wooden house, leaving the paper thin outline of structure in place, but the inside either hollow or filled with the powdered remains of masticated timber.

The Murphy doctrine of the late High Court Justice and former Attorney–General has been given full effect.

In part, the Mabo decision is surely an unforseen and unintended outcome of the 1975 Racial Discrimination Act. No ordinary person in 1975 could have contemplated the scenario we now have. The High Court has invented a new form of title to land for some Australians, based on their racial origins. Apparently that is not an act of discrimination which in any way offends the Racial Discrimination Act. The fact that 98.5 per cent of the Australian population are and will always be ineligible to claim a native title because they are not racially Aboriginal or Torres Strait Islanders is not, according to the decision of the High Court, an act of racial discrimination against the 98.5 per cent.

However, the High Court has made it clear that any attempt by the Sovereign, through a duly elected State government, chosen by the people, to abolish generally the native titles invented by the High Court will be an act of racial discrimination rendering invalid the attempt. It is pretty clear that no State Parliament alone, having had its absolute ownership of Crown lands legislated away by the High Court, can negate that judicial legislation by a simple enactment because it would fall foul of the Racial Discrimination Act – an Act itself underpinned by the extraordinary extension of the external affairs power previously legislated for by the High Court. Only the Commonwealth has the power to negate the postulated effect of the Racial Discrimination Act. It does not have the political will to do so for a number of reasons, including its own substantial gain in power over State lands.

For some, such as Father Brennan, son of the High Court's Justice Brennan, such a general negation of Mabo titles would be unthinkable, notwithstanding that the present outcome would have been not only unthinkable but unforseeable and unacceptable if ever contemplated at the time of the adoption of the Racial Discrimination Act.

I cannot help but observe the extraordinary circumstance that at least one of the Justices of the High Court, the Hon. Mr Justice Toohey, who is busy developing the concept of an implied Bill of Rights in the Commonwealth Constitution, which clearly contains no Bill of Rights, has been unable to imply anything which upholds federalism in our federal constitution. (8)

Mabo has created confusion, uncertainty, division and divisive argument. To say so is to state the obvious. What is less obvious perhaps is the extent to which it has set back the true cause of the Aboriginal people. As Mr Graeme Campbell, Federal Labor Member for Kalgoorlie, said in a radio broadcast on 15 June, 1993:

"As one Aboriginal fella said to me recently, `15 years people will argue about this, it'll make them lawyer buggers rich, at the end of the day blackfellas get nothing except everyone hates us'. Now I think he was absolutely right. Now that's a great threat."

Mabo has raised Aboriginal expectations to unrealistic heights, leading only to future disappointment. To that extent it represents yet again white abuse of Aboriginal people. As Mr Fred Chaney, one of the architects of the Commonwealth's Northern Territory Land Rights legislation of the 1970s, said in a feature article in The West Australian on Wednesday, June 30 (an article with which I almost totally otherwise disagree), "the worst outcome of Mabo would

be if it became no more than another set of dashed expectations". It is not the worst outcome – the destruction of Australian society is the worst outcome – but it is a bad outcome, especially for Aboriginal people.

Mabo assumes that Aboriginal people want to be different, privileged Australians, or, at worst, not Australians at all. In a real sense the decision is insulting to Aboriginal people, because again it emphasises separateness, dependency, and a need for special and different measures to apply. My own experience as a State Minister with responsibility for Aboriginal affairs makes me believe that Mr Graeme Campbell is right when he says, as he has on several occasions, that Aborigines he represents – bearing in mind that his Kalgoorlie electorate covers a high proportion of the potential Mabo claim areas in Western Australia – do not want a Mabo "solution" to their problems.

So far I have not referred to the economic consequences of Mabo. Despite the fact that so much of the public debate centres on the economic outcome, my own belief is that the greatest threat posed by Mabo is to the social and political fabric of our society, as will appear below. However, I do not overlook the enormity of the negative economic impact that Mabo has already had and will continue to have. As has been observed by others, these consequences will not appear for some years, as the downstream effects of uncertainty and non–investment emerge, and there is an eventual realisation that literally hundred of thousands of jobs for the children and adults of Australia are locked away in the special privileges and rights of Mabo lands, and the uncertainties of potential and unresolved claims.

There is no solution to the Mabo issue which creates certainty, expeditious resolution and justice for all Australians, other than a reversal of the Mabo decision. Fred Chaney, in his article (to which I have referred) finds it all very simple:

"Issues of compensation may arise with respect to post–1975 titles. That is part of the uncertainty and again must be put to rest. Governments created the titles; if there are problems in what they have done, that is their responsibility. The only issue which needs further discussion is which level of government will carry the responsibility".

Mr Chaney has apparently not learnt anything from his experience as a Minister in a Government which introduced retrospective tax legislation. It does not seem to occur to him that the High Court has not only legislated, but legislated retrospectively to affect people's rights created in good faith by elected Australian governments since 1975. To him, and others expressing a like view, that problem is simply solved by the payment of compensation, and all we have to do is work out whether it is paid by a State government or the Commonwealth government. Let me refer back to the pithy quotation from the article from Dr John Forbes in The Australian Financial Review:

"The High Court, in its legislative jurisdiction, has done what no single House of Parliament can do; it has passed an open–ended money Bill".

Not only are the beleaguered taxpayers of Australia to foot the bill for the horrendous incompetence of financial management, or mismanagement, by elected governments in the 1980s, they are now to foot the bill, of unknown and undetermined proportions, for the retrospective legislation of the unelected High Court.

An important statement was made in a speech a few weeks ago by a retiring senior State Parliamentarian, who was also an ex-serviceman. He asked if the hundreds of thousands of Australian men and women who fought in at least five wars to preserve this country were now expected to buy it back from the indigenous people.

It must be said that conflict and division arising from the Mabo decision will last for years.

Very small groups of people will benefit from the Mabo decision – a handful of Aborigines. Aboriginal people comprise about 1.5 per cent of the Australian population. It would be a fair

guess that less than one quarter of Aboriginal and Torres Strait Islander Australians have any realistic potential to succeed with native title claims – in other words, a handful of the few. Their gains may be very great. That is why the Aboriginal industry does not seek native title as an alternative to legislated Aboriginal land rights, but rather is pursuing both as part of a wider agenda.

So my simple question, "why is it that anyone supports the Mabo decision?", has led me to many concerns about the deficiencies of the outcome of Mabo. Whilst not all those concerns are equal in value, all have their own measure of validity.

When all those negatives, and no doubt there are others, are considered, a thoughtful person must ask the further question: "what is it really all about?"

What kind of madness is it that leads the established organs and institutions of a nation which prides itself on its legal, democratic and constitutional traditions, to deliberately create a monster – a legal monster of separateness based on race, of divisions of its people based on race, of legal privilege, of uncertainty, of vast indeterminate cost, of certain injustice, of indeterminate consequence, of upheaval of long established and sound legal principles – and in doing so put at risk a groping towards a free and equal society in which an indigenous people can take their place as equals?

There is another extraordinary twist to Mabo which has something to do with how it is treated. It is always assumed that the abandonment of terra nullius as a legal concept by the High Court leads inevitably to the adoption of native title as a legal right. But that is not a logical necessity. Terra nullius has been grossly misrepresented as meaning that Australia was not inhabited or occupied at the time of white settlement. Having made that misrepresentation, it is then possible for the critics of terra nullius, the proponents of Mabo, to condemn the Aunt Sally which they have set up, and thereby justify the outcome of its abandonment in the form of Mabo.

Terra nullius is explained in the article (9), "Old Colonisations and Modern Discontents: Legacies and Concerns" by Professor Alan Frost. It is not the subject of this address, but it is important to make the point (that no one I have observed has previously argued), that even if the misrepresented position of terra nullius were to be accepted as correct, and terra nullius therefore abandoned as a legal concept, it does not necessarily follow that the High Court's legislative decision for native titles is correct.

It is interesting, and perhaps fruitful, to consider the status of European occupation of Australia in the absence of terra nullius (correctly understood). There were no treaties of the kind entered into in Canada, United States and New Zealand. So we do not occupy by right of treaty : perhaps part of the intention of the High Court is that we should hasten to conclusion the proposals of some that we should have a treaty. (An explanation has not yet been provided as to whom Australia should treat with, other than the Aboriginal and Torres Strait Islander people, who are as diverse in their cultures and groupings as Europeans; nor has it been explained how a nation makes a meaningful treaty with one group of its own citizens. But these are issues for another paper.)

If we do not occupy by virtue of terra nullius or treaty, perhaps it would be accepted that we occupy by conquest. The Prime Minister has accepted, on our behalf, responsibility for terrible crimes against the Aboriginal peoples – crimes usually attributable to forces of conquest.

There is a good reason why there was no great or general treaty between the coming white man and Aboriginal Australia – there was no organised system of national or regional governments with which treaties could be concluded.

There were ethnic groupings of Aborigines, but they were never a nation. There were several hundred tribes scattered across the vast continent.

So what is Mabo about? Is it about guilt? If so, whose guilt, and for what? Is it about justice? That seems to be the most oft stated reason for supporting Mabo. But who can see justice even for Aboriginal people in the stunningly illogical, incomplete and inconsistent outcomes of Mabo? I doubt it provides justice even for a few Aboriginal or Torres Strait Islander people. Queensland Supreme Court Justice Martin Moynihan is reported to have reported to the High Court that Eddie Mabo himself had not lived on Murray Island since 1956, and that "his claims of visits to the Island came under somewhat of a cloud ... ".

There is little justice in Mabo for even a few individuals, and certainly none for the wider Australian community.

Is then Mabo about social welfare? Is it some new system by which Aboriginal people will be economically sustained without the continuing support of massive welfare handouts from the working population of Australia? Will the large numbers of them who regularly depend upon welfare as their sole means of sustenance, no longer need to do so as a result of Mabo? Clearly the answer is, "no". Even the proponents and supporters of Mabo acknowledge that it will provide land (and of course the provision of land in itself provides nothing more) to only a small percentage of the Aboriginal population, which is itself a small percentage of the Australian population.

Some opponents of Aboriginal land rights and Mabo have made a consistent mistake over a long period. Their mistake is to see these things in isolation, to see them as individual things, to see them as separate and isolated claims upon our society.

If we are to come to grips with Mabo we must see it as part of a wider agenda.

It is beyond my comprehension to work out why the High Court should, wittingly or unwittingly, have become a party to the fulfilment of that agenda. Being generous, one must respectfully assume that the High Court was simply misguided – that the majority of Judges confused their responsibilities as judicial officers with their personal ideologies, that they were not part of the wider long term agenda which will inevitably lead, if followed, to a divided and damaged, and some would say destroyed, Australian society.

Put very simply, the wider agenda is to create an Aboriginal, separate, sovereign state geographically within Australia, but not part of, or tenuously only a part of, the Australian nation.

Once more the Aboriginal people are being used – used by people whose aim is to weaken and destroy the nation we know, for reasons which can only be assumed to be as inverted, perverse and obscure as those which have driven Marxists and other totalitarian thinkers in all ages.

A small article appeared in The West Australian newspaper on April 20, 1993. Needless to say, it was not given great prominence or followed up by a newspaper which is almost obsessive in its support of Mabo, and its critical condemnation and disparagement of its opponents. However the article did appear, small as it was, under the heading "New Nation Tip By 2000". The article said in part, "`Aborigines will achieve a nation state within Australia by 2000'", says a leading Australian historian. Associate Professor Henry Reynolds, from Queensland's James Cook University, said the High Court Mabo decision would add momentum to the Aboriginal nationalist movement. `There are some pretty strong movements for people to gain self–determination, to have greater control over their internal affairs such as education, health and law and order' he said yesterday. `This would give Aborigines a special sense of identity and independence while remaining Australian citizens,' Professor Reynolds said. `The ideal is that there should be equality, and a great deal of effort has been put into this in the last ten years', he said."

But the ideal is not equality. The idea being pursued is independence and sovereignty, as in Canada where it is further developed. The official Canadian publication to which I have already

referred, in several places details the rejection of proposals for self–government for Aboriginal people, on the basis that the self–government being sought would not be delegated or constitutional self–government within the Canadian federation, as proposed by the Canadian government, but sovereign, independent self–government. I quote again the Canadian Government publication: "Under this proposal Aboriginal governments would have exercised delegated powers. Aboriginal peoples rejected the proposal ... Again, Aboriginal leaders took the position that the right of self– government must be free standing and capable of being implemented independently from a requirement for negotiated agreement".

A publication in October, 1990 by the Friends of the Earth (10), included an article entitled "Towards Aboriginal Sovereignty". Its sub–heading reads:

"On 16 July 1990 the Aboriginal Provisional Government (APG) was formed by Aborigines in Australia. This article was prepared by the APG, and outlines its structure, purpose and strategies and some of the implications of the establishment of a sovereign state for Aborigines".

The article makes the position very clear – the objective is an independent, sovereign Aboriginal state made up of various territories throughout Australia, albeit geographically divided. "Let it be clearly understood : the Aboriginal Provisional Government wants an Aboriginal State to be established, with all of the eventual control being vested back into Aboriginal communities and only oversee powers being vested in the Aboriginal Provisional Government. The amount of land involved would essentially be Crown land, but in addition there would be some land which would be needed by the Aboriginal community other than Crown land ... At the end of the day enough land would need to be returned to Aboriginal communities throughout Australia to enable them to survive as a nation of people, and the remaining land would be kept by whites and their governments as a basis for them to continue their nation".

There is no mistake as to the nature of the sovereignty being sought, or that it includes international relationships:

"The political control of each local Aboriginal community would be vested in the community themselves. There would be no point in transferring white power to an Aboriginal Provisional Government which simply imposed the same policies from above. The local communities must have absolute control over their day to day activities and the direction in which the local Aboriginal communities were to move. The residual powers of negotiation with foreign governments for trade, co- ordination of some uniformity between Aboriginal communities and so on should be vested in the Aboriginal Provisional Government." (Op. cit. p. 40, emphasis added).

Lest you see this publication as a fringe document, I refer you also to an article entitled "An Aboriginal Republic, Too?" which appeared in The Independent Monthly in March, 1992 by the same Associate Professor Henry Reynolds, who is said at the top of the article to examine "The precedents for a self–governing black Australian nation".

He takes the issue further by revealing that the Commonwealth Government of Australia has supported Aboriginal self–determination in international forums, as well as at home.

"The Australian Government has frequently paid lip–service to the principle of self–determination. There was the Government's commitment to this in the motion on Aboriginal rights moved by Prime Minister Hawke as first business in the new Parliament of August, 1988. A commitment to self–determination was also enshrined in the preamble to the Reconciliation Act of 1991. The Minister for Aboriginal Affairs, Robert Tickner, has given his personal commitment."

Reynolds concludes his article with the following:

"The Federal Government is in an awkward situation. Ministers profess to believe in self determination and say so in international forums. Having already given Norfolk [Island]

significant autonomy, can the Government in all seriousness deny the same consideration to Australia's `First Nation'? To do so would confirm the view that, rhetoric notwithstanding, Australia still has a colonial attitude to its indigenous people".

As long ago as February, 1981 an article was written in a publication, the Current Affairs Bulletin, entitled "The Makarrata, a Treaty Within Australia between Australians, Some Legal Issues ... " by Bryan Keon–Cohen, who is described as a Barrister of the Supreme Court of New South Wales and Victoria, and a Lecturer in the Law School at Monash University. He refers to the discussion about the treaty, then called "a Makarrata", a title which went out of fashion with the Aboriginal industry when non–Aborigines woke up to what it was really about.

Under the heading, "Content", the author said:

"Presuming all parties agree to sit down, in good faith and with the intention of achieving a Makarrata, what are they to negotiate about? What should the Makarrata contain? The abovementioned fundamental objectives, or something like them – which it can be assumed Aboriginal negotiators seek to achieve – will need to be translated into a `list' of demands. The Aboriginal Treaty Committee's current list provides a useful starting point. The Committee has suggested that the `Treaty, Covenant or Convention' should include provisions relating to the following matters:

i) the protection of Aboriginal identity, language, law and culture;

ii) the recognition and restoration of rights to land by applying throughout Australia the recommendations of the Woodward Commission;

iii) the conditions governing mining and exploitation of other natural resources on Aboriginal land;

iv) compensation to Aboriginal Australians for the loss of traditional lands and damage to those lands and to their traditional way of life;

v) the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose".

Under the later heading, "Political Control", the author says:

"The fifth item on the Treaty Committee's Agenda, `The Right of Aboriginal Australians to Control Their Own Affairs', is a little ambiguous. It appears to seek, basically, to extend the current Federal policy of self–management and self–determination. Again, Aborigines will need to specify their demands ... The thrust is not in this area of private control, but public administration – powers of self–government. This may be considered at two levels : first, representation in current governing structures; second, the creation of separate, aboriginal–dominated, self–governing structures".

The evidence is clear to me from the published material I have referred to, and other material going back at least to the 1970s, that Mabo is but a small part of a wider agenda, which certainly includes a separate, sovereign, Aboriginal state within Australia capable of conducting international affairs.

Even the recent document issued by the Council for Aboriginal Reconciliation entitled "Making Things Right" is carefully ambiguous in listing as one of its "Eight Key Issues as Crucial to Reconciliation", the issue of "Greater opportunities for Aboriginal and Torres Strait Islander Peoples to Control Their Destinies".

The essential agenda appears to involve five steps:

Step One: Transfer of control over land to the Commonwealth Government.

This is an essential step because it is clear that the individual States which have had historically, and legally until the High Court invented native title, essential control of the disposition of land, and the use of land, would not be prepared to concede the very foundation of the economic well being of their people for the creation of a separate, sovereign, Aboriginal state. It is only the

remote, unrealistic and extraordinary government of Canberra that can so easily be moved in these directions, especially as the pay–off for acceding to extraordinary forms of morality supposedly applicable elsewhere in the world, is that Canberra in its everlasting and voracious push for power will thereby increase its own power.

The transfer of control of land to Canberra is being effected by the extraordinary combination of laws made by the Commonwealth Parliament and decisions on those laws by the High Court. The Commonwealth Parliament enacted the World Heritage Properties Conservation Act which enables a single Commonwealth Minister in Canberra to take total control over any usage or occupation of land which is even so much as nominated for World Heritage listing. Interestingly in the context of this debate about Mabo, where compensation is so central an issue, no compensation is payable in respect of World Heritage listing controls which damage, destroy or outlaw the legal, property, occupation or livelihood rights of affected Australians. These extraordinary and undemocratic powers over land have been upheld as perfectly valid by the High Court under the external affairs power.

The Aboriginal and Torres Strait Islander Heritage Protection legislation, enacted under the power of the Commonwealth to make special laws for the people of any race, enables another single Minister in Canberra to stop any activity on private land, or State land, or in a park or reserve, which that Minister deems may be prejudicial to Aboriginal heritage. It is clear that new treaties to protect the environment, including the Treaty on Biodiversity, will in due course find their way into legislative enactment, further extending Commonwealth control over land and land usage, and no doubt that too will be enthusiastically upheld by the High Court of Australia, dutifully protecting the federal Constitution of this nation.

The High Court has upheld the power of the Commonwealth to abuse its export licensing power so that it can stop whole industries. There is no law in Australia which prevents the mining of uranium at as many places as it may be discovered, under normal mining legislation of the relevant State, and authorised in accordance with the law of that State. Uranium is confined to the absurdly illogical three mines policy position by the undoubted abuse of Commonwealth power in prohibiting exports except from the three selected and approved mines. Yet another major restriction and control on land use, in this case mining, transferred from the States to the Commonwealth with the complete approval of the High Court of Australia.

Now we have Mabo. This extraordinary decision creates a new form of title, totally inconsistent with the laws of the States which have hitherto been the sole creators of forms and systems of title, and effectively transfers a major degree of power over all unalienated Crown land in Australia from the States to the Commonwealth, through the application of the Racial Discrimination Act, upheld again by the external affairs power. The Commonwealth Government is now attempting to dictate to the States a requirement that they deal with Mabo in certain particular ways, and indeed Mr Keating has proposed that the Mabo principles be significantly extended.

Step Two:

This is part of the extension of Mabo proposed by Mr Keating. Despite Mabo, all present land rights legislation of the Commonwealth in relation to the Northern Territory, and other land rights legislation, is to be kept in place, and indeed extended in accordance with Mr Keating's proposal, so that Aborigines have a veto over any development or project on Aboriginal lands of various kinds. In all the literature I have read it is made quite clear that the policy intention of the proponents of Mabo is that the Mabo decision is to apply in addition to, and not instead of, legislated (that is, legislature legislated) land rights legislation.

Step Three: Mabo itself.

Mabo is to provide the legitimacy for Aboriginal land "rights". Mabo condemns State legislatures such as the Western Australian legislature, which democratically rejected Aboriginal land rights legislation. Mabo provides an international justification for creating special rights and privileges for indigenous people. Mabo is a morality to support the separateness of Aboriginal people and their special rights and privileges. But above all Mabo provides, in the absence of the legislative will to do so, vast areas of land for Aboriginal people who are able to prove claims (which, as indicated by the way the Mabo decision itself was decided, will not be difficult), and these vast areas of land will provide the economic underpinning for an independent, sovereign, Aboriginal State.

Step Four : The Treaty.

One has only to read, with a growing sense of alarm and despair, the "progress" in Canada to realise that we are but a step or two behind them. The agenda is exactly the same. First, we are persuaded that there has been an injustice in the past - as if we did not know that already. Then we are made to feel guilty. Then there is talk about reparation and compensation. Then there are demands for land. Land is granted under Aboriginal land rights legislation. Land is then granted under the Mabo native title approach. And the completion of the "progress" is the signing of a treaty. There is no doubt that the development of a treaty is in train under the promotion of the Federal Labor government, with some Liberal reservations. Currently that train of "progress" is called the process of reconciliation. A few years ago it was called Makarrata. We are constantly given new titles as each is exposed for what it truly represents.

The treaty leads inevitably to step five.

Step Five : Self Government.

As already noted, the Canadian Aboriginal people have repeatedly rejected any form of self–government which is seen as subsidiary or delegated. The ultimate agenda here in Australia is the same – independent, sovereign self–government, that is, self–government the legitimacy of which is not founded in delegated power from the Commonwealth Parliament, but is founded in the (claimed) inherent right of Aboriginal people to self determination. And that is the end of Australia as we know it.

By comparison to this plan, its long term objectives, its devious expositions and implementation, the occasional furtive claims for Western Australian secession are but child's play!

On 17 November, 1988 an article appeared in The Northern Territory News under the heading "Islanders Reject Pact". The article reported in part:

"Torres Strait Islanders have demanded immediate sovereignty and rejected the Aboriginal Treaty proposed by the Prime Minister Mr Bob Hawke. Delegates representing Australia's 25,000 Torres Strait Islanders voted unanimously yesterday to secede ... The Chairman of the Torres United Party, Mr James Akee, said delegates had demanded the Federal Government begin immediate negotiations for the Islanders to gain sovereign independence ... He said Torres Strait Islanders wanted full control of their affairs including only Torres Strait Islanders, and no whites, in government bureaucracies affecting them. The all-black bureaucrat situation should apply for the bridging period until sovereignty took effect".

This really sums it up. All steps are bridging steps until sovereignty takes effect.

Well meaning people like Fred Chaney are sorely misguided. Their long term dedication to the cause of the well being of Aboriginal people has blinded them to the reality of what is going on.

Australia is being undermined from within by a process, which is said by Brennan, J. of the High Court, to satisfy "the expectations of the international community" and "the contemporary values of the Australian people".

Leaving aside the propriety of judicial decision–making based on such criteria, and questions as to the qualifications, if any, of Brennan, J. to determine and apply those expectations and values,

one may ask if the High Court will change its Mabo judgment, or at least its direction, if it can be shown that the Australian people do not share his enthusiasm for handing over the people's land according to the whim of Judges.

Or, is it the situation that the High Court Judges have now assumed the mantle of infallibility as to the exposition of the contemporary values of the Australian people?

As has been shown, the expectations of the international community are partly being generated by the participation of Australian Aborigines and Australian Government officials in international forums.

I do not know the basis of any morality which dictates that a nation should accept its own destruction. I do not know the basis of any morality which says that 98.5 per cent of the people of a nation should concede certain exclusive fundamental rights to 1.5 per cent of the population of that nation. I do not know the basis of a morality that says that it is wrong to discriminate against Aboriginal people, but all right to discriminate against non–Aboriginal people, as the Mabo decision does. I wrote to the Hon. Ronald Wilson, former Justice of the High Court, who appeared on a television programme with me in relation to Mabo, and asked him to imagine the stream of protests and abuse which would break out around the country if some law were passed by a State or Commonwealth government, or a decision were made by a court, which provided that certain land was to be available to non–Aboriginal Australians, but that no Aboriginal would ever be qualified to acquire that land on the same basis, because of his or her race. And rightly so that there should be protests, but why not equal protest in the reverse situation?

It is increasingly clear that those who perceive themselves as the guardians and promoters of Aboriginal interests have abandoned any pretence that the objective is equality for all Australians.

The fundamental question remains unanswered : why should Aboriginal and Torres Strait Islander Australians have a greater, better or different right to acquire land than I do? As a fifth generation Australian whose forebears carved out their wealth in the South–West of Western Australia from the 1840s onwards, but who left none of their lands down the line to my generation, I make no claim to better land rights than last year's, last month's or last week's immigrant or lawful refugee. Why do Justices Brennan and Toohey and four of their colleagues, and Mr Tickner and Mr Chaney and Dr Wooldridge want to reduce my rights as an Australian citizen? – and, more importantly, by what right do they claim to do so?

It is important to understand that every step in the seemingly inexorable path to separate Aboriginal sovereignty depends on the preceding step. Only the Commonwealth will pursue extremist agendas represented by the post–Mabo demands, and earlier by extremist greenies. Therefore it has been necessary for the proponents of these agendas to help the Commonwealth seize power over land from the States.

The relevant decisions of the High Court have allowed this to be substantially achieved. The next steps will be the treaty and self–government. The States not directly much affected by Mabo will wake up too late if they don't take a strong stand now.

The questions implied by the title to this address – "Mabo and Federalism: The Prospect of an Indigenous People's Treaty" – are very clearly answered by the evidence which I have presented. Mabo is part of a process, allowed by High Court decision making, which has the effect of finally destroying the legal foundation of federalism.

By all reasonable expectations, if the present path is followed, there will be an indigenous peoples treaty, and that will lead inexorably and inevitably to an independent, sovereign, indigenous peoples government over a significant area of what, until then, will have been Australia.

Endnotes:

1. Published in Native to Australia, a Samuel Griffith Society publication, 1993.
2. The Weekend Australian, July 17–18, 1993, page 20.
3. A Reader in Law at the University of Queensland, in an article published at page 51 of The Australian Financial Review on 30 June, 1993.
4. Both proponents and opponents of Mabo now concede the High Court made new law, as referred to in the above notes. In addition, a key Mabo advocate and son of Brennan, J, Father Frank Brennan, said (June 11, 1992, reported The Australian 13 June, 1992), "The Mabo decision changes the law of the land." The issue moves from whether the High Court invented a new law – which was earlier denied – to the much more slippery field of argument, as to whether it was legitimate, traditional or proper for the High Court to adopt a legislative role.
5. More recently the historical basis of the High Court's Mabo decision has been questioned. A distinguished Professor of History, formerly from the University of Western Australia, has written in private correspondence (in my possession):

"I noted early on that the High Court Judges who decided on the Mabo case ventured out of the field of law into the realm of history, and did this in a most unimpressive manner. More recently I have noticed that their historical interpretations have been accepted and used as texts for the present debate, and this should not be allowed for the sake of the reputation of the Australian High Court and for the sake of the international intellectual reputation of Australia, where the current debates are not impressive. For example, for a High Court Judge to make a decision on a claim made by a Mr Mabo who lived in the Torres Strait Islands, and then apply that decision to Australia, would be the same as an American Supreme Court Judge making a decision about a Puerto Rican living in Puerto Rico, and then saying that decision applies to the American Indians. I am not certain how that thinking is to the legal profession. It is certainly unimpressive for the historian.

Like American Puerto Rico, the Torres Strait Islands are a lately acquired colonial possession of Australia, inhabited by a separate people whose lands were annexed at a special time for special reasons. As incorrect historical evidence is now being used and warped, the correct facts need to be presented, not only to make the debates properly informative and the political decisions soundly based, intellectually, but also to reveal to the High Court Judges the important pieces of historical evidence they failed to use when they made their judgment. With the correct historical evidence before them they might have reached different conclusions. However, that consideration is for members of the legal profession, not the historian. The only role of the historian is to present the factual evidence."

