Upholding the Australian Constitution Volume Twenty

Proceedings of the Twentieth Conference of The Samuel Griffith Society

Rydges North Sydney Hotel, North Sydney

Table of Contents

Foreword

John Stone

I should begin this Foreword with an apology. Its predecessor in Volume 19 of the Society's Proceedings began by saying that, "as this Foreword is being written, Australian voters have just decisively dismissed the Howard government ……". In other words, it was being written some six or seven weeks earlier than this one.

While the conference of which this volume constitutes the Proceedings was a week later than its 2007 counterpart, none the less this means that the production of Volume 20 has fallen about six weeks behind that of Volume 19. There are some valid reasons for that, with which I shall not bore readers, but an apology is, nevertheless, in order. Perhaps I may be allowed to say, however, that the speed of publication even of this somewhat delayed volume compares more than favourably, I am told, with the publication records of comparable conferences in academia.

The 20th Conference of The Samuel Griffith Society was held in Sydney on 22-24 August, 2008. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

The opening dinner was addressed by the Hon Ian Callinan, AC, former Justice of the High Court of Australia and now, I am glad to say, Vice-President of the Society, who delivered the second Sir Harry Gibbs Memorial Oration. Since I have already expressed, in my Introductory Remarks (see p.xxxiv), my appreciation of that address, I shall not dwell further on it here.

In keeping with our usual practice, the conference did not focus on a single theme, but rather took up a number of issues of relevance to the Society's interests. Under the general rubric, Undermining Australia's Federalism: The High Court at Work, we had two excellent papers – both, incidentally, from Queenslanders. Both papers pointed to the manner in which, over the years, a series of High Court benches have betrayed those who gave us the outstanding Constitution we originally had – so outstanding, in fact, that despite the High Court's serial depredations, it remains among the handful of best Constitutions in the world today.

The undermining of federalism by our High Court will, I fear, continue. During the past twelve months we have seen the appointment of a new Chief Justice who, despite being a Western Australian, comes with the depressing baggage of the National Native Title Tribunal, over whose destructive activities he presided for some years (1994-98). We have also seen the appointment of a new Justice, *vice* Mr Justice Kirby, whose qualifications for the role appear to go little further than the fact that she is a woman, and one whose own "orientation" will serve to replace that of her judicial predecessor. While she is said to be experienced in the criminal law – although even there, to what seems to be dubious effect – so far as can be ascertained she has no legal experience whatsoever, judicial or otherwise, in constitutional matters. In short, neither appointment gives grounds for confidence in the future performance of the nation's highest court.

If that were not depressing enough, the Rudd Government has also established a Committee (ostensibly of Inquiry), under the chairmanship of Father Frank Brennan, SJ, to look into proposals for a Commonwealth Charter of Rights. This Committee bears a strong resemblance to the similar Victorian body whose establishment was so well surveyed by Ben Davies in his paper *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, to the 18th Conference of the Society in 2006. In what is now increasingly seen to be a hallmark of the Rudd Government, there has been no attempt to produce any element of "balance" in the membership of this Committee. We can therefore confidently expect it to perform the same kind of duplicitous "consultative" function as its Victorian predecessor (under the chairmanship of Professor George Williams) did in 2005.

Although the Brennan Committee had not been established when our conference program was drawn up, it nevertheless contained two papers related to the Bills of Rights topic. A common feature of each of them – and one that appealed greatly to the audience – was their bluntly-spoken Political Incorrectness. Although I shall no longer be responsible – at any rate, not principally – for framing the programs of future Conferences of the Society, I have no doubt that we shall be hearing more such papers on this topic.

One of those two papers, that by Peter Faris, QC not merely addressed the flaws in the whole "human rights" agenda, but also pointed to the threat to Australian sovereignty inherent in that agenda. In that respect it foreshadowed the two following papers, on the general topic of National Sovereignty and International

Commitments. Both those papers addressed specific threats in that regard arising from Rudd Government initiatives. I refer to the reversal of our earlier attitude in the United Nations to the *UN Declaration on the Rights of Indigenous Peoples*, and the throwback to a "command and control" economy that, as Alan Oxley so clearly pointed out, is inherent in the government's plans for a so-called Emissions Trading Scheme. It is notable, incidentally – and again, characteristic – that Mr Rudd and his Minister for Climate Change and Water, Senator Penny Wong, have chosen to describe this policy, in true Orwellian fashion, as a Carbon Pollution Reduction Scheme. (Some have suggested, by way of modification, that this CPRS should be renamed as a Carbon Reduction Asinine Policy, or other such more truthful description having similar acronymic effect).

While the two concluding papers – each of them informative, albeit more or less depressing – on Australian Federalism Today brought us up to date on otherwise familiar ground, two other papers ventured on to new territory. The first, by Dr Matt Harvey, *The Treaty of Lisbon: A Federal Constitution that Dares not Speak its Name?*, provided an admirably concise and informative account of the development to date of what is now called the European Union. In contrast to the conception, gestation and final birth of the Australian federal Constitution, the EU (strictly speaking, its predecessor institutions) was conceived by a handful of initially high-minded European bureaucrats-cum-politicians; has undergone a long gestation period which has rarely seen the peoples of its constituent states consulted; and – much flowery language about "subsidiarity" notwithstanding – has been born into a world run "top down" from Brussels. On the very few occasions during this process on which nation state populations were given opportunities to express their approval or disapproval of what Brussels put before them on a "take it or leave it" basis, they decisively left it. (The most recent example of this genre was the "No" vote in the Irish referendum last year to approve the *Treaty of Lisbon*). Unlike the Australian constitutional processes, however, the only consequences of such popular rejections – in the very few states where the people have been given any chance at all to express their opinions about what is being foisted upon them – have been subsequent EU decisions that they must vote again – until, so to speak, "they get it right".

The second of these papers, by Professor John O McGinniss, of Northwestern University, Chicago provided one of the most memorable sessions of the conference. An account of the U S Federalist Society, and Professor McGinniss's personal involvement with that body almost from its inception in 1982, it was, in my opinion, one of the most inspiring papers ever delivered to the Society. At the risk of expressing a potentially invidious opinion, it constitutes a highlight of this volume.

At our 19th Conference in Melbourne those present for the Saturday evening dinner were treated to an address from Paul Houlihan, *A Constitutional Fairy Tale*. In my Foreword to Volume 19 I ventured the opinion that that address was "unlikely…..to be equaled in the annals of our Society for its mixture of wit, whimsey and the brutal reality which so marks, and so mars, the world of industrial relations in this country….". I added that it was, in my respectful opinion, "a rare gem – one to be taken out from time to time, turned over and re-examined for what may well prove to be its lessons over the years ahead".

I mention that past occasion because, last August, those attending the Saturday evening dinner were treated to a not dissimilar *tour de force* from one of our long-serving Board members, Professor David Flint. *Supreme Summit Smashes Creaky Constitution* (Pravda) consists of a remarkably sustained, tongue-in-cheek spoof involving two central characters, Australia's Mandarin-speaking Lu Kewen and a member of the Supreme Soviet, Vyacheslav Mikahailovich – both engaged in the important task of stacking the deck for a so-called 2020 Summit, where 1,000 of Australia's finest minds were to be invited to bloom – so long, that is, as the resulting flowers were Politically (as well as politically) Correct. The purported exchange of emails between the two protagonists, pointing to ways in which the "right" outcomes could be ensured, is not merely very funny (as was Paul Houlihan's address), but also (as too was his address) very instructive. To adapt my earlier words, its mixture of wit, whimsey and the brutal reality which so marks, and so mars, the performance of the Rudd Government and its assorted spin-doctors reveals, beneath the levity, the nature of governance in Australia, 2008.

If the proposals for a Charter of Rights, referred to earlier, are proceeded with by the Rudd Government, they will involve a statutory Charter rather than a constitutional amendment. This is because even the most zealous advocates of such nonsense will acknowledge, if pressed, that there would be no chance of a constitutional referendum passing the "commonsense test" of the Australian electorate. The only chance, in other words, of getting their own way is to by-pass the people. Nevertheless, several other formally constitutional snakes in the grass are also stirring.

One such is the proposal, formally advanced by Greens Senator Bob Brown, but tacitly endorsed by the Labor Party in the Senate, for a plebiscite on Australia becoming a republic. The proposal, now the subject of a Senate committee of inquiry, is characteristically imprecise, the key word being "a" (republic). The republicans, having been defeated in the 1999 referendum in every State and Territory other than (of course) the ACT, are well aware that their best chance of advancing their cause is by putting forward a goal to which republicans of all varieties can subscribe – that is, one which, by vaguely speaking of "a republic", conspicuously avoids defining just what form of republic might eventually be proposed. Such a plebiscite – as opposed to a formal referendum question put forward under s.128 of the Constitution – also has the great virtue, from the republican viewpoint, that it avoids the need for approval not only by an overall majority vote, but also by the votes in a majority of the States.

Of course, no republic can actually be brought into being without, in the end, having been approved by referendum. So the only result from a plebiscite in which a majority of electors approve a desire for "a" republic would be to leave our present Constitution seriously undermined, while putting nothing in its place.

Although the Rudd Government is clearly of a republican bent, nevertheless the cooler heads among its ranks are probably fully cognizant of the force of the foregoing arguments. Their support for Senator Brown's motion therefore almost certainly has as much to do with creating divisions within the Liberal Party (which of course was Paul Keating's chief motivation when he set this old grey mare running in 1992), as with any belief that the nag can finally get up. Given the quality of the parliamentary Liberal Party ranks today – and particularly what now passes for its leadership – they seem unlikely to be disappointed in that respect.

Other constitutional issues are also now rumoured. Perhaps this should not be surprising. After all, voters have to have something to take their minds off the economic abyss into which the Rudd Government is not only now staring, but also into which it is actively pushing us with both its industrial relations policies and its ridiculous emissions trading scheme. One such issue is the proposal – already sharply rejected by the people in one of the four referendum questions in 1988 – to enshrine the role of local government in our federal Constitution. Another is to revive the battle-scarred old issue of four-year (and fixed) federal parliamentary terms. The former has more to do with the inflated egos of those in charge of local government than with any genuine improvement in our constitutional arrangements. As for the latter, which in one form or another has already been rejected on several past occasions, it has mainly to do with Labor's desire to neuter the Senate (plus, of course, the desire of politicians of all persuasions to enjoy longer parliamentary terms before having to face, again, the verdict of the voters on their performance).

Earlier, I have made a couple of passing references to a change in my own role – and that of my indispensable helper, my wife Nancy – in the Society. I should now round out those earlier remarks.

Some time ago I had indicated to the Board that I wished to lay down some of my responsibilities in the running of the Society. Specifically, I proposed to cease to be Secretary, and to cease also to be the Conference Convener. The latter role I had held almost from the Society's inception. The Secretary's role, which had initially been filled by Nancy for twelve years, I took on in 2004, when she insisted on relinquishing it (and membership of the Board) so as to make way for the appointment of a younger member.

Accordingly, at the Annual General Meeting of the Society held in conjunction with our August conference, my resignation from the Secretary's position became effective. Those duties are now shouldered by Bob Day, AO, who has for many years been one of our most supportive Board members. I remain, at the request of the Board, a member of it. The precise arrangements for convening future conferences are still, at the time of writing, to be finally settled. While I have shed the ultimate responsibility, I expect none the less to provide some continuing input. I shall, moreover, as this volume – and I hope some future ones – may attest, continue to edit and publish the Proceedings.

There is one other matter I should mention before concluding. I refer to the death on 1 November last of our inaugural Vice-president, the late Sir Bruce Watson, AC. As I have said in my Editor's Note to Appendix I, while this is not the place for an obituary, suffice to say that he died as he had lived – a good man, a fine Queenslander, and a steadfast supporter, since its 1992 inception, of this Society.

The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 20th Conference, like all its predecessors, was directed to furthering that objective, and it is in that spirit that this volume of its Proceedings is now offered.

Dinner Address

Sir Harry Gibbs Memorial Oration (2008)
Superior Courts in the Republic of Australia

Hon Ian Callinan, AC

To be invited to give the Sir Harry Gibbs Memorial Oration is a very considerable honour. The whole of the Queensland legal profession, of which I was a member throughout Sir Harry's judicial career, took much pride in the recognition of his qualities by those who appointed him to the several offices he held, judge of the Supreme Court of Queensland, Bankruptcy judge, Justice of the High Court, and ultimately its Chief Justice.

I knew Sir Harry, not well, because of the difference in our ages and professional standing. As a student, I attended his lectures on Evidence in his barrister's chambers: as a young solicitor I instructed counsel appearing before him in the Supreme Court, and I appeared quite often before him as a barrister in the High Court. My recollections of him as a judge were of attentiveness, preparedness, knowledgeability, vast experience, and, as a consequence of all of these, efficiency. I have known many good lawyers, including judges, who possessed great virtues, but regrettably not all of them were efficient.

The sheer volume of material with which Justices of the High Court must grapple is not always apparent to people unfamiliar, happily so I might say, with the Courts. Cases in the High Court have usually had two earlier outings, at first instance, and then in an intermediate Appellate Court of three, very occasionally five, judges. They are rolling stones that have tended to gather rather a lot of moss. It is necessary for the Justices of the High Court to familiarize themselves with the full history and details of every case before them. I am unable to agree with a statement made by a former Chief Justice, that the ideal case for the Court to take and hear is one in which the facts are uncomplicated. The proposition that the highest court is in some way above the factual complexities of modern commerce and life is not one with which I agree. There is certainly no suggestion to that effect in the constitutional definition of the Court's jurisdiction. The disputes a complex society throws up will frequently be factually complex. The reason why I mention these matters is to make the point that Sir Harry Gibbs was always master of the facts of a case, as well as the law governing it.

May I also give you a further insight, again not an irrelevant one to the subject of my oration, into Sir Harry Gibb's thinking? On an occasion after I had been on the Court for a few years, he and I fell into a discussion. It will not surprise you to hear that it was about the jurisprudence of the Court before my appointment to it. I will not tell you of which decision he most disapproved, but I can tell you that he expressed a very strong opinion about the *Tasmanian Dam Case*, in which he dissented. He made it unmistakably plain that he was in favour, neither of any extension of the external affairs power, which he thought should not be used for an expansion of central power within Australia, nor of novel, extravagant constitutional implications.

This Society is, I believe, strongly constitutionally monarchist in inclination. It is important, however, that constitutional monarchists have a clear view about the type of republic that we should have if Australia is to become one. If they do not, then they run the risk of irrelevance in the debate which will continue.

It is the year after the passing of the much mourned, longest serving British Monarch, Queen Elizabeth the Second. The Australian people have voted in a plebiscite in favour in principle of a republic. They remain divided however, on not just the details, but also the nature of the republic that they want. It is because there is an apprehension on the part of the politicians that the people would prefer an elected President, who might then have greater legitimacy than an elected Prime Minister closely tied to a party, that in formulating the question for the people they failed to have due regard to the structure of the judiciary.

But now, attention to those details can no longer be postponed. A special legal sub-committee has been established to write a new chapter in a republican constitution for a judicature. Everything is on the table. Many have urged that there should only be one hierarchy of courts: why have both Supreme Courts and

Federal superior courts? That is a good question, to which I think there is only one sensible answer. What we have is a relatively recent consequence of an expensive course of conduct indulged in by federal governments of both colours.

It was, in my view, a brilliant stroke on the part of our founders to allow, in the Constitution, for the investing of federal jurisdiction in such courts (State courts in practice) as the Parliament decides (s. 71). For more than seventy years, most federal cases, criminal or civil, were heard and determined by State courts. I have never heard of a decision of a State judge or magistrate of which it could fairly be said that it showed any pre-disposition against the Commonwealth because it was the Commonwealth. I wish I could say the same about the High Court's regular preference in constitutional matters of the Commonwealth over the States. On the other hand, I have heard it argued, in favour of a large and separate federal judiciary, that the Commonwealth needs its own courts to interpret and apply its own laws. That, I think, is a very suspicious argument. It raises the suspicion that the argument is made in order to ensure some preferment of the Commonwealth. It is an insult to both the States, and incidentally, federal judicial officers appointed by the Commonwealth. It says something about those who press it.

Even now, despite the creation of a Federal Magistracy and a Federal superior Court, almost all federal criminal work continues to be done by State courts. It is likely that Federal Courts will exercise, albeit in a very limited way, some criminal jurisdiction but, for the foreseeable future, the State courts will continue to bear the burden of dealing with crimes against Commonwealth law. If it were otherwise, the great expense and inconvenience of enlarging the second set of parallel courts, and the administrative machinery to operate them, would be compounded.

In a new Constitution, how would all of this be dealt with? With minimal change, that is on the minimalist model for a republic, some would answer, by maintaining the present system. But both prudent unaligned, and the aligned alike, would say that a new Constitution presented an opportunity to do away with the expanding duality of the courts. The logic of constitutional provision for one hierarchical judicial system is compelling. The only other argument I have heard against one judicial hierarchy is that two provide healthy competition for each other, a matter upon which I will touch later.

But as to the form, relationship between its components, jurisdiction and titles in one judicial system, those who will appoint its judges and those who fix their tenure and remuneration, there is unlikely to be any early consensus. The devil will not simply be in the detail. Matters of high constitutional, legal and democratic principle are involved. Inevitably the debate will be complicated by the wish of a substantial body of people for the entrenchment in the Constitution of a Bill of Rights, to be applied by all courts and ultimately interpreted by a final court. There will also be pressure in some quarters to confine the final court's jurisdiction to constitutional and rights cases, in the same way as the jurisdiction of the Supreme Court of the United States is confined. May I remind you, at this point, of what the High Court, the Supreme Court of Canada, the Privy Council and the House of Lords have in common – a final jurisdiction in all matters, criminal, civil and constitutional. Among other things, those who wish for a confined constitutional court will argue that a lower tier of a superior court could adequately deal with non-constitutional matters, and that the burden upon an unconfined High Court is increasing and will soon become unbearable, a matter which I personally dispute.

But before I further comment on those matters, I would remind you of the course that legal and political affairs can take in judicial systems as they are organised in the United States.

A Presidential election was held in that country on 7 November, 2000. The Florida Division of Elections reported that Mr George W Bush had received a narrow majority of votes in Florida over Mr Gore. Florida had its own Election Code, even though the election was for the highest federal, indeed the highest political office in the nation. That Code required, because the margin was so small, that there must be an automatic machine recount of votes. After it, Mr Bush remained ahead but by an even smaller margin.

Mr Gore then exercised his right, a right conferred by Florida law, to demand a manual recount. But his demand was made after the expiration of the 7 days allowed by that law to make such a demand – a mandatory deadline, as the Florida Supreme Court decided. None the less, the Secretary of State, not federal, but of the State of Florida, had a discretion to receive the amended returns of elections lodged within a county of the State after those 7 days. The Secretary exercised her discretion against reception. Mr Gore and his party then sought the intervention of the Federal Court. That Court certified, that is, referred Mr Gore's application to the Florida Supreme Court. That Supreme Court then found for Mr Gore, holding that the Secretary's discretion was not untrammelled, that enough had been shown to trigger a full manual recount (in some

counties). Unsurprisingly, Mr Bush was not happy with that decision. He then applied to the United States Supreme Court for an order quashing it.

The Supreme Court, after saying it would generally defer to a State Court's decision on a State statute – I interpolate, on a State statute in its application to a federal election – having regard to Act 11, 1, cl.2 of the Constitution, and because the Florida Court's reasons were uncertain, held that its orders should be vacated, and the case "remanded for further proceedings not inconsistent with this opinion".[1]

The Florida Supreme Court to which the case accordingly came back, was satisfied, for various reasons, that there should be a manual recount, again not of all, but of some of the votes, and so ordered. Mr Bush was dissatisfied. He was able to bring the matter back to the United States Supreme Court ten days after its earlier outing there. Essentially for the reason that the recount ordered by the Florida Court would necessarily be incomplete, and would involve therefore uneven treatment of voters in Florida, the United States Supreme Court, by majority, quashed the latest decision of the Florida Court. In consequence, Mr Bush was able to be inaugurated as President of the United States.

If, by now, you are not dazed by the convolutions of this litigation, the result of which has not escaped criticism – criticism that I need not explore – I will tell you why I have referred to it.

First, is it not astonishing to an Australian at least, that a federal election, indeed of a President, should be subject to a State electoral law? Secondly, is it not equally astonishing that each State of the Union has its own, often very different electoral laws? Thirdly, although the High Court of Australia does, from time to time, send cases back to State courts for decision, it would never have the occasion to do so in the circumstances of a federal election remotely like those that relevantly occurred in the United States in November and December, 2000. Fourthly, is it not also remarkable that the Supreme Court should defer, to the degree that it did, in relation to a federal election, to the Florida Court in the first episode that came before it? The various episodes of this litigation certainly brought home to me the disadvantages that can attach to a federation united by rebellion, as opposed to one that evolved from an orderly, aspirational, democratic and legitimate process.

However a judiciary may be reconstructed under a republican constitution, we should make sure that litigation of the kind that occurred between Bush and Gore, and rebounded between the federal Supreme Court and the Florida State Courts there, should never take place here.

We have not however been immune to federal and State legal demarcation problems. While I would not go so far as my former colleague Heydon J, as to describe the creation of a Federal Court as a blunder,[2] I have no doubt that its establishment has increased opportunities for demarcation disputes between it and the State courts. It is an irony that the party in government which created the Federal Court had repeatedly opposed it in Opposition – just as, I might say, when it came to government it embraced it.

A particular problem is that the Federal Executive is voracious when it comes to power. I have been told – I am unable to verify whether it is so – that there is within the federal Attorney-General's department, a section whose principal duty seems to be, whether stated or not, to enlarge federal power at the expense of the States. I might say that in the '70s the Premier of Queensland established a similar unit, a "think tank" as I recall it, whose function was to repel attempted federal incursions.

When the federal Parliament enacted the *Trade Practices Act* 1974, it then enacted, as part of it, s. 86 which conferred exclusive jurisdiction, relevantly for present purposes, upon the Federal Court, subject only to the constitutionally conferred jurisdiction of the High Court.

If ever there were a recipe for problems it was that section. They soon manifested themselves.

In *Fencott v.* Muller[3] the applicants sued in the Federal Court for deceptive conduct contrary to s. 52 of the *Trade Practices Act,* attaching to that claim further claims for breach of fiduciary duty and breach of trust. There were many issues in that case, but the one of present interest was whether the Federal Court had jurisdiction to decide the non-federal claims.

It immediately strikes one as irrational and unbalanced that State courts, which had so long responsibly exercised federal jurisdiction, should at one fell swoop be deprived of it in relation to commercial affairs in which they were well experienced. It was equally irrational and unbalanced, and I might say foreseeable, that a question of the kind which did arise would arise. And, I might say, it was also foreseeable that all courts, especially new courts, of which the Federal Court was one, avid for power as they always seem to be, would seek to appropriate to themselves the power to decide every aspect of the case, including the non-federal claims.

Fencott v. Muller, which inevitably went to the High Court, was decided at a time when the High Court was as sympathetic as ever since 1920 to the expansion of federal power. Predictably it decided, albeit by a

narrow majority, that the Federal Court had full jurisdiction to decide the whole of the case, because all of the non-federal claims arose out of transactions and facts common to a federal claim, and all those claims were aspects of the matter constituting a single controversy. As the federal claim was a substantial part of the controversy, the Federal Court had jurisdiction over all the claims.

Gibbs CJ however had sought to hold the line. His Honour would go no further than to hold that the Federal Court's jurisdiction should be limited to claims for non-federal relief to the extent that the grounds were identical with the ground for federal relief, and that, in substance, if not in form, there was only one matter for determination. For completeness, I would point out that Wilson and Dawson JJ, in dissent, took an even more strict view, that the Federal Court did not have jurisdiction over any of the non-federal claims, because the facts on which the relief was sought were not identical with those upon which relief was sought in the federal claims.

It cannot be denied that an inability to prosecute all claims against the same party in the one court is inconvenient. But who caused the inconvenience? It was of course the Commonwealth, by choosing first to create an unnecessary court, the Federal Court, and then, by removing vested jurisdiction over the federal claims from the State courts, and giving it exclusively to the Federal Court.

I was in practice at the Bar at the time. There was a perception, no doubt entirely ill-founded, that in consequence, the Federal Court was the court in which to litigate because, first, it now had the jurisdiction to do just about anything; secondly, as a new court, it was not overburdened by work; and thirdly, it was very ready to display its wares by readily dispensing the very great jurisdiction conferred upon it by the *Trade Practices Act,* and confirmed by the High Court in *Fencott v. Muller* and a line of other cases.

The imbalance thereby created became too great for even the Commonwealth to disregard. The *Trade Practices Act* had to be, and was in due course, amended by altering s. 86 to restore vested jurisdiction in a number of matters under that Act to the State courts.

Be that as it may, the question that I ask tonight is how, in a republic, under a constitution reworked *de novo*, the judiciary should be organised, appointed and tenured?

I will no doubt be accused of conservatism in expressing my preference for a judiciary, and jurisdictions exercised by it, of the kind which served the country, and served it well, before 1976. I believe that already I have gone some way towards making a case for those. Let me now summarise and expand upon the case for one hierarchical judiciary without a separate federal court other than the High Court. It avoids forum shopping and jurisdictional disputes. It would eliminate the need for a separate Federal Court registry. It should on that account alone produce economies. It would better serve a highly developed, precedent based, common law system by ensuring one undivided line of legal authority. It would eliminate judicial salary leap-frogging. It would promote the more flexible deployment of judges by allowing them to move and sit where and when they are most needed, without concern about jurisdictional boundaries. It would simplify procedural and practical matters by providing for a unified set of practice rules, thereby again reducing expense and complexity. It would obviate the uncertainties attached to cross vesting by eliminating entirely the need for it. Arguments about *forum non conveniens*, and many difficult questions of conflict of laws, would disappear.