6. In The West Australian, July 2, 1993, p.6.
7. Reported "A.M.", A.B.C. Radio July 13, 1993.
8. See "A Government of Laws, and Not of Men?" by Justice John Toohey, Conference on Constitutional Change in the 1990s, Darwin, October 1992.
9. Chapter 11 of Upholding the Australian Constitution, the Proceedings of the Inaugural Conference of The Samuel Griffith Society, July 1992.
10. Chain Reaction Co–operative Ltd., 33 Pirie Street, Adelaide, South Australia, No. 62.

Chapter Five

Should The Courts Determine Social Policy?

The Hon. Peter Connolly, CBE, QC

The answer to this question is so obvious that one hesitates to take up time answering it. Social values and policies and the attitudes of a society will be reflected in its laws, and the judges will play their part and play it well if they confine themselves to the task of applying and interpreting the law, leaving it to the other organs of democratic government to make the changes to our legal system for which they receive a mandate from the electorate.

This said, it is undeniable that our highest court has from time to time played a significant part in shifting the balance of the Constitution. In fairness to the Court, it must be said that it is an historical fact that in all federations the passage of time has seen a marked centripetal tendency. In this country the High Court had not been in existence more than 17 years before the seeds were sown for the transformation of the central government, from one of limited authority to one which dominates the federal system and the States which brought it into existence.

The centralist tendency of the Court is denied by no-one, and the water has been running under this bridge too long to dwell upon it. However, recent years have seen some extraordinary re-writing of history by the Court and, in the name of interventionism, a disregard for the legal system carefully built up by its predecessors and for the established rights of the Australian community.1

As an example of the re-writing of history, I take the Territorial Seas Case2 in which the Court held by a majority that the colonies before Federation had had no proprietary rights in the territorial waters which washed their shores, nor in the land below those waters. The notion was that the territorial sea remained under the dominion of the imperial government, and that it was not until Australia became an independent nation that dominion over the territorial seas accrued to the central government.

Sir Harry Gibbs, the President of this Society, in one of the most powerful judgments he has written, demonstrated that before Federation the various colonies had made laws for the establishment of harbours and the construction of wharves, jetties and breakwaters, the control of navigation and pilotage, the maintenance of lighthouses and lightships, the regulation of fishing, whaling and prawning, and of diving for pearl shell and b,che-de-mer and the grant of oyster leases and licences to get marine fibres and sponges, and to enable mining to be carried out below low water mark.

The validity of none of this legislation had ever been questioned in the courts or by the imperial authorities in London. Opinions had been given by the law officers in London, many of them lawyers of great distinction, consistently affirming the authority of colonial legislation in Australia and elsewhere, extending for three marine miles from low water mark.

But in the view of the majority of the Court, the views of the imperial authorities were simply misconceived. This is really breath-taking in its arrogance. But even worse, as will appear, it showed no understanding at all of reality. It was perhaps attractive to the centralist mind to see the Federation ringed about by a three mile belt of purely Commonwealth territory. This would serve as a symbol of the essential unity of the nation and of the essential subordination of the constituent States. The reality however was to be otherwise.

When it was realised that all of the functions in relation to the territorial seas and the land beneath them, which had been painstakingly performed by the several States, would now become the responsibility of the lilies of the field in Canberra, the enormity of the responsibility must have struck them. The Prime Minister of the day made a touching concession to what he described, I believe, as new federalism, Canberra being no more capable of administering the territorial sea regime than it is of any other of the useful and indeed essential but unexciting aspects of public administration in this country. The central government could not wait to offer the territorial sea regime back to the States, and this was achieved by legislation passed by the Commonwealth pursuant to a request in that behalf under s. 51(xxxviii) of the Constitution.

In other words, the Commonwealth, having established its sovereignty, for what that is worth, hastily passed the bread and butter problems back to the States, which alone were capable of handling them.

To return to the Court's decision, Sir Harry pointed out that the notion of dominion over the territorial seas of the various components of the British Empire being retained in London, which was not aware of this fact, is wildly improbable. It would be an extremely difficult task to perform, even with today's speed of communication. It was not even a possibility in colonial times. Those who administered the British Empire were above all pragmatists. Whatever else may be said of the High Court of Australia, pragmatism is not one of its characteristics.

However, weird theories are. In delivering the inaugural address to the Society last year, I pointed out that the notorious Mabo case, which unhappily is still very much with us, involved a realisation by the Court that the British, who had put together an empire upon which the sun never set, did not even understand the nature of the rights to land created by the settlement of a colony. In the view of the High Court of Australia, they did not even understand who, in their vast empire, had control of the territorial seas of the lands outside Great Britain over which the Union Jack flew. More modest minds might have paused to think again before reaching such a bizarre conclusion.

I pass over Cole v. Whitfield which deprived the people of this country of the right, which had been guaranteed to them by s. 92 of their Constitution, to trade inter-State without government hindrance which went beyond reasonable regulation. I pass over the infamous Tasmanian Dam3 decision in which the majority held that legislative power over external affairs involved power over the internal affairs of a State.

I return to Mabo. I am aware that a paper on this decision is to be delivered at this meeting, but it is a case which poses so many problems of principle (which is the proper concern of a lawyer), and of practical application for our great primary industries (a matter of concern for all Australians), that I feel constrained to refer to it, with apologies in advance to the other paper writer, if I unwittingly trespass upon his field.

Before doing so, I must make a short reference to the case of Dietrich decided by the High Court on 13 November, 1992.4 Dietrich was charged with the importation of heroin, quantities of which were found in plastic bags concealed in his flat. Further quantities similarly packaged had been excreted by him in the prison hospital after his arrest. He was not given free public defence and the Court could not, consistently with its previous decisions, hold that he was entitled to such defence as a matter of law. Certainly there could not have been any such right at common law, for there was a time, some 150 years ago, when a prisoner charged with a felony was not entitled to counsel at all. Mason J., as he then was, had said in McInnis v. The Queen5 that an accused in Australia does not have a right to present his case by counsel provided at public expense.

So far, we see the law being consistently applied. It is, after all, a matter for those who have to find the money whether a contested trial should be financed by the public where the case is overwhelming. With respect to the views expressed by their Honours, this was obviously such a

case. The State had been prepared to finance the retainer of counsel to appear for Dietrich on a plea of guilty, but this he declined to make.
What then was the solution found by the High Court? It was to say that while he had no right to counsel at public expense, his conviction should be quashed because he had not had such counsel! Is it any wonder that the courts are congested with unmeritorious criminal defences, and that the cost of legal aid is such a burden on society that increasingly it is not being provided? The implication would seem to be that, unless the people finance what are often long, tedious and hopeless defences, offenders must go scot free. On intellectual grounds, Dietrich seems indefensible, and on pragmatic grounds it is likely to prove disastrous.
At this stage I return to Mabo, if only to ask the question "What was wrong with the decision?". The first answer is that it was sheer invention or, if you prefer a politer word, sheer legislation. As Dr Colin Howard has observed,6 "The philosophy of the common law is, above all, evolutionary, not revolutionary. Mabo is, above all, revolutionary, not evolutionary". In order to emphasise this point, I shall hereafter refer to the decision as the legislation of 3 June, 1992.
Now, if we had a Bill of Rights, there might conceivably be something in it upon which to hang such legislation, but there was nothing.
My thesis is, and I regret to have to put it so bluntly, that this is naked assumption of power by a body quite unfitted to make the political and social decisions which are involved.
Next one must ask what the legislation of 3 June, 1992 actually says. The answer can only be that it is vague and uncertain, and that is clear from the fact that, plainly, it is causing the greatest difficulty for all involved to understand just what is intended by the expression "native title" which is invented by the decision.
The notion seems best identified by the words "usufructuary right" which appear in the judgment. It is a pity that the study of Roman Law has been largely discontinued. It should have been apparent that a usufruct was a right exercisable against the property of another.7 As used in the Canadian cases which deal with Aboriginal title, it was a right exercisable against the property of the Crown. But the majority deny that the Crown had any property in the law. Who then was this mysterious other? Perhaps Captain Phillip should have been negotiating with him?
But let that be. One form of usufruct was a right to take the fruits of the earth. Giving the widest meaning one can to what, in the circumstances, is a pretentious and inaccurate expression, what seems to be said is that, on first settlement, the Aboriginal population had collective "rights" to move across the land, collecting its fruits and the game they found. It is also an historical fact that they resorted to particular places for ceremonial purposes and, as a means to clearing undergrowth and allowing the grasses and young growth to shoot, thus encouraging the proliferation of game, they regularly and constantly set fire to the countryside.
If the right to carry on all of these activities is to be included in "native title", it is still difficult to see in this legislation any basis for suggesting that Aborigines were deprived by white settlement of anything other than the right to carry on the activities of palaeolithic man. In particular, they did not mine the earth.
Indeed, the use of the expression "native title" in the legislation has engendered in "Aborigines" (some of them blue eyed and fair haired) with 200 years experience of European-style title to land, the notion that the legislation of 3 June, 1992 has given them something resembling freehold title (and more, for they are claiming mineral rights which are vested in the Crown, at least until the goalposts are shifted again). At the time of writing, they are claiming the stock routes of Queensland as a means to charging tolls on passing stock. It is no wonder that the Mabo decision was described by one commentator as the High Court's coup d',tat.8
If the above is a reasonable approximation of the content of the right which the Aboriginal population is said to have lost as a result of white settlement, a right which is obviously

inconsistent with freehold title, and equally inconsistent with the law upon which the national parks of Australia are held, one must then turn to consider what is a fair recompense for the loss of the right.

In a properly ordered society, this sort of question is essentially one for the elected Parliaments. Parliament, whose business all this is, is equipped to balance competing considerations. If, on balance, some recompense is due to the descendants of the Aborigines, the writer, like all other decent Australians, would not begrudge it to them.

But how would a wise and just Parliament approach the task? It would surely first identify just what the Aboriginal population has lost, and then consider what is called for in justice to them. So far as one can read the legislation of 3 June, 1992 with confidence, "native title" was certainly nothing resembling freehold, or exclusive occupation of the great tracts of land over which the Aborigines roamed with the seasons. The "rights" which their descendants will have lost if "native title" is extinguished may, according to the circumstances, include:

(a) first and foremost, the right to enter on land to hunt for native game and to forage for food;

(b) the right to resort to ceremonial sites; and

(c) the right to set fire to the landscape, including the national parks.

As to (a), considerations which would weigh with a wise and compassionate Parliament would, one would think, be the economic hardship involved in having to buy one's food from the supermarket in common with the rest of Australia, instead of taking it for nothing (though this was no sinecure, for much human effort was involved, and the hunter-gatherer was at the mercy of our often harsh climate). The Parliament would, naturally, go on to consider whether the billion-odd dollars currently being given to the Aboriginal population each year or expended, allegedly on their behalf, was not some small recompense for this change in their circumstances.

As to (b), if it be demonstrated that extinguishment of native title excludes the relevant section of the Aboriginal population from a site, and that they genuinely desire to go to it for ceremonial purposes, the Parliaments might well consider whether it is consistent with public interest that they should be accorded a statutory right to do so.

As to (c), the purpose of firing the land was to improve and sustain the resources of game. If the monetary distribution by the Parliament supplies their need for food, a wise Parliament might consider that little real loss is demonstrated.

The Court, no matter how interventionist, has neither the role nor the resources to weigh such considerations. Its legislation, therefore, is broad-axe in character and incapable of addressing the problem as a whole.

Further, a Parliament worthy of the name would perforce consider the impact of the new law on the nation as a whole. It would need to consider whether it was timely to spring this burden on Australia at a time when we are close to bankruptcy. It would consider the impact on industrial development which the country needs for survival. Indeed, in the wake of Mabo the Premiers met with the Prime Minister in Canberra to discuss the impact of Mabo on the economies of the several States. According to the Premier of Western Australia,9 the Prime Minister said that the cost of compensating the Aborigines for loss of their ancestors' rights is to be borne by "industry".

This proved to be no comfort at all to Western Australia, whose Premier wishes to see the mineral wealth of that great State developed for the benefit of all its citizens. It is no comfort to Western Australia to be told compensation will be paid by the Commonwealth, if the Commonwealth proposes to recoup it from industry, for such a policy will obviously be a great disincentive to industry to establish in Western Australia, or indeed elsewhere, if the world offers a more rational alternative.

Indeed, if this was the Prime Minister's response, it confirms the worst fears of Western Australians that the legislation of 3 June, 1992 would provide a springboard for outrageous claims,10 which the government in Canberra would be too weak to resist.

By the same token, they would have been too weak to introduce such a chaotic situation. Politicians may not have the supreme wisdom of some judges, but they have a quality of inestimable value to a democracy, their sensitivity to public opinion. The slightest hint of a cool change in the electorate will be registered by politicians, even in Canberra. A raging gale would pass unnoticed in the glass palace opposite the National Art Gallery.

Another aspect of Mabo to which no attention has been given is that the views of the Justices (other than Dawson J.) are no more than gigantic obiter dicta. As Mr Walsh, the former Senator, has pointed out, the Murray Islanders were not nomads, they were settled on the islands and had been for generations. It follows that their interest in those lands would have been respected by colonial governments if their settlement had been on the mainland; and it is a simple historical fact that Queensland annexed these islands at the instance of a former Premier, Mr John Douglas, the Administrator at Thursday Island, to protect these settled inhabitants against incursions from the Pacific. They are not of aboriginal descent but Melanesians, not nomads but cultivators, millennia ahead of the palaeolithics in terms of social organisation.

The situation of mainland Aborigines was wholly irrelevant to the situation of the Meriam people, who indeed dislike being associated with them for administrative purposes by the bureaucracy. If Australia's politicians had any courage, they would say roundly that Mabo is not a binding decision in relation to mainland Aborigines, and that they do not propose to adopt the socio- political philosophy of the majority of the Court. Of course, a truly Aboriginal case could easily be mounted, but next time the States and even the Commonwealth would be forced off the fence to defend the rights of the nation as a whole.

Finally, as law, the decision is pitiful. The draftsman does not deny that the law in 1788 was as Sir Paul Hasluck has described in a passage so clearly and simply stated that I set it out in full in the Endnotes to this paper.11 The law from 1788 until 3 June, 1992 was that on first settlement, property in the wastelands of the Crown (i.e. the whole continent) passed to the Crown for the benefit, as the draftsman concedes, of the people and all of them. This had not been doubted until 3 June, 1992. There was a line of High Court decisions to this effect from 1913 to 1969. A spurious distinction is drawn in Mabo between political sovereignty and title to land, but this distinction had been rejected by the courts, including the High Court, since 1847. As Lord Reid, one of the most respected English judges of this century, remarked: "We cannot say that the law until yesterday was one thing, from tomorrow it will be something different. That would indeed be legislating."12 By what magic then is the property of the whole of the Australian people taken away and given to a small segment of the people?

The writer is acutely conscious of the seriousness of commenting in this fashion on the decisions of our highest court, and has no pleasure in doing so. The High Court has occupied a unique position in Australian society. For whatever reason, we have never given our unqualified respect to any of our institutions, with the sole exception of the High Court. It has presided over 70 years of change, of the shift of power from the constituent colonies to the central government, and all this largely without complaint or criticism. Yet these years saw cases of very great political importance. The writer has no doubt that the main reason why they were so accepted was the perception in the Australian community that the Court was adhering to Sir Owen Dixon's principle of strict legalism. The principle was stated by Dixon during his swearing-in as Chief Justice in the following words : "There is no other safeguard to judicial decisions in great conflicts than a strict and complete legalism".13

The Attorney-General of the Commonwealth, Mr Duffy, when criticism of Mabo first surfaced, deprecated it, saying that criticism of the Court may endanger its independence.14 With respect, however, even in the vast majority of cases, in which judges confine themselves to their judicial functions, the common law tolerates criticism of the courts. A fortiori must comment, indeed criticism, be permissible when the judge assumes the mantle of law giver, and places himself uninvited at the head of the political system. In that capacity he is entitled to no greater privilege than any other politician.

Moreover, once a court arrogates this role to itself, it is of vital importance to the society as a whole to know, before its judges are appointed, what their personal philosophy, religion, racial background, personal associations, and the like, are. This is precisely why senior judicial appointments are the subject of what seems to us indecorous scrutiny in the United States, where the Bill of Rights forces this role on judges. We, on the other hand, are accustomed to putting these personal factors to one side in the case of appointments to courts properly so called, trusting to the judge to accept the intellectual discipline of the great profession of the law, and to subordinate any personal views he may entertain to the demands of a rigorous legal approach.

Dixonian "strict legalism" brought the High Court into modern times in high respect, despite its having had to rule on numerous matters with intense political implications. This surely was because, in the words of Sir Harry Gibbs, Dixon possessed a dedication to principle from which neither expediency nor a temptation to reshape society would cause him to swerve.15 The Dixon doctrine is currently derided in high places, but time will tell whether "judicial activism" will serve the country and the Court as well as judicial self-discipline. Let Dixon himself have the last word. He said: "There is, I believe a general respect for the Queen's Courts of Justice ... and I believe there is a trust in them. But it is because they administer justice according to law."16

Is it fair to suggest that a majority of the Court is pushing its own brand of sociology and playing its own brand of politics? Not so long ago the thought would have been unworthy. Yet we have the controversial suggestion of one Justice, immediately after the equally controversial decision of the Court, that there was some implication in the Constitution that the Parliament could not ban electronic political advertising in the last days of an election, that the Court might "articulate the contents of the limits on parliamentary power arising from common law liberties" and, in that sense, "construct a Bill of Rights".17

This aroused a storm of protest, especially in political circles. Mr Justice Toohey's mistake was frankness. He was however not alone. Mr Justice Brennan, in a paper delivered in Canberra on 16 July, 1992 to a Human Rights Conference, has been equally frank. He is on record as saying, with apparent enjoyment, that a Bill of Rights would bring the courts "into the political process as a new and dominant force". Apologists for judicial activism might note that this view completely denies the proposition that the judges have "always" done what is currently occurring. A Bill of Rights, said his Honour, "judicialises questions of politics and morality", the very last thing, one would think, that any self-respecting judge would want to be involved in.

Again his Honour says, "Once the right is defined, the Court must weigh the collective interest against the right of the individual. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialise questions of politics and morality." Later in this paper, his Honour gives the reasons which commend the courts "as the repositories of a supervisory power over the political branches of government". Heady stuff indeed!

But, according to his Honour, Canadian judges are said to revel in the constitutional change brought about by a Bill of Rights, and he suggests that if this be so, "surely Australia and Australian judges might do the same". (Emphasis supplied). The explanation for the enthusiasm may lie in words attributed by his Honour to Madame Justice McLachlin: "The advent of the Charter in Canada has elevated judges from a position where they once toiled in relative

obscurity to the level of media figures." It may be questioned whether the Australian people want their judges to be media figures. They may well think that there are already more than enough of those worthies.

One cannot help asking oneself how the enthusiasm of judges (presumably of the High Court, for I should not think that Mr Justice Brennan would venture to speak for other judges) for a Bill of Rights squares with the obvious lack of concern of the Court for the interests of Australians generally. Reference has already been made to Cole v. Whitfield. The Mabo decision would deprive the Australian people, through their governments, of the capacity freely to dispose of the land of the nation (insofar as it has not yet been disposed of) for the benefit of the nation as a whole. A Bill of Rights, whether imposed by judicial invention or by parliamentary action, in reliance on the external affairs power, would amount to arrogant disregard of the will of the people, which they affirmed as recently as 1988 when a mini-referendum on this subject was overwhelmingly rejected.

The Court cannot be surprised if their inventiveness and emotionalism lead to unwelcome consequences. Thus they have been accused of empire building18, and of following precedent only when they feel like it.19 The suggestion would ordinarily be deprecated by those who value our legal system, but the language of Mr Justice Brennan, whose ipsissima verba are set out above, seems to justify the accusation. Moreover, some of Mr Justice Toohey's views would seem to involve a direct challenge to parliamentary democracy.

There are those in the other branches of government who see the unprecedented views being expressed by High Court judges as foreshadowing a long term power struggle between the judiciary and the other branches.20 Mr Justice Toohey would justify the novel idea that governments govern on the sufferance of the courts, by reference to "inalienable common law freedoms". But unless the goal posts are to be shifted at will, the common law knows nothing of "inalienable" freedoms, for the common law is subject to the Parliament. It would be reasonable to speak of the fundamental aspirations and beliefs of Australian citizens, which politicians interfere with at their political peril, but this is a far cry from rights which are not subject to the will of the Parliament.

Mr Justice Toohey argues21 that "judicial review ... can operate to frustrate the will of the parliamentary majority only in a way which protects and promotes individual liberty. Judicial review does not result in any greater restriction upon fundamental liberties than would prevail in its absence." This, with respect, is untenable. Enlargement of the rights of one citizen or group will of necessity trench upon the rights of the rest.

Back to Mabo. If the governments of Australia are so supine as to allow judges to strip from the Crown property rights which the Crown has held and exercised for 200 years for the benefit of the nation as a whole, and turn them over to a special interest group, this must diminish the capacity of governments to advance the interests, economic and cultural, of their people.

In the light of these considerations, can any rational mind doubt the wisdom of the dissenting Justice, Sir Darryl Dawson, who pointed out that the implementation of a new policy towards the mainland Aborigines involved a change in the law, and that this was "a matter for government rather than the courts"? Can it be seriously doubted that Mr Walsh was right in questioning the learned Justices' understanding of "social and political reality"?22 Is it surprising that talk of secession is rife again in Western Australia?23

Since this paper was prepared, the Chief Justice of Australia, Sir Anthony Mason, is recorded in The Australian Lawyer of July, 1993 as saying that "to put Mabo in perspective", the Court had "done no more than the courts have done in the United States, Canada and New Zealand", and that, "generally speaking, the recognition of rights of Aboriginal people in Australia with respect to land is akin to the recognition of indigenous title on the part of the indigenous inhabitants of"

those three countries. Any statement by the Chief Justice of this country, even an extra-judicial statement, is entitled to the highest respect, and one naturally goes to the sources for further enlightenment. One assumes that his Honour was referring to the authorities cited by Mr Justice Brennan24 as authority that a clear intention for the extinguishment of native title was required.

The first of them is Calder v. Attorney General of British Columbia.25 This case concerned the Nishga tribe who, the evidence disclosed, occupied a particular area and made intensive use of it. The evidence was that their territory was recognised by other tribes as territory of the Nishga tribe, that parts of it were used in common for obtaining logs and timber for houses, canoes, totem poles and so forth, and that other areas were allotted to or owned by family groups. There was, in particular, evidence that it was not correct to say that the Indians of this tribe did not own the land, but only roamed over the face of it and used it.

The next was Hamlet of Baker Lake v. Minister of Indian Affairs.26 This case concerned the Inuit people. Theirs was a common law claim of Aboriginal title. The headnote states that to establish such a title four elements must be proved:

(1) that they and their ancestors were members of an organised society;

(2) that the organised society occupied the specific territory over which they assert the Aboriginal title;

(3) that the occupation was to the exclusion of other organised societies; and

(4) that the occupation was an established fact at the time the sovereignty was asserted by England.

The third of the Canadian cases R. v. Sparrow27 involved the rights of members of the Musqueam Indian Band to fish with an outsize drift net, the defendant contending successfully that he was exercising an existing Aboriginal right, and that any restriction on net length was inconsistent with s. 35(1) of the new Constitution of Canada of 1982. The Musqueam Indian Reserve was on the site occupied by a Musqueam village for hundreds of years, and the Musqueam had lived within the area as an organised society long before European settlement.

Of the American cases cited, United States v. Santa Fe Pacific Railroad Company28 concerned the Walapai Indians of Arizona. The judgment of the Supreme Court was delivered by Douglas J., who said, at p. 345:

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapai, in the sense that they constituted definable territory occupied exclusively by the Walapai (as distinguished from lands wandered over by many tribes), then the Walapai had `Indian title' which, unless extinguished, survived the railroad grant of 1866."

The first of the United States cases cited, Lipan Apache Tribe v. United States29, affirms the proposition that Indian tribes acquired so-called Indian title to land which they exclusively used and occupied continuously for many years. In the same volume the Court of Claims held that proof of Indian title depends on a showing of actual exclusive and continuous use and occupancy for a long time by the Indian tribe in question: United States v. The Seminole Indians of the State of Florida.30

The New Zealand case which is cited is Te Weehi v. Regional Fisheries Officer.31 This case concerned a charge under the Fisheries Act 1983 of possessing undersized paua (a form of shellfish). By s. 88(2) it was provided that nothing in the Act should affect Maori fishing rights. Te Weehi was found to have been exercising a customary fishing right which had not been extinguished, and to have a good defence under s. 88(2). The fishing right was one limited to the Ngai Tahu tribe who occupied and exercised control over an area of the South Island, and in

particular exercised fishing rights in relation to the beach in question, permitting friendly neighbouring tribes to take fish from the beach.
Each one of these cases involved, not nomads, but indigenous people who occupied and exercised rights over defined areas of territory. Such rights as they had would have been recognised by the lawyers of the late 18th Century, and by the great judges of the High Court whose decisions were summarily disregarded in the Mabo case. Their situation was as far removed from those of the mainland Aborigines as was the situation of the Meriam people. That the writer is unable to see how it can be said that the Court has done no more than the courts in the United States, Canada and New Zealand, must be put down to his own defect of understanding.
The Chief Justice is also recorded as saying that the rejection of the doctrine of terra nullius by the Court is "entirely consistent with the rejection of that doctrine by the International Court in the Western Sahara Case".
The report of that case32 shows that Question 1 read : "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain inherently belonging to no-one (terra nullius)?" The opinion of the court at p. 18, para. 15 classes the question as one of law. At p. 38, para. 77 the time of Spanish colonisation is identified as beginning in 1884. It appears at p. 22, para. 26 that the question arose because, in the words of King Hassan II of Morocco, the Spanish government claimed that the Sahara was at the relevant time res nullius, and that no power and no administration had been established over the Sahara, while Morocco claimed the contrary. At p. 38, para. 79 the court turned to Question 1, observing that it was to be interpreted by reference to the law in force at that period. Far from rejecting the doctrine, the court said:
"The expression `terra nullius' was a legal term of art employed in connection with `occupation' as one of the accepted legal methods of acquiring sovereignty over territory. `Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid `occupation' that the territories should be terra nullius – a territory belonging to no-one at the time of the act alleged to constitute the `occupation' ... In the view of the Court, therefore, a determination that Western Sahara was a `terra nullius' at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of `occupation'."
As the authoritative text is French and not English, I append
the French text of this passage.33 At p. 39, para. 81 of the advisory opinion, the Court refers to the evidence that Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them, and that by the Spanish Royal Order of 6 December 1884, far from treating the case as one of occupation of terra nullius, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes. The Court proceeded to reject not the doctrine of terra nullius, but Spain's claim that the Western Sahara in 1884 answered that description.
In this connection it should be noted that the minority opinion of Judge Ammoun cited by Mr Justice Brennan was not reflected in the advisory opinion of the Court and was a minority view.
In any case, Australians will be surprised to learn that the views of the International Court, whether expressed in an advisory opinion (as this was) or otherwise, entitle our courts to reverse law which has been settled for 200 years, and in reliance on which the affairs of the nation have been conducted.

It follows that the High Court's rejection of the doctrine in 1992 represents an ex post facto reversal of established law. Moreover, it is clear that, once again, an international authority relied upon by the High Court was in truth poles apart from the situation of the mainland Aborigines.

A point made by Sir Anthony in the same interview relates to the position of the Commonwealth in this unhappy matter. While not a mystery, it has not been apparent to most of us that the Commonwealth was at first a defendant, managed to extract itself from that position and become an intervener, and ultimately made no submission to the Court. In other words, the Commonwealth, instead of defending the interests of Australians generally, ran dead. There can be no doubt that it thereby accepted a share of responsibility for the outcome.

In conclusion, the writer offers two thoughts which epitomise the danger inherent in judicial activism. The first is from Burke's Reflections on the Revolution in France:

"It is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of utility before his eyes".

The second is from an address to the Holdsworth Club by Lord Goff of Chievely:

"Holdsworth was a convinced gradualist, believing in gradual and not in sudden or violent change - and so, I confess, do I, thinking that it is better to walk in the light than to leap into the dark".

Should our Courts determine social policy? The answer is "no", first because it is not their function, and second, because they do it so badly.

Endnotes:

1. See, e.g. Cole v. Whitfield (1988) 165 C.L.R. 360.
2. New South Wales v. The Commonwealth (1975) 135 C.L.R.337.
3. The Commonwealth v. Tasmania (1983) 158 C.L.R. 1.
4. Dietrich v. The Queen (1992) 109 A.L.R. 385.
5. (1979) 143 C.L.R. 575 at p. 581.
6. "The Consequences of the Mabo Case", I.P.A. Review, Vol. 46 No. 1.
7. Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia: Institutes Lib.II Tit. 4.
8. Mr P P McGuinness, The Australian, 2.9.92.
9. Television interview conducted by Mr Paul Lyneham, "7.30 Report", 21.6.93.
10. See e.g. the statement of Mr Mick Dodson of the Northern Land Council that Mabo was "a goldmine", and that of Mr Galarrwuy Yunipingu: "When I win I will go to Nabalco and twist their arm and tell them to come to the party. If they try to ignore us I'll simply pack them up and sell them." (As reported by Mr B A Santamaria,"The high price of Mabo madness", The Australian Financial Review, 22.6.63).
11. "The discovery, exploration and settlement of the Australian continent by Europeans certainly meant that in the course of two centuries land once occupied by Aborigines was occupied by Europeans. The Aborigines were dispossessed. The view commonly held by the white settlers was that the act of possession, solemnly made on the occasion of discovery or first settlement, meant that all the land in Australia was at the disposition of the Crown, and the only title to own or to have the use of a particular plot of land was a title granted by the Crown and registered by one of the several Lands and Titles Offices in Australia. Land not so granted ("not alienated" was the formal term) remained as Crown land. Decisions regarding the alienation, allotment and use of land were made in the name of the Crown by the various governments which had been set up in Australia under the constitutional powers of the British Parliament. When these colonial governments became representative and then responsible,they acted in land matters (as in other phases of government) in keeping with the views and to serve the interests of

the Australian citizens. They made decisions from time to time to alienate more and more Crown land, to promote settlement, to develop communications and services, to facilitate prospecting and mining for minerals and to exploit forests. Australian legislatures made laws regarding land and Lands Departments administered these laws. Rights in land did not exist outside this process. The popular understanding of the history of the foundation of settlement in Australia was that the early colonists had moved into unoccupied land. A scant Aboriginal population was nomadic and there were none of those signs of occupation or ownership of land familiar to Europeans, such as permanent dwellings, villages, towns, farms, herds, cultivation, enclosures, ditches, hedges, earthworks or clearings. There had been no conquest or surrender of territory,but a gradual process of occupying land that was waste land in the sense that nobody was using it in the way in which Europeans used land. In any case, the greater part of the immigrant whites arrived in the continent during the second century of the history of settlement. These late-comers, attracted to Australia by the prospect of making a new life for themselves in a new land, found little in the southern half of the continent to remind them of the earlier inhabitants. As a matter of course they obtained their piece of land, whether a farm or a suburban building lot, by buying it on the open market or becoming an applicant under some scheme of government-promoted settlement. They were not aware that the vanished Aborigines had a prior right to the piece of land to which the immigrant had received the title deeds."
Sir Paul Hasluck, "Shades of Darkness" (1988), Melbourne University Press, pp. 101-2.
12. As cited by Lord Mackay of Clashfern L.C. "Can Judges Change the Law?", Proceedings of the British Academy LXIII at p. 297.
13. 85 C.L.R. p. xv (21.4.52).
14. Sydney Morning Herald, 29.10.92.
15. "Sir Owen Dixon : A Celebration" (1986), Melbourne University Press, p. 39.
16. 85 C.L.R., loc. cit..
17. Mr Justice Toohey, as reported The Australian Financial Review, 6.10.92.
18. Mr P P McGuinness, The Australian, 17-18.10.92.
19. Mr P P McGuinness, The Australian, 2.9.92.
20. e.g. Mr Peter Hartcher, Sydney Morning Herald, 9.10.92.
21. The Age, 12.10.92.
22. The Australian Financial Review, 22.6.93, "Mabo's potential havoc".
23. The Bulletin, 22.6.93.
24. 175 C.L.R. at p. 64.
25. [1973] S.C.R. 404.
26. (1979) 107 D.L.R. (3d) 513.
27. [1990] 1 S.C.R. 1075.
28. (1941) 314 U.S. at pp. 353-4.
29. (1967) 180 Ct.Cl. 487.
30. (1967) 180 Ct.Cl. 375.
31. [1986] 1 N.Z.L.R. 680.
32. Western Sahara, Advisory Opinion, ICJ Reports (1975) p.12.
33. "79. En ce qui concerne la question 1, la Cour note que la requŠte situe express,ment cette question au << moment de la colonisation par l'Espagne >>: il parait donc clair que les termes <> doivent ˆtre interpr,t,s eu ,gard au droit en vigueur … l',poque. L'expression terra nullius ,tait un terme de technique juridique employ, … propos de l'occupation en tant que l'un des modes juridiques reconnus d'acquisition de la souverainet, sur un territoire. L'occupation ,tant en droit un moyen originaire d'acqu,rir pacifiquement la souverainet, sur un territoire, autrement que par voie de cession ou de succession, l'une des conditions essentielles d'une occupation valable ,tait

que le territoire consid,r, f–t une terra nullius - un territoire sans maŒtre - au moment de l'acte qui ,tait cens, constituer l'occupation (voir Statut juridique du Gro‰nland oriental, C.P.J.I. s,rie A/B no 53, p.44 et 45, p. 63 et 64). Par cons,quent, de l'avis de la Cour, on ne peut d,terminer que le Sahara occidental ,tait terra nullius au moment de la colonisation par l'Espagne qu'en ,tablissant qu'… cette ,poque le territoire n'appartenait … personne, en ce sens qu'il pouvait ˆtre acquis par le proc,d, juridique de l'occupation."

Chapter Six

The High Court in Mabo

S E K Hulme, AM, QC

I want to consider this afternoon not the effect and implications of the decision in Mabo (1), but certain aspects of the handling of the case in the High Court. The more one studies the case the more remarkable these will appear. Also worthy of remark is the way members of the judiciary have handled the matter since.

A. Why was What was Said and is Perceived to Have been Decided in Relation to the Australian Mainland, Said and Decided in that Case?

1. The Paradox

An observer examining Mabo would see a position broadly as follows:

Mabo as a piece of litigation concerned a claim by individual persons to specific parcels of land on each of three islands in Torres Strait. When those claims were seen as being doomed to fail it was turned into a claim that native title existed in relation to those islands.

There was before the Court in Mabo no claim or issue concerning land on the mainland of Australia. (Without wishing to offend, I use that expression throughout as including Tasmania.)

The Murray Islands are tiny. The largest of them is less than three kilometres long, and their total area is nine square kilometres. (By way of comparison, the parkland constituting the Albert Park reserve in Melbourne is some 2.5 square kilometres.) The islands have at all relevant times been inhabited by a people who seem to be called the Meriam (2) people. The Meriam people are of Melanesian race (as in New Guinea). In 1879, when Queensland annexed the islands, the Meriam people lived in established villages, cultivated the land, had a system of individual and perhaps family ownership of specific parcels of land, and had their own native court administering disputes as to land.

The Australian Aborigines are not of Melanesian race, and their culture and customs are very different from those of people of the Melanesian race. At the relevant dates 1788 and 1825 and 1829 there were several hundred tribes of them, living nomadic lives on a mainland of some 2,967,895 sq. miles, or some 7,622,183 sq. km. They did not live in established villages, they did not cultivate the land, they did not have a system of individual or family ownership of specified parcels of land, and it follows that they had no court administering such a system.

There was placed before the High Court evidence as to the facts concerning the Meriam people and the Murray Islands.

There was placed before the Court no evidence whatsoever concerning mainland Australia; no evidence whatsoever as to Australian Aboriginal culture and ways.

There were before the Court the Meriam Island plaintiffs, and the defendant the State of Queensland, for the Murray Islands are part of Queensland. The original co-defendant, the Commonwealth of Australia was represented in Mabo No. 1 but was dismissed from the action prior to Mabo No. 2, on the basis I presume that no issue in the case concerned it.

There were before the Court no Australian Aborigines whatsoever, and no person or company holding freehold or leasehold title of any kind, ordinary or pastoral or mining, on mainland Australia; nor any other individual person or company to do with mainland Australia.

With no mainland issue, with no evidence as to the mainland, with no parties concerned with any mainland issue, without argument as to any mainland issue, the High Court proceeded to destroy

what Deane and Gaudron JJ. described (175 C.L.R. at p. 120) as "a basis of the real property law of this country for more than a hundred and fifty years".
The observer might wonder whether this kind of thing commonly happens in litigation.

2. The General Practice of the High Court as to the determination of Constitutional Issues

In former days, including days now gone when international reputation saw the High Court as the finest appellate court in the English-speaking world, the well-established high policy and practice of the High Court was to deal with constitutional issues as sparingly as possible. If a case could be decided on the facts, that is how it was decided. If it could be decided by determining an issue of general law, or interpreting a statute, that is how it was decided. Only if the case could not otherwise be determined, would the Court deal with a constitutional issue. And it would confine that issue to the compass essential to determine the case.
All of this is one element of what is called "judicial restraint". A wise judge will be consciously aware that his basic function is to decide cases, and in doing so to say orally or in writing whatever is necessary to the proper discharge of that function and the development of the law in the manner of the common law. He will be reluctant to say anything that is not necessary. (More than one judge has recently found the unwisdom of expressing some relevant statement about a particular woman as an irrelevant statement about women generally.)
A wise judge interpreting a constitution will be particularly watchful. A judge interpreting a constitution makes decisions in areas involving political disputation, where passions may run high. His decisions can affect the interplay of government and citizen; may decide what governments can and cannot do.
A wise judge will be aware that he will see the ramifications of a problem and the implications of pondered solutions more clearly when an actual problem has arisen and been argued out in front of him, than if he writes an essay on problems not yet before him. He will moreover be consciously aware that his role is to decide actual disputes by the exercise of judicial power; will be aware that he did not attain his position by election, and that he has no mandate from the Australian people to play any other part than that of a judge in the great issues of the day. If he does wish to play some other part he will step down from his court and pursue some other role in public life, as Dr. Evatt did in 1940 and Sir Ninian Stephen did in 1982. While he stays on the Court he will not behave as if he had a constitutional or civic or social agenda to achieve. Like a good bootmaker, a good judge will stick to his last.
It is worth documenting the policy the High Court has traditionally followed. The practice of deciding the constitutional issue only if the Court cannot otherwise dispose of the case has been something more often taken for granted than formally laid down. The young barrister learns it briskly enough the first time he tries to get the Court to do anything else. That it has been the general practice is not to be doubted. Indeed a judge will frequently put the constitutional point aside if he himself can dispose of the case on other grounds, even if his brethren find it necessary to address it. The judgment of Gavan Duffy C.J. in Huddert Parker Ltd. v The Commonwealth (1931) 44 C.L.R. 492 provides a typical illustration :
"I need not deal with the constitutional question raised in this case. It is enough for me to say that the Regulations which are attacked are, in my opinion, inconsistent with Part III of the Transport Workers Act 1928-1929."
The associated practice of deciding the narrowest practicable constitutional issue, of not engaging in generalisations applying in circumstances wider than those of the case concerned, has been found wise in many courts of ultimate appeal. It was firmly established in the Privy Council. No lawyer ever had greater experience in the Privy Council, as barrister and judge, than Lord Haldane. With the possible exception of Sir Roundell Palmer (later Lord Selborne), Mr RB

Haldane, QC had the largest Privy Council practice any barrister ever had. While Lord Chancellor from 1912 to 1915, and again in 1924, he made a point of presiding personally in every appeal from the Dominions. From 1912 to 1927 he probably sat on more such appeals than any Law Lord of his day. The judgment he prepared for the Privy Council in John Deere Plow Company Ltd. v Wharton (1915) A.C. 330 contained his carefully considered statement on the whole matter. The issue in that case arose from a particular feature of the Canadian Constitution. But the statement is more general. Its intrinsic importance, and its relevance to the continuing Mabo situation, and its inherent wisdom, justify setting it out at length:

"The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in Citizens Insurance Co. v Parsons 7 App. Cas. 96 at p. 109 to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."(1915) A.C. at pp. 338- 339 (my italics).

The same approach has traditionally been taken in the High Court. I mentioned above the case of Huddert Parker Ltd. v The Commonwealth, where Gavan Duffy C.J. refrained from dealing with the constitutional point because he himself could decide the case on narrower grounds. Other judges disagreed as to the narrow point, and for them, it was necessary to decide the constitutional point. The particular point concerned the "trade and commerce" power which s. 51 (i) of the Constitution gives to the Commonwealth, but Sir Owen Dixon stated more generally the principle of deciding no more than was necessary:

"The difficulties which have been experienced in the United States in obtaining a satisfactory criterion by which may be determined the operation and application in such matters of the trade and commerce power, so indefinitely expressed, affords an additional reason for pursuing the course recommended in John Deere Plow Co. v Wharton by Viscount Haldane L.C., of confining decisions upon questions of constitutional interpretation to concrete questions and avoiding general definitions of expressions occurring in the Constitution. In dealing with the trade and commerce power, it is peculiarly desirable to consider each case which arises without entering

more largely upon the interpretation of the Constitution than is necessary for the decision of the particular case." 44 C.L.R. at p. 514 (my italics).
I am not aware of the Court having announced any intention of behaving otherwise than in accordance with this established practice.
3. The Common Law and New Colonies
Mabo involved the proposition that certain rights existing under the pre-existing society survived the annexation of the Murray Islands as a colony. That made it necessary to determine the laws applying in the islands after that acquisition. In Calvin's Case (1608) 7 Co. Rep. 2a, 77 E.R. 377, 2 St. Tr. 559, the court held that the means by which England might acquire new possessions fell into two categories. The first was descent to the monarch, and the second was conquest, a category seen fairly flexibly. The court held that in both cases the Crown was entitled to rule the new possession without regard to the requirements of English law, and free from interference by Parliament. The case was pretty much a put-up job, instigated by the new King James I (King James VI of Scotland), who had recently acquired the throne of England by descent, and with a court containing judges anxious to meet the royal wishes(3)(4).
While people's vision was confined to Europe as for hundreds of years the vision of Europeans had been that approach was realistic enough, especially as conquest was seen as flexible. Europe was settled throughout, and all parts of it fell under one or another system of government, whether nation or principality or duchy or free city or whatever else. No other situation existed. Accordingly it was true enough to say that only if the monarch of one country inherited another, or as a result of conquest, could one country acquire territory of another.
But the world was changing. Three developments in particular were at work. The first was the coming of the Age of Discovery. In 1486 Bartholomew Diaz of Portugal sailed around the Cape of Good Hope into the Indian Ocean. After him Christopher Columbus and Vasco da Gama and the Cabots and Ferdinand Magellan and Francis Drake and Martin Frobisher and Quiros and Abel Tasman led a host of other seamen in opening up lands hitherto unknown. In some places they found villages and towns and established systems of life and government, just as in Europe. But in other places things were very different. In some of them principally smallish islands there were no inhabitants at all. Others contained nomadic tribes, who settled nowhere but might pass over any part of large areas of land.
The second development was the increasingly sharp distinction drawn between monarch and country. When in 1720 the Elector of Hanover inherited the throne of England as George I, that was seen to concern the monarch, not the country. No one talked in terms of England having acquired Hanover, or of Hanover having acquired England. George I did not expect to govern England in the manner he governed Hanover, and the English Parliament recognised that it had no power to pass laws for Hanover. Nor had the Prime Minister any role in advising George I as to the conduct of Hanoverian affairs. England and Hanover remained utterly distinct countries, which happened to have the same monarch. Monarch and country were different. In like manner it was beginning to be perceived that overseas possessions acquired under treaties came through the activities of the country, acting through government, and not through the monarch as such.
With all this there was an increasing emphasis on the laws of England and the rights of Englishmen. When King James I declared it treason to say that he was bound by the law, Coke famously replied "Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege": "The king ought not to be under man, but under God and the law." When men felt that James's son threatened those laws and those rights, they chopped off his head. It will not surprise that men willing to do this were beginning to think and to talk in terms of their "right" to enjoy the laws of England, rather than to suffer the royal whim, not only inside England but in England's colonies.

Third, and though discovery long continued and indeed still continues, the Age of Discovery was succeeded by the Age of Foreign Settlement. English settlers settled Roanoke Island off North Carolina in 1585, and though that settlement failed the 1607 settlement at Jamestown in Virginia proved permanent. Settlements followed in Newfoundland and Canada and the West Indies and South Africa and elsewhere throughout the world. Such settlements demonstrated as the case might be the peaceful settlement of totally unoccupied territory, or the somewhat more forceful settlement of land from which nomadic tribes retreated on the settlers' arrival: what were called at first "plantations".

Along with these plantations came questions as to the laws applying in them. Steadily the notion grew that settlement of land outside England constituted a separate manner of acquisition, with its own rules. The notion went back a long way. In Calvin's Case itself it had been raised by Sir Francis Bacon, Counsel for Calvin. The widely-read Bacon had pointed out that in these matters the scholars of other countries were beginning to turn to the Roman Law. The Romans too had built an empire in a world large areas of which were unoccupied or but lightly occupied, and their law had treated acquisition by occupancy of land belonging to no one as a different case from that of acquisition by conquest.

In Calvin's Case the judges let that ball go through to the keeper. In Craw v Ramsay (1670) Vaughan 274, 124 E.R. 1072, the court noted the possibility that colonies acquired by "plantation" of unoccupied territory should be treated differently from those acquired by conquest. In 1693 the House of Lords listened to an argument that English subjects who settled in uninhabited lands had the common law as their birthright. The argument was unsuccessful on the day, as the football commentators say, but the tide was running that way. In 1720 the Legal Adviser to the Board of Trade expressed his opinion that in "plantations" which had been "settled" in that manner, "the common law of England is the common law of the plantations".

"Let an Englishman go where he will, he carries so much of law and liberty with him, as the nature of things will bear."(5)

In 1720 a Memorandum published by the Privy Council said:

"...if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England."

That was to be contrasted with the position in case of conquest:

"Where the King of England conquers a country, it is a different consideration: for there the conqueror by saving the lives of the conquered, gains a right and property in such people; in consequence of which he may impose upon them what law he pleases." (1722) 2 Peere Williams, B. & C. 247.

That even in that latter case things were not meant to be totally arbitrary was shown by the rider:

"... until laws [are] given by the conquering prince, the laws and customs of the conquered country shall hold place."

Clearly it suited the ordinary settler for the colony to be seen as a "settled" colony, for he would thus gain the right to live under not such rules as the Crown chose, but under such of the common law and the statute law of England as were appropriate to the condition of that colony.

In the period from Calvin's Case in 1608 to the mid-18th Century, the common law in this area showed steady development. Faced with cases of acquisition by cession under treaty, it first treated cession under treaty as falling within the flexible category of conquest, and then treated cession as a separate new category alongside conquest. It recognised acquisition of "plantations" by "settlement" as another new category. And it dropped acquisition by descent from its normal statement of the rules.

By mid-18th Century the common law was usually expressed in terms of three cases of acquisition, namely conquest, cession, and right of occupancy of lands "by finding them desart and uncultivated, and peopling from the mother country": Blackstone, Commentaries on the Laws of England (1st edn., 1765) vol. I p. 104. This last was the acquisition "by settlement".

Three points should be noticed. The first is a general one. It is that the common law was not saying that colonies could only be acquired in those three ways. Common law could not say that, for common law did not govern the acquisition of colonies; did not say which colonies had been acquired. Acquisition of colonies, and the binding statement as to which colonies had been acquired, were at all times a matter for the Crown.

"It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required." Post Office v Estuary Radio Ltd. (1968) 2 Q.B. 740 Diplock L.J.at p. 753, a passage cited with approval by Gibbs C.J. in New South Wales v The Commonwealth (1975) 135 C.L.R. 337 at p. 388 and (with Aickin and Wilson JJ. concurring) in Wacando v The Commonwealth (l981) 148 C.L.R. 1 at p. 11.

Government told the courts what places England ruled. Common law governed the results of acquisition, and it was for that purpose that common law made its classification of the various modes of acquisition.

The second point is to do with "settled" colonies. It is that the word "desart" had a much wider meaning than it does today. When Etherege wrote in The Man of Mode (1676), "What e'er you say, I know all beyond High-Park's (6) a desart to you", he had no vision of an uninhabited sandy Sahara Desert beginning somewhere along Kensington High Street. What he was saying was that to Sir Fopling Flutter everything beyond Hyde Park was rude, waste, and uncultivated.

In Act III scene 3 of The Winter's Tale Shakespeare has Antigonus say :

"Our ship hath touch'd upon
The deserts of Bohemia."

He means no more than the sea-shore. In his Dictionary of the English Language (6th ed., 1785) Johnson defined the adjective "desert" as "Wild; waste; solitary, uninhabited; uncultivated; untilled", and the noun as "A wilderness; solitude; waste country; uninhabited place", and it is clearly enough in that wider sense that those authors and Blackstone used the word.

Third, and again in relation to settled colonies. Outside the Antarctic, a few quite small ultra-arid desert areas, and especially in past days numerous small islands, in few parts of the world is or has there been a permanent total absence of all human presence. The great bulk of the land surface, even where there has been no fixed settlement, has been part of an area over which, however rarely or lightly, one nomadic people or another has pursued its life. If being from time to time passed over by nomadic tribes disqualified an area from being settled, plantations would have been few indeed.

But nomadic people have no settlements to protect, and if intruders came they would frequently withdraw to other parts of their nomadic realm, rather than challenging their presence. Their departure would leave behind neither buildings nor cultivation nor other sign of ownership or achievement.

The issue was the acquisition of land by occupancy; by "peopling" the land; by "settlement". Fundamental to that was the cultivation of land, for cultivation ties those who sow to being still there to reap, and it is cultivation above all else which leads to land becoming "settled". The rule developed that the fact that land was known to fall within a possibly enormous area over which there roamed a nomadic people, who did not cultivate the land, did not remain, did not build, in short did not settle the land, was not inconsistent with the acquisition of it by people who did

cultivate, did remain, and did build: people who did "settle". This had support in international law. In his Law of Nations (1758) Vattel argued that failure to cultivate land meant failure to take lawful possession of the land, so leaving the land available for acquisition by settlement by those who later on did settle and cultivate it.

Need I say that this did not mean that for legal purposes the country was uninhabited, as if one said that for legal purposes brown was green. Terra nullius is not the Latin for "No one lives in this country". It never did mean that a stretch of country had no inhabitants. It meant that the soil was the property of no one, either because there was no one there at all, or more normally because the people who might from time to time pass over it or hunt on it had no concept of individual ownership of it. It was the soil, not the country there was no "country" yet which was not "occupied"; was not "settled". Nothing turned on the reason for that, but the usual one was that the nomadic and hunting life of those who were from time to time present had never created a need for such a concept.

As to the results of acquisition, common law maintained the distinction between colonies acquired by conquest or cession on the one hand and those acquired by settlement on the other. Blackstone said of the first two cases:

"But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country." Commentaries, Book I, Introduction sect. IV, vol. I p. 105.

The case of the "unoccupied" country was different.

"For it is held that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them." ibid. pp. 104 - 105.

There had triumphed the attractive argument which in 1693 Sir Bartholomew Shower had put to the House of Lords without success, in Dutton v Howell (1693) Shower P.C. 24 at p. 32:

" ... the Common Law must be supposed their Rule, as was their Birthright, and 'tis the test, and so to be presumed their Choice; and not only that, but even obligatory, 'tis so."

4. The Facts Before the Court in Mabo

I said a little as to the facts earlier, but it is convenient to cover the whole ground here. The Murray Islands lie at the eastern end of Torres Strait. They are closer to New Guinea than to Australia, and (with a courteous indication that they are part of Australia) they appear in The Times Atlas of the World on the map of New Guinea, not that of Australia. They consist of three immediately adjacent islands. The largest is Murray Island (Mer), which is oval shaped, some 2.8 km. long by 1.6 km. wide, and has an area of 4.6 sq. km. A channel 900 m. wide separates it from the other and smaller islands, Dauar and Waier. These two islands together have an area of about 4.5 sq. km. Altogether then the Murray Islands total some 9 square kilometres.

The Murray Islands were annexed in 1879 by the Governor of Queensland, acting under the authority of Imperial Letters Patent and an Act of the Queensland legislature. They became part of Queensland on 1 August, 1879 and so they remain.

It was not disputed that the Murray Islands had been occupied by the Meriam people since time immemorial. The Meriam people are not by race Australian Aborigines. They are Melanesian people (probably originally from New Guinea), and they have a Melanesian culture. The evidence showed that since time immemorial the Meriam people had lived in permanent groups of huts on the foreshore immediately behind the beach, the different groups of huts being organised in named villages. The evidence was that at the time of annexation gardening "was of the most profound importance". There was some gardening within the villages, but the main

garden land was located a little distance inland from the villages. All garden land was identified with a named village and the relevant individual.(7) Moynihan J. reported:

"Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange during the various rituals associated with different aspects of community life. Marriage and adoption involved the provision or exchange of considerable quantity of produce. Surplus produce was also required for the rituals associated with the various cults at least to sustain those who engaged in them and in connexion with the various activities associated with death.

"Prestige depended on gardening prowess both in terms of the production of a sufficient surplus for the social purposes such as those to which I have referred and to be manifest in the show gardens and the cultivation of yams to a huge size. Considerable ritual was associated with gardening and gardening techniques were passed on and preserved by these rituals. Boys in particular worked with their fathers and by observations and imitations reinforced by the rituals and other aspects of the social fabric gardening practices were passed on." 175 C.L.R. at p. 188.

The evidence was that "The natives are very tenacious of their ownership of the land, and the island is divided into small properties which have been handed down from father to son from generation to generation." There was no concept of public or general ownership. All was individual or family group. Shortly prior to the 1879 annexation the Meriam people had, at the suggestion of a visiting Queensland official, appointed a headman, or Mamoose. The institution continued after annexation, and the Mamoose's functions included those of a magistrate. At the time of annexation, in his Island Court he determined disputes as to land, applying a mix of rules containing an element of recognition of individual rights and power plus an element of a search for social harmony.

Deane and Gaudron JJ. summed up the position:

"It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organized community which recognized individual and family rights of possession, occupation and exploitation of identified areas of land."

"It is true ... that it is impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title." 175 C.L.R. at pp. 115 - 116.

Their Honours recognised in terms that the facts were unusual:

"The entitlement to occupation and use differed from what has come to be recognized as the ordinary position in settled British Colonies in that, under the traditional law and custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it." 175 C.L.R. at p. 175.

The Contrast with Australia

There was no evidence before the Court as to mainland Australia, for there was no issue concerning the mainland. But it is obvious as a matter of general knowledge that the conditions and life on the small islands were as different from conditions and life on the enormous Australian mainland as they could easily be. In his Triumph of the Nomads (1st edn., 1976) Blainey compares the standard of living of the Australian Aborigine in say 1800 favourably enough as against that of the great mass of Europeans: see pp. 225-228. The people of the Murray Islands probably had a standard of living at least as good. But there was a large contrast between the two. On the mainland the race was different; there were no villages, let alone towns; the life was nomadic, lived over vast distances. In particular, the life did not include gardening or any kind of cultivation.

"New Guinea had gardens and pigs, and several islands in Torres Strait grew vegetables in neat gardens, but the new way of life did not apparently penetrate Australia." ibid. at p. 230.
Gardening came very close to Australia:
"The invasion of domesticated plants and animals came close to Australia. From the coast of south-east New Guinea it began to cross the stepping stones in Torres Strait. ... Gardening was not pursued in any part of aboriginal Australia, but curiously it took root on islands in Torres Strait. ... The islands at the eastern end of the strait had the prolific gardens. The Murray Islands, lying where the shallow waters of Torres Strait met the deep water of the Coral Sea, possessed volcanic soil, ample rains and dense vegetation. Much of the vegetation on the five square miles of the main islands was periodically cleared for the gardens, and the island a century ago supported 800 to 1,000 people. Most of the meals came from the tiny gardens. ... Gardens were also cultivated on islands which were so close to Australia that they could be clearly seen from the high ground near Cape York...." ibid. at pp. 236-237.
But the final jump was never made:
"There is a touch of drama about the way in which the world-wide advance of herds and gardens halted within sight of a strip of northern Australian coast. Two different ways of making a living stood side by side: economic systems which were as different as communism and capitalism. Moreover they co-existed in relative harmony for perhaps as long as several thousand years. Why the domestication of plants and animals did not affect Australia is one of the baffling questions in prehistory: and no sure answer may emerge." ibid. at p.237.
Nor, one may safely enough assert without enlarging on the matter, was there on the mainland any concept of individual or family ownership of particular parcels of land.
5. The Case Made for the Plaintiffs
Given the state of the law, the critical importance of the issue whether the islands were "settled" prior to their acquisition, and the critical importance to that question of both permanent settlement based on cultivation and a system of law to do with land ownership, it is not surprising that the argument for the plaintiff stressed the organised ownership and use of land on the Murray Islands. The report of the argument for the plaintiffs says:
"On the judge's findings there was a community in occupation of all the Islands, and within that community there was a society functioning within which individuals were treated as owners of their respective parcels of land. Each had an interest in his parcel. The position is analogous to that where colonization takes place and the Crown annexes territory where there are private owners holding under a pre-existing system." 175 C.L.R. at p. 8.
It was argued that the cases to do with the position on the mainland were inapplicable, for in the Murray Islands the soil (not merely the country) was occupied.
"The (mainland) cases proceed on the basis that the land was unoccupied, so that the Crown took an absolute rather than an ultimate title. They are inapplicable to a case such as the present where the evidence is that the Islands were occupied and where a real society flourished. Where land is unoccupied in fact or in fiction, the Crown's ownership is not merely an ultimate or radical title but is absolute or real ownership. The whole of the land is waste land, and waste lands legislation applies. That is not the case with occupied land." 175 C.L.R. at p. 9.
The case made, then, was that on the evidence before the Court the position in the Murray Islands was very different from that assumed by the cases to do with mainland Australia, and that within the established principles of the common law, ownership of the type claimed could be held to exist on the Murray Islands without one word being said as to the position under the quite different facts on the mainland.
6. The Response

One might have expected the judgments to discuss the significance of the facts to do with the Murray Islands, as found by Moynihan J, and as stressed by Counsel for the plaintiffs. The claim made for them could have been discussed without mention of the mainland at all. And if somewhat unnecessarily and dangerously the Court were going to say anything as to the legal position on the mainland, one might have expected recognition that such sources as were properly available to the Court (there was no actual evidence before the Court as to the facts on the mainland) showed that on the mainland there was a quite different factual situation. One might have expected discussion of the significance of the differences. Nothing of either sort occurs.