The only serious arguments I have heard against such a unified system is that there is nothing wrong with forum shopping, and that some competition between the courts, like competition in commerce, advances efficiency. Both are invalid. Why do you think people forum shop? They do it because they believe that they will gain an advantage in Court A that they would not have in Court B. That does not sound like even justice to me. As to the argument about greater efficiency, it is sufficient to say that the courts are not Adam Smith's free traders. As both a barrister and a judge throughout the period of the creation and expansion of the Federal Court, I have not seen the slightest evidence to suggest that its existence has in any way improved the performance of any other courts, or *vice versa*.

I see no reason why the States, assuming their continued existence, should not appoint all of the Magistrates and District Court judges, it being clear however that they are part of, and at the base of the one judicial hierarchy. The Commonwealth should continue to appoint the Justices of the High Court. It is the Constitutional Court, and, I would hope, would continue to be the final Court of Appeal for all matters. A democratic, prosperous, mercantile country can afford, and should enable, two appeals to be brought in important cases.

A far more vexed question would be, who is to appoint the judges of the superior Court, which should be divided into a trial division and a permanent appellate division. I myself think that rotating courts of appeal are undesirable. Too often appellate Courts constituted by trial judges defer, or certainly appear to defer, too

much to the judgment below: there but for the grace of God go I; my turn will come.

It would be resisted, but the Family Court should be part of the superior Court. Children and families are far too important to be entrusted to lesser judges. There could be further divisions within the trial division of the superior Court, but that should be a matter for legislation and regulation, and not a Constitution.

I have postponed until now the question of the means and makers of appointments of judges of the new, and fully empowered, superior Court. Politicians like the power of patronage, except of course when it is very risky. Even if it were agreed that a Judicial Appointments Commission should actually make the appointments, there would still be argument about who should appoint the Commission. I have reservations about Judicial Commissions, but that is a topic that I do not have time to pursue tonight.[4] My preference would be that appointments to a new superior Court be made by a committee of seven, constituted by the federal Attorney-General and the Attorneys-General of all of the States. If that be unacceptable, the committee could consist of two Attorneys-General of the States (taking turns), and the federal Attorney-General. There is no reason why the federal Attorney-General should have the final say. No doubt there would be compromise appointments, but I would think that there always would be. If there were to be a Judicial Commission it could similarly be appointed, each State and the Commonwealth nominating a member of it.

Who should pay for the maintenance of the judiciary? In my view, it should undoubtedly be the Commonwealth. It is likely to control the purse strings in a republic and have the capacity to pay. It would, after all, be relieved of the expense of the maintenance of an expensive separate federal judiciary.

Other people have ideas about these matters. I do not advance mine dogmatically. I advance them in order to stimulate a debate. As content as I am with our present constitutional arrangements, it would be naive for me to assume that they are immutable. What I fear is that, not just in relation to the courts, but also in relation to all other matters of detail, the non-republicans may deal themselves out of the game. In this paper I have simply tried to lay some cards on the table.

Endnotes:

1. *Bush v. Palm Beach County Canvassing Board et al.*, November, 2000.
2. 81 (ALJ) 2007 577 at 583.
3. *Fencott v. Muller*, 152 CLR 710.
4. See I D F Callinan, *Responsible Government – In Dilution*, *Quadrant*, April, 2008.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the 20th Conference of The Samuel Griffith Society.

Yesterday, in the course of doing all the other things she does in preparing for these Conferences, my wife dug out the Minutes Book containing the records of the first meetings of the Society's Board of Management. Over the months following the Society's incorporation in early January, 1992 I had written letters to about 900 people advising them of its formation and its purposes, and inviting them to become members. On 15 May, 1992 the Board met for the first time and dealt with 19 applications for membership. Some 13 of those then admitted are still members, and three of them were here last night – Charles Copeman, Derek Fowler and Joe Newton.

When the board met again a fortnight later, it dealt with another 95 applications for membership, including one from a prominent Queensland barrister, Mr Ian Callinan, QC – of whom, more later.

A week later again, the Board dealt with a further 69 applications for membership, of whom four were present last night – Noel Crichton-Brown, Jill Evans, Juliet Kirkpatrick and John Paul.

I could go on, but all I am trying to say is that, in its own small way, this Society has generated remarkable loyalties that have lasted down the years.

Of course, it has not all been smooth sailing. Even at our first Conference in the Hilton Hotel, Melbourne in July, 1992 we were being assailed by the usual ignorant – and worse still, politically tainted – journalists as "another right-wing organisation". We have survived that kind of malice, and today our bookshelves – and our website – proudly display the Proceedings of our previous 19 Conferences.

Last night we were privileged to be addressed by that same Queensland barrister, now the Honourable Ian Callinan, AC – that's Callinan with a capital C, you understand – on the topic *Superior Courts in the Republic of Australia*. Not only were we honoured by Mr Callinan's presence, in his new capacity as Vice-President of the Society, but we were also treated to a feast of ideas, robustly framed and, as always, equally robustly delivered. I am sure that, when the Proceedings of this Conference are published, his address will read as well as it sounded last night, and stimulate as much further thought.

Since our last Conference, much has happened. In particular, we have a new government in Canberra, which seems bent on re-starting the same old Republican nag that was left floundering in the run to the referendum post in 1999. Professor David Flint, who as well as being a member of our Board of Management is also the National Convenor of Australians for Constitutional Monarchy, will be addressing us on that topic over dinner this evening, so I shall say no more about it here.

Before we come to Professor Flint this evening, however, we have today a rich and varied bill of fare before us, and tomorrow morning we shall have three further papers focusing on federalism issues today both in Australia and the United States. So as usual at these Conferences, we shall not lack for intellectual sustenance.

Our program this morning begins with a session entitled *Undermining Australia's Federalism: The High Court at Work*. We have two papers directed to the federal nature of our Constitution, both as to its original intent and as to the distortions of that intent at the hands of successive centralist High Court benches. The first of those papers is to be given by Dr Nicholas Aroney, and as I am chairing this opening session I shall now move on to introducing him.

Chapter One

The Idea of a Federal Commonwealth*

Dr Nicholas Aroney

Arguably the single most important provision in the entire body of Australian constitutional law is s. 3 of the *Commonwealth of Australia Constitution Act* 1900 (UK). This section authorised Queen Victoria to declare by proclamation that the people of the several Australian colonies should be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Several things are at once noticeable about this provision. Of primary importance for present purposes is that, while the formation of the Commonwealth depended upon an enactment by the Imperial Parliament at Westminster and a proclamation by the Queen, the Australian Commonwealth was itself premised upon the agreement of the people of the several colonies of Australia to be united into a federal commonwealth.

The framers of the Constitution could arguably have used any one of a number of terms to describe the nature of the political entity that they wished to see established. The federation was established subject to the Crown and under a Constitution, so they might have called it the *Dominion of Australia* and described it as a *constitutional monarchy*. The Constitution was arguably the most democratic and liberal that the world had yet seen, so perhaps they could have called it the *United States of Australia* and described it as a *liberal democracy*. But to conjecture in this way is to hazard anachronism. The framers of the Constitution chose to name it the *Commonwealth of Australia* and to describe it as a *federal commonwealth*. What did they mean by this, and how was the idea of a federal commonwealth embodied in the Constitution which they drafted?

The use of the word *commonwealth*, the origin of which is generally ascribed to Henry Parkes, appears to have generated a great deal of debate, both behind the scenes and in public.[1] The use of the expression *federal commonwealth*, however, appears to have received much less explicit attention. Samuel Griffith appears to have been the first to use it during the first Federal Convention held in Sydney in 1891.[2] The phrase did not appear in the draft constitutions prepared by Andrew Inglis Clark and Charles Kingston,[3] but did appear in the draft Constitution Bill prepared by Griffith, Inglis Clark and Edmund Barton, together with the designation *Commonwealth of Australia*.[4] Thereafter, and especially during the second Federal Convention held in 1897-98, the delegates used the expression *federal commonwealth* freely and frequently to designate the entity they wished to see created.[5] Although the meaning of the phrase itself was not analysed at length until John Quick and Robert Garran published their monumental commentary on the Constitution in 1901,[6] the ideas and values signified by the phrase were the subject of a great deal of discussion.

The inspiration for the expression *federal commonwealth* can almost certainly be traced to James Bryce's highly influential book, *The American Commonwealth*.[7] Bryce's influence upon the framers of the Australian Constitution is well known.[8] His basic idea was that the American political system is best understood as:

> "a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs".[9]

Bryce was here echoing a conception of the federal commonwealth which had been previously described by Montesquieu in his famous *L'esprit des Lois*, first published in 1748. Montesquieu had said that a *federal republic* arises when:

> ".....several smaller States agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies, that constitutes a new one, capable of increasing by means of new associations till they arrive at such a degree of power as to be able to provide for the security of the united body. … As this Government is composed of small Republics, it enjoys the

internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large Monarchies".[10]

The influence of this idea of a Commonwealth of commonwealths can be traced in a direct line from Montesquieu, via the framers of the American Constitution, down to those who drafted the Australian Constitution in the late 19th Century. Alexander Hamilton, although the sincerity of his attachment to the idea may be doubted, adopted Montesquieu's definition of the federal republic in one of his letters to the *Independent Journal*, calculated to convince voters in the State of New York to ratify the proposed Constitution, and soon thereafter republished in a collection of 85 essays which we today know as *The Federalist Papers*.[11] In turn, Hamilton's essay (which we know as *Federalist No. 9*) was cited by Thomas Just in a little known, but highly significant, compendium which he prepared for the delegates to the Federal Convention of 1891 on the order of the government of Tasmania, and most probably on the instructions of Andrew Inglis Clark.[12]

Thomas Just's book contained a variety of extracts from various important writings on the idea of a federal commonwealth. Just's presentation of these extracts was done in a way that was apparently calculated to guide the reader in a certain direction. Most conspicuous among these were a number of extracts from *The Federalist Papers*, including Hamilton's *Federalist No. 9* and James Madison's *Federalist No. 39*. In Just's presentation, these extracts seemed to provide appropriate guidance on almost all important issues relating to Australian federation, apparently on the premise that "the Constitution of the United States was framed under similar circumstances to those which should mark the formation of the Constitution of United Australasia".[13] Just used Hamilton (and Montesquieu before him) to present the idea that a federation is essentially an "assembly of States" which is at the same time itself a "State", and in which the several States are constituent members, entitled to separate representation in the institutions of the federal government and an exclusive sphere of "sovereign" power over their own internal affairs.[14]

While there were disputes over the details, as well as a small handful who dissented, it was this general conception of a *federal commonwealth* which animated the vast majority of the framers of the Australian Constitution and represented the general consensus of opinion among them. Time and again, the framers reasoned in terms of the idea of a federal commonwealth – the idea that the proposed Constitution must create a Commonwealth of commonwealths, a political community which is itself composed of constituent political communities more essential to its existence than it is to theirs. The Australian framers in particular learned from James Madison that this premise – of a federal state constructed out of constituent states – must have an influence upon institutions, decision-making processes, configuration of powers and amendment processes adopted under a federal constitution.[15]

Madison had pointed out in *Federalist No. 39* that a genuine federation is premised upon the consent of all of the constituent states – which is to say that it is founded upon a unanimous agreement among them.[16] However, the formation of a federal commonwealth means that those states have agreed to a joint political destiny, and so they consent to a political decision-making process in which decisions are taken by some form of majority rule. And yet, because the states come into the federation as equals, they are entitled to equal respect in that decision-making process. For Madison, the proposed US Constitution gave effect to both of these principles; first, in the form of the House of Representatives, representative of the people of the nation as a whole, second, in the form of the Senate, representative of the States on the basis of equality, and third, in the form of the President, chosen through an electoral college representative of both the nation as a whole and the separate States.[17]

The specific form in which these principles could be embodied could vary, however. The Australians followed the Americans in constructing a House of Representatives in which the people of the entire Commonwealth would be represented, but diverged from the American example in providing for the direct election of the Senate by the people of each State, and deviated even more extensively by making provision for a system of parliamentary government in which the Commonwealth executive would be responsible primarily to the House of Representatives. And yet, after prolonged debate, the Australians settled upon a formula which gave the Senate power to refuse to pass the annual supply bills, a power which could be used to bring down a government.[18]

Since in such a system the constituent States enter the federation as previously existent, mutually independent, self-governing political communities, it followed for the Australians that it was not the task of the federal Constitution to establish them as such, nor to invest them with powers.[19] The existence and self-governing capacities of the constituent States were indeed the presupposition of federation. The purpose of the

federal Constitution was to establish and empower a newly-formed federal political community which would be responsible to undertake those governing tasks that could be better addressed by a federal government. Moreover, the object of federation was to create a federal commonwealth in which the States would continue to exist and function as such. Thus, as Madison had pointed out, it was appropriate for the Constitution to confer only specific powers upon the Commonwealth, leaving the States to continue to exercise their original, "sovereign" powers, subject only to the competencies transferred to the Commonwealth.[20]

Finally, Madison in effect pointed out that federation involves not only a commitment to a joint political action, but also a joint constitutional destiny.[21] While the constituent States entered the federation by unanimous consent, they committed themselves to the amendment of the Constitution by a decision-making procedure over which they did not retain an individual veto. For the framers of the Australian Constitution, just as the representative principle appropriate to a federal commonwealth was one in which both the people of the Commonwealth and the peoples of the States were represented in the Parliament, so the amendment formula recognised a role for the people (and their representatives) at both a Commonwealth and a State level, in both cases voting by majority.[22] And yet the decision-making process was not simply one of majority rule in all respects. Unanimity was the basic decision-making rule underlying the formation of the federation in the first place, and it remained appropriate to continue that decision-making rule in respect of those matters the constituent States were not yet prepared to relinquish entirely. Thus, the general process for amending the Constitution was in most respects one in which the final decision would be referred to both the people of the Commonwealth as a whole and to the peoples of the States voting in a referendum. However, amendments to the representation of the people of a State within the Parliament, or alterations to the boundaries of a State, would require the consent of the people of the State concerned.[23] In other words, to alter matters as fundamental as this, there was a reversion to the underlying principle of unanimity – a principle which required the consent of each constituent State to a proposed constitutional alteration of this kind.

I have elsewhere argued that this very same principle ought to apply to any amendment to the so-called "covering clauses" of the *Commonwealth of Australia Constitution Act*, including the Preamble.[24] The amendment of the existing Preamble or the insertion of a new one to take its place should depend, I have argued, upon the agreement of the people of every single Australian State, and not just of a majority of the Australian States. While the matter is certainly not without doubt, this issue of how the existing Preamble might be altered or replaced shaped the specific proposal presented to the voters during the constitutional referendum on an Australian republic and a new Preamble in 1999.[25] It will also shape any future proposal either to amend the existing Preamble or insert a new one.

This idea of a federal commonwealth has implications for how the Australian Constitution ought to be interpreted. Stephen Gageler, the newly appointed Solicitor-General of the Commonwealth, wrote an article two decades ago in which he argued that because the Australian Constitution contains a complex system of "political" mechanisms through which Commonwealth decision-making is channelled and a certain "equilibrium" of the federal system maintained, it is not the task of the courts to impose an additional set of what might be called "judicial" safeguards.[26] This means that when asked to rule on questions of whether Commonwealth laws fall within one of the heads of power contained in s. 51 of the Constitution, the courts – and especially the High Court of Australia – should ordinarily adopt a deferential standard of review. The Parliament's judgment that its legislation is indeed constitutional should be given the benefit of the doubt,[27] and federal legislation should only be held unconstitutional if no rational connection with an affirmative grant of power can be demonstrated at all.[28]

The grounds of Gageler's argument are diverse. He recites the views expressed by several framers of the Constitution, but does not seem to consider these views to be in any sense binding or authoritative. He also relies very heavily upon a particular interpretation of certain *dicta* in the judgment of Isaacs J in the *Engineers Case*, but does not in any place state clearly that he would rely on those *dicta* as a matter of authoritative precedent. Gageler alludes to the practical functioning of the political process in Australia, suggesting that the Commonwealth Parliament can be trusted to represent the considered views of the entire Australian people, but the claim remains very abstract, and is not subjected to the critical attention that would be necessary in order to establish it as a well-founded, empirical fact.[29] Gageler likewise finally concludes by pointing to "the centrality of the political process *in the Australian Constitution*",[30] suggesting, perhaps, that it is the text and structure of the Constitution itself that is ultimately determinative on this point; but nowhere in the article

is there a close examination of the relevant provisions and the institutions to which they give rise in order to make good this argument.

It lies beyond the scope of this paper to scrutinise each of these points. What I propose to do in the remainder of this paper is to focus on the way in which the framers conceived of the task to be undertaken by the High Court of Australia, with its implications for the way in which the High Court ought to go about its task of constitutional interpretation in federalism disputes.[31]

It is possible both to underestimate and to overestimate the significance of the High Court's role as the framers largely conceived it.[32] A clear majority of the framers believed that the structure of the Commonwealth Parliament and, in particular, the Senate would be an important mechanism by which the peoples of the States would be represented and the interests of the States taken into consideration. They therefore insisted that each of the constituent States should be equally represented in the Senate, and that the Senate should be just about as powerful as the House of Representatives. Those, like Isaac Isaacs and Henry Bournes Higgins, who did not wish a Senate of this kind to be established, argued that federalism is exhausted by the idea of a division of powers between the federation and the States, enforced by the courts. In this specific context, their argument *overestimated* the importance of the High Court and the division of powers, making this *the* centrepiece of the federal system. Against this, the vast majority of the framers of the Constitution considered that federalism implies, as well, a mechanism by which the States are represented in the decision-making institutions of the federation as a whole, that is, through their equal representation in a powerful Senate.

But it is also possible to *underestimate* the significance of the High Court's role as the framers conceived it. While the vast majority did not regard the High Court as the only means by which the interests of the States might be protected, they certainly thought it should have a very important role in resolving disputes between the Commonwealth and the States concerning the scope of their respective powers and responsibilities. Indeed, it was precisely as the specific design and composition of the Senate evolved during the course of the debates that the role of the High Court was itself clarified and emphasised.

The equal representation of the States in the Senate was never doubted. Throughout the Federal Convention of 1891, it was proposed and generally agreed that Senators would be nominated by the respective State Parliaments on the model of the US Constitution as it then provided.[33] Given that under the practices of responsible parliamentary government, the executive governments of each State enjoyed the confidence of at least the lower houses of their respective Parliaments, this would have meant that the Senators nominated by the State Parliaments would have been representative, not only of the State Parliaments but also of the views and interests of the State governments. At this early stage in the debate the need to provide for a federal Supreme or High Court was also recognised, especially as a general (and possibly final) court of appeal for the entire federation,[34] and as the means by which federal law would be applied directly to the citizen,[35] but its role as an arbiter of federal disputes and as an enforcer of the Constitution, while certainly recognised, was much less prominent.[36] Accordingly, in the draft Constitution Bill that emerged from the Federal Convention of 1891, provision was made to give the Commonwealth power to establish a Supreme Court of Australia; the existence of the Court was not established by the Constitution itself, but made contingent upon the Commonwealth taking steps to create it.[37]

Following the Convention of 1891 and leading up to the Convention of 1897-98, several important changes occurred. One was that the process by which the Constitution was to come into being was made by the Enabling Acts passed in each colony to depend upon the agreement of the people of each colony voting in a referendum.[38] Associated with this move to direct, popular ratification of the Constitution was the view that the Senate ought similarly to be directly elected by the people of each State, rather than nominated by the State Parliaments.[39] As such, the Senate would be representative of the people and give effect to the federal principle in that respect, but the degree to which the Senate would be representative of the views and interests of the governments of the States was to that extent significantly reduced, if not eliminated. Notably, at around this time as well, the framers began to take much more interest in the High Court and its role in interpreting the Constitution and resolving federal disputes. John Quick and Robert Garran, in two works prepared for the Convention of 1897-98, both argued that judicial review under a written constitution was an essential element of a federal system.[40] As Garran put it, the "essential characteristics" of federal government are:

"(1) The supremacy of the Federal Constitution.
(2) The distribution, by the Constitution, of the powers of the Nation and the States respectively.
(3) The existence of some judicial or other body empowered to act as 'guardian' or 'interpreter' of the Constitution".[41]

Consistent with this perspective, from the very beginning of the debate within the second Federal Convention of 1897-98, the High Court's role as constitutional adjudicator between the Commonwealth and the States was very clearly in view.[42] In addition to a general appellate jurisdiction from the decisions of the Supreme Courts of the States, specific provision was made for jurisdiction to be conferred upon the High Court by the federal Parliament to hear matters "arising under the Constitution, or involving its interpretation".[43] According to Josiah Symon, the High Court was going to be the "keystone of the federal arch" and essential to the very "fabric" of the Constitution.[44] According to William Trenwith, it would be the "custodian of the Constitution".[45] According to Edmund Barton, the Court would be "the bulwark of the Constitution" and its "supreme interpreter".[46]

Given the critical role that the High Court would play, much closer attention was now given to such matters as the number of Justices to be appointed to the High Court, the mode of appointment, the grounds of removal from office and the extent of the Court's jurisdiction. In particular, there was concern to ensure that members of the Court could only be removed upon an address of both houses of Parliament upon proved "misconduct, unfitness, or incapacity", as Kingston proposed in 1897.[47] Kingston's argument was that it was necessary to "preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament".[48]

Isaacs and Higgins thought the amendment unnecessary.[49] Responding in support of Kingston, however, Symon pointed out that because the High Court would be called upon to "safeguard the liberties of the subject and the rights of the individual States against the encroachment of the [Commonwealth] Legislature", it was vital that its independence be "absolutely assured".[50] For Barton, it was precisely because the Court would be called upon to scrutinise federal legislation to determine whether it was consistent with the Constitution that it was necessary for the Court to be protected from attack by the Commonwealth Parliament, and it was in disputes between the States and the Commonwealth that the most serious of such cases would arise.[51] For Downer, what was particularly important was that the Commonwealth be prevented by the Court from pursuing powers and enacting legislation on topics "never intended by the founders of the Constitution".[52]

What is especially clear, then, is that it was because the framers wished to ensure that the allocation of only limited powers upon the Commonwealth would be maintained that they provided for the creation of an independent High Court with the power of judicial review. They recognised the immensity of the power involved – that the High Court, as Symon put it, would be "equal to, if not above, the Parliament and Executive" in this respect.[53] Indeed, such was the power that the High Court would now exercise, there were even attempts to ensure that its composition would be reflective, if not even representative, of the several States. At Melbourne in 1898, Patrick Glynn (unsuccessfully) proposed that the High Court should consist of a Chief Justice and, until Parliament otherwise provided, the Chief Justices of the several States.[54] Glynn's stated reasons were financial: in its early years, the High Court would not have much work to do, and so it would be expedient to make use of the Chief Justices of the States as an interim measure.

Barton's chief objection to this was that the proposal placed the composition and indeed even the existence of the High Court ultimately under the control of the Commonwealth, enabling the Commonwealth to "alter the arrangements upon the faith of which" the various States would agree to federate – a "structural change", he said, "in the whole fabric of the Constitution" which would undermine and perhaps even eliminate the role of the Court as arbiter between the Commonwealth and the States *at the behest of the Commonwealth*.[55] Barton also argued that the appointment of the Chief Justices of the States would lead to the suspicion that they were intended to be representative of provincial interests rather than impartial between the interests of both the Commonwealth and the States.[56] As Symon put it, they would "owe their judicial allegiance and their emoluments to the separate States".[57] But to this Kingston retorted that if the High Court was to be appointed solely by the Commonwealth there would likewise be an apprehension of bias – *unconscious bias*, as James Walker explained – in favour of the Commonwealth, and that the best solution was to make the Court representative of both the Commonwealth and the States.[58]

On both sides of this debate, it was expected that the High Court would have to resolve disputes between the Commonwealth and the States and that it ought to do so in terms that were impartial between both parties.[59] The framers were conscious, as Richard O'Connor later put it, that the Court would have to decide questions which would become matters of "burning political moment" – questions which would affect the interests of the States and the Commonwealth and would likely give rise to "heated controversy" between the two.[60] After almost a century of High Court interpretations of the Constitution which have been friendly to the Commonwealth at the expense of the States, we may regret that something like Glynn's proposal was not accepted.

This closer attention given to the High Court at the Convention of 1897-98 could be explained simply on the ground that, after almost a decade of debate on the question of federation, the attention to detail had increased, the framers had become better informed and the arguments had become more sophisticated.[61] However, this greater emphasis upon the High Court can also be explained as a response to the fact that the Senate was now to be directly elected by the people of the States – properly representative of them, but to that degree less representative of the interests of the State governments, in which context some *additional* safeguard was doubly necessary, namely the High Court of Australia exercising judicial review. Certainly Edmund Barton thought that the most essential element of the federal project was the establishment of a relatively powerful Senate in which the constituent States were to be equally represented; but, at the same time, if the Senate should fail to protect the rights of the States, he said, the High Court should be called upon to adjudicate.[62]

The framers therefore expected the High Court to be the final bulwark of the Constitution – to resolve disputes between the Commonwealth and the States over its interpretation – and in so doing, to give effect to their general vision of a "federal commonwealth". This vision involved, as I have suggested, several basic ideas: first, that the Constitution would be founded upon the consent of the people and governments of each constituent State; second, that the Constitution would *establish* the Commonwealth and *continue* the existence of the States; third, that the Commonwealth Parliament would be representative of both the people of the Commonwealth as a whole and the peoples of the several States; fourth, that specific and limited powers would be conferred upon the Commonwealth, while the States would *continue* to exercise the legislative and other governmental powers which they had possessed prior to federation; fifth, that should the Commonwealth Parliament purport to enact legislation which, despite the existence of the Senate, exceeded its constitutional powers, the High Court would be called upon to enforce the Constitution against the Commonwealth (and likewise act against unconstitutional legislation by the States); and, sixth, that the entire Constitution should only be altered in ways that reflected its character as the Constitution of a federal commonwealth – a process in most cases requiring the consent of a majority of voters in Australia and a majority of voters in a majority of States, but in certain crucial cases, requiring the consent of a majority of voters in every State affected by the proposed alteration.

Contrary to the attitude adopted by Isaac Isaacs in the infamous *Engineers Case* of 1920, the Constitution is not to be reduced to a mere statute of the Imperial Parliament at Westminster.[63] Nor is it, as Isaacs J there suggested, a compact simply of "the people of Australia".[64] It is, rather, the result of a federating process in which the voters of each of the several Australian States participated; and the terms and structure of the Constitution reflected this fact.

With the greatest of respect to the many members of the High Court who have thought differently over the years, it is quite contrary to the text and structure of the Constitution to interpret each head of legislative power conferred upon the Commonwealth in the very widest terms which the language possibly allows.[65] Each head of power is capable of alternatively narrower or wider interpretations. The High Court ought rather to adopt an interpretation of each head of power which takes fully into consideration the underlying idea that the Commonwealth Parliament is designed to be a legislature of specific and limited powers, and that the Constitution preserves the existence and continuing capacities of the States as self-governing bodies politic.[66] This does not necessarily mean that the Court should adopt the very narrowest possible interpretation of each head of power conferred upon the Commonwealth, but it certainly means that neither should the Court necessarily adopt the very widest possible interpretation.

There is no pre-defined "federal balance" to which it is possible to point in this regard. There are interpretive choices to be made. But the federal scheme of the Constitution gives the Court good reason, when making

those choices, to take into consideration the fact that the framers of the Constitution intended to create a federal commonwealth in which the Commonwealth would certainly have significant powers, but also one in which the State governments would continue to be the means by which the peoples of each State would continue to exercise a substantial capacity to govern themselves.

The framers were strongly united on the importance of judicial independence as a means to this end of keeping both the Commonwealth and the States within their respective spheres. As Downer put it, the High Court would exercise "vast powers of judicial decision" in determining what would be "the relative functions of the Commonwealth and of the States". And he seemed to speak for many of the framers when he added that the Court would have:

> "…..the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us. With this Supreme Court, particularly in the earlier days of the Commonwealth, rests practically the establishment on a permanent basis of the Constitution, because with them we leave it not to merely judicially assert the principles which we have undoubtedly asserted, but with them rests the application of those principles, and the discovery as to where the principles are applicable and where they are not".[67]

Such was Downer's conception, at least, of the role to be played by the High Court. No-one ventured to contradict him at the time. To argue, as Stephen Gageler has done, that the Court should assume that the political process is generally sufficient to protect the integrity of the States as self-governing constituents of the federation, and that the High Court should therefore presume that Commonwealth laws are constitutional unless unconstitutionality can be clearly demonstrated, is to argue at variance with the design and function which the framers of the Constitution so clearly had in mind for this keystone of the federal arch.

Endnotes:

* The paper draws on the author's forthcoming *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, Cambridge, 2008).

1. JA La Nauze, *The Name of the Commonwealth of Australia*, in Helen Irving and Stuart Macintyre, *No Ordinary Act: JA La Nauze on Federation and the Constitution* (Melbourne: Melbourne University Publishing, 2001), 158-72. La Nauze draws attention to Rev John Dunmore Lang's *Freedom and Independence for the Golden Lands of Australia* (London: Longman, 1852), 26, asserting that the "community of the Australian colonies" already formed a kind of "state or commonwealth" in the sense used by John Milton.
2. *Convention Debates* (Sydney, 1891), 523 (Samuel Griffith). See also Griffith's use of the term *commonwealth* to designate the proposed Australian federation of States: *Convention Debates* (Sydney, 1891), 490. Griffith later acknowledged that he had not liked the term *commonwealth* when he had first heard it, but now thought it to be a very appropriate word indeed: *Convention Debates* (Sydney, 1891), 553.
3. Andrew Inglis Clark, *Australian Federation: Confidential (Draft)* (1891); Charles Kingston, *A Bill for an Act for the Union of the Australian Colonies* (1891).
4. *Convention Debates* (Sydney, 1891), 521.
5. E.g., *Convention Debates* (Adelaide, 1897), 19 (Barton), 620 (Isaacs); *Convention Debates* (Sydney, 1897), 111 (Forrest), 337 (Deakin), 750-51 (Barton); *Convention Debates* (Melbourne, 1898), 21 (Deakin), 1105 (Wise).
6. *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney, 1901; reprinted by Legal Books, Sydney, 1976), 292-4, 332-42.
7. James Bryce, *The American Commonwealth*, 2 vols (2nd ed, Macmillan, London, 1889). Indeed the first instances of the word *commonwealth* in the Convention debates appear in connection with the United States: *Convention Debates* (Sydney, 1891), 148 (Rutledge), 315 (Henry Parkes), 402 (Thynne). See La Nauze, *The Name of the Commonwealth of Australia*, *loc. cit.*, 172. There is also a hint of the idea of a

federal commonwealth in Edward Freeman's influential essay, *Presidential Government*, in *Historical Essays*, First Series (4th ed, London: Macmillan, 1886), 392. On Bryce and Freeman and their influence in Australia, see Nicholas Aroney, *Imagining a Federal Commonwealth: Australian conceptions of federalism, 1890-1901*, (2002) 30(2) *Federal Law Review* 265.

8. Alfred Deakin, an intellectual leader among the Australians, considered the debt they owed to Bryce to be "almost incalculable". The remarks of Charles Kingston, then Premier of South Australia, were not untypical; he referred to Bryce as "one of the highest constitutional authorities". See *Conference Debates* (Melbourne, 1890), 25-6; *Convention Debates* (Adelaide, 1897), 288; *Convention Debates* (Sydney, 1897), 287. La Nauze remarked that Bryce's *The American Commonwealth* was "the compulsory reading of the framers of the Constitution" and the "bible" of the 1891 Convention, and he observed that "[i]n the years ahead the cleverest and the dullest of the men of the Conventions would quote Bryce to add weight to their words": JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Carlton, 1974), 18-9. The importance of Bryce is undoubted, but it is possible to over-estimate his influence. Sir John Downer was perhaps more candid than most when he stated: "I humbly follow Mr Bryce when Mr Bryce happens to agree with my own views": *Convention Debates* (Adelaide, 1897), 209. None the less, the citations from Bryce within the Federal Conventions were extensive, unparalleled and usually deferential. See, e.g., *Convention Debates* (Adelaide, 1897), 30 (Baker), 98-102 (Higgins), 135 (Symon), 158 (Lyne), 209 (Downer), 243-4 (Fysh), 288-9, 293 (Deakin), 325 (Gordon), 536-8 (Glynn), 582 (Deakin), 646 (Higgins), 665 (Glynn), 704 (Deakin), 963 (Glynn), 965 (Symon), 1015 (Barton); *Convention Debates* (Sydney, 1897), 56 (Deakin), 287-8 (Kingston), 536 (Glynn), 584 (Deakin), 588 (O'Connor), 637 (Dobson), 663 (Isaacs).
9. Bryce, *American Commonwealth*, I, 12-15, 332. For a discussion of this idea, see Nicholas Aroney, *A Commonwealth of commonwealths: Late nineteenth century conceptions of federalism and their impact on Australian federation, 1890-1901*, (2002) 23(3) *The Journal of Legal History* 253.
10. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, translated by T Nugent (Hafner, New York, 1949, I:IX:1).
11. Clinton Rossiter (ed), *The Federalist Papers* (New American Library of World Literature, New York, 1961).
12. Thomas C Just, *Leading Facts connected with Federation Compiled for the Information of the Tasmanian Delegates to the Australasian Federal Convention 1891, on the Order of the Government of Tasmania* (The Mercury Office, Hobart, 1891). See La Nauze, *Making of the Australian Constitution*, 23.
13. *Ibid*., 33. On Just's use of *The Federalist*, see 33-4, 37-8, 44, 49-7.
14. *Ibid*., 37. For a discussion, see Nicholas Aroney, *Imagining a Federal Commonwealth*, *loc. cit.*.
15. For a detailed discussion, see Nicholas Aroney, *The Constitution of a Federal Commonwealth*, chs 7-11 (*op. cit.*, forthcoming). See also Nicholas Aroney, *Formation, Representation and Amendment in Federal Constitutions*, (2006) 54(1) *American Journal of Comparative Law* 277.
16. Madison, *Federalist No. 39*, in Rossiter, *The Federalist Papers*, *loc. cit.*, 243-4.
17. *Ibid.*, 244.
18. Henry Bournes Higgins foresaw and lamented the significance of the Senate's power: it could delay supply bills, he said, it could reject supply bills, and it could thereby "keep Ministers on tenterhooks" and force them to "yield": Henry Bournes Higgins, *Essays and Addresses on the Australian Commonwealth Bill* (Melbourne: Atlas Press, 1900), 16-7.
19. See Nicholas Aroney, *The Constitution of a Federal Commonwealth*, ch 9 (*op. cit.*, forthcoming).
20. Madison, *Federalist No. 39*, 245.
21. *Ibid*., 246.
22. Australian Constitution, s. 128.
23. *Ibid.*, para 5. Compare, also, Australian Constitution, s. 51(xxxvii) and (xxxviii); *Australia Act* 1986 (Cth), s. 15.
24. Nicholas Aroney, *A Public Choice: Federalism and the Prospects of a Republican Preamble*, (1999) 21 *University of Queensland Law Journal* 205. Section 128 of the Constitution applies only to the amendment of the Constitution of the Commonwealth as contained in s. 9 of the *Commonwealth of Australia Constitution Act*. It does not extend to the amendment of the *Constitution Act* itself.
25. Rather than proposing the insertion of the new Preamble at the beginning of the *Constitution Act*, the referendum question asked Australian voters to approve the insertion of the new Preamble into the text

of the Commonwealth Constitution, contained in s. 9 of the *Constitution Act*. See *Constitution Alteration (Preamble) Act* 1999.

26. Stephen Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162. Gageler revisited the argument in a paper recently delivered to *The Future of Federalism* conference, Brisbane, 10-12 July, 2008, provisionally entitled, *The Federal Balance: Cases and Judicial Attitudes in the High Court of Australia*.
27. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, *loc. cit.*, 188.
28. *Ibid.*, 197.
29. Broadly the same idea was first proposed in the United States by Herbert Wechsler in *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, (1954) 54 *Columbia Law Review* 543. It has since been scrutinised, for example, in John Yoo, *The Judicial Safeguards of Federalism*, (1997) 70 *Southern California Law Review* 1311; Larry Kramer, *Putting the Politics back into the Political Safeguards of Federalism*, (2000) 100 *Columbia Law Review* 215; and Lynn Baker and Ernest Young, *Federalism and the Double Standard of Judicial Review*, (2001) 51 *Duke Law Journal* 75.
30. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, *loc. cit.*, 197, emphasis added.
31. See, further, Nicholas Aroney, *Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism*, (2008) 27 *University of Queensland Law Journal* 129.
32. On the general topic of judicial review in Australia, see PH Lane, *Judicial Review or Government by the High Court*, (1966) 5 *Sydney Law Review* 203; Geoffrey Lindell, *Duty to Exercise Judicial Review*, in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Sydney: Butterworths, 1977); James Thomson, *Constitutional Authority for Judicial Review: A Contribution from the Founders of the Australian Constitution*, in Craven (ed), *The Convention Debates* (1986), Vol 6; Brian Galligan, *Politics of the High Court* (1987), ch 2.
33. In 1913, the US Constitution was amended to make Senators directly elected by the people of each State. Before then, Senators were nominated by the State legislatures. See US Constitution, Seventeenth Amendment.
34. *Federal Conference* (1890), 57, 72, 109, 148, 180, 197; *Federal Convention* (Sydney, 1891), 23, 26 (Parkes), 34 (Griffith), 45 (Fysh), 52 (Munro), 83 (Deakin), 96-7 (Barton), 103 (Downer), 126-7 (Jennings), 152 (Rutledge), 209 (Brown), 216-17 (Wrixon), 253-5 (Clark), 294-5 (Cuthbert), 306 (Suttor), 473-4 (Wrixon), 475 (Kingston), 527 (Griffith), 786-7 (Dibbs), 787 (Downer).
35. *Federal Conference* (1890), 89, 91; *Convention Debates* (Sydney, 1891), 95-6 (Barton). Note also Andrew Inglis Clark's calls for a distinct system of federal courts: *Federal Convention* (Sydney, 1891), 253-4, 474-5, 499.
36. Both James Bryce and AV Dicey had pointed out that judicial review was the means by which a federal constitution is enforced in the face of infractions by either the state or federal governments: Bryce, *American Commonwealth*, I, 225-8, 235-6, 237-43, 247; Dicey, *Law of the Constitution*, 130-55, 410-13. Cases in which the Supreme Court of the United States had interpreted and applied the Constitution in federalism disputes were cited and discussed by the Australians, but the general principle of judicial review presupposed in these cases was generally passed over. See, e.g., *Federal Conference* (1890), 45-6, 99. Perhaps the clearest statement of the court's judicial review role was by Edmund Barton: *Federal Convention* (Sydney, 1891), 96-8 (Barton); cf also 103 (Downer), 163-4 (Kingston), 294-5 (Cuthbert), 473-4 (Wrixon), 475-6 (Downer), 663-4 (Clark), 692-3 (Gordon), 696-7 (Kingston), 698 (Clark), 767 (Wrixon). Others recognised that judicial review would make the court even more powerful than the legislature (*Federal Convention* (Sydney, 1891), 198 (Moore)) and enable it to control the meaning to be given to the Constitution (*Federal Convention* (Sydney, 1891), 210-11 (Brown), 476 (Downer)). Apart from these references, however, there was generally only minimal recognition in 1891 of the role of the Court in interpreting the Constitution and resolving federal disputes.
37. *Commonwealth of Australia Bill* (1891), Ch 3, s 1. For the text, see *Federal Convention* (Sydney, 1891), 956.
38. E.g., *Australasian Federation Enabling Act* 1896 (Vic), ss 33-38.
39. See *Federal Convention* (Adelaide, 1897), 26-7 (Barton), 641 (Draft Bill, cl 9), 1223 (Draft Bill, cl 9).
40. Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (1897), 15-

16; John Quick, *A Digest of Federal Constitutions* (1896), 10-14.

41. Garran, *The Coming Commonwealth*, 23–4.
42. *Convention Debates* (Adelaide, 1897), 24-5 (Barton), 129 (Symon), 962 (Barton, referring to an observation of O'Connor's).
43. Australian Constitution, s. 76(i).
44. *Convention Debates* (Adelaide, 1897), 950 (Symon). Alfred Deakin said the same thing when introducing the *Judiciary Bill* into the Commonwealth Parliament in 1902: *Commonwealth Parliamentary Debates, House of Representatives*, 1902, p. 10967. Isaac Isaacs, less persuasively, had claimed that it would be parliamentary responsible government that would be the keystone of the federal arch: *Convention Debates* (Adelaide, 1897), 169.
45. *Convention Debates* (Adelaide, 1897), 940 (Trenwith).
46. *Convention Debates* (Adelaide, 1897), 952 (Barton).
47. *Convention Debates* (Adelaide, 1897), 947 (Kingston), cf 950-51 (Symon). Thus going further than the Canadian Constitution (*British North America Act* 1867 (UK), s. 99(1)), and before that the *Act of Settlement* 1701 (UK) (12 & 13 Wm 3 c.2), s. III.
48. *Convention Debates* (Adelaide, 1897), 946 (Kingston).
49. *Convention Debates* (Adelaide, 1897), 947-9 (Isaacs), 953 (Higgins). And yet, both Isaacs and Higgins thought that it was necessary to create a strong and independent Court. Higgins in particular saw a vital role for the Court in deciding "between the States and the Federation and upon encroachments by the Federation upon the States": *Convention Debates* (Adelaide, 1897), 953 (Higgins).
50. *Convention Debates* (Adelaide, 1897), 950 (Symon).
51. *Convention Debates* (Adelaide, 1897), 952-3, 962 (Barton).
52. *Convention Debates* (Adelaide, 1897), 557 (Downer).
53. *Convention Debates* (Adelaide, 1897), 942 (Symon).
54. *Convention Debates* (Melbourne, 1898), 265-8, cf 944. Samuel Griffith had previously suggested something along these lines: see *Convention Debates* (Melbourne, 1898), 270-71 (Symon, referring to Griffith). Glynn's proposal was supported by Kingston and Gordon, but opposed by Wise, Barton, Downer, Higgins, Isaacs and Symon. See *Convention Debates* (Adelaide, 1897), 115-6 (Wise), 117 (Gordon), 130-31 (Wise), 268 (Barton), 272-3 (Kingston), 274 (Downer), 279-81 (Higgins), 283 (Isaacs), cf 369 (Barton), 946 (Wise); *Convention Debates* (Melbourne, 1898), 269 (Barton), 269 (Symon). Note also the (unsuccessful) proposal of Frederick Holder that, in any case in which the High Court had declared a federal law to be *ultra vires*, there be a mechanism by which the matter could be referred to a popular referendum of the voters of the Commonwealth and of the States and that, should the referendum approve the federal law in question, the Constitution should be deemed to have been amended to the extent necessary and the law conclusively determined to be *intra vires* from the date of its enactment: *Convention Debates* (Melbourne, 1898), 1717-18.
55. *Convention Debates* (Melbourne, 1898), 268 (Barton).
56. *Convention Debates* (Melbourne, 1898), 269 (Barton), 270 (Symon).
57. *Convention Debates* (Melbourne, 1898), 269 (Symon).
58. *Convention Debates* (Melbourne, 1898), 272-4 (Kingston and Walker).
59. As Galligan, *Politics of the High Court*, 67, aptly summarised it:

    "The Australian founders had a more even-handed view of federalism than either the Americans or the Canadians, and thought that the federal government was as likely as the States to overstep its defined areas of jurisdiction. Consequently they considered judicial review by the court is absolutely crucial for keeping both levels of government within their constitutional boundaries".
60. *Convention Debates* (Melbourne, 1898), 357 (O'Connor).
61. Compare Galligan, *Politics of the High Court*, 53.
62. *Convention Debates* (Adelaide, 1897), 962.
63. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 148-154 (Knox CJ, Isaacs, Rich and Starke JJ); cf 161-2, 165 (Higgins J).
64. *Ibid.*, 153 (Knox CJ, Isaacs, Rich and Starke JJ).
65. See James Allan and Nicholas Aroney, *An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism*, (2008) 30 *Sydney Law Review* 245.
66. For more detail, see Nicholas Aroney, *Constitutional Choices in the* Work Choices Case*, or What Exactly*

is Wrong with the Reserved Powers Doctrine?, (2008) 32(1) *Melbourne University Law Review* 1.

67. *Convention Debates* (Melbourne, 1898), 275.

Chapter Two

Implied Rights and Federalism: Inventing Intentions while Ignoring Them

Professor James Allan

The thought of undertaking an exegetical analysis of the case law surrounding Australia's implied rights decisions and the division of powers federalist decisions, and doing so in 30 minutes at great speed, was a fairly unappealing prospect to me. More to the point, I reckoned it would have next to no appeal to any of you.

Instead, I thought I would try something a bit different. So I'm going to begin by asking you to remember your Jane Austen. Recall her novel *Emma*. Emma is the heroine who is the incorrigible matchmaker. Having tasted some success in this pursuit, she sets out on a new mission to arrange matters so that the local clergyman and a nice young woman of indeterminate parentage might come to see each other's attractions. Of course, the vicar misunderstands Emma's attentions on behalf of the young woman. Indeed, matters reach the point that when, by chance, Emma and he are left alone together in a carriage the vicar alludes to marriage. He does not at first explicitly state that he wants to marry Emma. Rather, he attempts to convey that meaning indirectly, to insinuate it. In other words, the vicar implies his intentions.

At first Emma misunderstands, thinking he refers to the young woman for whom Emma has been trying to matchmake. Only when the vicar is forced to be explicit – to state his intentions directly and clearly – does Emma understand. Embarrassment, rejection and hurt feelings follow.

Now my point isn't that Jane Austen's novels make for better reading than almost all statutes and judgments, though I daresay that wouldn't be an impossible case to try to make. No, my point is that attempting to imply meaning – as opposed to stating it explicitly – carries risks. The implication can be missed; it can be misunderstood.

Of course, in everyday life people imply things all the time. Generally little rides on any potential misunderstanding, and anyway we can always ask for clarification if we have any doubts about the inferences we are drawing as regards the implications our friend is making. In other words, implying something, rather than explicitly stating it, can sometimes have advantages in the day-to-day world of social interactions.

When it comes to a country's written Constitution, the framework by which its institutions will be structured and its government operated, the attractions of implying something – rather than stating it explicitly (if sometimes none the less in rather vague, amorphous and indeterminate terms) – is rather less obvious. In fact, in something as important as a Constitution we would not expect any crucial matters to be conveyed implicitly rather than explicitly.

Try it. Put yourself in the shoes of the framers of a written constitution. Make it one of the oldest democratic constitutions going. Let's pick Australia's.

And let's remember what the purpose of a written Constitution is. Its purpose is to lock things in. So perhaps a Constitution might contain an enumeration of federal and possibly State powers, or rules related to how members of the chambers of Parliament are to be selected, or provisions related to who chooses the most senior judges, or maybe even an enumerated list of embedded rights. Consider how Justice Antonin Scalia of the US Supreme Court puts it – and I like to cite Scalia, because in some self-consciously progressive academic circles the mere mention of his name is guaranteed to elicit a reflexive eye-rolling response, as though the roller were self-evidently more intelligent than Justice Scalia. But leaving aside my own sources of amusement, here's what Scalia says about Constitutions:

> "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole point is to prevent change".[1]

Put slightly differently, a written Constitution makes a few matters hard to alter, certainly harder than the regular statute-enacting process. As the American legal scholar Larry Alexander puts it – and you can relax because he doesn't elicit the eye-rolling response – in going down the route of a written Constitution we have decided that "risking rigidity rather than risking security"[2] is the better bet. (Parliamentary sovereignties such as New Zealand, and maybe still the United Kingdom – though the European Union is greatly undermining the UK's claim to parliamentary sovereignty status – have made the opposite bet.)

Now this fact about the very point of having a written Constitution that locks certain things in has a distinct bearing on how best to interpret such a document. I, personally, think there are good grounds for thinking statutes ought to be approached on a different interpretive basis than a written Constitution.[3] And I think it bears on the competing merits of "living tree" or "living document" or "progressivist" type interpretive approaches, as opposed to "original intent" or "original understanding" type approaches. In my view the latter are far more easily defended, not least on democratic grounds, as approaches to interpreting a written constitution. But that is a talk or a paper for another day.[4]

For today, let's go back to where you were putting yourself in the shoes of the framers of the Australian Constitution. Now why would you – or they – want to resort to implication when it comes to laying down society's fundamental legal framework, the core of its Rule of Recognition? More to the point of this talk, let's suppose that you and the rest of the framers wanted to include an embedded right or two that would trump the statutes of the democratically elected and legitimate Parliament. Maybe you and the framers think some sort of right to freedom of political communication is warranted.

Let me ask the question whose answer seems pretty obvious. Would you explicitly state or lay down that this right will exist? Or would you cross your fingers and hope that the explicitly laid down provisions for a system of representative democracy (say, ss 7 and 24) implied your intentions and that maybe, just maybe, some nine decades down the road a majority of top judges might "discover" or "find" this implied meaning of yours – a meaning or insinuation that lay buried in the "text and structure" of the Constitution?

If one seeks to link implications to any real life person's or group's actually held intentions, then of course things get worse. They get worse because we know that the actual Australian framers were well aware of the protection given to free speech in the First Amendment to the United States Constitution and we are well aware that those actual framers deliberately – after discussion and debate – chose not to insert any similar sort of Bill of Rights-type provision (and indeed no Bill of Rights either) into the Australian Constitution.

Nor is this some minor or ancillary matter. We are talking about a right that will afford the unelected judges the power to trump the decisions of the democratically elected legislature. As a result, one might be inclined to think that something of this magnitude would warrant an explicit provision, that the framers would not simply hope that the meaning they nowhere expressed explicitly would some day be "discovered" or "found" buried in the "text and structure" of those things they did explicitly state and lay down.

Provided one is still using the notion of an "implication" in a way that connects it to the intentions of real life human beings, then things get even worse for defenders of the so-called implied rights cases.[5] They get worse because the content, and scope, and substance of this right – today, some century later – is provided overwhelmingly by what some handful of unelected judges said in the *Lange* case,[6] and not by the nebulous, rather gaseous notions of "representative democracy" or "representative government" or anything else in the text of the Constitution. And it gets triply worse because, as s. 116 illustrates, the framers were prepared to lay down an explicit right "that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion". Why bother to do that explicitly, but merely imply a right to freedom of political communication? Hard question, isn't it?

Of course, once a precedent has been laid down, one let us suppose that has been wrongly decided, very difficult issues arise for later-in-time top judges who both recognize that this earlier precedent has been wrongly decided, but also understand the immense certainty-enhancing benefits of the doctrine of *stare decisis* – of following binding precedents. I attempted to discuss this vexing issue in my paper to this Society last year. Suffice it to say here that there is no simple formula of what to do in such circumstances and that smart, reasonable people (and that includes top judges) will differ on a case-by-case basis. It would be a brave person, luxuriating as he would be in all the benefits hindsight affords, who would criticize any top judge's choice (between following the perceived-to-be-wrongly-decided precedent, or overturning it and upsetting settled expectations) in such circumstances.

Returning to this year's topic, however, my point is that the so-called implied rights look an awful lot like judicially made-up rights. Or rather, that is the case for those who tie the concept of an implication to the

actually held intentions of real life human beings. So here's the next question. Can the notion of implications be sensibly or coherently divorced from that of actually held (but not explicitly stated) intentions of real life human beings?