The Judgment of Brennan J. (8)

An explanation is intended to be given in a very curious passage in the judgment of Brennan J, 175 C.L.R. at pp. 25-26. It is first said, that the argument for Queensland was cast in terms applying to all colonial territories "settled" by British subjects. Counsel for the Meriam people would have said that the easy answer to that was that the Murray Islands had not been acquired by settlement, and could not have been so acquired, because they were already settled. Brennan J. says nothing as to that, saying instead:

"Assuming that the Murray Islands were acquired as a "settled" colony (for sovereignty was not acquired by the Crown either by conquest or by cession) the validity of the propositions in the defendant's chain of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies." 175 C.L.R. at p. 26.

After that Brennan J. hardly discusses the facts as to the Murray Islands again.

The logic of the first part of that paragraph is less than impressive. Remembering that the evidence showed the existence on the Murray Islands of an organised system of land ownership and cultivation, which was inconsistent with acquisition by settlement, Brennan J. might with equally good or bad logic have said:

"Assuming that the Murray Islands were acquired by cession (for sovereignty was not acquired by settlement or conquest)",

or again

"Assuming that the Murray Islands were acquired by conquest (for sovereignty was not acquired by settlement or cession)".

The position is a plain nonsense. There is of course no basis whatsoever for saying that if the case is not within A or B it must be within C, unless you first posit that every case must fall within one of the three. The common law did not say that there were only three ways to acquire colonies. It could not say that, for as seen earlier it was government, not courts, which said which colonies had been acquired. Common law was concerned with the results of acquisition, and it was for that purpose that it sorted into categories the cases of acquisition which had been brought to its notice.

Faced with a case where government had found a mode of acquisition which did not fall within the perceived boundaries of any of the three categories recognised to date, the common law would not have said it had no answer. It is a principle of the common law that it always has an answer. A good common law judge in form and seeing the ball well would have found easy enough the task of dealing with the matter. He might extend the boundaries of one of the already recognised categories, if that seemed appropriate; or he might recognise a fourth category, with rules established by analogy from the categories already established. That is precisely what the common law had done in this very area in the 17th and 18th Centuries, when it first extended the category of "conquest" to include cases of acquisition by cession, then recognised cession as a separate category, and recognised acquisition by settlement as another category.

Any fair analysis would have found the position on the Murray Islands very much closer to both conquest and cession than to settlement. This was the age of blackbirding. The evidence was that the Murray Islands had been raided by blackbirders, its women seized, and its people murdered: see per Brennan J, 175 C.L.R. at p. 19. It passes belief that the Meriam people had not become well acquainted with the efficacy of cannon and musket.

In September, 1879 Captain Pennefather "mustered the natives" on the beach and told them "that they would be held amenable to British law now the island was annexed" (Brennan J, 175 C.L.R. at p. 21). It appears that the natives accepted the annexation and what they understood of its implications. The good common law judge might perfectly sensibly see their conduct as a politic surrender to overwhelming force, treat it as just as much a case of conquest as if they had thrown a few unavailing spears and been cut down by a volley of musketry, and hold the case to fall within the existing boundaries of conquest. Or he might with perfect propriety extend those boundaries to include the case of peaceful surrender to overwhelming force.

Alternatively, and remembering the hard lessons the Meriam people had no doubt learned at the hands of the blackbirders, the judge might analyse the events as resembling a request/consent of the Meriam people, acting directly rather than through a government, for the good and powerful Queen to take control and protect them against the wickedness of the outside world. On that basis he might see the case as one of cession, whether within the existing category or an extension. Or he might recognise a fourth category of peaceful surrender or direct invitation without conquest or treaty, with rules similar to those attaching to those closely related categories.

Any of those several analyses would have been far closer to reality than Brennan J's course of passing by without mention the quite critical facts of cultivation and land ownership, and proceeding on the basis that it was proper to categorise the acquisition of Murray Island as a case of acquisition by "settlement", just like the mainland.

There is indeed a further point. It is one thing to say that land was available for acquisition by settlement. It is another thing to treat it as having actually been acquired by settlement. That surely demands actual settlement; an actual "peopling" of the land. The simple and undisputed fact is that England did not "people" the Murray Islands. How then could it have acquired the Murray Islands by settlement? The point escapes attention by Brennan J. or any other member of the majority.

At p. 40 Brennan J. approaches the matter from another direction. At pp. 38 - 40 Brennan J. has noted the words "without settled inhabitants or settled law" in Cooper v Stuart (1889) 14 App. Cas. 286 at p. 291 (a phrase which is of course true in the sense which the word "settled" bears in this area), and has set against it the finding of Blackburn J, in Milirrpum v Nabalco Pty. Ltd. (1971) 17 F.L.R. 141 at p. 267 that there was "a stable order of society" and a "government of laws and not of men" (which is in no wise inconsistent with what was said in Cooper v Stuart). He concludes:

"The theory that the indigenous inhabitants of a `settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher `in the scale of social organization' than the Australian Aborigines whose claims were `utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not." 175 C.L.R. at p. 40.

This is heady stuff indeed. I have a number of comments:

(i) It is simply not true that the theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land depended on a discriminatory denigration of the inhabitants, their social organization and customs. All that is true is that the availability of land for acquisition by settlement depended on the view that those persons who from time to time were or might have been present on the land prior to acquisition were nomadic peoples who did not "settle" the land (and who almost automatically had no concept of individual ownership of land, and therefore claimed and had no proprietary interest in land in the area concerned). To say that is in no way a "discriminatory [or any other kind of] denigration" of them, unless it be automatically a "denigration" of a native race to say that its life style is nomadic, or that its culture did not include the concept of individual ownership of land. Until now I had not thought that it was.
(ii) I do not understand what the word "discriminatory" is doing in Brennan J.'s sentence. What would a non-discriminatory denigration be? Does the word "discriminatory" have any operation in the sentence other than making the "denigration" sound worse?
(iii) If the theory that the indigenous inhabitants had no proprietary interest in the land rested on a view of the indigenous inhabitants and their social organisations and customs which was not discriminatory and was not a denigration but was in fact wrong, would that invalidate the theory? Is the essential vice of the view taken that it was false, or that it is unfashionable?
(iv) It is not clear what separate effect is to be given to the latter part of the phrase "false in fact and unacceptable in our society". Does being "unacceptable in our society" involve a separate judgment from truth ? Say that it were held that the statement was true in fact. Would it still be "unacceptable in our society"? If so, by what criteria does the High Court decide what truths are and what truths are not acceptable in our society? Who asked it to do that? What is the source of those criteria? Where does the High Court find them? Where may the good citizen find them, so that he can plan his legal arrangements?
(v) It may be that at this point in his reasoning Brennan J. has already decided that the "basis of the theory" is indeed a discriminatory denigration. If so he has decided that issue in favour of Aborigines generally without there being before the Court any evidence whatsoever as to Aborigines generally, and without hearing argument from any person affected by that decision.
(vi) If at this point Brennan J. has not already decided that point, he now proposes to go on and do so without evidence and without the presence of or argument from any interested party at all.
(vii) Whatever be the position as to all that, it is simply not true that to apply the existing authorities as sought by the plaintiffs would have been to embark on an inquiry "whether the Meriam people are higher `in the scale of social organization' than the Australian Aborigines whose claims were `utterly disregarded' by the existing authorities". The inquiry would have been whether the evidence showed that the Meriam people had a social structure and concepts of ownership such as to make an acquisition of the islands of which they were in permanent occupation not capable of being an acquisition by settlement within the applicable common law principles. There would have been no comparison whatever with mainland Aborigines or their social organization or whatever else.
(viii) Has any other plaintiff, anywhere, ever been told that a court cannot decide a claim he has properly brought to the court, because to do so would involve deciding whether he was higher in the scale of social organization than certain other people?
(ix) Say that after considering the mainland position Brennan J. had decided that practical dictates of common sense required the Court to stand by the position existing on the mainland for a hundred and fifty years. Would he have said that the Meriam claim must also fail, because to determine it would be to inquire whether the Meriam people were higher up the scale of social organization than Aborigines on the mainland? Or would he in those circumstances have recognised that justice compelled him to determine the Meriam claim that the Meriam position

was different from that on the mainland, notwithstanding any implication as to position in the scale of social organization? If not, when are we to be told which claims can no longer be considered in Australian courts because to consider them is to involve a comparison as to comparative positions on the scale of social organization? If Brennan J. would determine the claim in those circumstances, why should the court not determine it immediately, in circumstances where it had not decided what the mainland position would be?

(x) If Brennan J. had felt discomfort as to a contrast between an assumed successful result in relation to the Murray Islands and what might be the position under the different facts on the mainland, could not the position have been met by a statement that the position on the mainland might need consideration, but that must await determination in a case concerned with and properly organised in respect of the mainland?

Rejecting such courses for no stated reason, the course adopted was to proceed to overrule long-decided cases, in the total absence of argument from interested persons, and a total absence of evidence as to Aborigines generally. This was for some reason seen as preferable to deciding the necessary case, as presented, and putting mainland questions aside for consideration, with full evidence and parties and argument, when they arose.

I find it difficult to imagine any earlier High Court proceeding in this way.

I turn to an earlier associated passage from Brennan J's judgment. Here it seems to be said that any differences as to the facts on the mainland would be irrelevant. The passage reads:

"Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." 175 C.L.R. at p. 26 (my italics).

Personally I find that the scariest passage in the whole of the Mabo judgments.

The passage is not quite as clear as one would wish so important a passage to be. The first sentence says, clearly enough, that circumstances "which might be thought to differentiate the Murray Islands from other parts of Australia" cannot be invoked as an "acceptable" (here's that word again) "ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands." Well might the Meriam people inquire, "Who invited other indigenous inhabitants to our party?"

The Meriam case claimed nothing, asserted nothing, set out to prove nothing, and argued nothing as to the position on the mainland or as to the rights of other indigenous inhabitants. All it said was, "The cases cited by Queensland are not about people like us." Where then did Brennan J. get his starting point? It is hard to believe that when a plaintiff asserts that on the law as it stands the facts he proves about himself entitle him to a particular result, and the defendant raises no allegation as to discrimination, the court is to look around and inquire whether the facts about him are different from those about other people.

Then the unclear part of the passage follows: "such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." It is not clear whether the alleged discrimination is founded merely on the assumed fact that there are "some categories of indigenous inhabitants" (if "some categories" constitutes a race) who cannot assert about themselves facts such as the Meriam people assert about themselves, or on that plus the further assumption that the reason why those indigenous inhabitants cannot assert those facts about themselves flows from a lack of capacity to have produced those facts.

Founded on the first assumption only, the proposition would surely be nonsensical. If one tribe chooses to develop in one way and another tribe in another, is each and every distinction founded on facts which are true of one tribe but not the other to fall foul of the Racial Discrimination Act 1975? Even where a difference in the facts does indeed flow from a difference in capacity, is it not carrying the idea of "discrimination" to absurd lengths, to say that the difference in the facts must automatically be ignored? If (as is likely) another runner beats me over a hundred yards, is it discriminatory to award him the race, because the reason that he ran faster than me was the difference in our capacities to run fast? If the men's 100 metres race at the Olympic Games is habitually won by someone of negro race, as it in fact is, is the race to be seen as discriminating against whites? Where Brennan J. is getting to in the area of discrimination is a matter of deep concern.

Deane and Gaudron JJ.

Deane and Gaudron JJ. said in partial explanation:

"The issues raised by this case directly concern the entitlement, under the law of Queensland, of the Meriam people to their homelands in the Murray Islands. Those issues must, however, be addressed in their wider context of the common law of Australia. Their resolution requires a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live." 175 C.L.R. at p. 77 (my italics).

Why that was so their Honours did not say. I deal below with related matters in their Honours' judgment.

B. The Absence of Interested Parties

It is of course not the practice for there to be represented before any court every person likely to be affected when the decision operates as a precedent for other cases. Life is too short for that, and courtrooms too small. The right of representation is limited in the main to those directly interested in the actual proceeding. But the court will be astute to ensure that there are represented before it parties with an interest either way on each of the issues which the court has to decide. Here the Court set out, in the just-quoted words of Deane and Gaudron JJ, on "a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live". Not often before, if at all, has the High Court or, I would think, any other common law court set out on "a consideration of the rights, past and present" of a group of persons, without there being represented in the court any one of those persons or any one of many classes of person whose own rights, past and present, were likely to be affected by the decision on the rights concerned.

It is of course true that because they were not parties, no Aborigine or property-owner on the mainland is technically bound by what was said and in that sense decided. The reality may be taken to be represented by the words of Deane and Gaudron JJ. The majority meant to decide these issues, and it did so in the absence of the interested persons.

It will be seen that the lack of representation applied to Aborigines as well as to others. It might be thought that in the result the Aborigines did not need to be represented. But in fact certain Aborigines have been very critical of Mabo. On 26 January,1993 Mr Gary Foley said on the Breakfast Show on radio 3CR:

"I mean, Jesus Christ, that is as laughable and as idiotic a proposition as what terra nullius was. So, you know, I have got no faith in the Mabo decision. I think it is a heap of shit.

"In fact the Mabo decision needs to be fought as vigorously as what terra nullius was. I mean, Mabo is the terra nullius of these days. I mean, you know, it is as idiotic a proposition as what terra nullius was.

"I mean, I just find the basic proposition of Mabo insulting. To say to people who you have rounded up, kicked off their land, brutalised, massacred large numbers of them, whacked in concentration camps for a hundred years, done everything you can to destroy their language and culture and custom, steal their children from them, stick them in little white homes and then turn them into domestics and sex slaves and things like that and then you turn around 200 years later and you say, you people can't prove that you have had an ongoing link with your land, so therefore any rights that you had were extinguished 200 years ago. That is a load of garbage."

That criticism might strike one of the majority six as somewhat outspoken, perhaps unfair, perhaps even ungrateful. The fact remains that explicit in each of the majority judgments is a considered denial to many Aborigines 90 per cent of them, I think I have read in the press of rights and potential benefits held to be available to a minority of Aborigines. That denial was made by six members of the High Court of Australia without one word having been said in the court on behalf of the excluded Aborigines. Whether there was much or little to say, is something one never knows till opportunity is given to say it. There is a doctrine requiring that an interested party be heard. It is called "natural justice".

Although as just stated the issue is not technically closed, the High Court has never (I believe) overturned as needing fundamental rethinking a doctrine it has overturned the legal world in stating just months before. Mabo has already caused great uncertainty and harm in the mining and pastoral and financial communities, within Australia and internationally. A restatement of a basic part of the recently stated doctrine would cause deep concern in those communities, and damage to the public's already tarnished perception of the High Court. In all likelihood the Aborigines excluded by this part of the Mabo doctrine will remain excluded, though unheard at any effective time. Mr. Foley's criticism illustrates vividly just one aspect of the wisdom of past High Courts in deciding as narrow a constitutional issue as possible, so that before something is decided it has been argued first by interested parties; and the unwisdom of what was done here.

C. Evidence and Language

I have been asked by a great historian where the High Court got its "facts" as to the Australian mainland. The particular point he had in mind was the entire absence of recognition that the great slayer of Aborigines has been disease, something he had thought accepted by historians of all schools. But the general point is much wider. The inquiry throws into high relief three particular passages in the judgment of Deane and Gaudron JJ. The whole matter is worth attention.

At p. 104 Deane and Gaudron JJ. speak of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

At p. 109 the following passage appears:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Courts get their facts from two main sources. The first is the evidence of one kind and another actually put before the court. The other is via the doctrine of "judicial notice". The court takes judicial notice of facts so notorious that to require evidence would be to waste time and money. The court needs no evidence for the proposition that in mainstream Australian society Christmas is celebrated on 25th December, or that Parliament House is in Spring Street. The court will also take judicial notice of facts which the court does not itself know (though judges with more pride than sense sometimes speak in terms of "reminding" themselves) but which meet the requirement of being capable of "immediate accurate demonstration by resort to readily accessible sources of

indisputable accuracy". Morgan: Some Problems of Proof under the Anglo-American System of Litigation p. 61. The court will consult works of unimpeachable reference to ascertain such things as the precise meaning of a word, the date of a well-known historical event, or the times of the tides.

The doctrine and its limits were indicated by Dixon J. in The Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1 at p. 196:

"Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians ... and employ the common knowledge of educated men upon many matters and for verifications refer to standard works of literature and the like ..., so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And with respect to our own country, matters of common knowledge and experience are open to us ... . But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics."

Two things follow. The first is that one cannot use this head of judicial notice as the basis of findings of fact in areas of controversy. Findings in controversial areas require actual evidence. Judicial notice will justify a judge in looking up a book and taking judicial notice that the Battle of Waterloo took place in 1815. (A better judge would have known it.) The doctrine will not justify him making a finding that the plays we attribute to Shakespeare were written by Bacon. Nor does the position become any different if the judge reads all the sources on a controversial matter and forms his own view on the matter. That is not taking judicial notice, but acting on the judge's personal view on a matter as to which no evidence is before the court.

The second is that when a judge does rely on this aspect of judicial notice, one will expect him to cite the "sources of indisputable accuracy" upon which he has relied. The particular importance of this is that otherwise no foundation for the court's findings will be known to the parties or to the public.

Judgments of other courts are not in themselves evidence, but one can easily imagine findings in such a judgment becoming accepted as a scholarly and authoritative statement of which judicial notice is capable of being taken.

Where cases are instituted in the High Court it has become usual to remit the finding of facts to another court more accustomed to seeing witnesses. That practice was followed in Mabo, the High Court remitting to the Supreme Court of Queensland on 27 February, 1986 for hearing and determination all issues of fact raised by the pleadings. The task fell to Moynihan J, who delivered his determination on 16 November, 1989. All the evidence and findings concerned the Murray Islands. None concerned the Australian mainland. So none of Deane and Gaudron JJ's "facts" as to the mainland came from that source.

The validity of the first two passages cited above from the judgment of Deane and Gaudron JJ. must as I see it rest on the doctrine of judicial notice. I know of no other basis upon which a court can introduce, as facts justifying a decision inter partes, facts not put before the court by evidence.

In my view the statements of Deane and Gaudron JJ. fail utterly to meet the requirements for being established by judicial notice. Neither statement seems to me capable of "immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy". On the contrary, both are highly controversial and much controverted. They are the very kind of findings which cannot be made on the basis of judicial notice.

In their private capacities it is surely the privilege of Deane and Gaudron JJ. to undertake whatever research they choose on these issues, and to come to whatever honest views, just or unjust, partial or impartial, might follow. In their private capacities they surely have the right to voice such views as they will, at school Speech Days or anywhere else appropriate for public utterance by judges. But when they function as judges and deliver findings of fact in the High Court, they operate under the constraints of legal doctrine. I cannot avoid the view that they made findings which had no basis in evidence properly before them.

I would add two particular comments on those statements. The p. 104 passage speaks of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

I could well understand it being said, and rightly said though it would probably be no business of the High Court to say it that the condition and position and prospects of the Aboriginal people in our present society were unacceptable and that the nation ought to try to do something about them: including thinking about the problem before throwing money at it, for I cannot avoid the view that the unthinking expenditure of many billions of dollars in the last generation has made the condition and position and prospects of Aborigines steadily worse. But the phrase "national legacy of unutterable shame" seems to suggest that the whole nation is to be unutterably ashamed.

I take the existence of a "national legacy of unutterable shame" to reflect an acknowledgment of moral turpitude in whoever did whatever they did, and an acceptance by all the nation of some kind of personal responsibility for what they did. For myself as merely one citizen, I am sure that some people behaved with moral turpitude, and that some did not. I know that government official after official was instructed to and did endeavour to protect Aborigines. To go no further than this city, the reason that Governor Bourke sent Police Magistrate Stewart to visit and report on the forbidden and unlawful settlement here at Bearbrass in 1836, was that there had been reports of violence to Aborigines.

I do not know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown, black and white, throughout the whole continent, during a century of Australia's history. As for acceptance of personal responsibility, I have enough trouble bearing, and properly bearing, personal responsibility for what I myself have done. I am perfectly willing to bear in addition my responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing. I have no intention of adding to my troubles by accepting personal responsibility for the acts of others, or of marching through the world trying to repair past ills to people now dead.

Let me say this about that. The mediaeval church held it against all Jews, that Christ had been crucified by Jews a millennium earlier. I had thought that attitude was now regarded as misplaced and unjust; that later Jews did not bear a burden of guilt for what was done far earlier, by others. I read again and again that we must not blame present-day Germans for what Hitler did in the war, nor blame present-day Japanese for what Japan did in the war. That all sounds fair enough. One wonders whether Deane and Gaudron JJ. would say that Germany bears a national legacy of unutterable shame, for the Holocaust. Or Japan, for Pearl Harbour and many subsequent atrocities. If not, it seems somewhat perverse to find a national legacy of unutterable shame for what (they say) was done in Australia earlier still.

I remind you of the second passage:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of

this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Mutatis mutandis, the comments just made apply again. I am willing to do whatever can be done to cure present ills, to give people hope and opportunity for the future. All that I can understand. I do not know how to retreat from a past injustice. If someone was unjustly killed in 1820, he is dead. What does it mean, to retreat from that? "Talk cant if you will", said Samuel Johnson, "But clear your mind of cant."

The third passage, at p. 120, contains what lawyers might call a confession and avoidance. It sets out to explain and justify the first two:

" ... we are conscious that, in those parts of the judgment which deal with the dispossession of Australian Aboriginals, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of Australian Aboriginals is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all lands of the Continent vested in the Crown. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart."

I add its concluding part:

" ... in the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they had already identified."

I have several comments.

(i) Unless I have been misled all these years when I thought I was reading judgments of the High Court, I can feel no doubt that the language of Deane and Gaudron JJ. in fact is unusually emotive for a judgment of the High Court. That is a simple matter of comparison, not calling for fine judgment. Many adjectives have over the years passed through my mind as I have read judgments of the High Court, but "emotive" has not often been one of them. I should be surprised if their Honours disagreed as to the unusual emotion of this one. I think they are intending to say that some may find the language too emotive, whereas they would justify it.

(ii) In fact the judgment does not give us "the full facts of that dispossession" which are said to be "of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown." It is far from doing that. Nor does the judgment say where the undisputed evidence as to all those facts is to be found.

(iii) The statement "that the continent was unoccupied for legal purposes" is a gravely distorted version of the doctrine that where the land concerned was not settled (in fixed habitation and settlements), settlement of the land would make the case one of acquisition by settlement.

(iv) Passing that point by, it is not easy to see how the validity of the proposition "that the continent was unoccupied for legal purposes" (a proposition which of its nature had to be true or false in 1788) could be shown to be false (or true) by events taking place over the following hundred years. What, one wonders, was the position in 1789?

(v) If the later shameful legacy referred to by Deane and Gaudron JJ. shows the proposition to have been untrue, would opposite events, namely universal kindness to Aborigines at all times, have shown the proposition to have been true? If not, what is showing what?
(vi) It is apparent from the final passage that Deane and Gaudron JJ. have read unnamed sources, and undertaken research in unnamed places. Beyond fair argument the areas in which they did this were areas of controversy. Without recording the facts as they have found them to be, they move to their moral judgments and conclusions based on the unstated facts. That is far indeed beyond what the doctrine of judicial notice justifies.
Deane and Gaudron JJ. stress the importance of all this, by saying that it is the association of the proposition with the subsequent dispossession which justifies their deciding to overturn what has been "a basis of the real property law of this country for more than a hundred and fifty years". If I understand this properly, the passage is an astonishing one. People of 1992, people not alive in the 19th Century, people in many cases who migrated to Australia following ill-treatment elsewhere, are to lose a basis of the real property law under which they lived, not even because of some proved and uncontrovertible balance of national shame flowing from evidence before the court, but from a judgment of national
shame arrived at otherwise than from such evidence.
D. The Chief Justice
Mason CJ and McHugh J concurred in the judgment of Brennan J. A Chief Justice is first and foremost a judge, and in ordinary circumstances there is nothing to stop him, any more than anyone else, concurring in a judgment of one of the other judges. But when a great case is involved, one does look to the Chief Justice, first of all for a narration of the procedural history of the case (which would have been very helpful in this case) and the issues and the materials, and second for an ordered and considered analysis and treatment of the matter in words which are his. His views in this latter part of the judgment may not be the ones which prevail. There is no embarrassment if they do not. Sir Owen Dixon made the observation that a judge's influence on his fellows does not depend upon where he sits. But one does hope to find in a judgment of a Chief Justice a firm and steady foundation on which the possibly more personal and idiosyncratic judgments of other judges may stand, and on the basis of which they may make more sense than otherwise.
Especially is all this so in seminal cases where the law is changing direction. Whatever the High Court thought the implications of Mabo might be, whatever it thought the reception of the decision would be, it must have recognised a likelihood of honourable people being concerned at its content. It was a situation in which one might have expected a Chief Justice, like any other leader, to show the way. It is a lasting pity that the judgments which were delivered were not preceded by and seen in the context of a sober statement of the kind one at least hopes for, and on the whole expects, from Chief Justices on such an occasion.
E. Judicial Behaviour Since Mabo
Since Mabo, Mr Justice Einfeld of the Federal Court has attached the dignity of his position as a judge of that court to criticisms of people who take views contrary to his.
"Australia is in danger of being engulfed in hatred, racism and division because of mischievous self-seekers spreading false information about Aboriginal land claims."
"Corporate nobodies and people who should know better are deliberately stirring hatred and racism by misrepresentation in the guise of prosperity and a sound economy."
"Australia is reaching another low in intolerance, racism, self-interest and self-indulgence." (9)
A person who talks like this publicly should not do so unless he is happy for others to reply in kind. Will Mr Justice Einfeld and his court be happy if this happens? Can a mining executive, if he feels just as angry as Mr Justice Einfeld and is willing to be just as discourteous, talk of

"judicial nobodies"? Or will someone start muttering about contempt of court? That really would seem unfair, but one can never be sure that everyone agrees. It seems worth suggesting that people who bring the title of judge to their participation in controversial affairs would do well to abide by ordinary standards of civility and courtesy.

The judge is further reported as follows:

"Mr Justice Einfeld said ... Mr Justice Brennan was one of Australia's most distinguished sons, who had made a greater contribution to the nation's progress and quality of life than any mining executive could emulate."

I imagine that Mr Justice Brennan is just as embarrassed by this kind of public utterance as most people would be. No doubt it is flattering to find one's contribution to the progress of the nation compared with those of Bowes Kelly, and WL Baillieu, and WS Robinson, and Essington Lewis, and Sir Ian McLennan. The time for such comparisons is not yet. If it ever does arise, the matter will not be judged by Mr Justice Einfeld. The Chief Justice has also broken new ground, in commenting for publication on a recent and controversial decision of the Court, both here and abroad. An interview initially agreed to for the purpose of discussing a different matter was extended to include an interview on Mabo. The interview was published in The Australian Lawyer for July, 1993. A few days before highlights of the interview were published in the press. The account I saw (10) ignored the principal part of the interview, and dealt solely with the Mabo appendix to it.

At a conference held at Cambridge University on 12 July, 1993 the Chief Justice took the matter abroad. He talked of "the most sustained and abusive (criticism) I can recall in my career as a lawyer". He identified the groups from which this came, namely "interest groups such as the mining and pastoral industries and to a lesser extent politicians". He spoke of "the concerted campaign run by the mining interests supported by the pastoral interest to discredit our decision". In the days before Mr Keating became Prime Minister, there was a firmly entrenched tradition that a Prime Minister or other Minister travelling abroad did not make public comment on current happenings at home. I cannot recall any occasion on which one has even thought in terms of a Chief Justice of the High Court of Australia making such criticisms of Australians while in another country, and one cannot but regret that the pressures of Mabo led to that taking place on this occasion.