I will not delve into this issue in overly great depth. Suffice it to say that such a task will be difficult. The most obvious approach to take in travelling down this route, and attempting this divorce, starts by noting that words – and marks on paper – do and can convey meaning against a backdrop of shared conventional meanings. So symbols can conceivably convey meaning even if there be no actual author (e.g., random typings by monkeys that after some huge period of time reproduce a Shakespeare sonnet). More to the point, words can convey a meaning (given some shared conventional backdrop), regardless of what the author or authors intended them to mean.

But this sort of "words can have a meaning separate from the one intended by their author or authors" does not overly much help the proponents of the implied rights jurisprudence. To help them more you would have to posit that the words used – as conventionally understood – convey a meaning in opposition to the actually held intentions of the framers. This is conceivably possible. But it seems highly unlikely as regards constitutions generally, and is even more unlikely or implausible as regards the specific question of whether the words in Australia's Constitution, given their conventional meaning, imply a right to the freedom of political communication.

Such a line of thought – that public meaning has somehow diverged from, or more accurately put, has taken on the exact opposite sense of, the intended meaning – requires you to posit a giant screw-up on behalf of the authors.

An alternative approach in attempting to divorce the notion of implications from any actually held intentions of any real life people requires you to think of constitutions not as devices to lock certain things in, but rather as some sort of vehicles for expressing society's fundamental values, in some sort of nebulous, undefined, and *Kumbaya*-singing way. And these vehicles, you need to think, were never meant to lock in the judges in any way. Lock in the rest of the voting public? Yes. The judges? No. I don't find that a remotely attractive or compelling alternative. Nor is it one which puts many – maybe no – limits or constraints on how the concept of an implication can be used by the point-of-application interpreters.

Don't get me wrong about the implied rights cases. In many ways I like the outcomes. I am a wannabe American in my attachment to wide open, vigorous free speech. I very much like the idea that there should be few constraints on speech, and particularly so in the context of matters political. I think good consequences for society follow from forcing people to have thick skins.

I am also of the view, though, that having unelected judges announce such a policy *ex cathedra* is undemocratic, illegitimate, and undermining of all the many good consequences that flow from what are sometimes referred to as the republican virtues of self-government.

That ends the first part of my appointed task, trying to convince you that our so-called implied rights cases look more like cases that invent or create or legislate rights. The framers may conceivably have intended to imply the existence of a right to freedom of political communication, but it just seems so unbelievably unlikely that this was in fact the case. Nor does any appeal to public meaning – to the understandings of the voters of the various colonies in approving the Constitution – help save the concept of implication here. It is almost always – not always, but almost always – the case that public meaning correlates or corresponds with intended meaning. There has been a giant screw-up when it does not. And there are no grounds to posit the framers' intentions were misunderstood – were turned into their polar opposites – on this issue. Only by conceiving of constitutions as loose and open vehicles for transmitting nebulous, indeterminate social values – values whose updating and "living tree"[7] or "keeping pace with civilisation"[8] aspects are handed over to the unelected judges – is there a realistic prospect of rescuing the concept of implication. Such a rescue, however, is purchased at far too high a cost. Travel down this road not only guts the concept of implication of most, if not all, of the constraints or limits on what it allows a user to do. It also elevates today's unelected judges into latter day redrafters, updaters and all-purpose fixers of the Constitution. A less appealing prospect is hard to imagine.

What about federalism then? Does the concept of an implication fare better there than it does with the right to freedom of political communication? The short answer is an unequivocal "Yes". But let me try out a rather longer answer on you.

To start, notice that there is no need here to sever the notion of implication from the actually held intentions of the framers. As Justice Callinan stated in no uncertain terms only two years ago, the Constitution "expressly,

and in many places by clearest of necessary implications, recognises the continuing existence of the States".[9] That reference to implications is a reference to actually held intentions of the real life framers, shown in part by their repeated reference to the States, not least in s. 107 and all the rest of Chapter V.

Of course, there are easy questions one can ask about federalism in Australian and hard questions. An easy question, at least an easy one in my view and the view of my colleague Nicholas Aroney, is whether the individual heads of federal power in s. 51 have been interpreted by Australia's top judges so as to extend Commonwealth power in ways that would not just have been unexpected by the framers, but wholly opposed by them? We think the answer is clearly "Yes".[10] Most obviously, the external affairs power (s. 51 (xxix)) has been used to allow the Commonwealth to move into internal affairs,[11] and the corporations power (s. 51 (xx)) has been used to allow it to move into industrial matters.[12]

In fact Nick and I have argued "that Australia's High Court has taken the *Australian Constitution* and created a … product … that ignores (or discounts so massively its weight that it amounts to ignoring) (1) the obvious attempt to create a federal system in fact, not just in name; (2) the process used to adopt the *Constitution*; (3) its structure as a whole; (4) the *Convention Debates* and drafting history; (5) various *failed* referenda aimed at increasing Commonwealth powers; and (6) the logic that tells you that a narrower, more circumscribed power that has been explicitly laid down and granted to the Commonwealth in some area (as in s. 51 (xxxv) ["Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State"]) forecloses granting the Commonwealth a wide-open, virtually uncircumscribed power over that same area via some other head of power (as via s. 51 (xx))".[13]

Another way to make the same point is to note that the cumulative way our Constitution has been interpreted, where things stand today, allows the Commonwealth a largely untrammelled legislative power, but not the States. More particularly, it allows the Commonwealth noticeably more such power than would seem was intended by the framers, or understood by the voters approving the Constitution. I'd bet that none of the Constitution's framers would ever have imagined that a century or so later the States would be as emasculated as they are today, and so dependent on the Commonwealth for their finances.

In that sense, intentions – and the implications that flow from the intended meanings of real life human beings – have been ignored when it comes to federalism.

However, there are a number of harder, more specific questions related to federalism that raise the concept of an implication, and so of original intentions. (I do not think that when it comes to federalism disputes there is any need to have recourse to the secondary ploys of i) saying public meaning diverges from intended meaning, or (ii) saying that the whole point of a constitution, and hence how it ought to be interpreted, is just to state society's most important values and hence create a vehicle through which these values and guidelines can "advance" and "grow".)

For instance, ought the s. 51 heads of power to be read individually and separately or ought they to be read as a whole? The gist of the question here is an interpretive one. Can the interpreter imply something about one head of power from reading the others or ought each one to be read in isolation. Both approaches are conceivable. The former approach can be described as requiring recourse to an implication.

And related to that issue is the so-called reserve powers doctrine, one that argues that the limited way in which a head of power is conferred on the Commonwealth bears on what powers have been reserved to the States in s. 107. Call this a negative implication if you want, the idea being that what is *not* granted to the Commonwealth under a head of power is almost as telling as what *is* granted.[14]

Again, both sides of the argument are plausible. I think intentions matter in resolving the dispute. I also think there is plenty of textual support for my pro-federalist readings here, though the text is not conclusive.

But let us be clear, the High Court from 1920 (and the *Engineers Case*)[15] onwards has overwhelmingly not agreed with that pro-federalist reading.

There are other specific matters that require recourse to implied meaning to resolve – for example, the issue of intergovernmental (or State-Commonwealth) immunities – but the two first mentioned ones are probably the most important.

There are also secondary, or ancillary questions that only indirectly bear on federalism disputes. One such ancillary question is whether failed referenda – referenda that aimed to increase Commonwealth powers but were rejected by the voters – are relevant in deciding the Constitution's meaning should the Commonwealth seek to enact legislation none the less under the unamended head of power (or without some new head of power). Can we infer that a failed referendum reinforced the generally received meaning of the words?

Think about that for a moment. In the *Work Choices Case*,[16] the majority of the High Court comprehensively rejected the claim that prior failed referenda were relevant. They stated there were "insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning".[17] Not only was there a lack of overlap or equivalence between the issue before the Court and the subject of the referenda, said these majority *Work Choices* Justices, but as well:

> "…..few referendums have succeeded. It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth is much more complex than that …. [and so we reject the suggestion] that failure of the referendum casts light on the meaning of the Constitution".[18]

My intention here is not to detail the history of what the High Court has said about the relevance of referenda to how the Constitution ought to be interpreted. It is not even to note that Justice Callinan had a view much more in line with thinking these failed referenda *were relevant*.[19] Professor Anne Twomey has done all that already in an excellent article in the *University of Queensland Law Journal*.[20] For our purposes here I simply want to do two things.

Firstly, I want to point out that if one really thinks that a failure by the electors to grant the Commonwealth some new power under an amended head of power is not relevant in any way (conclusively so, or even less than conclusively so) to the question of whether the Commonwealth can already exercise some portion of that sought after power under the existing heads of powers – that, in effect, the judges are now saying that the Commonwealth *always* had this part of the power but it did not know that was the case, nor did the electors, nor did the States, nor (perhaps) did the then existing Justices of the High Court – that this seems to me to amount to a rejection of any sort of implication at all. I, for one, cannot see how one can maintain that sort of purist line ("we need explicitness of correlation between the referendum and the court case before the former will be considered in any way at all") while accepting the thinking in the implied rights cases. If there are "insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to *any* conclusion about the Constitution's meaning"[21] (a claim I find wholly unpersuasive), then there must surely be insuperable difficulties – indeed a good many more such insuperable difficulties – in arguing from the "text and structure" of the Constitution to any conclusion about the Constitution's meaning as to whether one or more implied rights are there waiting to be discovered by present day top judges.

Secondly, I want to make it clear that I do not think it follows in any way from the fact that "few referendums have succeeded"[22] that Australia's procedure for amending its Constitution is a procedurally difficult one. The procedures to amend the Constitutions of Canada and the United States, involving the need to gain the agreement of the legislatures of large pluralities of the States and Provinces (and in the case of Canada in some instances, *all* of them), set much higher procedural hurdles. The record here simply shows that the electors like their Constitution and do not think that change is wise. That in no way amounts to a "pitiful Australian record of constitutional amendment".[23] Nor is it relevant to dismissing these failed referenda as irrelevant in the way the High Court did in *Work Choices*, without an implicit assumption that those voting against some, or all, of the proposed referenda were stupid, dumb or perhaps in need of re-education. That is the needed premise to make the failures wholly irrelevant, at least from the perspective of latter day judges deciding a head of powers dispute today.

I am completely in agreement with Justice Callinan, therefore, when he responded to this sort of thinking in the *Work Choices Case* by saying that he was "not prepared to regard the people as uninformed".[24]

In various ways, then, the concept of an implication arises in federalism, and more particularly in heads of powers, disputes. It seems to me that in all such disputes the intentions of the framers are relevant, and I would say often point in the opposite direction to the pro-Commonwealth decisions of the High Court. (In some ancillary matters one might be able to argue that the same applies to the electors in referenda, in my view.)

But let me finish by pointing to a certain irony when comparing the so-called implied rights cases and the division of powers cases. In federalism cases the High Court has generally come down on the side of *increasing* Commonwealth government power. In the free speech or implied rights cases, though, the Court's decisions have led to *decreased* or more constrained Commonwealth and State government power. In deciding the former, the federalism disputes, the judges have ignored original intentions and the various sorts of federalist implications based on intentions in favour of a sort of textual literalism. Yet in deciding the free speech

cases the same judges have put aside literalism in favour of vague appeals to the underlying structure of the document – appeals with little, if any, support from actually held intentions of real life people.

The irony of this bifurcated approach only breaks down in so far as both outcomes might be seen to be in keeping with what a "keep the Constitution up to date" desire would dictate.

Endnotes:

1. Antonin Scalia, *A Matter of Principle* (1997), p. 40.
2. Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998), p. 4.
3. See James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of Original Intent*, (2000) 6 *Legal Theory* 109-126.
4. In fact, it's one I have done in various ways already. For example, see *ibid.*, and also *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, (2006) 17 *King's College Law Journal* 1-26.
5. See, for example, *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; later revised in *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.
6. *Ibid.*. See Callinan J's judgment in *Coleman v. Power* (2004) 220 CLR 1, where he makes this point.
7. Lord Sankey. Notice how this metaphor of a constitution as a live thing is so implausible on examination.
8. Cooke.
9. *Sweedman v. Transport Accident Commission* (2006) 226 CLR 362 at 421.
10. James Allan and Nicholas Aroney, *An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism*, (2008) 30 *Sydney Law Review* 245.
11. *Commonwealth v. Tasmanian Dam* (1983) 158 CLR 1 ("*Tasmanian Dam*").
12. *New South Wales v. Commonwealth* (2006) 229 CLR 1 ("*Work Choices*").
13. James Allan and Nicholas Aroney, *op. cit.*, pp. 287-288.
14. See Nicholas Aroney, *Constitutional Choices in the* Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?,* (2008) 32(1) *Melbourne University Law Review* (in press).
15. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("*Engineers*").
16. *New South Wales v. Commonwealth* (2006) 229 CLR 1.
17. *Ibid.,* p. 100. The majority Justices were Gleeson CJ, and Gummow, Hayne, Heydon and Crennan JJ.
18. *Ibid.*.
19. *Ibid.*, p. 300.
20. Anne Twomey, *Constitutional Alteration and the High Court: The Jurisprudence of Justice Callinan*, (2008) 27 *University of Queensland Law Journal* 47.
21. *Work Choices Case*, p. 100, italics mine.
22. *Ibid.*. I believe the record is that 8 out of 44 have succeeded. And all but six failures lost on the first leg of the test, that they failed to get half of all electors to agree. (The others lost on the federalist leg of needing the electors in a majority of States to agree.)
23. Anne Twomey, *op. cit.*, p. 50.
24. *Work Choices Case*, p. 300.

Chapter Three

The Rule Of Lawyers, Not Law

Paul Sheehan

In the federal Parliament there are far more lawyers than any other group, even union officials, and the proliferation of lawyers reflects the proliferation of laws, implemented by a bureacracy that has never been more large, and a legal system that has never been more slow, more costly, or more omniverous.

We are drowning in a sea of red tape. Yet there are legal activists in Australia committed to the cause of more compulsion, more coercion and more codification. They want a whole new layer of law. Ideally, they want a comprehensive Charter or Bill of Rights enshrined in the Australian Constitution. As an interim measure, they will accept a State charter of human rights.

It sounds noble, but fortunately in New South Wales this baby was strangled at birth by Bob Carr, a non-lawyer, while he was Premier for more than a decade. As soon as Carr departed, the campaigners regrouped.

I was told by Michelle Burrell, who heads the Bill of Rights lobby group in NSW:

> "Australia is the only democratic nation in the world that does not have a national Charter or Bill of Rights. Both Victoria and the ACT have enacted new human rights laws, and a process is now underway for this in Tasmania… New South Wales risks being left behind other parts of Australia and other modern democracies".

We should hope so. To quote Bob Carr:

> "A Bill of Rights is only a device for shifting decision-making from elected governments to unelected judges".

At the 2020 ideas conference organised by the Prime Minister earlier this year, none of the delegates appeared to grapple with this social ailment of a rising tide of litigation, compulsion and intrusion, a creeping sense of entitlement over obligation, and the proliferation of tribunals with nebulous roles.

Instead, there were more calls for a Bill of Rights, coming from the existing layer of human rights and anti-discrimination bureaucracies which have proved to be largely pointless and useless. They have done nothing to reduce the systemic child abuse and neglect in Aboriginal communities. Instead, they provide a forum for vexatious zealots, such as Muslim fundamentalists attacking Christian evangelicals, while, for example, denying even the existence of hundreds of sexual assaults by Muslim men against non-Muslim women.

The human rights industry has already proved itself to be highly selective, highly ideological, and slyly vexatious. It was the human rights industry which manufactured and concocted the greatest social libel in Australian history, the claim that 50,000 Aboriginal children were stolen from their families in what amounted to *de facto* genocide – a fabrication blithely repeated by the Prime Minister in Parliament this year when he issued an apology for the excesses of the time.

In the spirit of the occasion, we were too polite to mention the lie at the time. Far from protecting the country and its international reputation from such intellectual calumny, the human rights industry actually constructed and implemented the lie.

We should all be grateful for the heroic efforts of Keith Windschuttle, who was able, single-handedly, to demolish this lie. I am delighted to see him in the audience today.

As for the creeping proliferation of litigation, complaint and legal imposition in our culture, new laws and regulations are constantly being passed while existing laws are rarely repealed. Thanks to Chris Berg, the former Director of the Institute of Public Affairs, we know that between 1980 and 2006, the number of pages of legislation passed in those 26 years was five times greater than all the legislation passed during the previous 80 years.

At the time of Federation, only 358 pages of legislation were required to lay the framework for the entire Commonwealth. Today, the Income Tax Assessment Act alone has grown from 120 pages to more than 7,000 pages.

The tide of regulation keeps rising, and thus the need for lawyers keeps rising. There are now more than 50,000 legal practitioners employed, and the amount of disputation and litigation continues to rise faster than the increase in the population. Yet what goes on in our courtrooms and tribunals often bears only a passing resemblance to the moral code by which the vast bulk of society lives and which maintains social cohesion.

We have a legal profession which professes to operate as rigorously impartial pursuers of the truth and natural justice. This is simply not true. We live with a legal system which rewards complexity, opacity and delay. We have an adversarial process so ingrained in the culture of legal practice that lawyers believe their obligation to their client is higher than their obligation to the public.

This stark divide between the rhetoric of the law and the reality of common legal behaviour was distilled in the April issue of the *Law Society Journal*, in a review of the book *The Making of Me*, by Tegan Wagner. It tells the story of her gang-rape, her ordeal with the legal system, and her efforts to reclaim her life.

The book was reviewed by Andrew Haesler, SC, who happened to be one of the three senior barristers who cross-examined Ms Wagner, then 17, over a period of three days. After offering faint praise, Haesler wrote:

> "Her desperate desire for affirmation and self-righteous tone irritates, in a way the parents of a teenager would know. Tegan is not a dispassionate observer. Her critique of the trial process suffers as a consequence…
> "Tegan claims she was raped by three brothers. Only two were convicted. I acted for the brother who was acquitted. There were sound reasons for that acquittal. Tegan's 'fairer' system would have seen my client jailed for a very long time. Her rapes were unjust and wrong, but so too would be the conviction and long-term imprisonment of an innocent boy".

I spent every minute of every day in court during the Tegan Wagner rape trial, and what Andrew Haesler, SC neglects to tell his readers is that Innocent Boy had already been convicted of gang-rape. Twice.

Innocent Boy was serving time in jail after being sentenced by Justice Brian Sully on April 22, 2004, more than a year before Tegan Wagner was cross-examined in May, 2005.

Innocent Boy had avoided trial by jury because his elder brother, and co-accused, had deliberately aborted the trial. He then avoided conviction because Justice Peter Hidden, although he made it clear to Ms Wagner that he did not doubt the veracity of her testimony, said he could not convict in the absence of any corroborating evidence.

Innocent Boy is now the subject of a fourth gang-rape complaint, independent of the three earlier gang-rape cases.

Had he been on trial before a jury of his fellow citizens, instead of a judge alone, he would have been convicted of rape, like his brothers. By what logic can a senior counsel describe his client as an Innocent Boy, and by implication, himself as the man who saved him?

The truth is different. Here is a brief taste of what I saw in court:

> Haesler: "I suggest that in your evidence, Ms Wagner, and in your tapes, that you invented much of what happened in the bedroom?".
> Tegan Wagner: "I didn't invent anything".
> Haesler: "I suggest that both in your evidence and in the tapes you have hidden some of the things that you know occurred in the bedroom?".
> "I didn't hide anything. Everything that I remember I put down in my statement…".
> Haesler: "I suggest to you then you have not told the truth about who you went into the bedroom with initially?".
> "No, I have told the truth…".
> Haesler: "Then I suggest that you have invented or added at least one extra person?".
> "I have not invented or added anybody. It was three".
> Haesler: "You agree that your memory was affected in some respects by what occurred that night?".
> "Yes".

That was the core of Haesler's case: confusion or invention by the witness.

It took him 432 questions. He and the two other senior defence counsel representing the three accused asked Tegan Wagner a total of 1,971 questions over three days, during which they repeatedly questioned her veracity and reliability.

Now, lest you think that this talk is going to be an orgy of lawyer bashing from a mere journalist, let me make mention of my last two books. They have coloured my experience. The first is *The Electronic Whorehouse*. It is about the media. I think the title tells you enough. I am not merely aware of the short-comings of the media, I have attempted to chronicle them.

The second book is *Girls Like You*. It was published in 2005 and republished in a second, updated edition in 2006. It depicts a series of criminal trials which turned into a legal circus. It follows the course of Tegan Wagner's case, which was postponed 14 times by legal delaying tactics. This book chronicles perjury on an industrial scale. Yet not a single charge of perjury was ever laid.

My professional life is spent on the front lines of the culture wars. In the end all wars require combat on the ground, at close quarters. Most of my antagonists are ideologues or lawyers, or both. There are so many possible examples to chose from I will confine myself to very recent incidents involving senior lawyers, and by that I mean judges and magistrates.

These exchanges have been robust, and public. On May 26, 2008, the Editor of *The Sydney Morning Herald* received an email from a NSW judge, whose name and court I will not reveal, for reasons that will become obvious. It was a formal complaint. And I quote:

> "To the Editor,
> "I was absolutely appalled by Paul Sheehan's column today on the Bill Henson controversy. Sheehan's reference to 'a subculture of paedophilia among gays...' is outrageous and constitutes malicious and ill-informed vilification of the gay community.
> "Where on earth did Sheehan obtain this information? Of course paedophilia is a problem within the whole community but Sheehan's remark suggests it is a particular problem within the gay community. That is of course offensive.
> "Let me assure you as a judge of the [name of court withheld] who regularly hears child sexual abuse cases, that the vast majority of such cases involve allegations of red-blooded heterosexual males sexually abusing female children.
> "Sheehan's reference to a subculture of paedophilia among gays was undoubtedly intended by him to be a slur on the entire gay community. I demand that Sheehan and the *Herald* apologise and withdraw this remark and its implication, otherwise I will be lodging a complaint with the Australian Press Council that Sheehan's article breaches the Council's Statement of Principles.
> "Given the position that I hold I do not consent to this email being published by you".

I was notified of this formal complaint by the Managing Editor of the *Herald*. He was nervous. This was a threat of action not from a mere reader, but from a judge, a judge in high outrage. He felt we were vulnerable. I disagreed. I thought it was the judge who was vulnerable.

After consultation with the paper's chief lawyer, and after I had conferred with a friend who is a friend, we agreed that the demands being made by this judge compromised his position. It was agreed that I could respond in print, and could even name the judge, though I chose not to do so.

The following Monday, June 2, 2008, my usual Monday column in the *Herald* began by publishing the judge's letter in full. I then replied with my own open letter:

> "Dear Judge [name withheld],
> "Your letter has been responded to and passed on to me. I found it quite compelling. I think it should be published. You say that 'given your position' your correspondence must remain private. Yet you have demanded a public response.
> "Further, you have written that unless you receive a public response to your private demand you will proceed with a complaint to the Australian Press Council. The Press Council is a public forum.
> "As neither I nor the *Herald* will be publishing an apology and withdrawal as you demand, and as you have already foreshadowed your intention to go public on this matter, I urge you to do so,

especially as you have expressly invoked your position as a judge to give weight to your private ultimatum.

"The issue you have raised, and the manner in which you have raised it, would be better served by the transparency and astringent sunlight of a public complaint and a public response rather than behind-closed-doors demands…

"There are also several troubling elements of your intervention. You baldly state: 'Sheehan's reference to a subculture of paedophilia among gays was undoubtedly intended by him to be a slur on the entire gay community'.

"Given that it is not what I wrote, not what I intended and not what I believe, how can you make declarations about my 'undoubted' intent? Had I intended to smear the entire gay community (itself a non-existent monolith and abused generality), I would have used the term 'gay culture' not 'gay subculture'. There is a world of difference.

"Which leads to another troubling aspect of your complaint – your language. You rely on the shrill terms 'loaded', 'outrageous', 'malicious', 'ill-informed', 'vilification', 'offensive', 'slur', 'demand', 'apologise' and 'withdraw', all while failing to point out a single error of fact.

"Or do you actually contend that there is no subculture of paedophilia among homosexuals? If not, your entire argument is based on mere supposition.

"Given that you chose to invoke your position as a judge while seeking to privately pressure the *Herald,* an objective reader of your complaint would be entitled to ponder your capacity for rigorous impartiality when confronted with a perceived affront to gay culture".

We didn't hear from the judge again. The point had been made. Would you want an irrational ideologue like this sitting in judgement on your case?

Within two weeks, I was involved in another skirmish with another member of the bench, this time the Deputy Chief Magistrate of NSW, Helen Syme. It stemmed from a column I had written about a criminal who cannot be named because he was a juvenile offender when he entered the justice system. I called him Weasel, which is the name the police and prosecutors use. It is a play on his real name.

This is what the offending column said, in part:

"A criminal, who I shall call Weasel, was fleetingly and inadvertently named by broadcaster Alan Jones when he read out a news report in *The Daily Telegraph.* The newspaper had published his name by mistake in breach of a suppression order.

"Under the *Children (Criminal Proceedings) Act*, it is illegal to publish or broadcast the names of juveniles involved in court cases in any capacity, even as a witness or a victim, and even if the victim is dead, unless the judge lifts the prohibition, which the legislation allows them to do. The penalties include a criminal record and up to two years in prison. An action was brought against Jones by the Director of Public Prosecutions.

"This case was heard by the Deputy Chief Magistrate, Helen Syme. She rejected Jones's defence, found him guilty of a criminal breach of the Act, issued a fine, put him on a bond, and upbraided him, saying he had 'ample time' between reading the article and speaking on air to check whether the newspaper had approval to name the witness.

"Like every other judge or magistrate who has had anything to do with Weasel, she ended up looking deluded and naive. Breaches of suppression orders are so rare it would be absurd to check every news report ever quoted.

"As for the gross injustice to Weasel, allow me to summarise his parade through our criminal justice system:

"The parade began in June, 2003, during a confrontation with police in which he said: 'You can't do anything. You can't touch us". Tells a female police officer, 'F*** you, you slut. You will get yours'. Spits at a police officer, saying, 'F*** you, you pig c***'. For this he was charged and convicted of assault, with no time served".