Conclusion

It will be obvious that I do not think the High Court served itself well in handling Mabo the way it did. I have no doubt that the High Court has wounded itself in recent years, and has done so again in Mabo. I first sighted the High Court as a student, in March 1948, when it was hearing the Banking Case: Bank of N.S.W. v The Commonwealth (1948) 76 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. Just three years later came the Communist Party Case: Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. When the Court's decisions came, each matter was seen as at an end. The decisions were accepted as if brought down from Mt Sinai on tablets. The Court carried the high respect and esteem of the great mass of Australians, of all shades and classes. This flowed, I have no doubt, from men's perception, their correct perception, that the judges strove to confine themselves to judging, and to doing so in judicial manner, in judicial language, and with judicial restraint.

The position today seems very different. Even before Mabo I was both astonished and fearful for the future, when hearing the terms in which ordinary Australians were talking of a court which so few years earlier carried the esteem of the great mass of Australians. Indeed I myself spoke here last year of judges seeming to have things they wanted to say, instead of being content to say only what they needed to say. They may not have things they want to say, but like Caesar's

wife, High Court judges should be above suspicion. They are losing the war if people think such things true, or suspect that they might be.

Mabo has taken the matter far further. It is not merely the calls for the result in Mabo to be reversed by constitutional amendment (as, I presume, by an amendment providing that all title to land on the mainland of Australia shall flow from grant by the established government of the State or territory concerned, and not otherwise). In the Cambridge conference, the Chief Justice said that the campaign by the mining and pastoral interests had the purpose :

"of discrediting the decision and ... persuading the government to in effect repeal it and, if need be, even to initiate the constitutional processes that would result in an amendment of the Constitution." (my italics).

The suggestion seems to be that there would be something vaguely improper about that, or at least unsporting, as if querying the umpire's decision.

Seeking to reach a different result in that way would in fact be neither new nor discourteous. The same Constitution which puts the interpretation of the Constitution with the High Court puts the ultimate power over the content of the Constitution fairly and squarely where it belongs, with the people of Australia. Few people had more respect for the High Court than Sir Robert Menzies, but the great man did not hesitate to seek by constitutional amendment to reverse the result of the Communist Party Case.

Deane and Gaudron JJ. have said in terms that the content of the law of property in Australia should be altered forever because of their view, arrived at by their joint research among unspecified material referred to by unspecified writers, of the rights and wrongs of what they call the dispossession of the Aborigines in the nineteenth Century. It would not surprise if the Australian people, if asked, said that it shouldn't.

But discussion now goes beyond that. One is asked in unexpected places questions as to why the High Court has such power. The political agenda has been extended to asking

whether the High Court should have such power. These are novel questions. They have not arisen because the Court is handling delicate and controversial matters. The Court has always done that. What is perceived to have changed is the manner of the Court's handling of such matters. Whatever the ultimate answers turn out to be, years hence, the handling of the Mabo case will not have helped the defenders of the Court.

Endnotes

1. The one piece of litigation gave rise to two hearings in the High Court and two reported decisions of the High Court: Mabo & Ors. v The State of Queensland & Anor. (1988) 166 C.L.R. 186, and Mabo & Ors v The State of Queensland (No. 2) (1992) 175 C.L.R. 1. I call the case as a whole simply Mabo. Where it is necessary to distinguish I call the two decisions Mabo No. 1 and Mabo No. 2.

2. At the time of Mabo No. 1 they were the Miriam people; in Mabo No. 2 they are the Meriam people. The Court does not mention the switch, let alone explain it. Hopefully it is safe to stick with the Court's second version.

3. Smith, Cases and Materials on the Development of Legal Institutions (1965) p. 467.

4. Scholars will recognise and other readers should be informed of my heavy debt to Castles, An Australian Legal History (Law Book Co., 1982) in this area.

5. Chalmers (ed.), Opinions of Eminent Lawyers on various points of English Jurisprudence chiefly concerning the Colonies, Fisheries and Commerces of Great Britain, p. 206.

6. High-Park is of course Hyde Park. In 1954 I was told by an English gentlewoman who was a nice observer of these things that in the early years of the Century her grandmother habitually

pronounced the name as if there were no "d". Her brother was a judge, so what she said must be true.
7. The analogy with garden allotments in many crowded English cities is an obvious one.
8. Brennan J's judgment was concurred in by Mason CJ and McHugh J.
9. The Age, 5 July, 1993.
10. The Age, 2 July, 1993.

Appendix I
The Background of Calvin's Case
The case grew out of the acquisition by James VI of Scotland (b. 1557) of the throne of England, on the death of Queen Elizabeth in 1603. The King's claim to the English throne was a claim by descent; indeed a claim by two descents. His mother was Mary Queen of Scots (b. 1542), daughter of James V of Scotland (b. 1512), son of James IV of Scotland and Margaret Tudor, eldest daughter of King Henry VII of England. His father was Henry Stuart, Lord Darnley, son of the Countess of Lennox, daughter of Margaret Tudor by her second husband, the Earl of Angus. This double lineal descent from an English King was matched by no other possible claimant, and King James ascended the throne of England unopposed.
It might be thought that the accession of James VI of Scotland as James I of England represented an acquisition by Scotland rather than an acquisition by England. Reality was around the other way, and Calvin's Case discussed acquisitions by England, not acquisitions of England. The unattractive but shrewd Henry VII had foreseen at the time of his daughter's marriage, in 1502, how matters would turn out a hundred years later. To the comment that if the marriage should lead to a Scottish King succeeding to the throne of England then "Scotland will annex England", he replied "No, in such a case England would annex Scotland, for the greater always draws to it the less."

Chapter Seven

Making Federalism Flourish

Professor Wolfgang Kasper

The 1980s were a time of dramatic change in Australia. The 80-year-old "Australian Settlement", offering protection and other government-provided certainties, collapsed. By now, it is widely accepted that Australian industries will simply have to compete with the best, both at home and in world markets. Even the nexus between the end of protectionism and the need to reform archaic, centralised ways of wage fixing is now reasonably well understood.

Adjusting to the Open Economy: Government and Transaction Costs

What is not fully understood as yet is that the opening of the Australian economy also requires adjustments far beyond industry. We need to adjust to the deeply–ingrained rules of how we interact in all spheres of life and, above all, in government administrations. Governments are now under challenge to become competitive. For a long time, social institutions, attitudes and government could develop unchecked on this island, without the discipline of world–market competition. Now, the legacy of these private and public institutions and attitudes stands in the way of turning financial and trade liberalisation into a success.

We know that the formal and informal institutions of society have great influence over the costs of doing business, the costs of information gathering, business transaction and organisation — what economists call "transaction costs". Nowadays, at least 40 per cent of the cost of producing the Gross Domestic Product is made up of such transaction costs. In Australia, many of these costs have been artificially inflated by administrative practices and political deals that could proliferate in the past. Now, the inherited high costs of doing business in Australia are destroying economic opportunity and jobs.

Politicians and their advisers have not woken up to what harm the Australian `transaction cost handicap' is doing in some areas. Only this week did the Commonwealth Cabinet compromise on the procedure of dealing with Aboriginal land claims. The proposed procedure opens the door for endless, costly arbitration, consultation, litigation, uncertainty, delay and, incidentally, a further centralisation of political powers. In the open Australian economy of the 1990s, I fear, the lack of clear, definitive rules and property rights will destroy competitiveness and will soon inflict economic pain.

The central economic challenge of the 1990s is to undo the cost handicaps created by the pervasive politicisation of economic life that was possible under the long–lasting economic isolation. Now, administrators can no longer ignore the costs of their actions; and politicians can no longer yield with impunity to pressure groups, creating yet higher costs. In the open economy, lack of cost control all around and cost-plus pricing are the way to national bankruptcy. Our success or otherwise in facing up to the challenge of institutional innovation will determine future living standards and the entire quality of private and public life.

What is at stake in the opening-up of the economy has unexpectedly turned out to be much bigger than expected, because advances in transport and communications have made it possible for the owners of capital, knowledge and enterprise to move internationally as never before. Investors now go to where they can expect favourable returns on their assets — a phenomenon that has been labelled "globalisation". It requires the controllers of production factors that cannot

move internationally — land and resources, unskilled labour and government administrations — to behave so as to attract and retain the mobile resources.

The East Asian societies learnt to make themselves attractive at an early stage and have benefited handsomely. Likewise, Australian governments and unions now have to compete with Singaporean, Californian or New Zealand government agencies and unions in the global market place for capital, knowhow and enterprise. If they fail to rise to the challenge — for example, because they persevere with self–centred, awkward and costly international arrangements — mobile capital and talent will simply tippy–toe away to more rewarding climates. And we will all become less productively employed and poorer.

Having to compete is certainly an unprecedented experience for Australian legislators and administrators. The long tradition of protectionism has bred Marxian illusions of the "primacy of politics" (and the primacy of single–issue politics) over economic life and individual aspirations. The rulers do not readily give up such a position. The results are Australia's declining attractiveness to mobile capital, insufficient exports, and a mounting foreign debt. If we want the inspiring dynamism and the optimism that so many admire in East Asian countries and New Zealand, then institutional reform has to be put at the top of the agenda and tackled expeditiously.

The Right Institutional Innovation will not come from the Centre

Government administration — the solving of shared tasks by collective means — will be central to achieving institutional reform. We have to develop world–best practice in public administration and policy making. This requires giant steps and often revolutionary breaches with past practice.

As a student of economic history and international experience, I am convinced that societies succeed in international competition only if they are governed by transparent, stable and simple rules, and when governments confine themselves largely to setting a fairly stable framework. Then, individuals are free to compete confidently and expediently within a set of clear rules. Good government acts on the principle that confidence is capital and time is money.

This lesson must now be learnt quickly by Australian legislators and administrators. They – – as well as the Australian public and opinion–makers like the ABC — must shed illusions that government can act as the Universal Problem Solver, intervening in all walks of life.

The challenge of administrative innovation is unprecedented, diffuse and manifold. Coming up with the right solutions requires much experimentation, creativity and breaking of new ground. We know that successful innovation is most likely to occur when the search for solutions is organised as a competition amongst independent rivals. The great task of the 1990s can be mastered most quickly and best if Australian jurisdictions and administrations begin to compete actively with each other.

States and local administrations should therefore be given much greater freedom to compete in inventing administrative solutions now to enhance the business climate, cutting everyone's business costs and attracting industry. If competing administrations are allowed to come up with differing rules and devices, the proven successes can later be imitated, and Australia will prosper. Marching in lock–step to the tune of a central industry policy designed and imposed by Canberra Centre is unlikely to hit upon the right institutional solutions which we now have to find in a hurry!

I therefore beg to disagree with Mr Keating who is reported to have said that "if we are to meet the economic challenges of the decade and of the new century in a global trading economy, we will also need more central authority to shape our economy and not less".

To find out how administrations can best compete, we must hand the States more sovereignty over how they administer their own destinies — and how they wish to respond to the highly

attractive administrative arrangements now offered to internationally mobile businesses by the likes of New Zealand and Singapore.

Whilst I have based the argument for decentralisation on economic grounds, I hasten to add that decentralisation of course also has important non–economic benefits. Much freedom would be gained if Australian citizens — as well as foreign investors — were allowed to chose freely between, say, a Green, stagnant Tasmania, a highly taxed, intensively governed South Australia, and a low-tax, lightly and expediently governed Queensland. Once some of us are able to vote with our feet, we can also show those who govern us what we, the sovereign people, really want! The electorate would have a say far beyond the rare and compulsory trip to the ballot box. Probably, there would be fewer administrative and political schemes of social engineering (like the trendy National School Curriculum) which now so often annoy and alienate the majority of Australians.

To a much greater extent than the Swiss Cantons or the American States, Australian States have been emasculated by a long history of fiscal centralisation. State governments have been trained to adapt with a "handout mentality". This often leaves little incentive for regional governments to build their own revenue base, but much incentive to clamour for Federal funds. Now, there is little incentive to vote for imaginative and responsible leaders in local and State governments — after all, the funds are handed down irrespective of what irresponsible mob has been voted in.

We have now reached a stage where the States have been disenfranchised and put on a central financial drip to an extent that one must fear for their survival. And it is quite credible now that the hidden agenda of republicanism includes the abolition of the States, as Mr Hawke and other Federal Labor leaders keep reminding us. If Australia were turned into a centralised republic, I would fear for our traditional liberties and our capacity to become economically competitive.

The Four Principles of Competitive Federalism

To face off the danger, we must think about injecting new life into State and local government. To that end, we should, in my opinion, adopt four essential and complementary principles that constitute what I shall call "Competitive Federalism": subsidiarity, a clear assignment of government tasks, fiscal equivalence, and the rule of origin. Let me elaborate.

(a) The principle of subsidiarity (which presently plays a big role in the debate of a future European constitution) is based on the observation that centralisation normally lessens the efficiency of public administration and alienates the citizen. Because the central administration of large countries requires complex information gathering – which is often impossible, as they discovered even in Moscow – government tasks should only be administered centrally when centralisation produces proven welfare gains. Such gains can be expected when there are strongly shared common interests (as, for example, in defence and foreign affairs), or when a diversity of rules would cause high and avoidable transaction costs (as, for example, when each State has a different monetary system or different traffic rules).

On the whole, general rules, which determine the overall legal and economic order and which cut transaction costs, should be set at the higher level of government, whereas more specific interventions in market processes and the public provision of infrastructures are best left to the lower levels of government. At a lower level, the costs and consequences tend to be more immediately obvious, and the citizens are involved more directly. There, it is harder to make policy anonymously, as the providers of public services tend to be watched more closely.

(b) This is so, in particular, if the second principle of Competitive Federalism, fiscal equivalence, is observed. Equivalence means that each level of government should finance its assigned and chosen tasks with the funds that it raises itself. This principle derives from the rule that those who are the beneficiaries of a public service should be, as far as possible, identical with those who are asked to pay for the service. Inefficient compromises, free-riding and much political

conflict are then avoided. It is well known that greater responsibility and administrative efficiency are ensured if those who make expenditures are also bound to raise the revenue.

Fiscal equivalence would create many incentives for State and local governments to cultivate their own tax base by pursuing good, far–sighted development policies and by competing to attract mobile capital and talent. Fiscal equivalence would of course also force all governments to live with the long-term consequences of their blunders in development and taxation.

(c) The third principle of Competitive Federalism says that the various responsibilities for collective action must be assigned exclusively, clearly and explicitly. Part V of the Constitution enumerates a very long list of Federal powers, but Canberra has usurped functions far beyond this list, e.g. in industry regulation, education, welfare, environmental matters and land rights. Before long, no doubt, the external affairs power will be used by the High Court to regulate our bedtime in the national interest! The current messy overlap, contradiction and costly duplication between various levels of government has created legal uncertainties and compliance costs. It detracts directly from Australia's international competitiveness, a luxury we can now ill afford.

My own choice would be for the Commonwealth to look after foreign affairs, defence, monetary probity, rules for nation–wide transport and communications, laws and regulations concerning civil and business interaction, and not much else. These functions could be financed from a low tax on personal and corporate incomes.

The States should look after matters such as transport infrastructures, general industrial conditions, and the environment. And financially autonomous local governments should be given the freedom to shape more detailed living conditions, including the obligations of public welfare provision and education. Just imagine the attention that would be dedicated to the local poor if local taxes had to provide for them! And how much attention local politics would earn if the local micro–climate were held largely responsible for job creation (rather than some abstract macroeconomic policy)!

Given the centralist bias of the High Court, local and State functions will probably have to be protected from the grip of the Centre by explicit constitutional stipulation. This might be coupled with a constitutional provision that allows the transfer of a function to a higher level of government only as and when clear proof of a welfare gain has been furnished. It may also be wise to allow transfers of government functions for a provisional five–year period, after which the claimed gains of centralisation are re–examined.

(d) As a fourth principle of Competitive Federalism, a rule of origin should be adopted. This means that a product or service is automatically acceptable throughout the Commonwealth if it meets the health, safety and other conditions in the State or local community where it has been produced. At present, each State and Territory tests and licenses a wide array of products. We suffer from a cartel of administrators who have imposed unnecessary, costly and excessive regulations because the regulators go unchecked. Under a rule of origin, State and local governments, which want to attract industry and jobs, would rival each other in developing the best–possible set of regulations. This puts an immediate competitive check on the regulators.

At the moment, we hear a lot about efforts to harmonise standards and negotiate between the States and the Commonwealth to obtain uniform regulations. But experience (for example in the European Community) shows that such negotiations give administrators and industrial lobby groups endless opportunity to talk and to impede competition. Such harmonisation will be discussed till the cows come home! If we are serious about raising Australian competitiveness and removing regulatory cost handicaps, business compliance costs can be reduced immediately by many millions annually by adopting the rule of origin.

Regulatory competition will not lead to unacceptably low standards of regulation. If, for example, products made in a State with poor safety standards were to hurt consumers, that State

would soon lose its attractiveness to industry, which would seek certification of its products by a State with appropriate standards.

These four principles are complementary. If they were implemented, we would soon get constructive competitive responses from Australian States and localities – unfettered by the centralist shackles, which were imposed under the "Australian Settlement".

Competitive Federalism would, for example, enable States and communities that now feel threatened by the New Zealand challenge to respond constructively. It is no secret that, increasingly, enterprises located in Australia are tempted to move to New Zealand, where an independent government behaves as an internationally competitive government should: confining itself to setting clear rules, providing stable money and helping to mobilise productive resources. Let us remove the handicaps on the States that want to take the New Zealand challenge head–on!

Some Possible Objections

The proposed reforms of government administration would of course affect deeply entrenched interests. One can therefore expect great sophistry among self–interested groups in putting forward seemingly disinterested objections to Competitive Federalism.

It may be argued, for example, that State and local politicians would borrow to subsidise industry now in order to win the next election, trusting that a higher level of government will bail them out eventually. The danger of "moral hazard" in public borrowing is of course always present. To contain it, higher levels of government will therefore have to be given explicit powers to impose additional taxes on lower–level jurisdictions, when these have gone broke. If this rule were known from the outset, the citizens would keep their local and State governments better under control. To make such sanctions effective, we also need more transparent accounting rules throughout the public sector.

Another objection may be that well–connected lobbyists and powerful public sector unions would gain more influence over political decisions. I do not share this fear, as long as all four principles of Competitive Federalism are implemented. Political favouritism would trigger the out–migration of not–so–well–connected producers and undercut revenue growth, making the selective preferment of certain interest groups economically and politically costly. Let us not forget that arbitrary rules and privilege have invariably been the creatures of closed systems.

People may also oppose a decentralisation of political powers on the grounds that work is duplicated. This argument was recently used by Mr Hawke. But the centralisers always conveniently forget about the possibility of central blunders. They tend to attribute superior knowledge and motivation to the central powers, which in reality they rarely have. In reality, it is much less risky to have decentralised experiments in policy making. We should also keep in mind that the cost of duplication in competitive government is often more than off–set by the likelihood of finding better solutions. Competition is not cost-free, but it is the best discovery procedure yet invented by mankind!

There can be no doubt that the quality of sub–national government would be enhanced by Competitive Federalism. The business of State and local government would become a much more challenging task, and better talent would be attracted into local and State government once it is again given greater responsibility.

Competitive Federalism is Ultimately about Liberty and a Healthy Democracy

As behoves a professional economist, I have dwelled mainly on the economic arguments. But — as already indicated — turning back the trend to centralisation is ultimately also about wider, non– material issues.

Over the past eighty years, Canberra has claimed more and more power to solve problems—which it has consistently been unable to solve. This has bred much cynicism and alienation from our ageing democracy. As an educator of young people, I am acutely aware how they are thinking about democracy: "Government of the people, by those people and for those people at the top"! It concerns me deeply that often, when challenged by my students, I can only point to the anarchy of power plays, and Byzantine deals without honour which are so reminiscent of the Weimar Republic! There is woefully little in the Canberra experience to inspire the young!

I put it to you, in conclusion, that the reforms of Competitive Federalism which external economic circumstances will — in one way or another — foist upon us, should be promoted actively in order to inspire new life into Australia's ageing democracy. A flourishing Competitive Federalism would turn Australian citizenship and democracy again into an asset worth having and worth defending.

Endnotes:

Chapter Eight

The Threat to Federalism

The Rt. Hon. Sir Harry Gibbs, GCMG, AC, KBE

As the end of the Century approaches, the movement to change our Constitution gathers force. Although the movement is intended to bear fruit in the first year of the new millennium, it probably owes less to an enthusiasm for reform born of the approach of a new chronological era, than to political expediency or ideological conviction.

Two fundamental features of the Constitution are under attack. As the Constitution Act declares, the people of the Australian colonies "agreed to unite in one indissoluble Federal Commonwealth under the Crown". The attack on the Monarchy is at present the more vociferous, but it can hardly be doubted that the ultimate aim of many of those who are seeking change is to destroy federalism. They may be 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.

Associations of States can of course take various forms, but the essential character of a federal Constitution 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.

It is clear that the Australian Constitution was intended by those who framed it to establish a federal system of government. As the eponym of this Society, Sir Samuel Griffith, said during the first of the convention debates in 1891, "We must not lose sight of the essential condition that this is to be a federation of States and not a single government of Australia". He added "The separate States are to continue as autonomous bodies, surrendering only so much of their power as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves."

It appears from the debates that most delegates to the Constitutional Conventions during the 1890s shared the view that the Constitution was to be federal in character. The Constitution itself makes it plain that this was intended. It gives to the Commonwealth certain powers which, although wide, are limited and defined, but otherwise leaves the powers of the States intact. It contains provisions intended to protect the position of the States, and to restrict the application of certain Commonwealth powers to the States. It was recognised that a Commonwealth law made in the exercise of a limited power might come into conflict with a law of a State, and it was provided that if that occurred the Commonwealth law should prevail. Nevertheless, the Constitution expressly states that every power of the Parliament of a colony which has become a State shall continue, unless it is exclusively vested in the Commonwealth or withdrawn from the State.

True federations are rare, although there are some associations of states which cannot be called federal because the central authority dominates over the constituent states. No federation can be successful if any of its component states differs significantly from the others in race, religion or culture; for want of homogeneity federations in Africa, Asia, the Caribbean and more recently

Yugo– Slavia have collapsed, often in flames. A separate State composed of, say, Torres Strait Islanders or Aboriginal people would be a threat to Australian federalism. However, those federations that do succeed are among the most liberal and wealthy countries of the world.

Sir Owen Dixon has said – and it has often been repeated – that experience shows that it is only those who dwell under a federal constitution who become adequately qualified to interpret and apply its provisions. Unfortunately, experience also suggests that even those who dwell under a federal constitution do not always successfully interpret and apply its provisions.

It is a basic rule in the interpretation of any written document – and indeed a matter of common sense – that the whole document must be looked at in order to ascertain the meaning of any particular part. It might therefore have been supposed that in deciding on the meaning of the paragraphs of the Constitution which confer power on the Commonwealth Parliament, 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. However, since 1920 the High Court has consistently rejected an approach of that kind.

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. It has consistently declined to limit the scope of a Commonwealth power to prevent it from encroaching on to the area of power apparently left to the States. The only effect that the Court has been willing to give to the fact that the Constitution is federal in character is to hold that the Commonwealth cannot exercise its powers in a way that would threaten the continued existence of a State, or that would discriminate against any State. 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.

The most striking illustration of a Commonwealth power to which the Court has given an undefined and unlimited scope is, as you will be well aware, that with regard to external affairs. An Act which gives effect to an international treaty or convention has been held to be one with respect to external affairs, although the treaty deals with a matter internal to Australia. The result threatens the very basis of federalism. The scope of the Commonwealth power can in effect be extended by Executive action, for the Commonwealth Government, by agreeing to enter into a treaty, can give the Parliament a foothold to exercise the external affairs power in relation to matters concerning the internal government of a State. The scope of this power of the Commonwealth has thus become completely undefined.

Other Commonwealth powers, also, have been given an expansive interpretation which invades or reduces the power of the States. Powers which have, or threaten to have this effect, include those with respect to trade and commerce, corporations, conciliation and arbitration and the people of any race for whom it is deemed necessary to make special laws. It has been said, with some truth, that in future the issue between State and Commonwealth Governments is more likely to be whether a Commonwealth power should be exercised, than whether the power exists.

Another, and major, departure from the federal principle has been in the field of financial relations between the Commonwealth and the States. The States are unable to raise for themselves sufficient revenues to discharge their financial responsibilities, and rely for that purpose on grants made by the Commonwealth out of its revenues. This situation has come about

in a number of ways. First, the power of the States to impose taxation is limited. The Constitution itself, by section 90, forbids the States to impose duties of excise. The reason why it does so remains obscure. The section was probably intended to give the Commonwealth full control of its tariff policy. However, some members of the High Court have suggested that it has a wider economic purpose, although there has been no agreement as to what the purpose is, and under the influence of that view the word "excise", which is very imprecise in its meaning, has been given an interpretation which is wide and unpredictable in its results.

The section prevents the States not only from imposing taxes at the point of production of goods, but also from taxing the sale or distribution of goods, and even invalidates receipts for payments on sale, and a fee for operating a gas and oil pipeline. To escape from the section the States sought to impose business franchise fees, and legislation imposing licence fees, calculated by reference to sales or production during a period other than that in respect of which the licence was granted, has been held valid in relation to licences for the sale of tobacco or alcohol, but not in relation to licences for the processing of fish or the slaughtering of meat. This distinction seems difficult to maintain, and the High Court may reconsider the question in a case in which judgment is at present reserved. The decision in that case may render the effect of the section less uncertain, but it is too much to hope that it will remove its inconvenience. Section 90 is an impediment to the rational division of financial powers between the Commonwealth and the States.

Since 1942 the States have also in effect been prevented from levying income tax. There is no constitutional barrier to their doing so, but there was until 1978 a legal barrier, raised by Commonwealth legislation. Although the legal barrier no longer exists, practical obstacles still remain.

These restrictions on the taxing power of the States – in part constitutional and in part practical – have so reduced the tax base of the States that they are forced to impose taxes which are unsatisfactory from an economic point of view, such as payroll tax and taxes on financial dealings.

Perhaps the most important cause of the distortion of the financial relations between the Commonwealth and the States is section 96 of the Constitution, which provides that the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

It appears likely that the Section was intended to be only a transitional one, and was intended to be applied when some special need arose for supplementing the financial resources of a State, but the Section now permanently governs Commonwealth–State relations, and it has been established that there is no limitation on the purposes for which a grant may be made, or the terms and conditions that may be imposed on the grant. It has become the practice to make grants for specific purposes which are beyond the power of the Commonwealth to effect directly, and which would otherwise have been the sole responsibility of the States. For example, the Constitution does not give the Commonwealth any power with regard to the provision of roads, education, housing or legal aid, but grants are made to the States to be applied for those purposes in accordance with detailed conditions laid down by the Commonwealth.

It would appear that the framers of the Constitution intended that the Commonwealth and the States could each take effective steps to raise for themselves the revenues each needed for the performance of its own functions. However, that has not proved to be the case. The Commonwealth raises more than 75 per cent of all taxes levied in Australia, but its expenditure represents only about 50 per cent of all governmental expenditure. The States rely on Commonwealth grants for about 55 percent of their revenue.

In other words, the Commonwealth raises many millions of dollars more than it needs for its constitutional purposes, and the States raise less than they need for their purposes. State Governments are thus rendered less able to control their own affairs and find it more difficult to plan for the future. At the same time, the system leads to a lack of accountability, since the Commonwealth raises money but is not responsible for the way in which all of it is spent, while the States spend money without being responsible for the manner in which it is raised. A drift of financial power to the central government seems typical of all federations, but the imbalance between financial responsibility and financial resources appears to be greater in Australia than in other federations.

Constitutional arrangements are not set in stone. There is no immutable principle that requires that our Constitution should remain strictly federal in character. It is to be expected that in any federation changes will occur in practice in the relations between the central government and the states, and not uncommonly any change will take the form of increased centralisation. In Australia, where political pragmatism often prevails over constitutional theory, there are many people who would support the reduction of the role of the States, or their replacement by subordinate regional governments. Many people would agree with the opinion that we are over–governed, and others would point to the fact that all too often the performance of State Governments has been less than satisfactory, as a reason for getting rid of them. Those engaged in commerce may well believe that national recovery and growth would best be assisted by uniformity of law and regulation.

The arguments in favour of centralisation as against federalism are plausible. There are, however, strong arguments in favour of the maintenance of the federal system in Australia. One argument is that, in a country so vast geographically as Australia, politicians and public servants in the States are more likely to keep in touch with local feeling, and to understand local problems, than are those who work in the unpolluted air of Canberra. Another is that the competition and diversity that can be provided in a federation tend to stimulate efficiency. A very strong argument is the fact that a successful federation assists to guarantee the maintenance of democracy.

There is no more effective way to curb abuses of political power than to divide it. Australia has been a notably free and tolerant country, but it cannot be taken for granted that those conditions will always prevail. Already legislation is passed which appears to limit unnecessarily the freedom of the individual, and already citizens incur public obloquy, if not punishment, for speaking truths which offend against political and social orthodoxy. A federal system cannot guarantee freedom and tolerance, but it can help to protect them.

In any case, I think it unlikely that the necessary majority would be obtained in the foreseeable future at any referendum which sought to abolish the federal system. While Australia remains a federation, its constitutional mechanism should be made to work effectively.

It is not easy to suggest remedies for the present deficiencies in the working of the Constitution – at least remedies that are likely to be given effect. Clearly, an amendment to section 90 of the Constitution, to enable the States to impose duties of excise, would be desirable, and perhaps the Commonwealth Government might support it, for this restriction on the taxing power of the States is of no value to the Commonwealth. The High Court is unlikely to change its approach to the interpretation of Commonwealth powers, and any Commonwealth Government with centralist tendencies is unlikely to support amendments that would confine those powers so as to prevent their encroachment into areas more properly left to the States.

The problem of fiscal imbalance needs to be solved in the interests of economic efficiency. It might be solved by co-operation. Although fortunately the Australian Constitution places no impediment in the way of co–operative action between Commonwealth and States, political

considerations often do impede such co-operative action. Our Constitution has worked passably well, and we should oppose changes designed further to weaken its federal structure, while at the same time attempting the difficult task of endeavouring to bring about such constitutional change as will strengthen the federal nature of the Constitution.

That does not mean that every increase in Commonwealth power should be opposed, but it does mean that we should support the clear definition of Commonwealth powers, so that they do not intrude into the affairs of the States, with all the duplication of cost and bureaucratic activity that results. The practical problem, of course, is that the strongest pressures for change now being exerted are in the wrong direction.

Chapter Nine

Australia's Diminishing Sovereignty

Dr Colin Howard

At the inaugural conference of this distinguished Society I had the honour to be invited to present a paper on the power of the Commonwealth Parliament, pursuant to s.51(xxix) of the Constitution, to legislate for the peace, order and good government of the Commonwealth with respect to external affairs.

I entitled that paper "When External Means Internal" in order to emphasise the extent to which the High Court in recent decades has converted a legislative power to deal with foreign relations and diplomatic representation overseas into a major, and almost overriding, source of power to control purely domestic issues.

Within the country the main practical consequence of that development has been an ever–increasing transfer of effective legislative power from the States to the Commonwealth. The transfer of power from the States to the Commonwealth is of course not new. It has been going on since federation, mostly in consequence of two notable features of our Constitution: the financial dominance of the Commonwealth through its powers to tax, and the influence of s.109 of the Constitution, which gives Commonwealth laws priority over State laws on subjects over which each has legislative power.

Indeed, the external affairs power of s.51(xxix) of the Constitution played very little part in our governmental arrangements at all until the mid–sixties. Since then however it has carried all before it, particularly in the trio of landmark decisions known as the Seas and Submerged Lands, Koowarta and Tasmanian Dam cases [New South Wales v. Commonwealth (1975) 135 CLR 337; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168; Commonwealth v. Tasmania (1983) 158 CLR 1]. There is nothing as yet to suggest any prospect of the High Court beginning to wonder if enough is enough, let alone too much, and starting to set limits to this development.

Indeed, the now notorious Mabo case suggests the very contrary. Although the external affairs power was not directly involved in that constitutionally cataclysmic event, its spirit informs the entire proceeding. Part of the message is that if such countries as New Zealand, Canada and the United States of America can acknowledge claims to special rights made by their indigenous peoples, particularly in relation to land, we should not lag behind.

Why not? Is there in the experience of those countries something so very apt to our circumstances that we should dutifully follow their examples instead of making up our own minds about our own country? If there is, I am not aware of it.

My understanding of the American system of reservations for their indigenous Indians does not suggest to me that that particular example should be followed. With a few individual exceptions, it does not seem to have done much for anyone, Indian or otherwise.

If we turn to Canada, where in the indigenous racial context the light of what is nowadays felicitously called the politics of the warm inner glow seems to shine more brightly than anywhere else, we find both Indians and the people I was taught as a child to call Eskimos, but should now refer to as Inuit. This I find confusing because I thought Inuit was the language the Eskimos spoke, not the people themselves, but no doubt that is just my ignorance. I get similarly confused when Jews are referred to as Hebrews, and black South Africans as Bantu.

Anyway, Canada does not particularly enthuse me as an example either. I am not up to date with the Canadian Indian situation but my understanding is that on the Inuit front things are not too good. Apparently advantageous entrenched land rights that were offered to the Inuit in Canada's latest constitutional convulsion (a national pastime there, of course) were rejected. The ground of objection seems to have been a calculation that they could hold out for even better land rights.

Well, good luck to them, but I should have thought that the message for Australia would have been: keep clear of land rights, they bring nothing but turmoil for everyone. So what do we do? Take thought and seek our own original ideas? Dear me, no. Instead of undertaking anything so taxing, we charge headlong into the land rights quicksand, apparently alarmed at the prospect of being classified everywhere from Chad to China as internationally politically incorrect.

The third example always cited to us is New Zealand. I think it is particularly important in the case of New Zealand to emphasise that what I am talking about is not how other countries handle their internal affairs. I am talking about the undesirability of Australia formulating domestic policy, either wholly or in part, on the basis that we should do this, that or the other simply because other countries have done it already.

In the case of New Zealand there are striking differences from this country which should induce caution at the very least. For a start, the Maori and related non–white peoples of New Zealand are, as I understand it, very different from the Aboriginal peoples of Australia. Secondly, the history of their relations with their white rulers, symbolised by the Treaty of Waitangi, is similarly different. Thirdly, the history of that treaty in itself does not necessarily inspire confidence. Without in any way commenting upon the way in which New Zealanders manage their affairs, therefore, I see no reason why we should copy them.

There is, in the marked contemporary Australian tendency to approach domestic issues by trying to link them with other people's problems, an unsettling undertone of the famous cultural cringe, from which we are supposed to have suffered for the last two hundred years, and from which, according to some determined pessimists, we still suffer. I do not know if these are the same people as those who insist on talking this country down as racist, or different people of a similar cast of mind, but it really doesn't matter.

What matters is the remarkable persistence in Australian intellectual life of a tendency to take our values from elsewhere. In no context is this more clearly to be seen than in the operation of the external affairs power. My concerns today therefore have a different emphasis from my previous paper, or perhaps I should say carry the same emphasis but present a different aspect of it, an aspect which, although I did not choose the expression, I am happy to call Australia's diminishing sovereignty.

Any topic worthy of debate is always the better for a touch of irony. This topic certainly has that. Is it not ironical in the extreme that, at the very time when so much hot air is being generated by our republican enthusiasts in the name of sovereignty, there is evidence in abundance that true sovereignty, as opposed to political posturing, has been diminishing in this country for quite some time?

Let us return now to the three landmark cases that I mentioned earlier. The first was the Seas and Submerged Lands case in 1975. As it happened, that decision led to some sensible results, by way of a useful principle and a reasonable clarification of how, as a matter of domestic law, to distribute offshore domestic power between the Commonwealth and the States.

These gains however were made at a cost which is proving to be considerable. Not only was resort to the external affairs power quite unnecessary: the two maritime conventions relied on had nothing to do with the main contentions argued. Only heroic intellectual contortions by the High Court made it seem otherwise. This gave powerful support to the view, with which I entirely disagree, that if Australia enters into an international agreement it can, with the

assistance of s.51(xxix) of the Constitution, use that agreement as a means of getting its own way on domestic questions.

That is not the way the system should work. International agreements are not intended to settle domestic disputes but to make the world a better or safer place: to make nations better neighbours. That is a quite different matter from making any particular nation a better place. Of course there is, or one hopes there will be, an inter–relation between the two, but this hope should not be allowed to obscure the proper division of responsibility.

That division ought to be between the conduct of the external or foreign affairs of the nation state, and the conduct of its internal or domestic affairs. Each is conducted in the first instance by the executive government of the day, but for different purposes. External affairs are primarily concerned with Australia's position internationally, that is to say, with its relations with other nation states. In a federation, internal affairs are primarily concerned with relations between the constituent parts of the federation, and also the balancing of interests that do not necessarily correspond to those constituent parts but have a more national character.

Although the executive government is the prime mover in both departments of the national life, there is a significant difference of emphasis between them. In external affairs the government is relatively untrammelled. Although particular policies may be debated in Parliament, and although supplementary legislation may be needed for the implementation of a policy like a trade treaty, or the supply of arms and equipment, Parliament and the subordinate constituent parts of the federation do not in general play a major role in external affairs.

Insofar as legislation is required, it should be directed towards genuinely external affairs. What I mean by a genuinely external affair is any matter that as a physical fact has its primary operation outside this country. The contrast I draw is with a situation in which the only external element that can be detected is a degree of goodwill between nation states generated by physical consequences that occur, not outside but inside one or more countries, in our case Australia.

As soon as that happens, each of the goodwill nation states is allowing each of the others to trespass upon its own sovereignty. This happens because the compact leads to physical consequences that ought to be the result of domestic policies, not external policies. This remains true, although less obvious, in such a case as South Africa, where the physical consequences of a goodwill compact are visited not upon the parties to it but upon an outsider.

It remains true because it legitimises a surrender of sovereignty. If South Africa, or indeed any other nation state, decides to interfere in our domestic policies towards Aborigines, we shall be in no position to object. That is because we have to a significant extent surrendered our own sovereignty over that subject, by helping to internationalise it through our own blatant and sustained interference in South Africa's internal racial policies.

That particular exercise in surrendering sovereignty over our own affairs was all the more remarkable in that we insisted, and still do, on retaining in our own Constitution s.51(xxvi), which in explicit terms empowers the Parliament to enact racially discriminatory laws. Although the rest of the world, rather surprisingly, does not seem as yet to have noticed that provision, and although most Australians, if they have heard of it at all, seem to be under the mistaken impression that its function is to authorise laws for the advancement of Aborigines, the simple fact is that it is not so restricted, but authorises racially discriminatory laws in general.

The ironical consequence is that a law passed under s.51(xxvi) to benefit a racial group can usually do so only by discriminating against everyone else. This sort of exercise is often called "positive discrimination", as if there were some magic in the word "positive" that changes the meaning of "discrimination". Such puerile semantic tricks do nothing to alter the fact that a law of that kind is still an act of racial discrimination expressly authorised by our Constitution.

If it is to be removed from the Constitution, however, a referendum to do that ought to be the result of a domestic debate and a domestic government policy. It ought not to be hidden behind a purported international obligation. The likelihood is different. Particularly owing to our South African involvement, but not entirely because of that, we are likely at some stage to find ourselves under international pressure to remove s.51(xxvi) simply because we are regarded, correctly, as having surrendered effective sovereignty over domestic racial issues.

This brings me back to the Seas and Submerged Lands case. The principle there decided, that the power of the Parliament under s.51(xxix) of the Constitution to legislate with respect to external affairs extends to matters outside Australia with which Australia has some reasonable connection, did not need to rely on s.51(xxix) at all. Such a conclusion could have been arrived at on the much sounder basis that a power to make laws with extraterritorial application is inherent in any nation state.

This is a sounder basis than reliance on s.51(xxix) because it does not require an international agreement about anything. It is a simple and usual extension of domestic legislative power. Dragging superfluous international conventions into the matter merely gave powerful support to a pernicious and unnecessary use of the external affairs power. It is a usage that has in recent years led to an increasing number of actual or threatened losses of sovereignty, by which I mean control of our own domestic affairs.

The second of the landmark cases I referred to earlier, Koowarta, illustrates the progression. The context was racial discrimination. Although inter–racial strife has been a continuous theme throughout history, and continues to flourish at the present day in most parts of the world, racial discrimination has for some reason now reached a pitch of moral fervour for which I cannot recall a parallel, unless it be the anti-slavery movement that played so great a part in the American civil war.

As I think we all know, it is not so long since even to investigate the extent to which there might be a genetic basis for evident differences between ethnic groups was a hazardous undertaking. For a while, racial discrimination shared with the feminist movement the feature that publication of even the most rigorous and respectable scientific results could mean the end of a career, the destruction of a reputation and even personal danger and hardship. Although the worst excesses of dogmatic censorship of knowledge about race may now be on the wane, prohibition of racial discrimination is still a motherhood cause and seems likely to be around for some time.

In Koowarta there was a superficial and misleading resemblance to Seas and Submerged Lands, in that the challenged legislation (which in the event was upheld) was enacted in reliance on an international agreement to which Australia was a party, in that instance the Covenant on the Elimination of all Forms of Racial Discrimination. To concentrate on that aspect of the matter, however, is to miss the point.

The point is that Seas and Submerged Lands dealt with questions of extraterritorial jurisdiction and the offshore division of legislative power between Commonwealth and States, to the resolution of which the international conventions involved were neither necessary nor even relevant. As I mentioned already, the problems involved, although presented in all the trappings of international posturing, were in fact domestic, and perfectly capable of resolution by the High Court without reference to s.51(xxix).

Contrast this with Koowarta. The problem there did not arise from anything inherent in our constitutional structure, like the division of powers between Commonwealth and States, or from the march of domestic events calling for extraterritorial laws. It arose entirely from the very international agreement that was purportedly relied on to resolve a domestic problem. By any sensible measure there was no such problem of racial discrimination in this country as could possibly justify our surrendering effective sovereignty over the subject to any international body.

If one examines the matter, far from being morally praiseworthy, the whole affair was morally indefensible. I do not deny, and I do not need to deny, that racially discriminatory attitudes are to be found in Australia. Such attitudes are to be found in every country in the world with which I have any acquaintance, and I am sure I am safe in saying that they are in fact to be found everywhere. It is an unfortunate feature of human nature but, fortunately, not acceptable to the vast majority of civilised people on that account alone.

Paradoxically, the world ought to be a good deal more discriminating than it is in resorting to the language of racism. International conventions on the subject ought to be directed at nation states that are deliberately and manifestly organised on racially discriminatory principles for the purpose of oppressing one or more groups. Such conventions should not be indiscriminately aimed at all and sundry simply because if you look hard enough you will find individual racists everywhere.

Personally, I regard it as highly undignified, not to say unwise, for this peaceful migrant country, which strikes me as one of the most tolerantly and successfully multiracial in the world, to place itself in the same category as, say, South Africa, Fiji, Rwanda–Burundi and, in some respects, even Japan. It is from this standpoint that I advance the view that this country should have had far more pride, not to say common sense, than to enact the Covenant on the Elimination of all Forms of Racial Discrimination into domestic law.

Signing it in the international arena to indicate approval of the principle is one thing. Conceding that we are so backward a nation as to need it in our own domestic law is not only an acceptance of what is not true, but a downright insult to the Australian people. So much for governmental concern about the preservation of the Australian sovereignty that so exercises our republicans.

The whole episode clearly manifests the unfortunate tendency I mentioned earlier, to follow the crowd instead of defining our own values. After all, if we thought any racial group in this country was not getting a fair go, we could always have bitten the bullet and enacted a special discriminatory law under s.51(xxvi) of the Constitution, without trying to hide behind the spurious respectability of approval at the international level.

So in Seas and Submerged Lands we find ourselves introduced to the legislative technique of unnecessarily surrendering a measure of our effective national autonomy to an international organisation, merely in order to sort out relatively straightforward domestic questions that basically had nothing international about them. Even so, no great harm need have been done. In Koowarta however we find the precedent thus established extended to cover the far more serious case of relinquishing a significant degree of national autonomy merely to seek ephemeral international popularity.

The price of jumping on that particular moralistic bandwagon has been high. It includes creating a perceived problem of great volatility where there was little or none before, whilst at the same time subjecting any solutions that we might come up with to international censure if we neglect to conform to rules made by others. There are plenty of good reasons why we should not exchange national legislative flexibility for an international straitjacket. An obvious one is that rules that suit other places may very well be counterproductive here.

Even more seriously, I have no doubt that the Koowarta exercise has played a significant role in encouraging the development of a divisive and unrealistic land rights movement, and in creating the climate of judicial opinion that has now produced the Mabo disaster. If that is not enough to teach us to manage our own affairs in our own way, instead of meekly following the dictates of the international fashion parade, I don't know what will.

So to the third landmark case, Tasmanian Dam. Up to a point, only far more seriously, Tasmanian Dam too was similar to Seas and Submerged Lands, this time because in both cases the federal government resorted to so-called international obligations to settle domestic

differences. This time however the resort to international commitments was not so much unnecessary as blatantly opportunistic.

As everyone here will know, the Government of the day found itself politically committed to preventing the flooding of a wild and scenic area of south–west Tasmania determined upon by the Tasmanian government in order to build a dam. Now, one may have personal sympathy for the environmentalist cause in this instance, but it is inevitably wise in matters of government to preserve a durable balance between ends and means. If any such balance existed in this context, it was severely strained by the Tasmanian Dam case.

Like another famous piece of litigation, the Bank Nationalisation case in 1948 [Bank of New South Wales v. Commonwealth 76 CLR 1], it is a treasure trove for lawyers, because it ranges across a variety of specific issues and each of the seven Justices decided to give a separate judgment. About the only difference between the two along these lines is that the report of Bank Nationalisation extends from p.1 of the relevant volume to p.400, whereas Tasmanian Dam can't get beyond p.326. But I digress.

Treasure trove or not, the striking feature of Tasmanian Dam for the purpose of this address is the remarkably tortuous course pursued by the arguments for the Commonwealth, to the effect that a tangled conglomeration of international agreements and regulations to do with conservation led to the result that Tasmania could not build its dam. It would be neither interesting nor useful to trace that course in a technical manner today. Suffice it to say that in terms of legislative sovereignty and our domestic constitutional arrangements, Tasmanian Dam was an extraordinary and depressing performance. Not even in Seas and Submerged Lands were the materials at hand so contorted to arrive at the result.

I have one more point to make. Although I have structured this address around three relatively recent High Court decisions to illustrate the insidious nature of our diminishing effective, as opposed to formal, sovereignty owing to misuse of the external affairs power, I have mentioned only a small part of the problem. I do not know how many international agreements Australia has entered into, but the number must be very large, and mostly unknown except to people directly affected by them. This material is a huge store house to which the Commonwealth can resort whenever it wants to get its own way in a major domestic dispute.

Every time it does that, it not only weakens the internal federal structure, and diminishes our standing in the international arena, in which our governments so ardently seek popularity: it also weakens both our resolve and our capacity to make up our own minds, and take our own decisions as a self–reliant nation state.

Chapter Ten

The External Affairs Power: What is to be Done?

The Hon. Peter Durack, QC

Dealing with the "external affairs" power, section 51(xxix), has been the High Court's greatest failure in its role as interpreter of the Constitution. Admittedly, it is an extremely wide and vague head of power. However it is instructive to compare the High Court's treatment of section 92. Had the High Court applied that section in the same literal way it has in relation to the "external affairs" power, government in Australia would have been well nigh unworkable. Although its treatment of section 92 has been subject to heavy criticism and has not been easy to follow, the High Court at least realised that it could not be literally interpreted. Unfortunately the same approach has not been adopted in relation to external affairs.

I have not been asked, nor do I propose, to deliver a paper on the history of the High Court's treatment of this head of power. I have been asked to attempt a much more difficult task, namely to answer the question, What is to be done about the situation which has resulted from the High Court's current interpretation of it?

Nevertheless I am compelled to make one point about the history of the High Court's approach. On re-reading Burgess's Case which was decided in 1936 I was, rather to my surprise, struck with the conclusion that if the same Justices had sat on the Franklin Dam Case in 1983 (nearly fifty years later), they would have come to the same decision. Furthermore, instead of being divided four/three as they were in the latter case, they could well have been unanimous, or at least four/one in favour.

The biggest surprise was that only one judge (Dixon J.) in Burgess's Case was in any way troubled about the fundamental problem with the section : how is it possible that the power can be utilised by the Executive of the Federal polity to gain both executive and legislative powers on any subject under a Constitution, the main purpose of which was to limit the Federal power to specified areas of Government?

Although Dixon saw this fundamental problem, it did not stop him from agreeing with his brothers that the international civil aviation Convention which they were dealing with did in fact give power to the Federal Parliament to apply the Convention's rules wholly within a State. His reason was that they were "indisputably international" in character, and therefore a matter of external affairs. The other four Justices (Latham, Starke, Evatt and McTiernan) were not concerned about this argument at all.

Although subsequent judges and commentators have fallen back on Dixon's obiter as providing some limit on the power, the only case in which this view played a vital role in the decision was Koowarta. It must now be clear that it is simply far too vague and unworkable to provide a limit on the power, and that the weight of judicial (and legal profession) views are that the power encompasses, at least, the obligations of any bona fide treaty entered into by the Commonwealth, subject only to the express and (severely restricted) implied limits on Federal power under the Constitution (e.g. sections 80, 116, etc. and the essential functioning of a State).

It must, of course, not be overlooked that the power is not simply a treaty–making one. It clearly applies to anything which is truly external to Australia (extraterritorial laws, recognition of other countries, extradition of offenders, etc). It also gives Australia the power to protect our off-shore resources, and to regulate shipping in the territorial sea.

It is however the ambit of the treaty–making power which causes the problem for those who have a firm commitment to a Federal system of Government. That is not to say that the Justices of the High Court who have supported this wide power lacked such a commitment, although it may well have been so in some cases. The criticism of the Court is that it has failed to develop any workable and acceptable doctrine to engraft a federal meaning onto this head of power.

That is really so disappointing that I must acknowledge a nagging fear that the task is beyond legal solution.

Certainly I see no likelihood that the current Court or its foreseeable successors will accomplish the task. It may well be that in the long run a legal solution will be found, but I don't imagine that any of us here today are content to leave it at that. For what it is worth my own view is that the Court could have developed the implied limits on Commonwealth discrimination against the States, or interfering with their essential function, to achieve, on a case by case basis, some reasonably satisfactory doctrine.

I believe there is a real difference between a Convention on aviation, or pollution of the atmosphere or the sea, and one which is said to prevent the construction of a small dam on a minor river in a remote part of the country. But the Court has not attempted that, and it would be just academic to propose that it do so now.

The only other contribution which some Justices have made towards solving the Federal dilemma inherent in the power is the requirement of some mutuality between the activities in Australia, and those outside Australia, which are covered by the Convention. This view has been most clearly propounded by Sir Harry Gibbs in the Koowarta Case. Unfortunately, only a minority of the Court agreed with him and, here again, it seems unlikely that it would gain any support in the current Court.

I turn now to the question of a political solution.

Since the Franklin Dam decision, there has been no lack of attention at the political level to the ambit of the external affairs power and its problem for our Federal system. However, it must be stressed that the likelihood of a decision of that kind had been foreseen for many years before the Franklin Dam was proposed. State Governments had been concerned about the rapidly growing list of treaties which were being entered into by the Federal Government without any consultation with them, even though, at the least, it was clear that they were going to be pressured to give effect to many of these new obligations. At the same time the Federal bureaucracy (with the encouragement of constitutional lawyers in the Attorney General's Department and the academic world) saw the potential for the great enlargement of Federal power.

The Whitlam years greatly intensified this conflict, and in 1975 the High Court added more fuel to the fire with its decision in the Seas and Submerged Lands Case, which limited State jurisdiction to the high water mark around the Australian coastline. The decision in this Case was partly based on a treaty, but that was not strictly necessary for the decision. Nevertheless it lit up all the smouldering concerns and discontent at State level.

Fortunately the Fraser Government had just been elected. It was sympathetic to these views, and set about the policy of solving such problems by co-operative arrangements between the Commonwealth and the States. The National Companies and Securities scheme and the Offshore Constitutional Settlement are the two best known examples of the success of this approach. However, a less well known contribution to cooperative federalism was the agreement to give the States a greater role in the negotiation and implementation of treaties. This was enshrined in a resolution at the Premiers' Conference in June, 1982 but the practices set down then had already been put in place. The two most important commitments made by the Commonwealth were (1) to seek Federal clauses in treaties; and (2) to give the States the first opportunity to

implement any of the obligations of a treaty which came within State jurisdiction. These were promptly repudiated by the Labor Government in November, 1983.

The great issue presented by the scheme for a dam on the Franklin River was well and truly on the political agenda by mid 1982. You may recall that there were a number of other great issues on the political agenda at that time. Nevertheless, the one that proved to be the greatest problem for the Fraser Government was undoubtedly its handling of this issue.

We were already committed to and well experienced in seeking co-operative solutions to problems of this kind, and as a result we ruled out the sort of legislation which led to the Franklin Dam Case. We did all we could to negotiate with the Tasmanian Government; first to stop the building of the Dam at all and, after this failed, to meet the demands for better protection of the South–West Tasmanian wilderness which had been placed on the World Heritage List.

At the 1983 election, all we had done gave us no political benefit. The city electorates, particularly in Sydney and Melbourne, were overwhelmed with outrage at what they saw on their television screens, and the perceived devastation of the wilderness which most of them would never even want to enjoy. Colleagues who lost their seats, as well as those who survived the ordeal, all attested to this searing experience, and believed that the Fraser Government had been quite wrong to allow itself to be crucified on the altar of State rights.

The Federal Liberal Party will never forget that experience, and will be reluctant to pay such a political price for that principle, even if it is prepared to go to great lengths to observe it. The other side of the coin is, of course, that State leaders should not push State rights to extremes.

By 1983, with co-operative federalism on the decline and the Federal power entrenched by the High Court, those of us left with a commitment to the federal cause started to look for other solutions. Ideally of course the external affairs power could be limited by a referendum, but that required both an effective form of words and sufficient support in the electorate to obtain the required majority for change.

The new movement kicked off to a good start at the Adelaide Constitutional Convention in April, 1983.

On the motion of the then Leader of the Opposition, Mr Peacock, a resolution was passed expressing concern about the expansionary interpretation of the external affairs power, and directing that a sub-committee of the Convention should be set up to consider mechanisms by which the "traditional balance" of legislative, executive and judicial powers in Australia should more effectively be preserved.

This sub–committee was duly set up, and reported to the next Constitutional Convention held in Brisbane in July, 1985. It found that there were sharp political differences of opinion about the views expressed in the motion, and great difficulties with the phrase "traditional balance" of power referred to in it. This difficulty seems rather strange considering the committee was not made up of lawyers but of practising State and Federal politicians. If they could not discern such a balance even in broad terms, you may well question whether voters at a referendum would have more success.

At all events, the only agreement was the recommendation for a Treaties Council, to be set up by the Premiers' Conference, which would perform virtually the same function as Federal/State officials had been performing during the years of the Fraser Government as set out in the Agreement of June, 1982. Not surprisingly, that was the only proposal which could gain support at the Brisbane Convention.

Over this time, however, three firm proposals for a referendum were developed and put before the Brisbane Convention. These were:

1. A root and branch constitutional change worked out by Professor Crommelin of Melbourne University. He suggested that the solution was to assign exclusive powers to both the Federal and

State polities, with all remaining areas of Government to be the subject of concurrent powers. This would clearly ensure that the States would retain a significant governmental role, and that despite treaty obligations being entered into which came within State powers, these could only be enforced at the State level. The argument against this proposal was that it would be difficult to reach agreement on the actual division of powers, and would be too difficult to explain to the electorate.

2. A very different approach to the Crommelin proposal was drafted by Dr Finnis, a constitutional lawyer at Oxford University, who had been advising the Bjelke-Petersen government of Queensland on these issues for some years. He proposed to limit the legislative ambit of the external affairs power to certain specific subjects, such as aviation and fugitive offenders, but otherwise only in respect of those powers already enumerated in section 51. This proposal did not have the same intellectual attraction as the Crommelin proposal, but the main criticism of it was that it would be too restrictive of Australia's role as a member of the international community.

3. The third proposal was one which I developed on behalf of the Opposition when I was Shadow Attorney–General in 1983-84. Unfortunately it was not prepared in time for consideration by the sub– committee, which for some reason finished its report in September, 1984.

Although I was not a member of the sub-committee I had learned of the conflict within it and decided to put forward a separate proposal for the Brisbane Constitutional Convention. With the help of a former Commonwealth Parliamentary Counsel, Charles Comans, we devised a bill for an amendment to section 51(xxix), to limit its ambit along the lines suggested by the dissenting Justices in the Koowarta Case, particularly as formulated by Gibbs CJ.

The bill as introduced by me in the Senate sought to ensure that the power does not authorise the Federal Parliament to make laws regulating "persons, matters or things in the Commonwealth", except to the extent that:

(a) those persons, matters or things have "a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) the laws relate to the movement of persons, matters or things into or out of the Commonwealth".