(I then listed the 11 occasions, from 2003 to 2008, that Weasel had come before the courts, either charged with a variety of violent crimes, or as a witness who committed flagrant perjury.)

> "What all this means is that in the wider context of public safety and community values, Helen Syme delivered a sanctimonious lecture on behalf of a bad person, a bad law, a bad principle, and an odoriferous prosecution. Her decision was dismissed on appeal".

A few days after this column appeared, a letter of demand arrived from a solicitor acting on behalf of Ms Syme. She wanted a correction and an apology.

Even though her judgment had been set aside on appeal, the appeal judge had found the facts proved against Jones but did not record a conviction. He also found that the mistake had been "inadvertent". Further, he did not believe Jones needed to make an apology. Nor did the judge believe the offence warranted a criminal penalty of any kind. He added that Jones was a man of exemplary character.

In summary, everything of substance Helen Syme had found in her judgment had been thrown out except for the uncontested fact that there had been a breach of the law. But Syme wanted a correction because I had compressed all this down and said her decision had been dismissed on appeal.

She also wanted an apology, and her lawyer even proffered the form of words, which included an admission that the criticisms in the column were "unduly personal and went beyond legitimate discussion of Her Honour's decision in the case".

There was nothing quite so dainty when she had used her position on the bench to lambast Jones, convict him of a criminal offence, all while the criminal and serial perjurer Jones had fleetingly referred to was presented as an innocent victim.

The *Herald* declined to publish an apology, and the kindest description I can muster for the Deputy Chief Magistrate's reaction is "precious".

It would be a shame, while on the subject of a clash of cultures with the bench, not to mention the paradigm of judicial sanctimony, Marcus Einfeld. Two years ago, on August 21, 2006, I wrote of Einfeld:

> "The more you examine the career of the Honourable Marcus Einfeld, QC, the less you find. The great mystery is why it has taken so long for the media to take an axe to this rooster.
> "Last week, as Einfeld's saga of absurd denials and evasions became ever more threadbare and pathetic… Enough. Marcus Einfeld has made a career out of portentous moralising. The man now enmeshed by small falsities and large vanities is the same man who has resorted to the big deceits to gain moral advantage – the claim of genocide and the comparisons with Nazis.
> "This son of a Labor politician, and Labor judicial appointee, has played the political game with ferocity. He has invoked the Nazi era ('The thuggery of the guards at Woomera … not much different to that shown by the SS guards in the name of the Third Reich …')
> "Inevitably, he cried 'genocide' after the *Bringing Them Home* report on the removal of Aboriginal children was published, a report whose claim of genocide, when subjected to the forensic scrutiny of the courts in *Cubillo v. Commonwealth* (2000), disintegrated.
> "Now he has become Marcus Minefield, or Justice Seinfeld, and it no longer matters who was driving his Lexus in Mosman on January 8. He had seven months to get it right, kept blustering to reporters, and the axe has come down. All that's left is blood and feathers".

What makes Einfeld a valuable case study is that he made his reputation as a human rights lawyer and jurist, and is thus the living embodiment of the vexatious excesses and moral blackmail which so often afflicts this area of law.

Let us finish this section with two words: Pat O'Shane. Almost 10 years ago, the columnist Janet Albrechtsen wrote a column about O'Shane's anger. The magistrate sued for defamation. Even though the column had largely quoted O'Shane's own descriptions of her anger, she was awarded damages of $200,000, plus costs, which amounted to another $100,000. I will say no more, and don't need to.

These examples are merely mosaics from the big picture, and the big picture asks the question: who will judge the judges? Do we want them to have a new tool with which to spread their interpretive power? And why is it that our legal profession can pursue all other professions for negligence, and makes a tidy living doing so, yet lawyers cannot be sued for negligence by their clients?

All of which leads back to the beginning, and the larger front of this cultural war, the battle over the Charter or Bill of Rights – or, as I call it, the bill of wrongs.

Fortunately, while Victoria lost the war, in NSW, after the departure of Bob Carr as Premier another senior Labor leader, the Attorney-General of NSW, John Hatzistergos, took up where Carr left off. On April 10 this

year he delivered a lucid summary, not only about what was wrong with a Bill of Rights, but what was wrong with the people who most ardently wanted one. He said:

> "In all my time in public life, not one ordinary constituent whose door I have knocked has pleaded for a Bill or Charter of Rights… Instead, the constituency for such change has come not from ordinary citizens but rather professional lobbyists and law school élites.
> "Recognising that a constitutional amendment is a hopeless cause, the protagonists have turned their attention to a statutory Charter model.
> "In essence, whether one talks about of Bills or Charters of Rights, essentially one is discussing the degree to which the primary power for making decisions about rights will shift from legislatures to the courts.
> "And this to me is the crux of the problem… The sophisticated electoral system and proportional representation of our bicameral Parliament, together with a free press, and ministerial accountability, all work to ensure that competing rights and interests are weighed up and decided in a democratic way.
> "To put it simply: Parliaments are institutions specially designed for consultation on, discussion and resolution of difficult political questions. On the other hand, the judicial branch of government is set up to achieve different ends: the adjudication of private conflicts and the applications of law.
> "By transforming social and political questions into legal ones, a Charter of Rights threatens to harm the integrity of both institutions… It generates uncertainty about the meaning of laws, and deprives legislation of its finality… A Bill or Charter of Rights will not serve to clarify the law and help Australians to understand their legal rights; it will impose an additional layer of interpretation over all legislation".

Thanks to the admirable Professor James Allan of the University of Queensland, who has tracked the stealthy nature of the Bill of Rights campaign, we know that this legislation is being introduced at a State level in ways which evade and by-pass the implacable roadblock of public opinion and public need. Professor Allan has also tracked the ways in which the sweet rhetoric of the Bills' proponents is at odds with the reality of how a Bill of Rights has and can be used to extend judicial, bureaucratic and ideological power:

> "A statutory Bill of Rights may leave Parliament with the last word in name, but it gives judges a steroid-enhanced power of interpretation. They get to use a new 'human rights-friendly' method to interpret Parliament's words. In effect, they get a blank cheque…
> "Proponents of this Bill of Rights say that can't happen here. So why should any voter worry about it? Because of what has actually, in real life, happened in Britain and New Zealand. In Victoria the voters themselves didn't get a referendum to decide whether they'd have a Bill of Rights; the Government decided that for them. So much for the 'right to take part in the conduct of public affairs' ".

He is right. We are now likely to get a Bill of Rights by stealth, because the last thing the utopian Left wants is a referendum or popular vote, because the people cannot be trusted to know what is good for them. That is why the utopian Left has begun avoiding the democratic process over the Bill of Rights – because it is exactly the democratic process it is seeking to by-pass and contain.

In short, this campaign is part of several insidious trends in the culture of our legal system:

- There is a creeping primacy of international law over Australian law.
- There is a headlong evolution of law schools toward ideology rather than legal practice and precedent.
- There is a subtle shift under way from elected Parliaments to unelected tribunals.

A superfluous layer of human rights bureaucracy and advocacy already exists, and this industry, via people such as the federal Human Rights Commissioner, Graham Innes, are agitating for a Bill of Rights. Of course. The Human Rights and Equal Opportunity Commission, like the NSW Anti-Discrimination Board and their counterparts in the rest of the country, are used, by their very nature, as a punitive machinery for the

vexatious, the dogmatic, the ideological, the axe-grinders and the grudge-holders who can and will exploit the nebulous area of "human rights" to cause pain through process.

Pain through process. The outcome of their complaints does not matter. What matters is the burden of accusation. That's why religious and secular fundamentalists wage war through the human rights and discrimination machinery. They do because they can.

This is the culture we are becoming inured to, the culture of litigation and threat of litigation, more compulsion, more intrusion, of more lawyers calling for more laws, and more regulators calling for more regulations.

A society under the rule of lawyers, not law.

Chapter Four

Human Rights Legislation and Australian Sovereignty

Peter Faris, QC

My contention is that the introduction of Human Rights legislation will, in the end, diminish or even destroy our Australian sovereignty.

I am content to use the Macquarie Dictionary definition of sovereignty as "supreme and independent power or authority in government as possessed ... by a state".

As I see it, the major threat to Australian sovereignty is from human rights legislation of two different sorts.

First, the Aboriginal rights movement, supported by legislation, gives Aboriginal people sovereign power not possessed or exercised by the rest of the community. Second, the approaching federal Bill of Rights will be an intrusion of various United Nations covenants into our domestic law.

With regard to the first case, I am a strong supporter of the Aboriginal people as Australians, not as a racial group. They are disadvantaged Australians, and we should all work hard to make the future better for them and all other disadvantaged Australians. This is not to be done by diminishing our national sovereignty in their favour.

In the second case, we are preparing to abdicate our Australian sovereignty to "law" made by the United Nations, particularly in the area of human rights. The United Kingdom has discovered that, for the first time, their Parliament is no longer sovereign. The unelected judges enforcing the European Human Rights laws can now overrule the elected Parliament. In Victoria, we have the *Charter of Rights and Responsibilities* which came into force this year, courtesy of a socialist government. An extraordinary power has been given to the unelected judges to decide that, as a matter of law, legislation passed by the elected members of Parliament is contrary to human rights. The Victorian courts cannot strike the law down, but they do report this decision to the Parliament. It would be a brave Government (and an especially brave socialist government) that failed to act by changing the law by bringing it within the terms of court approval.

Until now, Australia has followed the former British system of government, with elected Parliaments passing the laws and unelected judges interpreting these laws. The major exception is the power given to the High Court to review legislation and strike it down if it is unconstitutional.

Human rights, including Aboriginal rights, have their source outside Australia. This source is the United Nations and various international covenants to which Australia is a signatory. The one of principal concern is the *International Covenant on Civil and Political Rights* of 1976 (*ICCPR*).

It is important to remember that none of these Covenants are part of our domestic law as such. In other words, unless and until a Parliament passes them into domestic law they are not enforceable in Australian courts.

The Victorian *Charter* adopts large portions of the *ICCPR*, as will any federal Bill of Rights. Accordingly, parts of the *ICCPR* are effectively now part of the domestic law of Victoria.

Part 1: Aboriginal human rights

In the last 30 years, for various reasons, Aboriginal Australians have been treated as a dispossessed nation who have a (human) right to have the national territory returned to their ownership or control. This is the land rights movement. For pragmatic reasons, they cannot have the parts (like Melbourne and Sydney) which would be inconvenient to the mainstream population. Notwithstanding this restriction, they have been granted very large tracts of land by various governments, Commonwealth and State. They have been given extensive powers within these territories (called "lands"), including the right to exclude all other Australians in general and journalists in particular (the permit system).

For example, the (Aboriginal) Northern Land Council has the following on its website:

> "Aboriginal land is private land. It is not Crown land, nor public land. ...
> "Like other landowners in Australia, Aboriginal people have the legal right to grant or refuse permission to people wishing to enter or travel through their land. ...
> "If you want to visit, drive through or work on Aboriginal land in the Northern Territory, you are legally required to have a permit to do so".

It is very simple. These vast tracts are private land in the same sense that your home is on private land. Accordingly, in the same way that strangers are not permitted to intrude on your private land, it is against the law for Australians generally to travel upon (intrude into) these areas.

There is a difference, of course. The probability is that your house is something that you have worked and paid for. It is likely to be on a very small piece of land. Nobody sees a risk to Australian sovereignty in the concept of ownership of private land. For Aboriginals, they are given the land, they have not earned it. They are given it because they allegedly have some sort of (human) right because it was taken away from them in the first place.

(*First aside*: My ancestors came from Scotland. I wish that sort of thinking applied there. I would be happy to go back to take up my land. I also point out that my bloodline is 50 per cent Scot and 50 per cent English. In other words, as full-bloods go, I am an Anglo-Celt from the British Isles. A significant percentage of the Aboriginal people are more white than black, and have no more right to Australia than I have to Scotland – probably less. But this is a problem everywhere. President Obama is called, prospectively, the first black President, yet he is half white. It beats me.)

The Aboriginal lands have been established in areas which, not long ago, were owned by all Australians, and all Australians were free to go there.

Now very large areas have been given to a racial group which has established (by law) an exclusive private use and ownership of it. All others are excluded by law. Entry is a criminal offence.

Given all this, it seems to me that Australian sovereignty has been seriously diminished. By that I mean that parts of our country which were once owned by us all collectively have been granted to a minority group as of right.

The consequences of land rights will be played out over the next few decades. They will not be good for Australians.

If one applies a fertile imagination to the future, the following scenario (whilst highly unlikely) is not impossible. In any event, it graphically illustrates the problem of giving away national sovereignty to a cohesive group.

Perhaps Muslims driven by an extremist ideology could penetrate the Aboriginal people in the same way that the Churches did (through the missions). Many Aboriginals are Christians. Islam is a valid world religion, so there is no reason why Aboriginals should not become Muslims. Perhaps control of a large area of tribal lands in Northern Australia could be gained by Muslim-Aboriginals. Let us say that there develops a conflict between those Aboriginals and the federal Government. Perhaps they might want self-determination and their own Nation. After all, they have the land, they have a flag, and it is conceded by Australia that they are the wrongly dispossessed original owners (a bit like the Palestinians). Pressure for nationhood grows. An Aboriginal republic is declared. The Australian Government intervenes and sends police to take control. The Aboriginals appeal to Indonesia (population about 320 million, 85 per cent Muslims) just across the water. The Indonesian government takes up the cause of its co-religionists and supports Aboriginal nationhood and attempts to intervene. And so it goes on.

(*Second aside*: As an Australian I find two things most offensive. First, the constant reiteration by the socialist federal government that whenever they meet or make a speech they must first acknowledge the traditional owners. For my part, if we must do this, I would like to acknowledge the work of my people, the Anglo-Celts, in the 19th and early 20th Centuries of first building the country, then defending it in two World Wars.

Second, I find the Aboriginal flag and its use offensive as a statement of Aboriginal sovereignty and nationality. I find it extremely offensive when it is flown from Parliament House and other government buildings. The flag of all Australians, including Aboriginal Australians, is the Australian flag, and it is the one that should be flown).

This sort of problem has existed throughout history. Today it exists in the Middle East (Palestine-Israel) and on Russia's borders (South Ossetia-Georgia).

All I have tried to do is to suggest some of the risks involved in Australia diminishing its sovereignty by handing over lands to the Aboriginals in what appears to be sovereign ownership. But wait, there's more.

Aboriginals have a right to self-determination. This right has been effectively acknowledged by Australian governments and the Australian people as set out above – land, private ownership, flag and so on.

The *United Nations Universal Declaration of Human Rights* (*UDHR*) (1948) states:

> "Article 15: 1. Everyone has the right to a nationality.
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

It is easy to construct an argument that Aboriginals have been deprived of their right to Aboriginal nationality (the Aboriginal nation in the Aboriginal lands) by the colonisation of Australia by the Anglo-Celts and (later) others.

The *ICCPR* states:

> "Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.....
> 3. The States Parties to the present Covenant ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations".

Australia has promoted "the realization of the right of self-determination". Aboriginals have been given the land in apparent acknowledgement of this fact. The next step is self-determination. It will come.

The Report upon which the Victorian *Charter* was based specifically granted Victorians some of the rights set out in the *ICCPR*. But it did not propose the right to self-determination in Victoria at this stage. Instead, it postponed the issue for four years. It stated:

> "The Charter should be reviewed four years after its commencement. The review should include consultation with the public and should consider matters including:
> whether, following consultations with Victorian Indigenous communities, a right to self-determination should be included in the Charter, and, if so, the appropriate definition and scope of that right;.....".

It is certain that the Aboriginal communities (in Victoria they are not called Aboriginals, but either Kooris or Indigenous persons) will happily accept self-determination. In this sense it is a foregone conclusion.

For its part, the present socialist federal Government could be expected to go along the same path. Since the election of Mr Rudd as Prime Minister last November, Australia has emerged as a World Leader in numerous matters of high principle: global warming, whales, human rights in China, freedom for Tibet, the end of nuclear weapons and a European Union-style community for South-East Asia.

It would be unthinkable that a man of such high principle as Mr Rudd could preach to other countries about their human rights records and fail to implement the UN covenants for the self-determination of the Aboriginal people.

Thus has Australian sovereignty been diminished by applying Human Rights principles to the Aboriginals. We will pay a price for this.

Part 2: A federal Bill of Rights

Eventually, the federal government will adopt most, if not all, of the *ICCPR* by legislating it into force as domestic law. It is not Australian in origin, as I will explain.

In fact, this type of legislation is completely unnecessary. Australians' rights are fully protected by the Australian Constitution, federal and State legislation and the Common Law as developed by our courts. All these sources are purely Australian. Nobody in the street is complaining that they do not have human rights.

Although the Australian Constitution is actually an appendage to a British Act of Parliament, it was in fact drafted for Australians by Australians. It has been amended a number of times by the voting public. It has served us for more than a century and it has served us well.

Legislation is passed by members of democratically elected Parliaments.

The party forming government in those Parliaments appoints the judges – in Australia, we do not have elected judges.

As far as the human rights of citizens is concerned, this system has worked well. It is not often that we hear a serious allegation that Australians are deprived of human rights. Where there are difficulties, the law can be adjusted. That is the way of a sovereign democracy.

But some people are not satisfied with sovereign democracy. They want every state in the world to be governed by some sort of international law. This international law is to come from NGOs (non-government organisations) like the UN. A greater attack on national sovereignty is hard to imagine.

Let me give a contentious example. The United States, as a sovereign national state, decided that it was in its military interests to attack Iraq in the context of an actual or perceived War Against Terror. Many countries, and many people in many countries, took the position that it was unlawful for the USA to do that without the consent of the UN. On one view, this was very close to a statement that the decisions to be made for the defence of a sovereign nation were first to be made by the UN.

Much of this thought is driven by the Left. These people were (until recently) fervent supporters of Russia, China, Stalin and Mao, and hated the US, democracy and capitalism.

After the collapse of Russian Communism and the movement of China towards capitalism they have taken their hatreds elsewhere. They now support the UN and consider that nothing can be done without UN support. Even though they have lost the war against democracy and capitalism, they are seeking to gain control through international organisations.

A prime and current example is global warming. The propagation of this fraud by the Left constitutes a major attack on capitalism. Rich countries will be obliged to bankrupt their industries and economies, to the great benefit of so-called poor countries like China and India. In the end, the aim is to bring the US to its knees.

And Australia, through Rudd, is now a world leader in this process.

And so it is with the law.

The Left do not want to have Australian laws for Australia. They want UN laws. This, of course, removes Australian sovereignty. Instead of Australians making their own laws, the laws are imported (as some sort of universal truths) from the UN.

The ultimate aim, which will be achieved, is that every UN covenant is legislated into law in Australia.

The practical effect is that the UN becomes our supreme legislative body. And these laws will be supervised by the unelected judges who can effectively strike down any legislation of the duly elected Parliaments.

From the point of view of sovereignty, the United Nations has no legitimacy – in fact, it is in direct contradiction to the concept of sovereignty. It is one thing for Australians to make their own laws, it is quite another for the UN – an unelected body, a collection of states including some of the worst in the world – to be deciding what laws are so universal that they should be imposed upon the Australian people. Yet such is the perceived moral authority of the United Nations; whatever they say is, quite literally, the law.

There are many excellent analyses of the dysfunctional nature and corrupt practices of the UN. Despite all of this, some people believe that the UN speaks like the Pope – infallibly on the questions of faith or morals.

Today in Australia, Political Correctness is so strong that it is no more possible to challenge the moral authority of the UN than it is to deny global warming. And we can be absolutely certain that our socialist federal Government, in the great tradition of socialists and communists, will seek to destroy our Australian sovereignty in favour of UN dogma.

The major international conflict today is between Islam and the Western democracies. Australia, as a Western democracy, feels that it must implement UN human rights laws, particularly in relation to the rights of Muslims within Australia, the rights of terrorists and the rights of illegal Muslim immigrants. That may be all very well, although there is considerable scope for disagreement. What is significant is that the Islamic

nations do not themselves support the UN human rights covenants. Accordingly, they subscribe to such statements as the Cairo Declaration of Human Rights in Islam (1990). This Declaration supports Shariah law, grants no freedom of religion, does not give women equal rights with men, and discriminates against non-Muslims. In itself, it demonstrates that there is no magic universality of law which should be imposed in each country.

In summary, my complaint is this. We will have introduced into Australia, as legislated domestic law, various UN Covenants. These will replace parts of our own law as we know it. The introduction of these laws acknowledges their moral superiority – they are universal laws and must be obeyed.

Our sovereignty is diminished by the fact that these superior laws are the product of an unelected body outside of Australia. Australia and Australians have demonstrated that they are perfectly capable of creating a just legal system arising from our national sovereignty. This is now denied. The acceptance of UN Covenants is an acceptance of the correctness of that denial.

In my opinion, there must always be a tension, if not a contradiction, between the concept of national sovereignty and the concept of universal human rights. It really gets down to the basic question: who should make the laws?

People like me consider that Australian laws should be made by Australians, and they reject the legitimacy of universal laws as determined by the UN or any other NGO.

Those that disagree with me (and there are many) have a fervent, almost religious, belief that the United Nations is the font of international justice, of the rights of man. Consequently, they believe that Australia must adopt the UN Covenants as domestic laws.

I do not believe that this conflict is capable of resolution. There is no right position, just a difference of opinion.

But I still believe the consequences for Australia will be a significant loss of sovereignty.

Chapter Five

A Collision Waiting to Happen? The *United Nations Declaration on the Rights of Indigenous Peoples* and Australian Domestic Policy

Senator George Brandis, SC

On 13 September, 2007 the UN General Assembly voted, by an overwhelming majority, to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*. 143 member states voted in favour of the declaration, 11 abstained and 4 (Australia, New Zealand, Canada and the United States) voted against it. The *Declaration* thus became the latest document in the already dense forest of international instruments by which the UN purports to protect human rights.

With the change of government last year, Australia's official attitude to the Declaration changed. On 14 September, 2007 the then Shadow Minister for Indigenous Affairs (and now Minister), Jenny Macklin, announced that:

> "A Federal Labor Government would endorse Australia becoming a signatory to the [Declaration]. The Declaration is about the international community expressing its support for Indigenous people and their children having an equal chance at life".[1]

Ms Macklin's characterisation of the purpose and effect of the declaration is glib, to say the least.

The Opposition has and, I am sure, those attending this Conference would have no problem with the idea of supporting the aspirations of indigenous people and their children having an equal chance in life. Over decades, successive Australian Governments have spent – not always wisely – billions of dollars attempting to lift the living standards and prospects of our indigenous population. I might say that it has been Liberal Ministers for Aboriginal Affairs who have been the pathbreaking reformers in this area, from William Charles Wentworth, the first Commonwealth Minister to take a deep interest in Aboriginal affairs, who during the Gorton and McMahon Governments took advantage of the newly-extended Commonwealth powers in this area following the 1967 referendum (itself an initiative of the Holt Government); Dr John Herron, the father of "practical reconciliation"; and Mal Brough, who famously pioneered the intervention in the Northern Territory which the new Labor Government has felt it necessary to embrace, albeit half-heartedly.

Further, it cannot be said that indigenous Australians are currently devoid of specific statutory protections, which augment the protections which all Australians enjoy under the common law. Confining myself to Commonwealth legislation alone, the *Racial Discrimination Act* 1975, the *Family Law Act* 1975, the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984, the *Human Rights and Equal Opportunity Commission Act* 1986, the *Higher Education Funding Act* 1988 and the *Native Title Act* 1993, to name just a few, all make special provision for the protection of indigenous rights and interests. The *Evidence Amendment Bill* 2008 currently before Parliament contains special evidentiary provisions for indigenous laws and customs.

There is a temptation, to which we are witness at the moment in the context of the debate about whether Australia needs a Bill of Rights, to gloss over our common law rights, to see them as somehow inferior if they are not codified in a constitutional or quasi-constitutional document or sanctified by reference to some international instrument or another. Last week, when I announced the Opposition's policy on a Bill of Rights for Australia, I said:

> "Let me make it clear at the outset what this debate should *not* be about. It should *not* be a debate about whether Australian citizens should enjoy the full range of civil, political and other rights which are the defining characteristic of modern liberal democracies. The reason why we need not

> have such a debate is that the issue is uncontroversial: no public figure I can think of doubts that proposition. Rather, the debate about a Bill of Rights is about means, not ends. It is, in particular, about two things: first, whether the protection of the rights which our citizens undoubtedly have would be better served by the enactment of a Bill of Rights than they are under the existing law; and secondly, whether the debate on the question of what substantive rights Australians should enjoy takes place in the open forum of elected and accountable Parliaments, or is determined by unelected and largely anonymous judges in the cloistered environs of the courts".[2]

It is, in my view, in the same context that the consideration of the *Declaration on the Rights of Indigenous Peoples* needs to occur.

On 11 March this year, I asked Senator John Faulkner, the Special Minister of State, whether it was the Rudd Government's intention that Australia should become a signatory to the *Declaration*. His reply was that:

> "… the government does support the principles underlying the *Declaration on the Rights of Indigenous Peoples*, which covers broad subject matter and is of great importance, as I have said, to indigenous peoples. This support needs to be seen in the context of Australia's domestic law and also our international legal obligations … As a declaration attached to a General Assembly resolution, this is an aspirational declaration. It has of a course a political and moral force, but it is my understanding that it has no legal effect".[3]

Senator Faulkner's characterisation of the document is consistent with its text. The *Declaration* describes itself as a non-binding document, proclaimed by its terms (in the final recital) as "a standard of achievement to be pursued in a spirit of partnership and mutual respect". So at first blush – and here's a surprise from the Rudd Government – the symbolism seems to be the important thing. However, are we to detect from Senator Faulkner's observation that the *Declaration* "needs to be seen in the context of Australia's domestic law", an implicit acknowledgment that the *Declaration* might not in fact be a seamless fit with the domestic law of this country? Or is it of symbolic significance alone?

If the *Declaration* is merely a piece of Rudd Government and UN window dressing, what do Australians, including indigenous Australians, have to gain from this country acceding to it? Or is there something in Senator Faulkner's hint about domestic law? Concern about the possible implications of the *Declaration* in domestic law was one of the principal reasons why the four democracies which voted against adoption of the Charter, chose to do so.

The *Declaration* – Recitals

Let me turn to the terms of the *Declaration* itself. It is the culmination of about 25 years of discussion and agitation for action at an international level on behalf of the world's indigenous peoples. The text itself is the product of about 10 years' diplomatic wrangling. The process was so slow because one of the core provisions of the *Declaration* is the right to self-determination. How that sits with national sovereignty, and whether any resolution of that issue has in fact been addressed by the text, is a matter with which I will deal in a moment.

As I have said, when the *Declaration* was adopted by the UN General Assembly on 13 September, 2007 only 4 nations – each of them like-minded liberal democracies with significant indigenous populations – voted against it.[4] It is noteworthy that these nations lead the world in the comprehensive domestic laws and policies to protect and advance the interests of their indigenous populations, while many of those abstaining or not present for the vote have longstanding or seemingly intractable tribal or separatist movements within their borders. Indeed, some voting for adoption which have their own such conflicts, like Sri Lanka and Indonesia, are content to view their populations as indigenous *in globo*, which leaves uncertain the consequences for the demonstrably non-indigenous elements of the population.

The *Declaration* opens with 24 recitals, most of which are uncontroversial (although, as is the nature of these things, somewhat piously expressed). Here are a few examples:

> "*Affirming* that indigenous peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different and to be respected as such; and *Affirming also* that all people contribute to the diversity and richness of civilisation and cultures, which constitute the common heritage of humankind;
> "*Recognising also* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration …".

Others are infected with heady doses of a kind of Rousseauvian romanticism:

> "*Welcoming* the fact that indigenous peoples are organising themselves for political, economic and social enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur;
> "*Recognising* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment....".

The final recital states that the declaration is proclaimed as "a standard of achievement to be pursued in a spirit of partnership and mutual respect". This is the provision which Senator Faulkner apparently had in mind when he said that the *Declaration* is an aspirational document and is not intended to have legal force.

Whether the *Declaration* will always have that status is a matter for conjecture and, in my opinion, a matter of serious concern, to which I will return.

Specific Articles

It is curious, given the purportedly aspirational nature of the document, that the 46 Articles which follow are all expressed in terms of rights, guarantees and mandatory requirements for States.

Some of the provisions in the Articles cannot be quibbled with. For example, Article 2 states that:

> "Indigenous peoples and individuals are free and equal to all other peoples and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity".

However, there are other aspects of the document which are deeply problematic.

In the first place, surprisingly, the *Declaration* contains no definition of the expression "indigenous peoples". This is a striking omission for a document whose very point is to declare their rights. It has been suggested by some scholars that the definition is to be found by reference to other international instruments, in particular the 1989 International Labour Organisation's Convention No 169.[5] This defines "indigenous peoples" as:

> "(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> "(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

It goes on to provide that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".

There are two principal problems with the omission of a definition from the text of the *Declaration*. First, and most obviously, if the ILO definition is meant to apply, its omission from the text means that the interpretation of the *Declaration* will be governed by the language of an international instrument that may not have been adopted by the signatory states. Australia is itself not a ratifying party to the ILO Convention.

Second, the requirement of self-identification means that the *Declaration* has the potential to be misused by separatist or minority groups seeking to exploit claims to self-determination or control of resources.

Next, Articles 3 and 4 provide that indigenous people have the right to self-determination. This concept is not defined – the text simply provides that in pursuance of that right, indigenous peoples may freely determine their political status, whatever that means, and have the right to autonomy or self-government in matters relating to their internal and local affairs, whatever they might be. This has the clear potential to place customary law above national law. It must also be reconciled with Article 46, which provides that the *Declaration* does not imply any right to perform any act contrary to the UN Charter, or that might "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". However, it is possible to imagine an international court or tribunal being persuaded by the argument that allowing customary law to prevail over national law will not affect the territorial integrity or political unity of a state, especially if those concepts are given a narrow reading. It might even be argued that the concepts of territorial integrity and political unity should themselves be interpreted so as to accommodate indigenous self-determination.

The states opposing the text of the declaration deposited, in accordance with General Assembly practice, Statements of Reasons for their negative votes.[6] Among their grounds of opposition they pointed to the following provisions:

> •Provisions on land and resources rights (Articles 25 and 26) may give indigenous peoples a right of veto over national legislation and state management of resources.
> •Article 26.3 requires that "states shall give legal recognition and protection" to lands, territories and resources traditionally "owned, occupied or otherwise used or acquired" by indigenous peoples, without limitation or any recognition of a means of alienation of those lands or other limitations. There is nothing in the text about how the rights of third parties might be affected.
> •Article 28 provides for indigenous peoples' right to "redress by means that can include restitution or … compensation, for their lands and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent", again without recognising any limitation to that principle.
> •Article 32.2 requires states "to consult and cooperate in good faith with indigenous peoples...to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources".

Under Australian law, the Crown retains title to certain resources under privately-owned land, which may be exploited without the consent of the title-holder (subject to reasonable compensation)[7]. A right to negotiate is provided under the *Native Title Act* 1993 which, in itself, exceeds the rights available to non-indigenous people. However, this Article not only seeks to set the interests of indigenous people at a higher level than that enjoyed by the rest of the population, but also beyond the extended regime in the *Native Title Act*. Further, it requires consent in respect of lands "affected" by the exploitation, which is a much wider concept.

The United States, in particular, has criticised the text for failing to be transparent and capable of implementation.[8] Its objections are worth noting for their clear-eyed analysis of the human rights implications:

- "Indigenous peoples in our countries [i.e., the US, Australia, Canada and New Zealand] can already fully and freely engage in our democratic decision-making processes. But, our governments cannot accept the notion of creating different classes of citizenship. To give one group in society rights that take precedence over those of others would be discriminatory under the *Convention on Elimination of Racial Discrimination*. While the *Convention* does allow States to take special measures, the power to do so is discretionary and cannot be used to take measures that are unlimited in duration".
- "The provisions on land and resources in the text are unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. Such provisions would be both arbitrary and impossible to implement".

- "It seems to be assumed that the human rights of all individuals, where they are enshrined in international law, are a secondary consideration in this text. Human rights are universal and apply in equal measure to all citizens. That means that one group cannot have human rights that are denied to other groups within the same nation-state".

  These concerns appear to be fully justified.

  There are some other provisions which are potentially problematic:

- The prohibition on removal of children (Article 7.2). This "collective right" is unqualified, yet must also be squared somehow with the individual rights in Article 7.1 to life, physical and mental integrity, liberty and security of person. An abused child has individual rights, but can its removal from the source of harm be resisted by the community on the basis of the collective rights? The text provides no guidance and, in particular, takes no stance in terms of the priorities to be accorded to individual as against collective rights.
- Article 8.2 is a requirement for redress for *any* population transfer measures which have had the *effect* (not just the aim) of, *inter alia*, depriving indigenous people of their integrity as distinct peoples. What happens in the case of an emergency evacuation from, or to, an area occupied by indigenous people? What circumstances might constitute a "loss of integrity as a distinct people"?
- Article 11.2 contains a requirement for States to provide redress (including restitution) with respect to any "cultural, intellectual, religious and spiritual property" taken "in violation of their laws, customs and traditions". Does this include artefacts taken by people without any approval or sanction by the state? Does this include legitimate anthropological and archaeological research? Are these "rights" subject to any balancing considerations, such as fair use for intellectual property?
- Article 14 provides for indigenous control of their educational systems. This is expressed in terms of rights, both to State education (should it be desired) and to education controlled by the indigenous people themselves. However, the rights are not balanced by duties or obligations. It is possible that the terms of the text may even be used by indigenous communities to veto compulsory State education.
- Article 31, pertaining to intellectual property rights arising from traditional knowledge, appears to be significantly in advance of current intellectual property law on this issue. There is quite a body of legal academic writing on the intellectual property that might subsist in indigenous art and knowledge. But, under Australian law as it presently stands, intellectual property rights such as copyright and patents have a termination date, at which point the subject matter goes into the public domain for the free use of the community. The terms of this Article are silent on the rights of third parties, and contain no reference to the way intellectual property rights are hedged in modern law, for example by exceptions such as fair use, the requirements of genuine novelty or invention, or the recognition that property has already entered the public domain.
- As a final example, although there are more, Article 39 states that "indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this declaration". This may readily give rise to ambit claims for State financial assistance in respect of claims not recognised under domestic law.

Before I turn to consider how this document might collide with domestic law, I need to emphasise that the Opposition is *not* opposed to the creation of international instruments for the protection of indigenous peoples. Instruments to provide for international assistance have their value, particularly where states are unable or unwilling to accord rights or vital assistance to disadvantaged groups. It is a testament to this that Australian representatives were closely and constructively involved in the process that ultimately produced this document. This process was helpfully summarised by my colleague, Senator Marise Payne, who during the Howard Government was the Chair of the Human Rights Subcommittee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade, and is widely acknowledged as one of the Parliament's most articulate and committed defenders of human rights. Senator Payne told the Senate last year:

> "[W]e have been involved in this process for over 10 years. We approached the consultations that were held in New York recently in a constructive, engaged and flexible manner. We put on record in New York the fact that our concerns could be met through very limited changes in the Chair's text. We made a concerted effort to reduce our key concerns to a minimum number

> of possible changes so that we were not seeking a complete rewrite of the entire declaration, which would obviously be an extraordinary process. We are not trying to have the entire text renegotiated …
>
> "We believe that indigenous peoples deserve and need a declaration which can be implemented meaningfully, not one which is rushed for the sake of signing on a particular dotted line".[9]

I respectfully endorse those comments. The problem is that, in its ultimate form, this is not, as Australia, the United States, Canada and New Zealand have explained, a document that *can* be implemented meaningfully. It says at once that it is an aspirational document and goes on to state a series of minimum demands. In places it is almost unintelligible, in other places it seeks to guarantee rights that would seriously displace the rights of others, and throughout it places individual and collective rights in the same basket, without providing any guidance as to how to resolve the inevitable tensions between them. However, what most concerns me is the possibility that this is not a mere piece of aspirational doggerel, but a roadmap to a collision between this instrument and Australian domestic law.

Potential domestic legal consequences of accession

Is the *Declaration* merely an aspirational document as claimed? Article 43 describes the rights recognised by the *Declaration* as constituting "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world". Those are odd words for an aspirational document.

On a more fundamental level, the significance of the *Declaration* lies not in its formal legal effect: declarations of themselves do not constitute binding international law. Rather, they create a perception that its provisions reflect a State's *opinio juris* and thus go towards establishing customary international law.[10] Further, there is a body of law in this country that would go further than that and, through judicial *fiat*, start implementing the *Declaration*'s programme without regard to Parliament, should Australia accede to it at the UN.

Members of this audience would be well familiar with that monument to the jurisprudence of the Mason High Court, *Minister for Immigration and Ethnic Affairs v. Teoh*.[11] By a 4-1 majority,[12] the Court held that although a Convention ratified by Australia does not become part of Australian law unless its provisions have been validly incorporated into municipal law by statute, the ratification was an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers would act conformably with the Convention. It was not necessary that a person seeking to set up such a legitimate expectation be aware of the Convention or personally entertain the expectation. It is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

The decision was controversial, to say the least. On at least two occasions,[13] the High Court has had a chance to consider it: several members of the Court expressed a preference for the dissenting position, but *Teoh* has not so far been overruled. The decision has since been applied in many lower courts. The fact is, if decision makers in the bureaucracy wish to take the *Declaration* into account there is nothing to stop them doing so, and any expression of an intention to do so may create a "legitimate expectation" that the terms will be applied, which may be justiciable at the instance of indigenous claimants.

While I very respectfully doubt that the present High Court will wish to reinvigorate *Teoh* (and I interpolate here the reassuring fact that the judge who dismissed Teoh's arguments at first instance was the new Chief Justice, Robert French), the case remains a touchstone for rights activists and continues to generate optimistic journal articles. All that may be needed to push this *Declaration* into domestic law are some sympathetic decision makers at the bureaucratic level or legislatively-minded judges on the Federal Court willing to give *Teoh* another run, and a monster may be created.

This *Declaration* contains provisions that go well beyond the rights recognised in Australian domestic law. There is a real danger that accession to it will create a sectional jurisprudence that is fundamentally out of step with the domestic law which has been crafted by the people of this country through their elected representatives, for the benefit of all the people of this country. And this could occur at the stroke of a pen, without any reference to those elected by the people to safeguard the rights and interests of all of them.

Endnotes:

1. Macklin, J, *International Declaration on the Rights of Indigenous Peoples*, Media Statement, 14 September, 2007 at http://www.alp.org.au/media/0907/msia140.php.
2. Senator George Brandis, *The Debate We Didn't Have to Have: The Proposal for An Australian Bill of Rights*. Speech to James Cook University Law School, Townsville, August 14, 2008.
3. Senate *Hansard*, 11 March, 2008, p. 497.
4. The abstaining votes were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.
5. Odello, M, *International Focus: United Nations Declaration on Indigenous Peoples*, (2008) 82 *Australian Law Journal* 306, 308.
6. Statement by NZ Ambassador to the UN, Rosemary Banks, on behalf of Australia, New Zealand and the United States, 16 October, 2006, issued by the United States Mission to the United Nations press office.
7. See, for example, the *Mineral Resources Act* 1989 (Qld), ss 71-78 and 265-269.
8. Explanation of vote by Robert Hagen, US Advisor, September 13, 2007.
9. Senate *Hansard*, 10 September, 2007, p. 53.
10. See Charters, C, *Indigenous peoples and international law and policy*, (2007) 18 PLR 22 at 33 ff.
11. (1995) 183 CLR 273.
12. Mason CJ, Deane, Toohey and Gaudron JJ, McHugh J dissenting.
13. *Re Minister for Immigration & Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1; *U v. U* (2002) 211 CLR 238.

Chapter Six

"Global Warming" and its Discontents: The Threat of Populism to Sovereignty and Prosperity

Alan Oxley

The public call for the Australian Government to do "something" about global warming has led the major political parties to adopt policies which would have been considered unthinkable on both sides of mainstream politics a decade ago.

They entail governments returning to substantial intervention in how economic affairs are conducted. The first intervention seemed minor – regulating targets which set how much power should be generated from renewable resources – although the impact of the 20 per cent target set by the Rudd Government would not be minor for the considerable hike it would create in the cost of electricity. The decisions by first the Howard Government and then the Rudd Labor Party/Rudd Government to establish what is loosely called an "Emissions Trading Scheme" (ETS) to reduce emissions of carbon dioxide is a giant step.

Most discussion about how trading in permits to emit carbon can be undertaken has focused on the question of how to do it in a way that keeps faith with market principles, thereby leaving an impression, intended by some, that this system will be consonant with, if not enhance, an open economy. The general counter consideration has been on the cost and efficacy of operating such a system. In this a fundamental reality and the implications of it have been overlooked. The key tool in an emissions trading system is the device which artificially creates the demand for permits – the cap to limit consumption and thereby production of energy. The cap is a command and control tool whose natural home is a Soviet five year plan, not a modern open economy.

As becomes strikingly clearer as one wades on through the multiple pages of reflection produced so far by government work (and the Garnaut Review) about how to make a trading system function, a key issue preoccupying those officials is trying to work out how to ensure the cap does its job – reducing production of energy to a set target. It is a complex matter. At each adumbration of the problem, the invariable answer is some additional, usually onerous, form of regulation to ensure the cap works.

Garnaut proposed creation of a super regulator to control the supply of emission permits to the secondary market which he argues is necessary, and to manage it to achieve the cap.[1] He also proposed that another super regulator be appointed to predict global commodity prices so reimbursements could be made to exporters after that regulator assesses their competitive disadvantage.[2] Where is the free market common sense? Commodity traders and Central Banks have been bankrupted trying to control and predict markets.

Garnaut is not the only one to revert to regulation of the market for a solution. Early work by officials under the Howard Government suggested that a condition for giving trade exposed industries offsets in an ETS might be that they be required to use the latest available low emissions technology, and that an official be tasked to monitor compliance with this requirement.[3]

So much for the professed virtue of emission trading that businesses would be left free to determine how to invest in their business according to the demands of the market.

The cap and trade ETS model introduces a very potent command and control economic tool to control production of a key input into the economy – energy. This is a massive change in how government should intervene in the economy. In Australian terms, it is as philosophically significant as a return to protectionism. Yet there has been virtually no discussion of the pros and cons of reverting to active management of enterprise, the like of which we have probably not seen since the end of wartime rationing.

Why is it that after a quarter of a century of economic reform which has made the Australian economy the strongest it has ever been – not measured by the size of the economy or the level of wealth of Australians, but by flexibility of the economy to adjust to change and to enable investors to decide what enterprises to establish and support – we now contemplate reversion to State domination of key economic activity?

There are several reasons, which include the timing of the electoral cycle in Australia and relatively low level of interest in discourse on things that fundamentally matter in Australian politics. They are not specific to the question of global warming. But one reason is specific, and that is the nature of the global debate about global warming and the international instruments established to date to reduce emissions of greenhouse gases – in particular, the *Kyoto Protocol* to the *UN Framework Convention on Climate Change*. The *Kyoto Protocol* aspires to legislate a global cap on production of energy.

The message is clear. By some means or other, the amount of energy each economy consumes which generates greenhouse gases will be controlled. Each economy will surrender its right to let market forces decide where they will operate in the energy sector. And the international system created by the *Kyoto Protocol* will provide international policing of that surrender of that right.

The extraordinary ambition of this notion is only matched by the great difficulty of trying to implement it. That is why the *Kyoto Protocol* has been a failure. It has had only a negligible impact on its primary purpose – a global reduction in emissions of greenhouse gases. However, it has had a very large intellectual impact. It made establishment of global cap and trade systems to reduce consumption of energy the leading idea for tackling climate change. The result was that both major parties in politics in Australia committed to introduce a system to cap production of greenhouse gases, without any significant discussion of the implications of the use of such an interventionist instrument for economic management in Australia, and next to no public consideration of alternative options such as a carbon tax.[4]

We can bemoan lack of political discussion in Australia about the implications of the *Kyoto Protocol*, but to be fair, we cannot hold the thinking public too much to account, since every other major industrialized economy except the United States acceded to the *Protocol* and has attempted to implement its requirements.

The saving grace in all this is that developing economies understand perfectly the economic implications of the attempt in the *Kyoto Protocol* to set a global cap on emissions. They are that the control on economic activity envisaged in the *Protocol* will reduce economic growth. This is why they insist these provisions in the *Protocol* not apply to them. There is irony in this, because developing nations in international economic affairs have been weak exponents of the virtues of using open economies to create growth, as we have just witnessed in the World Trade Organisation as the Doha Round has stalled yet again.

For good or bad, electoral sentiment in Australia wants to see action taken to reduce emissions of greenhouse gases. There is also a commitment among all parties to the *UN Framework Convention* to develop a new global strategy for the same purpose.

In this paper, the only way a new global strategy which will draw the support of all major emitters of greenhouse gases can be developed will be set out. It cannot be based on the principle of setting some form of global control over global production of energy. The developing countries will not accept this. It is also unlikely that the US Senate would approve such an instrument, unless equivalent commitments to those imposed on the US were also applied to key developing countries – especially China. So it cannot be based on instruments envisaged in the *Kyoto Protocol*.

If Australian leaders give primacy to the principle that any global strategy on climate change should enjoy the support of major emitters, then invariably they will set aside the concept of a global system of regulated caps on emissions.

In considering a national program to address climate change, it would be to the benefit for continuing prosperity for Australians if our leaders recognized that the most appropriate policy to apply is best formed after rational analysis of the problem and the most effective response, rather than taking a political decision to adopt the most promoted and worst idea. In the process, we should hope they would reflect on the economic misery visited on millions of people in the 20th Century by the disastrous efforts to use command and control tools in the Communist economies.

Kyoto's mechanisms – undermining national sovereignty

Kyoto commits industrialized economies which become party to it to adopt targets to reduce emissions over a nominated period.[5] It also states that a system to create and trade credits to emit greenhouse gases will be established. It does not say how this is to be done.

These are stupendous commitments, yet they are laid down in just a few words.[6] The *Kyoto Protocol* obliges parties to establish emissions trading without laying down agreement how it will work. The *Protocol* is the

most lamentable expression yet of a regrettable practice that has grown over recent years in the UN and international treaty-making. This is to enshrine political goals as legal commitments in an international Convention, then leave it to the parties to the Convention, once they have acceded, to decide how those commitments are to be implemented. It has been a marked trend, particularly in negotiation of Multilateral Environment Agreements.

This means that when sovereign governments accede to these agreements, they are not accepting specific obligations which can be easily enshrined in law (whether or not that in itself is regarded as desirable): they commit to be bound to adopt decisions determined collectively by a group which the international Convention has empowered to make policy in the form of new or elaborated commitments. In plain terms, national interests are being put into the hands of others.

That is the case in the *Kyoto Protocol*. It in fact obliges parties to do far more than adopt nominated caps and to participate in a yet to be defined system of emissions trading.

It also obliges parties (Article 2.1) which are industrialized economies to implement policies which:

- Enhance energy efficiency.
- Protect and enhance carbon sinks; promote sustainable forestry and afforestation and deforestation.
- Research, promote, develop and increase use of renewable technologies, carbon sequestration and other innovative technologies.
- Reduce or phase out measures that run counter to the Convention and market mechanisms (instancing market imperfections, taxes, incentives and subsidies).
- Promote policies and measures that limit emission of carbon dioxide and methane.

This obligation is limited with the condition that it is fulfilled "in accordance with national circumstances". This is a traditional way in international agreements of leaving each party the freedom to determine how it will fulfil the obligation. But that freedom is limited.

The *Kyoto Protocol* has enforcement mechanisms. The Secretariat to the Protocol (a standing and permanent administrative group established to support the *UN Framework Convention on Climate Change*) is authorized (Article 8) to review the performance of obligations by parties. That includes annual reports by Annex One parties on compliance with obligations to reduce emissions. It also stipulates that the review shall provide a "thorough and technical assessment of all aspects of the implementation by a Party of the Protocol". That would include the obligations set out in Article 2, which are listed above.

The Secretariat is authorized under Article 8 to manage those reviews and appoint experts to undertake them. It has considerable discretion in this regard. The reports shall assess "the implementation of the commitments of the Party and identify any potential problems in, and factors influencing, the fulfilment of commitments".

These reports are to be considered by the Parties to the *Protocol* meeting as a group, where the ultimate decision-making process is by a vote by three-quarters of the members.

Penalties for non-compliance are addressed in two ways. Under procedures adopted by the Parties, any Party which fails to meet its commitments to reduce emissions in a nominated year is ineligible to participate in an arrangement to accept credits to reduce emissions under arrangements approved under the Clean Development Mechanism. The latter is a procedure allowing projects to be approved in developing countries which can generate credits for emissions which may be traded into an emissions trading scheme established by an Annex One party. This cost is not very high, since this mechanism has not been very successful.

There is also a provision to specify penalties for failure to fulfil obligations to reduce emissions, but these need to be set by parties to the conference meeting in a specified mode. Voting rules indicate that decisions by three-quarters of members are binding.

These mechanisms mean that an Annex One party can be assessed by a process over which it has no control. Particularly inappropriate is the fact that around three-quarters of the parties to the Protocol are not Annex One parties, who are not obliged to reduce emissions, but can constitute a majority, or most of a majority, which can determine whether Annex One parties have complied with the Convention.

Parties have the option to withdraw from the *Protocol* or the *Convention* at any time. In this respect, they can ultimately protect their rights to develop and implement national policy on matters covered by the *Kyoto Protocol*.

Notwithstanding that, the governance arrangements of the *Protocol* require parties to surrender to mechanisms and procedures which are either undefined, or over which they have no right of veto, and which can be largely determined by groups of parties who, prospectively, share none of the interests of Annex One parties – in particular, in not accepting onerous and costly obligations to reduce emissions.

Finally, the Secretariat of the *Protocol* is empowered by it to exercise considerable authority in the way in which assessments of compliance are undertaken. It is also relevant that, over time, the Secretariat to the *UNFCCC* and the *Protocol* has come to exercise considerable independence. The ideal governance standard is that parties to a Convention select and control administrative staff. It has become practice for the Head of the *UNFCCC* Secretariat to be appointed by the UN Secretary-General. As well, it is common practice with Multilateral Environmental Agreements for individual parties to provide voluntary funding for specific activities which are administered by the Secretariat or its Head. A noticeable feature of the work of the UN Secretariat is the large number of German nationals on the staff.

Forging global consensus and respecting national sovereignty[7]

The fact that there is a global consensus to address global warming is often overlooked. That is represented in the membership and provisions of the *UN Framework Convention on Climate Change*. While the United States (and formerly Australia) was widely pilloried for not acceding to the *Kyoto Protocol*, the US is a party to the parent *Framework Convention*, as are all other leading emitters of greenhouse gases, including China, India and other developing countries.

The *Framework Convention* is a classical example of good governance standards and law-making in international conventions. Aspirations for change and goals are set out, but the ultimate obligation for implementation lies with national governments acting under national law. There is an obligation on parties to submit reports on national actions taken to meet the aims and purposes of the *Convention*, but there is no mechanism providing penalty for non-compliance. There is the pressure of being seen to have failed to act.

This model is appropriate, given that the international community and the United Nations system do not have the approval of member states or the capacity to implement an executive function of such complexity as managing a global regulation to limit important economic activity, such as a global system to cap emissions and create and trade permits to emit greenhouse gases. Creating a global currency would be easier, and that is a task beyond the will or capacity of international institutions.