How well we achieved our purpose may be debated, but at any rate I believed, and still believe, that the solution would be a significant brake on the power and could be reasonably applied. Its virtue over both the Crommelin and Finnis proposals is that it leaves room for flexibility in its application to new and unforseen developments in the political world, while at the same time preserving a significant role for the States. As I have said, it was not considered by the sub–committee but, if it had been, I am sure that it would not have gained support. However, a motion to refer it to the External Affairs sub-committee at the Brisbane Convention was only narrowly defeated. Had the Queensland Government delegation supported the motion it would have been passed. Instead it actually opposed it, even though it had failed to gain support for its own (Finnis) solution.

To complete the frustrating attempts to seek a Federal solution to the external affairs power, I refer to the proceedings of the Hawke Government's Constitutional Commission, presided over by Sir Maurice Byers with the aid of Gough Whitlam, Professors Campbell and Zines and Sir Rupert Hamer. In its 1988 report the Commission duly recorded the work of the External Affairs sub- committee of the Constitutional Convention which had recommended a Treaties Council. It concluded that Australia's role in the international community would be greatly weakened by any further limits on the external affairs power than those already laid down by the High Court. It endorsed the proposal for a Treaties Council. Both the Distribution of Powers Committee and the

Commission itself discussed the proposals for a referendum which I have mentioned and found fault with all of them. Difficulties with my bill were found in the drafting, but no suggestions were made as to how it could be improved.

All these proposals were however rejected because the majority of that Commission was wholly satisfied with the extent of the Commonwealth power as it stood, and was not concerned about its effect on the Federal compact. Courageously, Sir Rupert Hamer made a vigorous dissent on this question and proposed a simple amendment to section 51(xxix) to prevent the Commonwealth's legislative power under it to go beyond the enumerated powers. He dealt a powerful refutation to the claim all through this debate that Australia would be an international cripple if it could not implement the obligations it assumed under a treaty. He pointed out that this has not occurred in Canada, Germany or the United States. None of these countries can guarantee the implementation of treaties entered into by their national governments.

One further proposal did however emerge from the report of the Constitutional Convention. Mr Lindell in the Distribution of Powers Committee, and Professor Zines in the final report, both criticised the fact that treaties are ratified as well as negotiated by the Executive under our Constitution. Parliament plays no role in the process. This is not the case in the US, where a two– thirds majority in the Senate is required for ratification. They proposed that the Federal Parliament should assume a role in the ratification process, either by requiring an Act of Parliament to do so, or by Parliamentary disallowance of ratification by the Executive. The attraction of this proposal, as with the Treaties Council, is that it could be implemented without a referendum and would place some brake on the executive power. The majority of the Constitutional Commission did not support this proposal.

After a decade of lively and unresolved debate about the external affairs power, I still have to answer the question put to me : What is to be done?

In my view no solution can be found in the High Court or by a referendum in the present climate. The latter is ruled out by the continuing failure to reach any political common ground about even the desirability of an amendment to section 51(xxix), much less the form of it. Accordingly, it seems that the only possible change could be made by Parliament itself which would, of course, require support from the Government of the day. The proposals for a Treaties Council and a Parliamentary role in the ratification of treaties are useful and workable, and would undoubtedly place some restraint on the vast Executive power which now exists.

In my view the Treaties Council should be set up by uniform legislation by the Parliaments of Australia rather than by the Premiers' Conference. This would clearly give it greater authority, and it should represent wider interests than just the Federal and State Governments.

In the end, however, no solution will work unless the Federal Executive power is committed to it. There are now so many treaties in place (?1600) that it would not detract much from existing Executive powers if a hostile Senate refused to ratify any more. That attitude in the Senate is, however, not a likely one. It is more likely to support ratification.

The Fraser Government's experience showed that co-operative federalism does work, or can be made to work in most cases. Labor Governments since 1983, although committed to much greater central power, have not relied much on the external affairs power to achieve their policies. Despite the furore over the Franklin Dam Case, little use has been made of it. One notable exception is the Sex Discrimination Act, but the administration of that Act relies heavily on State bodies. Currently the Government is threatening to use the ILO Convention to achieve its industrial relations policy, but so is the ACCI. There is more bluster about this power than substantial usage. The truth is that there are many other powers in the Federal treasure house of section 51.

I would like to think that my judgment about the feasibility of changing section 51(xxix) by referendum is wrong. It may be that the people would be more perceptive about the need to rein in the external affairs power in Australia than many of their own Federal and State representatives appeared to be at the Constitutional Conventions. The Labor Party however would undoubtedly oppose such a proposal.

If nevertheless the Federal Parliament could be persuaded to attempt the task, you will not be surprised if I answer the question, What is to be done? by choosing my own bill as the most promising means of achieving success. So long as it remains unchanged, the power is there for a Federal Government to subvert the Federal system, with the States being left as mere administrators.

Chapter Eleven

The 1944 Referendum

John B Paul

Dr Evatt's Curtain–Raiser

On 1 October 1942, less than ten months after the Japanese attack on Pearl Harbor, Dr H V Evatt, Attorney–General and Minister for External Affairs in the Curtin Labor administration, introduced into the House of Representatives the Constitution Alteration (War Aims and Reconstruction) Bill. The terms of this Bill were so sweeping that it was bound to have attracted strong opposition, not only from State Governments, but also from the Federal Opposition, by then a demoralized and fractious group comprising the United Australia Party and the Country Party.

Sir Paul Hasluck has observed in the second volume of his contribution to Australia's official history of the Second World War that "the controversy surrounding the proposal contributed far more than the uniform taxation measures [also introduced in 1942] had done to the growth of concern about the possible use of wartime powers and arrangements to inaugurate lasting socialist or unificationist programmes'.

Dr Evatt moved:

"That leave be given to bring in a Bill for an Act to alter the Constitution by empowering the Parliament to make laws for the purpose of carrying into effect the war aims and objects of Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world, and for the purpose of post-war reconstruction generally."

The opening of Dr Evatt's second reading speech set the tone for the whole: it was a veritable jeremiad. He claimed:

"When the war is over, Australia will be confronted with the greatest task of economic rehabilitation in its history. Problems of employment, of housing, of health and child welfare, of vocational training, and of markets and price stability, will call for enterprise and statecraft of the highest order. The whole history of the Commonwealth Constitution shows that these problems cannot be solved without wider powers in the hands of the central government."

Evatt then spelt out the difference between the Commonwealth Government's war capability and its powers in time of peace:

"... events have proved that the Constitution which the Australian people adopted in 1900 is flexible enough for the needs of war. But it is equally true that it is not flexible enough to serve Australia in the great task of post-war reorganization which the declared war aims of the United Nations will involve. Why is this? The defence powers of the Commonwealth are contained in a few general words, to which the courts have been able to give a sufficiently wide interpretation to meet the situation of totalitarian war. By way of contrast, the peace-time powers of the Commonwealth, though numerous and detailed, are hedged around with severe limitations. Although they were written down in the 1890's, many of the words and phrases were simply transcribed from the American Constitution of 1787. The general approach belongs to the horse-and-buggy age of social organization. This is especially true of the economic powers that are so vital an element in a modern industrial community. For instance, `trade and commerce' is so divided between the Commonwealth and the State authority that neither can deal effectively with it. Such topics as production, employment, investment, industrial conditions, are either not

committed to the national government at all, or are granted in jealous, limited, qualified and indirect terms. The Constitution of 1900 is outmoded.

"If the exercise of national power is necessary for war, it is equally necessary for reconstruction. Most thoughtful Australians are realizing that the Constitution of 1900 is not an instrument fitted to the needs of tomorrow. Let us consider the tasks involved. The mistakes of the past must not be repeated. Every promise to the men and women of the fighting services must be honoured. The full development of the physical resources of Australia will be necessary for expanded production, increased population, full employment and social security. No policy of national development can be carried out effectively without power to control prices and investment. The transfer of men and women from the fighting services and the war–time industries to suitable peace-time occupations will involve a huge programme of works and housing. The division of powers between the Commonwealth and the six States with divergent policies will be a fatal obstacle to speedy and effective national planning. Some of the Commonwealth's war-time controls may last for a time after hostilities close; but only for a time. Without carefully considered constitutional amendment the result in the post–war world in Australia will be social and economic disorganization, chaos in production, mounting unemployment, widespread social insecurity — in short anarchy."

Lest that should not prove a sufficient inducement to proceed with all despatch to assist in the fulfilment of the learned doctor's grand design, there was a further uplifting remonstrance :

"But the problem goes even deeper. This country, like all the other United Nations, has pledged itself to the task of achieving the broad objectives embodied in the Atlantic Charter and the historic declaration of the four essential human freedoms. These declarations are not legal instruments technically binding on Australia; they are far more. They are solemn pledges of our dedication as a nation to the great ends of economic security, social justice and individual freedom. .... the Australian nation, which is pledged as a nation, must be endowed as a nation with legislative powers to carry out the pledges within Australia and its territories."

Sir Paul Hasluck commented that this represented the main part of Dr Evatt's case. His stated objective, as Hasluck observed, had been plainly set out in the title of the Bill and "... [a]fter stressing the aims of `economic security and social justice' he plainly revealed the enormous scope of the power he sought":

"It is proposed that the Parliament should have power to make any law which in its own declared opinion will tend to achieve economic security and social justice, including security of employment and the provision of useful occupation for all the people. I desire to make it perfectly clear that the amendment I propose will give the decision to Parliament itself, and no person will be able to challenge the validity of Parliament's decision. For its decisions and actions Parliament will be responsible to one authority only – the people of Australia."

In the week subsequent "the Government", in Sir Paul Hasluck's words, "being faced with mounting opposition to the Bill and the prospect of a head-on collision with State Governments and Parliaments, decided that the debate on the Bill should not proceed", or at least, as the Prime Minister stated in the House of Representatives on 8 October, not:

"until after the measure has been referred to a special committee, consisting of eight members of the House of Representatives and four members of the Senate, to be equally representative of the Government and the Opposition."

The Prime Minister continued:

"The Government desires that the committee shall have added to it the Premier and the Leader of the Opposition of each State Parliament.. .

"The members of the committee to be chosen from the House of Representatives will be the Prime Minister (Mr Curtin), the Leader of the Opposition (Mr Fadden), the Deputy Prime

Minister (Mr Forde), the Deputy Leader of the Opposition (Mr Hughes), the Attorney–General (Dr Evatt), the Right Honourable member for Kooyong (Mr Menzies), the Treasurer (Mr Chifley), and the Right Honourable member for Cowper (Sir Earle Page). The gentlemen from the Senate who have been nominated to act on the committee are Senators Collings and Keane, representing the Government, and Senators McLeay and Sampson representing the Opposition."

The Prime Minister concluded:

"I am confident, in the light of the history of the efforts that have been made from time to time to amend the Constitution, that recourse to this procedure, whilst delaying the consideration of the Bill by the Commonwealth Parliament, will add immeasurably to the practicability of giving effect to whatever legislation this Parliament may pass... The committee will consider the Bill, and make any suggestions that it may wish. But the form in which the Bill shall become law will be entirely a matter for the Commonwealth Parliament."

Sir Paul Hasluck remarked of this changed procedure:

".... This Committee was created by decision of the Government, not by Parliament, and the parliamentary situation simply was that the Bill remained on the notice paper, while outside Parliament, discussions proceeded about the constitutional changes which the Bill had proposed. While it is doubtful whether the Government had a clear intention on the next step when Curtin announced that the debate would be deferred, the consequence of the deferment was that the Government abandoned the original purpose of changing the Constitution by Act of the Commonwealth Parliament followed by a referendum (as provided in Chapter VIII of the Constitution), and sought the method of gaining additional legislative powers for the Commonwealth Parliament by having matters referred by the Parliaments of all the States, as provided in Section 51 (xxxvii), thus avoiding a referendum during the war."

This Committee, which came to rejoice under the name of a Convention, formally met in Canberra on 24 November, 1942. On 3 November, 1942 Mr (later Sir) Clifden Eager, K.C., moved in the Victorian Legislative Council, of which body he was then the designated unofficial Leader:

"That, in the opinion of this House, it is desirable that, before the representatives of this State proceed to the Convention which has been called by the Commonwealth Government to consider proposed alterations to the Constitution of the Commonwealth, the members of the Legislative Council and of the Legislative Assembly should meet together for the purpose of discussing the proposed alterations."

This, together with a contingent motion that the Legislative Assembly should be acquainted with the terms of the foregoing resolution and asked to concur in it, was passed by the Legislative Council without a division. With the Legislative Assembly's concurrence, the two Houses of the Victorian Parliament, in an action for which there was then no precedent and which has not to my knowledge been emulated since, met in joint session in the chamber of the Legislative Assembly on 10 and 11 November, 1942.

The political situation in Victoria at the time was that, from April 1935, Victoria had been governed by a Country Party administration under A A (later Sir Albert) Dunstan. Until June 1942, this minority administration had been kept in office by the Labor Party under Thomas Tunnecliffe and then John Cain senior. The Dunstan government's decision to join South Australia, Queensland and Western Australia in mounting a High Court challenge to the uniform income taxation legislation of the Curtin government gave the Victorian Labor Party the pretext to withdraw its support. The Dunstan government then continued in office as a minority administration with the support of the United Australia Party. Because of this reversal of alliances, the Victorian Labor Party was able to be represented at the Constitutional Convention in Canberra by John Cain senior in his recently assumed capacity as Leader of the Opposition,

while the United Australia Party had no independent representation, as a tame supporter of the Dunstan government. The debate at this joint session of the Victorian Parliament saw members of the Victorian Labor Party outnumbered, as indeed they were in normal circumstances in both Houses sitting separately.
Early on the first day of the joint session, Clifden Eager, KC, MLC moved:
"That, in the opinion of this Joint Meeting of the Members of the two Houses of the Parliament of Victoria, the proposed alteration of the Constitution of the Commonwealth set out in the Commonwealth Constitution Alteration Bill is expressed in language too wide and too indefinite, would destroy the federal character of the Constitution, would undermine the authority of the High Court of Australia as the guardian of the Constitution, and would sweep away the safeguards of the rights of the people at present existing in the Constitution."
After two days of debate this motion was carried without a division, but only after the Labor Party members had announced their intention of leaving the chamber before the question was put. Although therefore the question was recorded as having been carried unanimously, it was not in fact a unanimous decision of all those who were entitled to vote, and there was no record of those who had in fact voted in favour.

The "Constitutional Convention", Canberra, 24 November –2 December, 1942.

Dr Evatt directed the preparations for the meeting of this so–called Convention. One who was involved in a group of about thirty in these preparations was Sir Paul Hasluck, then an officer in the Department of External Affairs: he was later to recall these preparations as `frenzied'; but this was at most times an apt description of the learned doctor's modus operandi. Sir Paul added:
".... Before the convention met he [Evatt] distributed a handbook entitled Post-war Reconstruction. A Case for Greater Commonwealth Powers. In the preface, signed by Evatt, it was made clear that the proposals in the Bill introduced in the House of Representatives were not `final or definitive' and suggestions for its modification were invited. The case, in brief, was that the Commonwealth's power must be extended `to enable it to supervise a grand national plan for post-war reconstruction', and the powers would have to be wide enough to ensure the planned use of Australia's economic resources so that they were fully employed and directed primarily to achieving `economic security and rising standards'... Considered as a handbook prepared for a meeting that was to be described as a Constitutional Convention, the publication is a curious mixture of emotional political appeals and argument. It reveals clearly what the Government wanted to do but is not wholly convincing as a case for doing it."
The Victorian Premier was to reflect on this general air of confusion when, on 9 December l942, he moved the second reading in the Victorian Legislative Assembly of the Commonwealth Powers Bill which was the direct outcome of that Convention so-called. After quoting the resolution which the joint session of the Victorian Parliament had carried, he continued:
"With the guidance of that resolution the Victorian delegates arrived at Canberra to attend the opening of the Convention on the 24th of November. To the astonishment of many of the delegates it was announced, as soon as the Convention began its proceedings, that the Commonwealth Government now proposed to ask the Convention to consider an entirely new draft Bill. Copies of that Bill – called a Constitution Alteration (Post-war Reconstruction) Bill – were circulated among the delegates, who were also presented with a publication prepared by the Commonwealth Attorney– General in book form, and consisting of 188 pages of material, designed apparently to educate the members of the Convention in matters relating to war aims and post–war reconstruction...
"Not the least interesting portion of the book consisted of 95 questions asked and answered by the Commonwealth Attorney–General. This part of the book demonstrated the ease with which questions can be answered when the answerer himself frames the questions. I have tried that, and

honourable members will also realize how easy it is! The delegates were invited to adjourn until next day to consider the new draft Bill, together with the book that had been issued. It was evident that it was mentally, if not physically, impossible to digest the contents of the book in the time available. It was apparent, too, that the book had been prepared in reference to proposals in a Bill that had since been abandoned. Consequently, most of the delegates concentrated on attempting to dissect and analyse in one day the contents of the new draft Bill, suddenly circulated in place of one that had been the subject of discussion throughout Australia for a period of six or seven weeks."

Sir Paul Hasluck described the new draft Bill as follows:

".... First the Government had inserted into the Bill constitutional guarantees of religious freedom, and freedom of speech and of the Press, in a form in which they could not be abridged either by the Commonwealth or by any of the States. Second, the primary grant of power to the Commonwealth had been defined by the phrase `post–war reconstruction' which, Evatt said, meant national planning aimed at re–establishing the life and economy of the nation. Third, it had been made clear that the post–war reconstruction power would empower the Commonwealth Parliament to make laws with respect to 12 specified subject matters or groups of subject matters. Most of these had been in the original Bill. Fourth, all the present powers would be subject to interpretation by the High Court as the guardian of the federal system, and the provision making the opinion of the Commonwealth Parliament conclusive had been omitted. Fifth, the clause enabling Parliament to exercise its new legislative authority without regard to certain other constitutional restrictions was altered so that the only restriction that might be disregarded was that contained in Section 92, and then only in relation to Commonwealth price–fixing or marketing legislation. Sixth, cooperation between the Commonwealth and State Governments would be facilitated by a new sub–section authorizing State and local governing authorities to assist in the execution of any of the new post–war reconstruction powers to be granted to the Commonwealth Parliament."

As already noted, the outcome of the Commonwealth Government's change in tactics, in the light of the widespread opposition to the original Constitution Alteration (War Aims and Reconstruction) Bill 1942 was the substitution, as a preferred method of vesting the Commonwealth Parliament with additional powers, of a reference of powers by the State Parliaments under section 51 (xxxvii) of the Constitution for the original proposal for a referendum in conformity with section 128 of the same Constitution. Sir Paul Hasluck has recounted how the Convention resolved this and continued:

".... Curtin was willing to try the procedure, provided that the powers to be granted were adequate, that they were granted for a long enough period, that any revocation should be made impossible without the approval of the electors of the State in question – an interesting example of the proposed use of the referendum as a blocking mechanism – and that the Premiers and Leaders of Oppositions at the Convention should agree to do their utmost to pass the legislation and to do so within a reasonably short period. Details of the legislation which it was proposed should be passed by State Parliaments were worked out in a drafting committee under Evatt's chairmanship."

Apart from Evatt himself, the other members of the drafting committee were the Federal Parliamentary Leader of the United Australia Party and Deputy Leader of the Opposition, Mr W M Hughes, and the six State Premiers, of whom only Thomas Playford of South Australia and Albert Dunstan of Victoria were not leaders of Labor governments. Dunstan described the approach of the drafting committee to the Victorian Legislative Assembly on 9 December, 1942 as follows:

".... The committee sat behind locked doors. The press were not admitted, and only the most formal announcements as to progress were made.
"It was clear from the beginning that the sharpest divergences of opinion would occur among the members of the committee. Naturally, the Commonwealth Attorney–General sought the widest of powers. The other Commonwealth representative [Hughes] had himself sought, on many occasions in the past, additional powers for the Commonwealth, and had announced publicly that he had voted in favour of every referendum that had been held... The political philosophy of some of the Premiers was such that they were practically committed to a policy of unification, and, consequently, in committee, were willing to confer very wide powers on the Commonwealth. The remaining Premiers were willing to transfer to the Commonwealth only such powers as could be shown to be necessary for post–war reconstruction, or, in the terms of the resolution unanimously carried by the Convention, adequate powers for the Commonwealth to deal with post-war reconstruction.
"The real work of the Convention was accomplished by this committee. After sitting almost continuously for two and a half days, the committee had made such progress that it was able to suggest the heads of power which might be included in referential legislation to be passed by all States. Working through the night and into the morning, the draftsman managed to make available on the morning of the last day of the Convention a printed draft of a model Bill. This was fully considered by the committee during the morning, when the Prime Minister took the chair. The parliamentary draftsmen from Victoria and South Australia were also present. The Bill was presented to the Convention upon a unanimous report from the committee, and finally adopted without amendment, though a few members of the Convention accepted it with some reservations."
One member of the Convention, but not of the drafting committee, was the Commonwealth member for Kooyong, R G Menzies, a former and a future Prime Minister but then no more than an Opposition back bencher. According to a report in the Melbourne Argus of 15 December, 1942 (almost a fortnight after the Convention had concluded):
"Mr Menzies strongly criticized the attitude of the [Commonwealth] Government in its desire to obtain the powers sought in the proposals at a time when the people of Australia were concentrating their thoughts and energies on the war effort. It was unseemly and untimely to bring up such a measure now. Powers asked for by the Government for dealing with employment and unemployment were extraordinarily wide, and could only be regarded as most dangerous."
This was not a favourable portent.
The particular powers to be referred by the State Parliaments to the Commonwealth Parliament "until the expiration of a period of five years from the date upon which Australia ceases to be engaged in hostilities in the present war" were as follows:
(i) the reinstatement and advancement of those who have been members of the fighting services of the Commonwealth during any war, and the advancement of the dependants of those members who have died or have been disabled as a consequence of any war;
(ii) employment and unemployment;
(iii) organized marketing of commodities;
(iv) companies, but so that any law shall be uniform throughout the Commonwealth;
(v) trusts, combines and monopolies;
(vi) profiteering and prices (but not including prices or rates charged by State or semi–governmental or local governing bodies for goods or services);
(vii) the production and distribution of goods, but so that
(a) no law made under this paragraph with respect to primary products shall have effect in a State until approved by the Governor in Council of that State; and

(b) no law made under this paragraph shall discriminate between States or parts of States;
(viii) the control of overseas exchange and overseas investment; and the regulation of the raising of money in accordance with such plans as are approved by a majority of members of the Australian Loan Council;
(ix) air transport;
(x) uniformity of railway gauges;
(xi) national works, but so that, before any work is undertaken in a State, the consent of the Governor in Council of that State shall be obtained,and so that any such work so undertaken shall be carried out in cooperation with the State;
(xii) national health,in cooperation with the States or any of them;
(xiii) family allowances; and
(xiv) the people of the aboriginal race.

The State Parliaments Confer to Refer

Only two State Parliaments legislated to give full effect to the agreement reached at the Canberra Convention so-called. These were the Parliaments of New South Wales and Queensland. The Labor Party held office in both States: in New South Wales that party controlled both Houses, while Queensland's Parliament, as a unicameral legislature, presented no problems to its Labor government in passing the necessary legislation. In the other States it was a different story, although each State differed in different ways.
A Commonwealth Powers Bill, to give effect to the agreement, was introduced into the Victorian Legislative Assembly by the Premier, Albert Dunstan, and it proceeded smoothly to the second reading. The Assembly resolved itself into Committee and accepted Clause 1 or the short title of the Bill on 16 December, 1942. On 27 January, 1943 further consideration of Clause 1 of the Bill was resumed with the Premier moving:
"That the following sub-clause be inserted:
(2) This Act shall come into operation on a day on which the Governor in Council declares by notification published in the Government Gazette that he is satisfied that legislation the same or substantially the same as this Act has been enacted in each of the other States of the Commonwealth."
Labor's Leader of the Opposition, John Cain senior, claimed that the Dunstan government was responding to the influence of the United Australia Party, and of business pressure which had spread from South Australia: on that latter point I shall subsequently have more to say. In spite of objections from Labor members, this sub-clause was duly inserted into the Bill, and on 16 February, 1943 the third reading of the Bill was passed by the Assembly by a very large majority.
By the time the Bill was received into the Victorian Legislative Council on 23 February, 1943, it was clear, as Clifden Eager, KC, pointed out, that the Tasmanian Parliament, but more specifically the Tasmanian Upper House, had rejected the Commonwealth Powers Bill introduced by the Tasmanian Labor Premier, Robert Cosgrove, into the House of Assembly and duly passed by that Chamber. Referring to sub–clause (2) of clause 1 of the Commonwealth Powers Bill before the Victorian Legislative Council, and its significance for any future proclamation of that Bill as an Act, Mr Eager added:
".... So far, the Tasmanian Parliament has not shown any intention to change its decision not to pass the Bill introduced by the Premier of that State. If the Tasmanian Parliament persists in that attitude, any Bill passed by the Victorian Parliament will never come into operation if this Bill retains its present form. We know that the Assembly of the South Australian Parliament has made very serious amendments in the Bill introduced into that Parliament and the amendments render that measure substantially dissimilar to the Bill now before this House...in four or five

respects... Of course we cannot take very much notice of what has been done in the South Australian Assembly until that Parliament has disposed of the measure, because we do not know what will be the fate of the Bill in the Upper House."

Clifden Eager's expectation of continuing obduracy by the Tasmanian Upper House was in the event fulfilled; the Tasmanian Legislative Council resisted all entreaties to have the Commonwealth Powers Bill passed.

The South Australian contribution to the ultimate frustration of the Canberra Convention's agreement deserves an extended treatment. I have had the advantage of reading a memorandum by Mr Ian McLachlan (senior), in which he recalled the circumstances surrounding the establishment of the Constitutional Powers Committee in South Australia immediately after the announcement of the agreement reached at the Canberra Convention; and I propose to quote from it with his permission:

"A group in Adelaide, consisting of A C Rymill and myself, who having been discharged from the Army were two of [the] very few younger members about then, and a group of older men, the names of whom, as far as I can remember, were, O L Isaacshen, of the Bank of Adelaide, E W Williamson, of Executor Trustee & Agency Company, a Mr Sanderson... of Elder Smith's, H Grose and H Powell, got together to consider how best to persuade our Premier Tom Playford not to hand over these powers, as he had indicated he was prepared to do.

"A meeting was held, I believe at Sir Wallace Bruce's house, where it was decided that the best method of persuading Playford to change his mind was to create as much uproar and vocal opposition as possible. This was done through organizations like the Bank of Adelaide, which had many country branches, and Elder Smith's and Grose's organization (flour milling), through their country Managers talking to their clients and persuading them to send telegrams of objection to the Premier.

"We also apprehended that, if every other State handed over the powers, the pressure would be too much for Playford, especially as he had already more or less committed himself. As days went by it became fairly clear that the Western Australian Cabinet had more or less committed itself, and Victoria looked as though it would grant the powers.

"In order to bring some pressure to bear on Western Australia and Victoria, it was thought a good idea to get a couple of eminent lawyers to address meetings of businessmen in those States with a view to getting them to do something along the lines of what was happening here, and so at our behest Mr F Villeneuve Smith, KC, went to Western Australia and Mr G Ligertwood, KC, went to Victoria, where meetings were called by people who were known to some of the older members of our Committee....

"Generally speaking these meetings were a success, and perhaps were responsible for holding up the adoption by Parliament of Evatt's proposal...."

This claim by Mr McLachlan senior of success and its consequences is, in my judgment, far from excessive. Some old lecture notes of mine contain the following:

".... In both Western and South Australia the Bill was amended `almost out of recognition', and Western Australian amendments betrayed South Australian influence. In those States, the employment, marketing, production, monopolies and other powers were emasculated. In South Australia, the Premier, Mr (later Sir) Thomas Playford was deserted by his own party when it refused to follow his lead in sponsoring the Bill, whilst in Western Australia, the anti–Labor Legislative Council was again the destructive agent.

"By 3 February, 1943 the Prime Minister, John Curtin, conceded that the method of `reference' appeared to have failed. The matter dragged on unresolved for eighteen months, however, before the [Federal] Government put the proposals to the people in the unsuccessful referendum of August, 1944."

As to some of the legal implications of this proposed reference of powers, I can do no better than quote from a Ministerial statement to the Victorian Legislative Assembly by the Premier, Mr Dunstan, on 26 January 1943, which was the day before he introduced the amendment concerning the condition antecedent to the Bill's proclamation as an Act, to which I have already referred. The Premier stated inter alia:

"In the first place, Mr G C Ligertwood, KC, an eminent South Australian counsel, who was asked by a group of Adelaide businessmen to consider the Bill, stated that in his opinion the Bill did not give legal effect to the intention that the reference should be limited in time, nor to the intention that laws passed under the reference should cease to have all force and effect after the expiration of the five year period referred to in the Bill. About the same time Mr Hannan, KC, the Crown Solicitor of South Australia, had raised doubts as to whether the Bill as drafted did give legal effect to the Canberra Convention. Mr Ligertwood based his opinion on the fact that certain words contained in the New South Wales Commonwealth Powers (War) Act of 1915 had been omitted from the Bill, and that the result of the omission of these words was that the matters referred to in Clause 2 of the Bill were not limited in time. Mr Ligertwood proposed to insert the words omitted from the New South Wales Act, and also to add a definite statement that all Commonwealth laws passed under the reference should contain a provision limiting the operation of the laws to the five–year period.