So what are the options to create a new global approach to address global warming? First it is worth reviewing the experience with the *Kyoto Protocol*.

- The *Protocol* failed to reduce emissions of greenhouse gases. Less than half of the world's emissions were governed by it. Emissions from Annex One parties have increased. The *Protocol* was a classic example of institutional functionalism. It established a process without agreement on a goal.
- It delivered few benefits to developing countries. They acceded to the *Protocol* on condition they were not obliged to reduce emissions, and in expectation that technical assistance would be provided, particularly to support adaptation to the effects of global warming, a goal laid out in the *Framework Convention* to which the developing countries attached parallel importance to the other goal – mitigation. *Kyoto* is a tool principally for mitigation.
- *Kyoto* demonstrated the high cost of reducing emissions. Most Annex One parties have failed to meet their targets to reduce emissions.
- The *Protocol* failed to build a global consensus The EU justified the decision to proceed to have some countries commit to reduce emissions on the grounds that the *Protocol* would be a "First Step", an exemplar that others would follow. They didn't. The EU was told directly at the three meetings of parties that preceded the Bali conference, which launched the negotiations for a new global strategy in December, 2007, that the US and the developing countries would not either accede to the *Kyoto Protocol* or accept binding commitments to reduce emissions.
- Experience with the European emissions trading system as well as research in the United States has demonstrated the formidable difficulty in administering a system of emissions trading. This includes over-active management by government in allocation of permits, gaming to acquire permits, and the difficulty of ensuring compliance and verifying the integrity and value of the traded instruments.[8]

So what lessons should be drawn from the Kyoto experience in developing a new strategy for global action on global warming?

1. *Strategies need to recognize that the interests in every economy are different.* Developing countries supported the *Protocol* because it permitted them to consider strategies that met their development needs. The same principle should apply to economic differences among industrialized economies.

2. *Global regulation of economic activity does not work.*

Commitments that incur significant costs and penalize economic growth will not be met by governments. There is no consensus among parties to the *UNFCCC* to create a global system to regulate economic activity.

3. *Participants must regard strategies as equitable.* Reducing emissions or slowing the growth in emissions is costly. Each country has to regard the economic cost of reductions as reasonable and equitable. The measure of that cost is a national judgment, not a common international benchmark.

4. *Countries want to adopt differentiated approaches.* To secure support, *Kyoto* had to provide for a dual track approach –industrialized parties committed to mandatory targets to cut emissions; developing countries pursued voluntary national strategies. Other approaches to reduce emissions have emerged outside *Kyoto*, particularly the Asia-Pacific regional strategy.

A realistic strategy

No new strategy will succeed unless it sits within the policy parameters of the leading emitters of greenhouse gases. Governments have already set down their positions on how they will approach a new global strategy on global warming:

- The EU wants the architecture of the *Kyoto Protocol* – timebound commitments to reduce emissions and global emissions trading – extended. It wants new, deeper targets to reduce emissions and all major emitters to accept binding commitments. Part of its motivation is to shift costs it has imposed on itself via ambitious targets onto its competitors. It fears a loss of competitiveness if it cannot convince others to impose similar costs on themselves.
- The US wants a general non-binding approach that may recognize some general aspirational targets to reduce emissions in the long term but provides the flexibility for each party to design and adopt their own national programs. This may change depending on the position of future administrations. The leading candidates for the 2008 Presidential election both support introduction of a national cap and trade system, but with conditions and important nuances. The attitude of Congress will be critical. Until now it has rejected cap and trade models.
- Developing countries are insisting that the architecture of *Kyoto* not change – no binding targets to reduce emissions for developing countries, but there are signs national programs to restrain emissions might be considered.
- A clear preference among most parties to the *Framework Convention* and the *Protocol* that measures to implement strategies on global warming fully respect national sovereignty.

The inescapable conclusion from the foregoing is that a decision to create a new global strategy is a political decision. It is not a technical decision on how much emissions will be reduced, or in what timeframe or by how much levels of carbon dioxide in the atmosphere will be reduced, or by how much temperature rises in the future might be mitigated. No consensus can be achieved over those questions.

The most effective way of building a new political consensus which recognizes those realities is to start from where consensus currently exists; and that is on the common policy platform on which the *UN Framework Convention on Climate Change* currently sits. It sets out the actions countries should take as national measures, but without mandatory commitments or targets, and places equal emphasis on measures to adapt to the impact of climate change as on measures to mitigate it.

To secure consensus some additional elements are required:

1. Some sort of target: The US idea of a long term, aspirational target is the only way to bridge the positions of the EU, the US and the developing countries.

2. Multitrack implementation strategies: Scope has to be provided for each country to set out its own programs. It is speculated that China might consider setting a target of increasing efficiency in generation of energy, for example by reducing the number of emissions per unit of fuel burned. This would still allow it to increase emissions, which it has said is essential. If members of the EU or even Australian governments decided to set binding national targets as national policies, they could be their contribution to a global strategy to work towards a long term aspirational goal. This would also create a demand for some honesty in global warming policy, restricting the proclivity of governments to make high sounding commitments to take action on condition others do the same.
3. Annual reporting: It would be necessary for every party to the Convention that is a major emitter to report each year on actions taken to implement their national strategies. Peer review pressure does work in international *fora*.
4. Regular review: Given how much is not known about the science of global warming, it would be sensible every decade to review the goals and procedures of this global strategy. This would provide time needed to satisfy the five aspirations which require to be met if there is to be an enduring global consensus on how to tackle climate change, namely:
    i. The hope, held dearly within the EU and among Greens, that ultimately other major emitters will come to share their conviction that a more coordinated and common global strategy is necessary.
    ii. The desire of China and probably other developing countries to see the emphasis on global warming shifted to adaptation rather than mitigation in the foreseeable future.
    iii. The hope of those who consider the science of global warming weak or sufficiently open, that over time there will be greater clarity and certainty about the nature and trends of global warming.
    iv. That proper recognition is given in discussion about global warming in industrialized economies to the true cost to poor countries of early and sharp action to reduce global growth. Green and EU demands for sharp, early cuts carry unacceptable moral implications that continued elimination of poverty is less important than being seen to be acting to address global warming. The British Government-commissioned Stern Report sought to reverse the accepted wisdom among development economists that the most development-and-poverty friendly approach to global warming is to begin to restrict emissions by small amounts over a very long period. Comment by Pachauri, Garnaut and others notwithstanding, this remains the prevailing view.[9]
    v. That sound judgment and good policy will ultimately come to shape deliberations on practical approaches to the question of global warming.

Summary

The hype about global warming, and the pressure on governments to take action which validates that hype, has created the situation where it has become commonplace to see policies being promoted which won't work and will cause tangible harm.

The current debate over global warming cleverly exploits multilateral diplomacy through development of a new populist political tool for national governments. This is where national governments support policies which are impractical (like a global cap on emissions), or for which leaders or governments will never be accountable (like committing the international community to deliver a joint result in 2050), to win domestic political advantage and then deliver the problem to an international institution which is incapable of achieving it. This is one of the reasons the UN so rarely develops tangible results.

With global warming, we have traveled a bridge too far. Highly publicized promotion of the case for strong, impractical action in international *fora* on global warming has created an environment where seriously damaging national policies, such as use of command and control tools to limit emissions, are now receiving attention with a seriousness they neither deserve nor warrant.

This problem is not unique to Australia. It is a challenge to all governments in democracies which function most successfully when it is taken as given that prosperity depends on sound governance and not populist politics.

Endnotes:

1. In his Interim Report, Garnaut makes it clear that a secondary market price curve "provides fundamental stability to the market with opportunities for hedging price risks, and adjusting quickly to new information". (Garnaut Review Interim Report, p. 45.)
2. Apart from the practical difficulties involved in the proposal (especially calculating the carbon content of competing products), this intervention would also undermine the certainty which a secondary market requires.
3. Department of Prime Minister and Cabinet, *Abatement incentives prior to the commencement of the Australian Emissions Trading Scheme*, September, 2007.
4. The Report of the Howard Government's Prime Minister's Task Group on Emissions Trading, which was prepared to underpin the switch by that Government to support a cap and trade system, contains a slim discussion in a few pages on the pros and cons of using a carbon tax rather than cap and trade to reduce emissions. That is the only formal public review of options to manage emissions of carbon dioxide. The implications of policy to curb emission of greenhouse gases is arguably much more significant for the economy than the introduction of GST which, properly and in contrast, was preceded by a large, wide-ranging and extensive process of public debate sponsored by government.
5. Emissions of greenhouse gases are to be reduced by an average of five per cent below levels prevailing in 1990, by 2010. A schedule nominates the rate of reduction for each such party.
6. **Article 3.** 1. "The Parties…. Shall …..ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts……".
   Article 17. "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines…. for emissions trading".
7. The following analysis of the failings of *Kyoto*, and how a new global consensus on tackling climate change can be forged, draws heavily on *World Growth*, 2007, Oxley, *Building a pro-development strategy on climate change*, http://www.worldgrowth.org.
8. For a good overview of the problems of administering cap and trade systems see Robert J Shapiro, *Addressing the Risks of Climate Change: The Environmental Effectiveness and Economic Efficiency of Emissions Caps and Tradable Permits, Compared to Carbon Taxes*, February, 2007, 22, available at http://www.theamericanconsumer.org/Shapiro.pdf.
9. See work by Lomborg, (This case was originally cogently set out in *The Skeptical Environmentalist* and updated in recent work in the Copenhagen Consensus program. William Nordhaus is also a key reference point for analysis on this issue).

Chapter Seven

The *Treaty of Lisbon: A* Federal Constitution that Dares not Speak its Name?

Dr Matt Harvey

The *Treaty of Lisbon* (2007) is the latest attempt by the European Union at constitutional development. The previous attempt, the *Constitutional Treaty*, failed in 2005. The rejection by Irish voters of the *Treaty of Lisbon* on 12 June, 2008 may signal its demise, though the EU has not admitted defeat yet. As of 22 August, 2008, 24 of 27 Member States have ratified it, and Ireland may be asked to try again, as it was with the *Treaty of Nice* in 2001-2. (Sweden and the Czech Republic are the other Member States who had yet to ratify). The EU is clearly in a constitutional muddle. Let us explore how it got there, then what it might do next.

The EU is an extremely complex creation. It was created by the *Treaty on European Union* (*TEU*), signed at Maastricht, the Netherlands, in February 2002. It encompassed the three European Communities: the European Coal and Steel Community, created by the *Treaty of Paris* in 1951, the European Economic Community, created by the *Treaty of Rome* in 1957, and the European Atomic Energy Community of the same year. The European Coal and Steel Community was wound up in 2002. The other two bodies are of indefinite duration.

The *TEU* changed the name of the European Economic Community to the "European Community". It is the most important Community, and the only one of which I will speak further. It is however worth mentioning that the European Coal and Steel Community had a constitutional framework largely reproduced by the other Communities: a Commission (called in the ECSC a High Authority), consisting initially of technocrats, but later increasingly politicians, to propose and implement legislation; a Council of Ministers of the Member States to approve legislation; a Court of Justice; and an Assembly, initially of delegates of Member State Parliaments, later directly elected and called the European Parliament.

The success of the ECSC inspired its architect Jean Monnet to attempt something more ambitious: a European Defence Community and a European Political Community. The latter, although sounding extremely grand, was (only!) attempting a united foreign policy rather than full political control. The EDC/EPC was ultimately defeated in the French Parliament in 1954. Monnet went behind the scenes, but others picked up the Community idea and negotiated the European Economic Community and European Atomic Energy Community treaties in 1957. The Member States were the same as for the European Coal and Steel Community: France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. Britain declined to join any of the Communities at their inception.

No sooner had the *Treaty of Rome* taken effect in 1958 than the French Fourth Republic collapsed, and General de Gaulle was able to come out of retirement and create the Fifth Republic in his own image. He was distinctly skeptical about the Communities, and while he did not withdraw from them, he was far from enthusiastic. When Britain applied for membership in 1961 and 1967, de Gaulle vetoed the applications.

The *Treaty of Rome* had a twelve year implementation period. In 1966, this provided for some majority voting in the Council of Ministers, and de Gaulle withdrew the French representatives. This "Empty Chair Crisis" was resolved by the "Luxembourg Compromise", which kept the national veto intact – not the last example of diplomatic compromise overriding the words of the treaties.

What does the European Community do? Very briefly, it presides over a customs union, a single internal market with free movement of goods, services, people and capital, a single external trade policy, and a Common Agricultural Policy which heavily subsidises farmers. Monnet always intended that the Communities would expand beyond the economic to the political. Britain seems to have hoped that a single market could be created without political interference.

After the departure of de Gaulle, Britain was accepted into the Communities in 1973 along with Denmark

and the Republic of Ireland. Norway signed to join, but its voters rejected this in a referendum. Denmark and Britain have remained half-hearted members. Ireland has been an enthusiastic member (no doubt largely due to the significant funding it has received!) until recently, when its voters have rejected two proposed constitutional amendments: in 2001 (the *Treaty of Nice*, subsequently accepted in a second referendum); and now the *Treaty of Lisbon* in 2008.

The 1973 enlargement was followed by the oil shock of that year which hit the Member States hard. A period of "Eurosclerosis" followed. Significant events were election of the Thatcher government in 1979, the accession of Greece in 1981, and the arrival of Jacques Delors as Commission President in 1985. It was a Conservative government under Edward Heath that had brought Britain into the "Common Market" in 1973, only to lose office in 1974. The incoming Labour government held a referendum on continued British membership in 1975. This was passed, but it is the only referendum the British people have ever had on European issues! Margaret Thatcher was pretty skeptical about the EEC, but the part she liked best was the single market, and she was a key supporter of the Single European Act, a treaty which tried to speed up the completion of a single market by the end of 1992 (this should have been achieved by 1970!).

Meanwhile, as the EEC was getting its internal market in order, the "iron curtain" collapsed. The countries of Central and Eastern Europe, which the EEC had always called to join them, were now free to do so and very willing. West Germany was able to swallow East Germany whole (though it has taken some time to digest!), but the other states were made to wait. They were slung some money and plenty of advice, but they were basically told to get up to European speed before they would be admitted. This was in contrast to the treatment of Ireland and Greece, and of Spain and Portugal, which were admitted in 1986. They were all given substantial periods to adjust to the rigours of membership, and considerable funds to assist the process.

As the completion of "1992" approached, the politicians and Eurocrats looked for the Next Big Thing (the EU is rather like a bicycle – it must keep moving or it will fall!). They decided this would be a single currency. They also decided to create a European Union, which sounded better than a Community, and would be grander. Thus, in February, 1992 came the *Treaty on European Union*, which can be seen as the start of the constitutional muddle. But before we look at it, let us take a quick look at some other constitutional developments.

The European Court of Justice had, as part of its role, a commission to ensure that "the law is observed".[1] A supranational court with compulsory jurisdiction is revolutionary. The ECJ has made the most of its opportunity, rather like the Australian High Court. Its first revolutionary case was *Van Gend & Loos*[2] in 1963, which held that private parties could invoke rights under the treaties against Member States. This doctrine of "direct effect" was significant as, before then, international law had been the sole province of states. Community law was proclaimed to be a "new legal order" between international law and domestic law, with the ECJ its supreme arbiter.

The second revolutionary case was *Costa v. ENEL*,[3] in which the Court held that Community law was supreme over Member State law. This was gradually accepted by Member State constitutional courts, though they have tended to express reservations. One of their main reservations, particularly of the German Constitutional Court, has been the lack of Community protection of rights. The ECJ took the hint, and in 1974 began to discover rights embedded in Community law. This too may sound familiar to Australians! The ECJ was able to draw on the *European Convention on Human Rights and Fundamental Freedoms* of 1950, to which all Member States are signatories, and on "the constitutional traditions common to the Member States" to create a new human rights jurisprudence.

The European constitutional muddle began with the *Treaty on European Union* because the Union is such a nebulous concept. It may be objected that the Communities are nebulous too, but at least they have clear international legal personality and lawmaking power. The Union, in contrast, has neither.

The Netherlands had wanted the *TEU* to state that the EU had a "federal goal". Britain insisted that the "f-word" be removed, and it was. This triumph of British diplomacy has helped to ensure that the federal entity that is the EC cannot be intelligently discussed. The *TEU* also introduced "subsidiarity" – "the word that saved Maastricht".[4] This concept, drawn from a papal encyclical of 1931, states that decisions should be made as close as possible to the citizen. As used in the *TEU*, it means that the EC will only legislate when it is the more appropriate legislator than the Member States, whenever that is! Subsidiarity is in the eye of the beholder.

The *TEU* was almost immediately in trouble when it was rejected by Danish voters. Initially, this caused anger in the EC establishment and muttering of expulsion, but when perusal of the treaties revealed no

mechanism for expulsion, and there was no stomach to reopen the treaty negotiations, a compromise was reached whereby some of the contentious articles were given an official interpretation. This was then able to be put to the Danish people as a concession and they ratified the treaty the second time around in 1993. The treaty also survived a referendum in France very narrowly. This had become a referendum on the ageing President Mitterrand, and attested to his sagging popularity. The treaty also had to survive a constitutional challenge in Germany by a Herr Brunner, a former Commission official. The challenge failed, but it gave the German Constitutional Court another opportunity to remind Europeanists that there were possible limits to German accommodation.

So the *TEU* entered into force in November, 1993. One of its main innovations was to set a path to a single European currency. This was achieved in 1999 after much austerity and some creative accounting. Britain had opted out of the single currency from the start, and Denmark obtained confirmation that it too could stay out, and it has.

So while the Member States were working on a single currency, the Central and East European states were banging on the door. They were told to enact some 80,000 pages of legislation, known as the "*acquis communautaire*", and to await the EU's pleasure. Yugoslavia collapsed into civil war and secession. Slovenia made a relatively clean break. Croatia's break was more messy, and divided Germany and France in a reminder of conflicts past. Macedonia had to call itself the "Former Yugoslav Republic of Macedonia" ("FYROM") to assuage Greek sensitivities. Bosnia-Herzegovina became a war zone. The EU tried to negotiate a solution, but only NATO bombing of Serbia finally forced agreement to a grudging federation. The EU remains in occupation as a peace keeper. The collapse of Yugoslavia demonstrated the foreign policy impotence of the EU.

Austria, Sweden and Finland joined the EU in 1995. As prosperous, neutral countries, they were comparatively easy to assimilate. As in 1973, the Norwegian government negotiated accession but the Norwegian people again rejected it in a referendum. Negotiations in 1997 were meant to enable institutional reforms allowing for admission of the Central and East Europeans, but the *Treaty of Amsterdam* was preoccupied with attempting to obtain a common approach to asylum seekers and failed to make the necessary reforms. The main effect of Amsterdam was to bring the "Schengen *acquis*" into the EC. The Schengen Agreement was an agreement on border controls by some of the Member States.

The reforms to enable enlargement remained to be achieved. They were achieved by the *Treaty of Nice* of 2001, but *Nice* was a rushed job and grudging compromise. By then, the idea of a constitution was firmly on the agenda, and some of the hard questions could be deferred to that. At Nice, a *Charter of Rights and Freedoms* was adopted, but not with legally binding force. It was basically a piece of window-dressing.

As mentioned, the *Treaty of Nice* struck trouble when rejected by Irish voters. It too required some "clarifications" so it could be offered to Irish voters again. They were kind enough to accept it the second time around, in 2002. This enabled enlargement negotiations to proceed, and ten countries were able to join on 1 May, 2004. Eight of these were Central and East European states: Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Lithuania. Two were the Mediterranean microstates, Cyprus and Malta. Bulgaria and Romania, more backward than their Central and East European brothers, were deferred to 2007, when they did indeed join.

Meanwhile, a Convention had been convened to draft a Constitution for Europe. Somewhat like the Australian Constitutional Convention of 1998, the Convention was carefully constructed so as not to be too radical. Under the presidency of the former French President Giscard D'Estaing, it produced a draft Constitution that stuck pretty closely to the existing script. Indeed, it ran to several hundred pages, as it reproduced almost all of the Treaties of Rome and Maastricht. It incorporated the *Charter of Rights and Freedoms* and was styled as a *Treaty Creating a Constitution for Europe*. This was a deepening of the muddle. Was it a Constitution? Was it a treaty? Could you have a Constitution made by a treaty? The draft was pored over by the Member States and not signed until late 2004.

Both France and the Netherlands announced that they would hold referenda on the treaty. Neither had to do so. Spain held a referendum early in 2005 which endorsed the treaty. Several states ratified it by parliamentary means. Then in late May, 2005 France held its referendum and the treaty was rejected. A few days later, on 1 June, the Dutch voters rejected it too. This effectively killed the *Constitutional Treaty*, but the leaders were thoroughly committed to its main reforms. They were willing to drop the "c-word" *Constitution*, and revert to a treaty. Hence the *Treaty of Lisbon*, a federal constitution that dares not speak its name.

The treaty itself would not be the constitution. Rather, it is the amendments that it would make to the existing treaties. These would fold the EC into the EU, making it the sole entity. The *Treaty of Rome* would become the *Treaty on the Functioning of the European Union*. There would be clarification of the powers of the Union. Instead of the six-month rotating presidency of the European Council, a person would be appointed as President for a two and a half year term. The Commission would be restricted to 27, meaning that in the event of further enlargement, not every Member State would be guaranteed a Commissioner. *The Treaty of Lisbon* was signed in late 2007. As noted earlier, many states have ratified it. Only Ireland held a referendum, on 12 June, 2008. This rejected the Treaty. Now the question remains: will this kill the Treaty, or will Ireland be asked to try again?

From what I hear of the political mood in Ireland, asking again may lead to another rejection. This is somewhat puzzling, as Ireland has been a major beneficiary of EU membership, but it is possible that the Irish now take their prosperity for granted, are shocked by the migration they have received, and are tired of change. That is to assume that EU issues actually played a part in the vote. Often, voting on European issues is an opportunity to give the government a kick without actually voting it out.

Some had hoped that Lisbon would be the end of constitutional development. I would doubt that, given the EU's record. So regardless of whether it comes into effect, I will give my constitutional prescription. I believe that the EU does need a Constitution. I also believe that it already has a constitution, but that a group of treaties is not an adequate constitution. However, the attempts so far to create a Constitution have been doomed to failure.

There is a strong sense that the EU has got this far because it has delivered peace and prosperity. People seem to have taken it to their pockets rather than their hearts. People have not minded that they do not understand it as long as it goes on delivering results. The efforts to constitutionalise the EU in a more open way have coincided with the end of good times. If the party stopped in 1973 with the oil shock, it is noticeable that the EEC did little from 1973 to 1985. The Single European Act was able to be portrayed as enhancing prosperity. As it was nearing completion through the recession of the early 1990s, a new trick was needed, and this time it was the *Treaty of Maastricht* – the creation of the EU, whatever that is, the establishment of a timetable and pathway to a single currency, and lofty aims for a common foreign and security policy. After Maastricht, the trick was enlargement. That has been achieved, but one may doubt if it has really been absorbed. The then candidate states were able to take part in the constitutional convention, but not as equal partners. Having escaped from the Soviet yoke, they are not keen to put on a European one. They may yet be able to teach the Union some lessons about democracy and constitutionalism.

In the midst of difficult times, can a Constitution become a rallying point for a sense of common purpose among the people of the EU? Among nearly 500 million people across a diverse continent, this is a big ask. This is surely where federalism comes in. It enables decisions to be made about some matters at one level, others at another. I am far from convinced, unlike Ken Wiltshire, that the EU is destroying national identity and diversity. The EU works in over twenty official languages! It has performed the spectacular feat of uniting 27 diverse states, with plenty more knocking at the door. It cannot and must not deploy the tools of nationalism, race and religion to bolster loyalty and support. It can promise economic benefits, but these can be hard to deliver to all and all the time.

I believe that the solution lies in a more patient and realistic approach. An EU Constitution is not a panacea. The EU works. It could work better. A Constitution is part of the way to make it work better. It would enable a genuine European politics, less strained and distorted through national channels. This will require vision and leadership, but also extensive education and consultation so that, over time, a Constitution with deep public support can be created. The ten year time frame of Australia in the 1890s springs to mind. Where is Europe's Samuel Griffith?

Australia and Asia-Pacific Union

Finally, a brief aside on an Asia-Pacific Union. Just as each new Australian Prime Minister seems to need a New Federalism, each seems also to need an Asia-Pacific Union! Bob Hawke and Paul Keating had APEC. John Howard explored several possibilities. Now Kevin Rudd has his Asia-Pacific Union. Keating was insistent that APEC would be like the EU but without the bureaucracy. It is notable that without the bureaucracy, APEC is little more than an exotic photo opportunity. An Asia-Pacific Union faces formidable obstacles. Asia, let

alone the "Asia-Pacific", whatever that is, is much more diverse than Europe. It does not have the geographical contiguity and cultural similarities that make the EU cohere. It lacks so many of the conditions that made the EU possible. An Asia-Pacific Union may be of most use as a rhetorical device to demonstrate Mr Rudd's engagement with Asia.

Endnotes:

1. Article 220 of the European Community Treaty.
2. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] European Court Reports 1.
3. Case 6/64, *Costa v. ENEL* [1964] European Court Reports 585.
4. See D Cass, *The word that saved Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, (1992) 29 *Common Market Law Review* 1107.

Chapter Eight

"Supreme Summit Smashes Creaky Constitution": Pravda

Professor David Flint, AM

This satirical address was inspired by the 2020 Summit, and much of what appears here is based on news reports about the Summit.

The most reported decision at the Summit was the support of its Governance panel for some unspecified republic. This was decided by a vote of 98:1, with one abstention. This vote was taken with almost no discussion, no research, and no details of what was being proposed.

The decision was then reported as one to hold a referendum preceded by a first stage in which links with the UK would be ended. As links had been ended years before, the announcement was ridiculed in reports in the media. Ten days later the decision was changed surreptitiously, to read that the first stage was to be a plebiscite, and not two – which is favoured by one republican faction, but strongly opposed by another.