"Mr Ligertwood, in reply to a specific question, said that in his view the State could transfer powers under the Constitution for a limited time, as the Bill sought to do, but he made it clear elsewhere in the opinion that the amendments he suggested to the Bill were necessary in order to produce that result. Subsequently, Sir Robert Garran, Sir George Knowles and Professor K H Bailey, the legal advisers of the Commonwealth, stated in a joint opinion that they entirely disagreed with Mr Ligertwood's opinion, and were satisfied that the Bill as drafted did contain an effective time limitation on the matters to be referred.

"In the next place, an opinion on the Bill was obtained, at the instance of certain Victorian business interests, from Mr Fullagar, KC. Mr Fullagar's opinion may be summarized shortly in this way:

(1) The Bill, as drafted, expresses the intention to limit the reference to five years.

(2) But it is not possible constitutionally to limit a reference in time. Clause 4 of the Bill is, therefore, invalid, and the result of this invalidity would probably be that the whole reference attempted by the Bill would fail, though there was a danger that the invalid Clause 4 would be severed from the rest of the Bill, and there would be a permanent reference of matters to the Commonwealth.

"The clause imposing the time limit might be held to be bad, but the clause referring the power might be held to be good, and in that event the power would be referred on a permanent basis. Mr Fullagar also indicated that, if the reference could constitutionally be limited to a five year period, Commonwealth laws made under the reference during the period would continue to operate at the expiration of the period.

"As a result of the doubts raised by those opinions, the Government sought the opinion of Mr [Wilbur] Ham, KC, of the Victorian Bar. Mr Ham's opinion, generally agreeing with that of Mr Fullagar, may be shortly paraphrased as follows:

(1) The Bill does not carry out the intention of the Canberra Convention to refer matters for a limited time, for the reason that no State has power to refer matters limited in time.

(2) It is not possible under the Constitution for a State Parliament to grant to the Commonwealth Parliament power to make laws in respect of the matters proposed to be referred, and at the same time to limit the period during which such laws may operate.

"The result of the opinions therefore, to this stage, seems to be that :

(1) The three Commonwealth legal advisers and Mr Ligertwood thought that a reference might be limited in time. The Commonwealth advisers thought that the Bill effectively limited the reference in time, but Mr Ligertwood suggested the insertion of certain words in order to bring about that result.
(2) Mr Ham and Mr Fullagar thought that a reference to the Commonwealth could not be limited in time, and Mr Ham agreed to the inclusion of certain amendments only on the basis that, if the Bill were proceeded with, the inclusion of the words would make it more likely that the whole reference would fail completely.
"Since the publication of the opinions of Mr Ham and Mr Fullagar, a number of attempts – some of which have been criticized by the Commonwealth legal advisers – have been made in South Australia to find a form of words which would make it even more certain that the whole reference must fail if a time limitation on the reference were held to be bad, and those new proposals have been submitted by the Victorian Government to counsel, so that the intention that the powers proposed to be referred should be limited in time will be more definitely safeguarded.
"It must be realized, however, that there are two definite limitations on any drafting amendments that can be made. In the first place, it does not seem possible by any form of drafting to overcome the point raised by Messrs Ham and Fullagar that this Parliament has no power to place a time limitation on a reference. Secondly, Mr Fullagar raised the point – tacitly agreed to by Mr Ham – that if a time limitation can be placed on a reference, Commonwealth legislation passed during the period of the time limitation will continue to operate beyond the expiration of the period. It is doubtful whether it is possible by any form of drafting to place it beyond doubt that this point is completely and effectively overcome.
"Mr Ligertwood had attempted to provide definitely against this contingency, but his suggestion was not approved either by Mr Fullagar or by Mr Ham. A further joint opinion by the Commonwealth legal advisers has, however, been furnished, and it appears that the reasoning in that opinion would support Mr Ligertwood's attempt, though his suggested amendment now appears to have been abandoned in South Australia.
"I have had the advantage of studying those opinions, but there is such a violent conflict in them that one is in much the same position as before one has read them. I am a layman, and therefore any opinion I express on the legal aspect of the question will not be of much value. I suppose we shall not be able to say who is right and who is wrong until somebody has tested the matter in the High Court of Australia."
As it happened, this matter was never put to the test in litigation before the High Court because of the failure of the Parliaments of Victoria, South Australia, Western Australia and Tasmania to follow the course which the Parliaments of New South Wales and Queensland had already taken.

The "Fourteen Powers" Referendum 1944.

Sir Paul Hasluck in his official history takes up the narrative as follows:
"The Constitution Alteration (Post–War Reconstruction) Bill, 1944 – the measure to inaugurate the procedure for constitutional change – was introduced into the House of Representatives by Evatt on 11th February [1944]. It was in substance the one which had been drafted at the Constitution Convention and which the States had agreed to pass. After reviewing the history of the matter he said that there was no practical method for laying a sound constitutional basis for Australian post-war reconstruction except by an appeal to the people. A referendum was not being forced on the States. The Canberra Convention had agreed that adequate powers for post–war reconstruction should be conferred on the Commonwealth Parliament and the States had failed to adopt the only legal method by which a referendum to give those powers could be avoided.

"Interjections revealed that on the Labor side there were still those who would have liked a permanent transfer of powers to the Commonwealth Parliament, and on the Opposition side those who feared that at the end of five years the referred powers might not return to the States. Evatt said that the Commonwealth would not go beyond the agreement reached at the Canberra Convention. He saw the five years of a temporary grant of power as a period `on probation'. The step now proposed was not final. At the end of five years it would be retracted, or the people by referendum, or State parliaments by reference, could make the transfer of powers permanent."

By the time the Curtin Government proceeded to initiate this referendum, as a means of acquiring the fourteen powers which the States as a whole had not ceded to the Commonwealth by reference, the state of parties in the Federal Parliament had undergone a significant change as a result of the 1943 election. The Curtin Government had been confirmed in office by a landslide – whereas in the previous Parliament, it had had to rely on the votes of two Independents – and it had also obtained a majority in the Senate. After the election Menzies had regained the parliamentary leadership of the United Australia Party and became Leader of the Opposition. Unlike the Country Party leader, Arthur Fadden, who had led the Opposition from 1941 until 1943, Menzies had not given his support to the agreement reached at the Canberra Convention in late 1942, and had indeed voiced criticisms of it. Untrammelled by any prior commitment, Menzies felt free, therefore, to lead his party in opposition to the referendum.

Professor Geoffrey Sawer has partly summarized the opening of the Opposition's case:

"Menzies in his second reading speech claimed that the powers sought fell into three classes: some were unnecessary, since adequately covered during the transition to peace by the existing defence power; others went beyond what a non-socialist programme of post-war reconstruction would require; others might be supported if they could be made permanent, but their exercise could lead to confusion if they were given, as proposed, only for a limited period."

In a fuller summary, however, Sir Paul Hasluck pointed out that much of Menzies's speech concentrated on powers the Commonwealth already possessed independently of the defence power, including the external affairs power, which Evatt as a High Court Justice had interpreted very broadly in The King v. Burgess ex parte Henry in 1936.

Incidentally, Menzies in some lectures he gave at the University of Virginia in 1966 had this to say on the external affairs power:

"Let the Evatt interpretation be adopted by the Full High Court (and he would be a very brave man who denied the possibility), and I have no doubt that many domestic problems so far regarded as not within Commonwealth power will be made the subject matter of some international agreement for the very purpose of attracting Commonwealth legislative power.

"And so regarded and so employed, the power of `external affairs' would be seen more and more as a power over `internal affairs', and provide us with what our late friend W S Gilbert called a `most ingenious paradox'."

I consider that if Sir Robert had survived well in the 1980s he, for one, would not have been surprised by the majority decision of the High Court in the Franklin Dam Case of 1983.

Sir Paul Hasluck's summary of the conclusion of Menzies's contribution to the second reading debate will have to suffice in lieu of the full text of an amendment Menzies moved, namely:

".... that existing powers were not shown to be inadequate for the immediate post–war tasks of reinstatement and advancement of servicemen and others displaced from normal peacetime occupations, and for the reconstruction of primary and secondary industry. Any doubt on this point should be resolved by constitutional amendment, but no amendment should be approved which `would authorize the socialization of industry, the undue centralization of administration, or the maintenance of such laws as unnecessarily interfere with the liberty of citizens to choose their own means of living and to exercise their rights as free people'; that the House was

concerned at the surrender of legislative powers to administrative officials; that the Bill should be withdrawn and redrafted so as to declare or provide that the Commonwealth Parliament had or should have certain listed powers during a period of five years from the termination of hostilities, but should not have power to enable the Executive to engage in any civil production, industry or commercial process not authorized by its existing powers; that during the period of possession of additional powers matters of a legislative nature should be dealt with by Parliament or laid before it; and that within two years of the termination of hostilities an elective popular convention should be set up for the review of the structure and working of the Constitution.

"As the debate continued, differences of viewpoint and particularly of emphasis were revealed among the Opposition, and at the division on the amendment moved by Menzies, Spender crossed the floor to vote with the Government. Otherwise the vote was on party lines and the amendment was defeated by 46 to 18. On the motion for the second reading, although there was no call for a division from the Opposition, a division was held in order to establish that there was the absolute majority required for a Bill to alter the Constitution. The result was 55 to 10, the members of the Country Party and [Billy] Hughes joining Spender in voting with the Government."

Some semblance of harmony was restored to the Opposition in the vote on the third reading, when both Opposition parties joined to vote against the Government, leaving Spender (in the absence of Hughes) as the only member of the Opposition to vote with the Government. Hasluck explained the Country Party's change in attitude as being due to their inability to enlist the support of the Government in the Committee stage to enable it to make any impression there, "while both in Committee and subsequently in the House they suffered from brutishness in the chair". The legislation passed through all stages in the Senate and was then put to the electors in the States on 19 August, 1944. All fourteen powers sought by the Commonwealth were bracketed together as a single package on which the electors could give a single verdict: Yes or No.

The Labor Party appointed "Yes" committees in each State, but membership was not necessarily confined to people active in that party. In some States the open association of the Communist Party with the "Yes" committees led to the formation of a "non-party `Yes' committee".

Hasluck was to record:

".... the most emphatic and extensive opposition to the referendum came from the Constitutional League in New South Wales, Victoria, Western Australia and Tasmania, and to a less extent from organizations like the Citizens Vote No League in South Australia and the Save Our State League, Freedom League and Liberty Defence League in Western Australia. The Constitutional League was formed to combat the referendum proposals, and drew to itself most of the active support for federalism and State rights, guided by such people as [Professor] F A Bland....

"Government members were not all active, although tours by Ministers were numerous enough in the small States, particularly Tasmania, Western Australia and South Australia."

The referendum resulted in a convincing defeat for the Government. The percentages in all States and in Australia as a whole were:

	Yes.	No
New South Wales	45.44	54.56
Victoria	49.31	50.69
Queensland	36.52	63.48
South Australia	50.64	49.36

Western Australia	52.25	47.75
Tasmania	38.92	61.08
Australia	45.99	54.01

Sir Paul Hasluck had this comment to make on the result:
"Relating the results to the state of the parties in the House of Representatives, and to the election results, how did the Government, which had got in on a landslide only twelve months before, fare in this request to the people for greater powers in peacetime? All Opposition electorates and the electorates of the two Independents (Coles in Henty and Wilson in Wimmera) rejected the proposals. (Coles and Wilson had favoured the proposals.) All the electorates which changed to Labor at the 1943 elections save two (Adelaide and Swan, in Western Australia) rejected the proposals. Of the 35 electorates which had returned Labour at both the 1940 and 1943 elections, 15 rejected the proposals. Out of the total of 74 electorates, only 22 voted "Yes"; in Queensland and Tasmania all electorates returned `No' votes."
I agree with Lord Blake's contention: "The historian should frankly admit when he is baffled"; and I find some features of these results baffling. On the performance of the Australian electors in referendums, certain conclusions can be drawn. First and foremost, the lack of bipartisan support for a proposal virtually ensures its defeat, but there have been instances when bipartisan support has not proved a sufficient condition to enable a referendum proposal to be carried. But in cases of failure where the defeat is not inflicted in all States, a commentator is more often than not unable to explain why one or more States voted affirmatively. So it is with the 1944 referendum!
Why was the defeat registered so strongly in Queensland and in Tasmania, but not so strongly in New South Wales and only marginally in Victoria? And why was the proposal carried in South Australia, however narrowly as it happened, and in Western Australia slightly more convincingly? I cannot hope to explain, except in the case of Queensland to acknowledge the presence there of large numbers of voters from other States based there for defence purposes.

A Cautionary Tale for Mr Keating?

There are two issues affecting Mr Keating's administration which have been the subject of papers at this conference and which present Mr Keating with a warning of sorts derived from the experience of Mr Curtin and Dr Evatt in their quest for broadening the scope of Commonwealth powers in 1944. These two issues are of course the consequences of the High Court decision in the Mabo case and Mr Keating's determination to convert Australia into a republic.
It is no more likely that Mr Keating will succeed in gaining the cooperation of the States on the Mabo issue by a high-handed comportment, and the taunt that they can take his proposals or leave them, than Dr Evatt did in pressing ahead with a referendum in 1944. Is Mabo an issue on which he can go on a frolic of his own, invoking Commonwealth powers to the full extent permitted to him by the courts, including such powers as the external affairs power, without risking serious electoral damage? I think not! And then there is the question of how much backing such Premiers as Mr Goss can count on from their own Parliaments, and from their own constituencies, for any ill considered agreement they reach with Mr Keating which is hastily cobbled together as was the case at the so– called Convention in 1944.
Mr Keating's grand design for an Australian republic has some similarity with the constitutional controversies resulting in the 1944 referendum, and it could founder on any number of reefs. The

obsession of Dr Evatt with post-war reconstruction was, on his own admission, founded on considerations affecting Australia as a belligerent in the Second World War, and the responsibilities these imposed on Australia as a member state in the international community. Recall if you will all his talk of the Atlantic Charter and the four freedoms.

To listen to Mr Keating, you could conclude that nothing less than the adoption of a republican Constitution will enhance Australia's international standing to whatever our present and future exigencies require. I state this not because I agree with what he claims: indeed, to me it is the least convincing of his arguments, but then one could have said the same of Dr Evatt's reliance on international considerations in 1942–44. But there I feel the broad similarity with the 1944 referendum ends.

Dr Evatt's obsession with Australia in the post–war world was at first unveiled as a design to arrogate to the Commonwealth sweeping powers, in the assertion of which the Commonwealth Parliament alone would have the ultimate discretion; in the face of widespread opposition, the design was then narrowed to a set of proposals putatively to be discharged on probation for a five year period dating from the cessation of hostilities. Mr Keating's republic seems to be moving in the opposite direction. It was unveiled as a proposal which would involve the minimum rewriting of the Constitution to attain his objective, but Mr Keating's own advisory committee seems to have moved beyond that, and there is of course the unsolicited advice flowing from the involvement in the debate by Mr Hawke, who has called into question another topic discussed at this conference: the continued existence of Australia's federal system.

On the face of it there seems to me to be no warrant in republicanism for a reference of powers by the States to the Commonwealth as was unsuccessfully attempted in 1944, but there is surely a need for some sort of cooperation from the States in the rewriting of their Constitutions to convert them to a republican mode. And without their cooperation, can a referendum be carried to change the Commonwealth Constitution to a republican one? Even if the Commonwealth Constitution can be changed to that effect with significant opposition from one or more of the States, could continued opposition in one or more of the States be overborne by a sweeping enough amendment to the Commonwealth Constitution, through the agency of a referendum within the terms of section 128, to bring about the desired changes in the State Constitutions?

The republican grand design introduces far more complications than Curtin and Evatt had to contend with in 1944. Supposing those two had succeeded in the 1944 referendum. Within the scope to which they had limited themselves, such a referendum result would have concluded the matter. There might have been subsequent litigation in the High Court, but there would have been a very strong likelihood that the issues raised would have been resolved to the satisfaction of the Curtin Government, in that that administration might have found itself with broader powers than it thought it had gained. With the republican design, if Greg Craven's views are correct, it is just possible that even a successful referendum result might not complete the matter in respect of the Commonwealth Constitution alone, let alone in respect of the State Constitutions.

The real cautionary tale for Mr Keating, however, may be this: that when great issues of constitutional import are raised in our democracy, and particularly when they are raised by over–mighty overlords in Canberra, they usually tend to generate a growing groundswell of public debate, at first, and then resistance. As the record by Mr Ian McLachlan senior, referred to earlier, illustrates, and as the formation of this Society, and the program of this conference, further attest, proposals to increase even further the powers already concentrated in Canberra have a nasty habit of coming back to confound their proponents. They do so by foundering, not so much upon the resistance of their party political opponents (at any rate in the first instance),

but upon the resistance of everyday Australians banding together, like Mr McLachlan senior and his colleagues, "to create as much uproar and vocal opposition as possible".

Endnotes:

Appendix I

Contributors

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1. Addresses

The Hon. Jeff KENNETT, MLA was educated at Mt. Eliza State School and Scotch College, Melbourne. After two years in the Australian Army, serving in Malaysia and Singapore (1968-70), and some years in advertising, manufacturing and importing businesses, he entered the Victorian Legislative Assembly in 1976 as the Liberal Member for Burwood. During 1980 to 1982 he served as Minister for Housing, Minister for Immigration and Ethnic Affairs and as Minister responsible for Aboriginal Affairs. Following the defeat of the Government in March, 1982 he became Leader of the Parliamentary Liberal Party and Leader of the Opposition until 1989; was re-elected to that position in 1991; and in October, 1992 was elected as Premier of Victoria. He also holds the portfolio of Minister for Ethnic Affairs and chairs the Victorian Ministerial Industry Council.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland, and was admitted to the Queensland Bar in 1939. After serving in the A.M.F. (1939-42), and the A.I.F. (1942-45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1961-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). Since 1987 he has been Chairman of the Review into Commonwealth Criminal Law and, since 1990, Chairman of the Australian Tax Research Foundation. In 1992 he became the founding President of The Samuel Griffith Society.

2. Conference Contributors

The Hon. Peter CONNOLLY, CBE, QC was educated at St. Joseph's College, Brisbane and St. John's College at the University of Queensland. After having served in the A.I.F. during 1939-46, he was admitted to the Queensland Bar in 1949 and was a Member of the Legislative Assembly for Kurilpa in 1957-60. He became a Queen's Counsel in 1963, President of the Australian Bar Association in 1967-68 and President of the Law Council of Australia in 1968-70. From 1977 to 1990 he served as a Judge of the Queensland Supreme Court and now chairs the Queensland Litigation Reform Commission.

The Hon. Peter DURACK, QC was educated at Aquinas College, Perth and the University of Western Australia, and was Rhodes Scholar for W.A. in 1949. After completing his BCL degree at Oxford, he was admitted to the W.A. Bar in 1954 and from 1965 to 1968 was a Liberal Member of the Legislative Assembly in that State. In 1971 he became a Liberal Senator for Western Australia, and in that capacity served as Minister for Veterans Affairs (1976-77), Attorney-General (1977-83) and Deputy Leader of the Government in the Senate (1978-83). After the defeat of the Fraser Government in 1983 he served in the shadow portfolios of Attorney-General (1983-84), Resources and Energy (1984-87) and Defence (1990-92), and as Deputy Leader of the Opposition in the Senate (1983-87 and 1990-92). He retired from the Senate in June, 1993.

The Hon. Bill HASSELL was educated at a number of State Schools in Western Australia, at Hale School, and at the Universities of W.A. and Reading (UK). After returning to W.A. he

practised as a barrister and solicitor (1968-80), and in 1977 became the Liberal Member for Cottesloe in the W.A. Legislative Assembly, from which he retired in 1990. During the Court and O'Connor Governments he served as Minister for Police, Traffic and Community Welfare (1980-82), Minister for Police and Prisons (1982-83) and Minister for Employment (1983). From 1984 to 1986 he was Leader of the Opposition. He is at present the President of the W.A. Branch of the Liberal Party.

John HIRST was educated at Unley High School and the University of Adelaide. After tutoring in Economic History at that University, he moved to La Trobe University in 1968, where he is now a Reader in History. He is the author of several books, including Convict Society and its Enemies and The Strange Birth of Colonial Democracy, and numerous articles. He is a convenor of the Australian Republican Movement, and is currently a member of the Prime Minister's Republic Advisory Committee (the so-called Turnbull Committee).

Dr Colin HOWARD was educated at Prince Henry's Grammar School, Worcestershire, and at the University of London and Melbourne University. He taught in the Law Faculties at the University of Queensland (1958-60), and Adelaide University (1960-64), before becoming Hearn Professor of Law at Melbourne University for 25 years (1965-90). He was awarded his Ph.D from Adelaide University in 1962 and his Doctorate of Laws from Melbourne University in 1972. He is now a practising member of the Victorian Bar, being perhaps best known for his constitutional expertise, but specializing also in commercial and administrative law, and has published a number of texts for both lawyers and laymen. During 1973-76 he was General Counsel to the Commonwealth Attorney-General; he is also a long- established commentator on public affairs.

S E K HULME, AM, QC, was educated at Wesley College, Melbourne and at the Universities of Melbourne (Queen's College) and Oxford (Magdalen College). He was Rhodes Scholar for Victoria in 1952 and the Eldon Scholar, Oxford in 1955. He was admitted to the Victorian Bar in 1953 and at Gray's Inn, London in 1957. Since 1957 he has practised as a barrister-at-law, becoming Queen's Counsel in 1968. He has published in various legal journals, and is a Director of several public companies.

Professor Wolfgang KASPER was born in Germany and educated at the Universities of Saarbrucken, Kiel, Paris and London, and was awarded his Ph.D. at Kiel University's Institute of World Economics in 1968. After working with the German Council of Economic Advisers (1965-69), the Kiel Institute (1969-71) and the Malaysian Ministry of Finance (1971-73) (under the Harvard development advisory service program), he came to the Australian National University, Canberra in 1973. After a subsequent period at the Reserve Bank he has held, since 1977, a Chair in economics at the University of New South Wales (Australian Defence Force Academy). He has had wide international experience in the OECD, the US Federal Reserve Bank of San Francisco, and elsewhere, and is the author of numerous monographs and articles, in journals both learned and lay.

Dr Frank KNOPFELMACHER was born in Vienna and educated at the Jewish Gymnasium, Brno, Moravia prior to leaving Czechoslovakia in 1939 after the German invasion of that country. After two years in Palestine, and three years war service with the 8th Army in Libya and the British Liberation Army in Europe, he studied first at Charles University, Prague and then, after the Communist coup there in 1948, at Bristol University, England. In 1953 he was awarded his Ph.D. by University College, London. After coming to Australia in 1955, he spent 33 years in University teaching before retiring from the University of Melbourne as Reader in 1988 after a

lifetime dedicated to combating the products of Marxism - Leninism wherever encountered. Following the collapse of the Communist regime in Czechoslovakia in 1989, he spent some time in Prague as a Visiting Professor before returning to Melbourne. He is the author of numerous articles in books and journals both in Australia and overseas.
John PAUL was educated at Geelong Grammar School and the University of Melbourne (Trinity College). After ten years in the Commonwealth Public Service (1961-71), including five years in The Treasury, he moved to academia and is now Senior Lecturer in Political Science at the University of New South Wales. He has written extensively on the reserve powers of the Governor-General, the role of the Monarchy within the Australian Constitution, and on Australian political history more generally.

John STONE was educated at Perth Modern School, the University of Western Australia and then, as a Rhodes Scholar, at New College, Oxford. He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the I.M.F. and the World Bank in Washington, D.C. (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post - and from the Commonwealth Public Service - in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate, Shadow Minister for Finance and, generally, a contributor to the public affairs debate. He is currently a Senior Fellow at the Institute of Public Affairs and writes a weekly column for The Australian Financial Review.

Jack WATERFORD was educated at St. Joseph's College, Sydney and the Australian National University, Canberra and has been writing on law, politics and public administration for over 20 years. During 1977-79 he worked first as an adviser to Aboriginal organisations in Central Australia, and later with the late Professor Fred Hollows on the National Trachoma Program; in these capacities he visited several hundred Aboriginal communities in all mainland States of Australia. He has been a journalist with The Canberra Times since 1972, and its Deputy Editor since 1986. In 1985 he was Graham Perkin Journalist of the Year, and in 1986 was a Jefferson Fellow in the United States.

Appendix II

The Samuel Griffith Society

The purposes of The Samuel Griffith Society are as follows:

1) To found a Society named after Sir Samuel Walker Griffith, First Chief Justice of the High Court of Australia. As Premier of Queensland and subsequently Chief Justice of the Queensland Supreme Court, Griffith was one of the prime movers of Federation. During his term as Chief Justice of the High Court from 1903 until his debilitating illness in 1917, he consistently supported the rights of States against the powers of the Federal Government.

2) To set out as a preamble to the specific purpose of the Society a statement of the role of constitutions and parliamentary and legal institutions in the following terms:

One important function of political constitutions, and indeed of all political institutions, should be that of maintaining civil peace and concord, and of protecting the citizen from the arbitrary abuse of power, including executive power.

People who have experienced nothing but peaceful association within the society in which they have grown up, take the incalculable benefits of such civil quietness for granted. The terrors of civil war or threats of civil war, of savage government repression, seem to most native born Australians to be beyond comprehension, and certainly beyond the realms of possibility here.

Nevertheless civil unrest – ethnic, political and religious violence – has been endemic throughout recorded history. Arbitrary arrest and imprisonment has, likewise, been commonplace.

Those countries which have achieved long periods of unbroken civil peace, with societies which have lived under the rule of law, have also become prosperous. Some of these countries have written constitutions. Others, such as the United Kingdom, do not.

Australia has an unbroken record of constitutional government, and rule of law. It was one of the first nations to establish universal suffrage. It has been entirely free from any hint of civil war. Up until the Great War of 1914-18 Australia was also in per capita terms, the richest country in the world.

The strength of our parliamentary and legal institutions, of our political conventions and modes of behaviour is, arguably, Australia's greatest asset. The Constitution which Australians drafted and accepted in the 1890s, and which established the framework of the Australian nation as a sovereign federal state, is the keystone of this structure and has served us well. It has protected our democracy, and our liberties, by providing for independent centres of political authority and the diffusion of power which flows from that. The Australian people have voted many times against proposed amendments. We must presume that they regard the Constitution, on the whole, with approval.

All institutions, nevertheless, require refurbishment and repair. There is growing concern at the decline in the prestige, standing and influence of parliament, and the growing centralisation of power and authority in the executive. There is also concern at the expansion of the power of the Commonwealth at the expense of the States, the increasing centralisation of power in Canberra, and the consequent growth of a Commonwealth bureaucracy which, in many areas, deals with matters which were originally the sole concern of the States.

As we approach the centenary of the passage of the Commonwealth of Australia Act (1900), by the British Parliament, a vigorous debate is building up, focussed on changes which people wish to see made to the Constitution, to the place of the monarchy in that Constitution, and to our parliamentary institutions.

The founders of The Samuel Griffith Society wish to encourage and promote the widest possible debate not only on particular constitutional issues but on the health of our political and legal institutions generally. We intend to emphasise federalist views and to reverse the Canberra-led erosion of our federal institutions.

3) In the light of the foregoing, the Society proposes the following objectives:

General

. 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;
. to defend the great virtues of the present Constitution against those who would undermine it in order to supplant it with a unitary state;
. to restore the authority of parliament and defend the independence of the judiciary;
. to foster and support reform of Australia's constitutional system to these ends.

Specific

. to arrange conferences, hold meetings, publish papers, and inform people and governments in accordance with the general objectives set out above;
. to thereby encourage a wider understanding of Australia's Constitution and the nation's achievements under the Constitution.

Priority Areas

The following areas of priority have been identified in the wider debate over Australia's constitutional future:
. the need to redress the federal balance in favour of the States, in view of the excessive expansion of Commonwealth power and the need to decentralise decision making;
. the need to safeguard judicial independence in light of increasing executive encroachments;
. the need to re-assert the role of Parliament (including that of the Speaker and President of the Senate) vis a vis the Executive;
. the need to review the financial arrangements between the Commonwealth and the States with a view to achieving a more equitable and efficient division of taxation power and a greater sense of financial responsibility on the part of all Governments;
. the need to redress the duplication of bureaucracy by clearly defining the respective spheres of Commonwealth and State interest and by eliminating Commonwealth influences in matters that should be the concern of the States;
. the need to consider, and as appropriate, develop alternative methods of constitutional amendment, such as State's initiatives.

Immediate Aims

To arrange and conduct, as soon as possible, a general conference for constitutional reform.
To attract for the Society a stable membership and funding basis.