In almost every respect – selection, appointment, transparency and fairness, respect for privacy, management, process, the procedure for arriving at, recording and reporting decisions – the Summit not only compares unfavourably with the Conventions which drafted the Australian Constitution, but also with the 1998 Convention from which the republican model that was the basis of the 1999 referendum emerged.

Never before in the history of this nation has the government of the Commonwealth presided over such a travesty. As one ardent republican at the Summit, Professor Robert Manne put it, it came to resemble a Mad Hatter's Party.

The 2020 Summit was a mismanaged attempt to indicate support for substantial constitutional change. That several prominent members of the media actually participated indicates the extent to which that institution has become seriously compromised.

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A collection of highly confidential documents has come into my hands.

They are in a file entitled "Supreme Summit Smashes Creaky Constitution", and consist of a series of emails. They are principally from one address, vyacheslavmikahailovich@bolshe vikwatch.com.

While I cannot definitely conclude this is a pseudonym, it is possible that it is taken from the first two names of the leading Soviet functionary, Vyacheslav Mikahailovich Molotov. He had famously been a signatory to the Molotov- von Ribbentrop Pact on the division of Poland between Hitler and Stalin. He is also well known in Australia for authorising the celebrated reply to an inquiry by Dr H V Evatt during the Petrov Royal Commission as to whether Soviet espionage existed in Australia.

The Soviet reply advised that there was no such espionage. On this, a file note reads:

> "The Molotov letter was, as you know, of inestimable value in proving beyond any reasonable doubt that Beria's placeman in Canberra, Vladimir Petrov, was lying when he alleged there was a Soviet spy ring in Australia.
> "And of course the fact, subsequently revealed, that the CPSU [Communist Party of the Soviety Union] had advanced funds to Comrades Sharkey and Aarons when they came to Moscow for their regular medical checkups in the workers' and peasants' paradise revealed no more than some meagre funding to float the Eureka Youth League raffles".

All of the emails are addressed to a person whose identity I am still trying to establish. His or her address is tovarich.lukewen@comradwatch.com.au. Because of time constraints I shall only read a few of these:

1. From Comrade Vyacheslav Mikahailovich to Comrade Lu Kewen, February 2008:

"Dear Comrade Lu Kewen,
As you know, the next stage of the struggle is to consolidate all power in an Australian peoples' or soviet republic – just as the great comrade academician, Katherine Susannah Prichard, predicted.
It is crucial that the process to achieve this, the 2020 Summit, have an effective and loyal co-chairman to work with you.
The candidate you mention already heads an Australian university, so he ought to be all right. He was once Queensland Commissioner of Public Sector Equity, which to my ears recalls the Committee of Public Safety in the French Revolution.
But we need to be certain that he definitely manifests no bourgeois tendencies, for example in tolerating deviation or dissent.
Yours, in marching through the institutions,
Comrade Vyacheslav Mikahailovich".

2. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, February 2008:

"Dear Comrade Vyacheslav Mikahailovich,
I must say that the proposed co-chairman seems to have performed very well in the Queensland nomenklatura.
For example, he is a master of the current usage, 'management speak'.
Because it suggests that what is being undertaken is a bourgeois operation, 'management speak' has proved particularly helpful in such matters as camouflaging the insertion of the universities into the command economy, just as we did with the doctors.
The Vice-Chancellors took to 'management speak' like ducks to water, ensuring that the most dangerous academics would be tied up working out inane and entirely useless mission and vision statements, 'SWOT' analyses, central planning and the like, and would thus have no time to object to collectivisation and the subsequent reductions in their pay.
This has allowed the universities to employ large numbers of party cadres as managers, thus increasing our influence.
So I think we will be safe with him as co-chairperson. Be assured that he will denounce the imperialist constitutional system which the British imposed on us, as Paul Keating so cogently taught the masses.
As co-chairman he will no doubt invoke the standard Pavlovian response we have successfully inculcated into the media and universities, that is, that ours is no more than a 'horse and buggy Constitution' imposed by the imperialist British.
Because our policy of 'dumbing down' education has been so successful, few in the media or the academy are able to point out the obvious riposte – that the American Constitution is twice as old.
To date he has a good record of revolutionary compliance. He accepted appointment to the Republic Advisory Committee in 1994, where of course Comrade Paul would tolerate no opposition whatsoever.
While Vice-Chancellor, he held a conference on 'constitutional futures' at Griffith University where he delivered a revolutionary call in his paper *Republicans will rise again*.
Once again he did not make the bourgeois error of allowing any dissenting voices at all.
Fortunately the files have been removed from the university's site.
You should have heard Greg Barns get stuck into the Royal Family.
It was as if Vladimir llyich were with us again.
He denounced them – as he should have – as 'rancid' and 'a menace to democracy'.
The imperialist monarchy was, he rightly said, a 'corrupt institution ... prepared to subvert the rule of law... and allow criminal activity to go unchecked within its walls'.
It has 'little interest in anything other than self-preservation and ...it will ride roughshod over the rule of law, if necessary, to achieve that aim'.

Good stuff that.
In anticipation of the advent of peoples' republican power,
Comrade Lu Kewen".

3. From Comrade Vyacheslav Mikahailovich to Comrade Lu Kewen, March 2008:

"Dear Comrade Lu Kewen,
When you said of the 2020 Summit, 'Let a hundred flowers bloom', you correctly predicted what we will do, as did the Great Helmsman.
As soon as the hundred flowers bloom, we shall cut off their rotten bourgeois heads.
But let me offer a word of friendly warning.
Most in the media, being educated in schools now almost totally under party control, would not have understood the allusion.
But a few may have – Alan Jones, Piers Akerman, Paul Sheehan, Andrew Bolt, Gerard Henderson, Jim Ball, David Oldfield – for example.
So it would be unwise to show your Maoist determination.
At least at this stage.
Yours with Marx, Engels, Lenin, Stalin and Mao,
Comrade Vyacheslav Mikahailovich".

4. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, March 2008:

"Dear Comrade Vyacheslav Mikahailovich,
I have exciting news. As you know, the central aim is, as dear Vladimir Ilyitch said, 'All power to the Soviets'.
He also said something along the lines that Communism is Soviet Power plus the electrification of the country.
Well, with the NSW situation I'm not so sure about electrification.
But the good news is I have a man, from the media, to chair the core Governance panel.
He's the chairman here of Rupert Murdoch's News Ltd.
Now don't worry one minute about Murdoch – he wants to get his empire into the People's Republic, doesn't he?
Dangling that over his head has been quite effective, as that imperialist reactionary, Chris Patten, soon learned.
I always remember what Vladimir Ilyitch would say about the bourgeoisie: 'They would willingly sell us the rope which we would use to hang them'.
And as dear Manning used to say, Vladimir Ilyich was truly Christ-like in his compassion.
We also have placed some key media people at the Summit, including David Marr and Robert Manne.
True, both are getting on, and at their age may become confused if things go too fast.
But their presence will help to send a signal to the other journalists that the Summit is on side.
With hope of the early foundation of a workers' and peasants' paradise in Australia,
Comrade Lu Kewen".

5. From Comrade Vyacheslav Mikahailovich to Comrade Lu Kewen, March 2008:

"Dear Comrade Lu Kewen,
The lady comrades – correction – I mean the comrade women – have really been in turmoil.
Your own dear 'trouble and strife' even asked mine how on earth did you forget about them?
By the way, as a comradely warning, she still doesn't fully believe that the CIA spiked your drinks in New York.
Incidentally, you should be careful about your tax to stop girls – whoops, I mean young women – 'binge' drinking.
I fear the publicans – who are worse than the most reactionary kulaks, even the ones who cruelly

threw my mother and me onto the streets where I lived in an old tractor – will try to draw attention to that incident in New York, and worse – that it was all taxpayer funded.
I mean – if John Howard had done that it would have been on the *7.30 Report* and *Lateline* very night.
Do be careful. And just on the ABC, you should appoint an ABC personality as co-chair to that Murdoch man.
As you know, we've well and truly marched through that particular institution.
But it still irks me that they even allow one nominal bourgeois, once a week, usually the Ackerman – Bolt –Henderson revisionist clique.
Haven't the ABC heard of balance?
The ideal will be to have 100 per cent of all presenters and commentators towing the party line.
I told Comrade Conroy that's the way he has to apply the Charter.
Then there was a hiccup when the Zionists complained the Summit coincided with Passover. The reaction was typical.
Comrade Joseph Vissarionovich Dzhugashvili had their measure, didn't he?
Telling the Politburo in 1952 that 'Every Jewish nationalist is the agent of the American intelligence service' was spot on.
But this brings me to something which really irritates me.
Sometimes the effective abolition of the teaching of history – and just about anything else – does work against us.
Talk about marching through the institutions.
Now I'm all for keeping the people ignorant.
As the Irish revolutionary Oscar Wilde said, before the imperialist British purged him:
'Ignorance is like a delicate exotic fruit; touch it and the bloom is gone. The whole theory of modern education is radically unsound. Fortunately in England, at any rate, education produces no effect whatsoever'.
So don't burden the people with useless detail.
But the cadres are different. They're supposed to be informed. We have hundreds of people working on this 2020 Summit, but no one knows anything.
We saw this during the 1999 referendum when Senator Stott Despoja was launching a book on advancing republicanism.
She said, 'Why can't Australia become a republic..after all, Canada is'.
You could have heard a pin drop in the public library. Fortunately the journalists were on side.
But for the Summit, missing the Passover was bad enough. They followed this with a note on the Summit website saying no referendum had been passed in 40 years.
The monarchists pointed out we'd missed three.
Fortunately the media are on side or, more likely, they're just as ignorant as we planned to make the next generation.
Orwell's 1984 has been such a godsend, although he did not intend it.
If you gradually reduce the number of words in the language – as he does with Newspeak – you reduce the people's capacity to think.
As you know, Newspeak is the only language in the world whose vocabulary gets smaller every year.
This makes any alternative thinking or speech – 'thought crime' – impossible, by removing any words or constructs which describe the ideas of freedom, rebellion and so on.
As one of the comrades said: 'It's a beautiful thing, the destruction of words'.
The brilliant discovery of the education comrades here was not limited to just language reduction, but the reduction of all knowledge. That's the reason for giving everyone computers – I can't think of a better way to distract them.
I wasn't too happy, though, when I went to a doctor who asked me where my heart was. I'm afraid we went too far when we ran down anatomy teaching in the medical schools.
Fortunately we control the history departments, whatever the Trotsyite renegade Keith Windschuttle thinks. Why learn facts, when you can do things like three months projects to

discuss a day in the life of a convict laundress, or the Dreaming?
What we'll have to do is consult with a few old time bourgeois intellectuals – I hate to say it, people like the Winsdchuttles and the Pauls.
Even after we take full power, we can seal them up in the outback with a library and make sure we are not embarrassed internationally with the facts.
The truth is far too precious and dangerous to waste on ordinary people – only people like us should know.
Yours dialectically and materially,
Comrade Vyacheslav Mikahailovich".

6. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, April 2008:

"Dear Comrade Vyacheslav Mikahailovich,
Having the media run the session will be ideal. They are typical of Chesterton's adage that when a man stops believing in God, it's not that he believes in nothing. He'll believe in anything.
By the way, and as this is a private communication, I don't feel obliged to use feminist speak. Being old fashioned, I find that too jarring – you know the sort of thing, 'If any Comrade wishes to criticise the leader they must engage in self criticism'.
Provided it doesn't come from the right, and it fits in with some New Age belief with the right buzz word – republic, multicultural, indigenous, refugee, the UN – the typical political journalist will eat out of your hands. They'll even do our job.
A warning – this doesn't always work – remember 1999.
(By the way, when it comes to economic control, forget nationalisations, they're old hat. We'll use the ETS. One of the cheekier *apparatchiks* calls it the Energy Tax Swindle, but of course we'll sell it as an Emissions Trading Scheme.)
Give the journalists a buzz. They are all republicans.
The other thing about our two journalist co-chairmen (I'd better get used to saying co-chairpersons) – neither has any experience in running meetings, just chat shows.
So no one will know what is decided. And as you know, we've already written the decisions.
Howard was too clever by half in appointing republicans Ian Sinclair and Barry Jones to chair the 1998 Convention.
The trouble is they ran it properly, so we lost the vote. Howard then looked magnanimous when he still put the model which the republican delegates preferred to a referendum.
As we agreed, this time there will be nothing like Hansard there, so no one will know what they have decided.
Comradely regards,
Lu Kewen
PS It reminds me of old times. Remember the fellow travellers – well I don't really, but Gough tells me about them.
Well, they used to have peace conferences, where there would be plenty of clergymen. including one the bourgeois press christened the 'Red Dean'. You know the line – 'I've seen the future and it works'.
Well this particular clergyman went into the church after being a politician. We may have done it by sending him to the Vatican.
His Easter Message was actually about our becoming a republic. He seems to think we can cut off The Queen as an interim measure. If that's true, why didn't Keating do it? I've got the lawyers on to that, so I probably won't hear the answer until after the Summit.
Anyway, we've got a clergyman for the Summit".

7. From Comrade Vyacheslav Mikahailovich to Comrade Lu Kewen, April 2008:

"Dear Comrade Lu Kewen,
We have one problem with this Head of State business. Remember, we introduced this term in the nineties so we could talk about having an Australian as Head of State. As you know, the

monarchists, David Smith and Philip Gibson neutralised that.
That Smith has been a real nuisance since he read the proclamation dissolving Parliament in 1975. A dangerous man, I think.
Now they've found a High Court case which supports them. You'll have to be careful in future appointments here.
Good that you appointed Robert Manne to the Summit. He's just called the monarchists liars. Says they are guilty of fraud on this. Manne is a real straight talker. He says that when The Queen comes to Australia the Constitution says the G-G has to 'push off'.
This proves she's Head of State. Former Chief Justice Anthony Mason argued this at the referendum. We got him onto the front pages on this – said the monarchists were speaking 'arrant nonsense'.
Pity that bourgeois revisionist knight David Smith found that press photograph of The Queen opening Parliament House, not only with the G-G behind her, but also with Sir Anthony Mason there in the front row!
That's why we need a 'Mintruth', Orwell's Ministry of Truth. We need people to continuously correct the record.
I remember when Lavrenti Beria, who headed the KGB, was 'outed' as a British spy. They executed him at a Politburo meeting.
Well, I used to subscribe to the Great Soviet Encyclopaedia.
After this I receive a lovely extra page on the Behring Sea, with instructions to pull out and destroy the page on Beria.
By the way, I have found the perfect Liberal to make the governance panel look balanced.
He's the shadow A-G and an SC. That's what QC's are now called thanks to a really great legal profession reform by John Fahey and the NSW Liberal government.
How they walked into Paul's republican trap. What a brilliant wedge that was.
Anyway, he has to be a republican. His name is Senator George Brandis, by the way. We can use him – and not just on this.
Comradely greetings,
Comrade Vyacheslav Mikahailovich
PS You'll love this. The comrades have succeeded in appointing no one at all who was in the 1999 No case, but we do have the head of the prostitutes' union. After all, why shouldn't the toiling workers and peasants have some fun? Andrew Bolt noticed it, but his time will be limited when we have full power".

8. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, April, 2008:

"Dear Vyacheslav Mikahailovich,
The Governance panel could not have gone better. We made sure that the GetUp! comrades were very well represented, and they ensured the question was raised.
Well, as we planned, it was all so confusing that poor old David Marr asked why they hadn't dealt with the big issue.
But to get a vote of 98: 1 was superb. The monarchists whinged that the gerrymander would have made Robert Mugabe envious. (Comrade Mugabe, incidentally, is doing such a great job in Zimbabwe, we've made sure he is getting the latest arms. He's been much more successful than Gough was in making the currency worthless, which is a tried and tested way to destroy the kulaks and the petty bourgeoisie).
Now it's true I wanted 100 per cent in favour of a republic.
Sir William Deane unfortunately nailed his colours to the fence, and as for that George Brandis! We were counting on him. I can tell you, heads will roll here.
'Rorting' the Summit is light years from our work in the elections.
I remember Albert Sloss upbraiding Joe Riordan when he lost Philip.
'Joe, Joe Joe', he said, 'how could anyone possibly lose an electorate that has two cemeteries in it?'.
The McGrath – Copeman – Kirkpatrick clique are still on to us, but the Coalition will only

realise they are right when it's too late.
But it's all going through, and in the confusion and the euphoria tomorrow we'll get it through.
Yours fraternally,
Comrade Lu Kewen
PS Did you like the shots of me sitting on the floor? Real humility, don't you think?".

9. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, May 2008:

"Dear Comrade Vyacheslav Mikahailovich,
We shall have to do something about the Comrade Professor Manne. He will have to be disciplined.
He has written too honestly about the way we ensured that the meeting of the Governance panel would be confusing and the bourgeois delegates confused.
He writes that 'the level of chaos increased'.
Well, of course it did. That's why we used Maxine McKew and John Hartigan; they were sure to opt for the chat show format rather than, say, Joske's *Law of Meetings*.
But it was too much to reveal that, 'The meeting now more resembled a Mad Hatter's party than a symposium'.
'Often the loudest voices prevailed', he lamented. 'Sometimes it was not even clear what the vote was about'.
Of course that is how it happened, Comrade Robert. That was the plan.
Then he reveals that at the very end of the meeting, Fairfax and ABC commentator David Marr intervened 'with a dramatic plea that the republic be included'.
Well, we knew of the problems with Marr. He had written –openly – some time before that the ARM [Australian Republican Movement] was near comatose.
Of course it was. Once Malcolm Turnbull turned off the funds it wasn't going anywhere.
'He was told that the idea was actually at the top of our list', the Comrade Professor Manne writes.
He says there had been a 'near-complete consensus about a two-stage program for the creation of the republic'.
But he says, 'Marr's confusion was understandable. In our haste, no one could be certain what had been decided. I certainly was not'.
Manne then explains the way the Summit became a national laughing stock on the following Monday.
This was its decision 'to end ties with the UK'. Even the residual ties the States had insisted on keeping went in 1986.
Fortunately the good Professor redeemed himself – partially.
He says the report was 'written at heroic speed' over the Sunday lunch break, so 'the wording of our stream's republic idea, by far the most popular at the Summit, was botched'.
Yours fraternally,
Comrade Lu Kewen".

10. From Comrade Lu Kewen to Comrade Vyacheslav Mikahailovich, May 2008:

"Dear Comrade Vyacheslav Mikahailovich,
I shall never forget the elation and the standing ovation at the plenary.
You were absolutely brilliant to have them release the decoy decision about the breaking of non-existent links with Britain to the press.
Unfortunately, because of our triumph in removing all knowledge from the education system, few in the media noticed it. Only the monarchists did.
The press didn't realise it was to distract attention from your plan to hold one plebiscite, and defeat the Trotskyite republicans who wish the President to be popularly elected.
The Trotskyites say the President should be elected.

After all, we control elections, as the renegade Drs McGrath, Bruce and Doug KirkPatrick and Charles Copeman keep saying.
Just as well the Liberals changed the Minister when he finally understood what they were going on about.
But there is always the chance they will prevail and an election will be so clear we can't control it. Look what happened to Mugabe.
We can't have a presidential election. Professor Craven had to take Senator Marise Payne aside for hours to explain why a second plebiscite will produce that result.
Yes, it was embarrassing for her when she had to then dissent from part of her own proposal. Fortunately the journalists didn't notice.
So when we changed the record ten days later, the Trotskyites were too slow to notice we'd turned the tables on them too.
It was victory all the way. It couldn't have gone better.
But I had not realised that Dr Anne Twomey is too honest for her own good. I wasn't aware of her book, which shows The Queen and the system in too good a good light.
She refers to the plenary sessions as no more than TV 'chat shows', 'a complete waste of the time of the participants, who were press-ganged into constituting an audience. For the most part, they wallowed in the shallows of the superficial and puerile'.
She writes that when the chat show host asked his guests, 'What do you find embarrassing about Australia?', 'one prominent Minister sitting in my row muttered 'this', and led a walk out, which I gratefully joined'.
We'll have to put her on one of our hundreds of reviews so we can find out which Minister said that – he'll be in the gulag soon enough.
Hasn't she ever been to a party conference – or better, a launch of one of our election campaigns?
We learned a lot from Dear Comrade Joseph Vissarionivich.
The regular long standing ovations, the cries of 'Long live Comrade Stalin'.
That's how we ended the Summit – a standing ovation *pour moi*.
It has made the struggle worthwhile, the eviction from the farm by the evil Kulaks, the night sleeping in the tractor, the ambush in New York when the CIA spiked my drinks.
If only those Kulaks who threw us off our farm could see me now.
That is why we have decided to camouflage our real intentions by appearing to have become capitalists.
As you know, this has become party policy, with all former leaders taking on the appearance of being multi-millionaires.
Malcolm Mackerras will have to revise that assessment of me as No. 14 in the table of Prime Ministers. Number 14, really!
Reminds me of the time Comrade Gough appeared on the *Tass* endorsed *7.30 Report* for something of a retrospective. When the Comrade presenter asked him who he thought were the three greatest Australian Prime Ministers, Gough just looked at him.
After a pause that went on until the presenter became nervous, Gough suddenly said: 'Kerry, I'm still trying to think of the other two'.
Yours in anticipation of the inevitable victory,
Lu Kewen
PS This is my farewell, Comrade, or should I say, vile enemy of the people.
We now know the truth. You were a plant by the Vatican to destabilise the party.
The bearer of this letter will immediately impose the supreme sentence of the Presidium of the Supreme Soviet on you".

Chapter Nine

An Opinionated History of the Federalist Society

John O McGinnis

I am very grateful for the invitation by The Samuel Griffith Society to talk about the Federalist Society. As some of you may know, the Federalist Society is an organization of conservative and libertarian lawyers in the United States which now has over 10,000 dues-paying members and another 30,000 sympathizers who come to meetings. It is the American counterpart of your own Society and thus it may offer your Society some useful lessons, just as I am sure we could profit by understanding your own work.

The Federalist Society has been both the most important new civic association in the United States in the last quarter century as well as the most important civic association in my own life. Thus, I hope I will be forgiven for giving a talk that is at once personal and abstract, that tries to convey both how the Federalist Society has inspired me by its ideals and changed the United States by its activities. In doing so, I hope to emphasize that the Federalist Society can serve as a model for civic associations of lawyers and those interested in law in other nations who want to revive the vision of the rule of law and limited government – twin glories of western civilization.

The Federalist Society began when I was a student at Harvard Law School in the early 1980s. It was started by a handful of students at other law schools, principally Yale and the University of Chicago. The prime movers of the founding had known one another from their days as undergraduates at the Yale Political Union – perhaps the most prestigious debating society in the United States, the equivalent of the Oxford Union in the United Kingdom. What startled and depressed them in the transition to law school from their undergraduate college was the absence of debate about the fundamental issues of law. Both the faculty and the student body at their law schools and at élite schools across the nation were so uniformly liberal (in the modern American sense of liberalism) that liberal assumptions were rarely if ever challenged in the classrooms or the cafeteria. As a result, discussion at law school was shrouded in a pall of orthodoxy. Judicial activism and social engineering were praised, and the importance of markets and fidelity to law were neglected, if not actively disparaged.

As veteran debaters, the founders of the Society naturally thought a remedy was to create a forum for disputation. And thus the first Federalist Society event was held in 1982 at Yale Law School, and the topic was federalism.[1] A handful of conservative Professors from across the country, including then Professor (now Justice) Scalia, attended. It should be emphasized that the motivation for this meeting was ideological debate, not partisan mobilization. There has never been a partisan litmus test for speakers or members. The Society has always been open to both Democrats and Republicans, even though the increasingly partisan debate over constitutional law has meant that fewer Democrats than Republicans are members.

Indeed, the *credo* of the Federalist Society is a simple one that should command broad consensus: "the state exists to preserve freedom, the separation of powers is central to our Constitution, and it is emphatically the duty and province of the judiciary to say what the law is, not what it should be".[2] It is a mark of how far law has fallen short of its classical ideals, that an organization with such a philosophy has proved so controversial.

A few liberal students in fact protested its first convention, carrying placards that denounced the Society as the vanguard of reaction in general, and a threat to constitutionally based abortion rights in particular. Given the overwhelmingly left-liberal nature of the academy, the protestors' concern about the power of a rag-tag band of dissenters must have seemed somewhat comical at the time. But given the power of the ideas expressed and the growth of the Society in the next three decades, these student protesters were oddly prescient.

This first formal convention presaged many of the features that have made the Society so successful. First, the Society has enjoyed the advantages of intellectual jujitsu. It is precisely because the legal academy was so utterly dominated by left-liberals that the Federalist Society had a void to fill, and in filling the gap in legal intellectual discourse, it could attract a lot of attention. Second, like The Samuel Griffith Society, the

programs have been serious intellectual events with publishable papers. The notion is that members' ideas will be improved over time by presentations that are serious enough to stand the test of time. Because of focus on publication, the Society has created a symbiotic relationship with the *Harvard Journal of Law and Public Policy*, a conservative law review run out of Harvard Law School, but by a staff of student editors from leading law schools across the nation. The *HJLPP*, as it is called, is one of the most widely circulated law reviews in the nation, and four times a year it delivers three or four substantial articles on law from a conservative or libertarian perspective. It also publishes the proceedings of the yearly Federalist Society student symposium.

It has also been crucial to the Society's success that much of its programming takes place in law schools. First, universities continue to be our prime generator of ideas. As John Maynard Keynes said, "Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist".[3] And the legal gloss on Keynes' epigram is that the legal theorizing of today is the judicial opinion of tomorrow. For instance, Justice David Souter, who sits on our Supreme Court, largely follows the legal process school that was dominant at Harvard Law School when he was a student.

Because of the Federalist Society many more students are exposed to conservative and libertarian ideas about the substance and process of law, and this exposure can pay dividends twenty years from now through better judges. Second, students have time to explore ideas in a way practitioners do not. But if one can get students involved and committed to the Society, as practitioners they will have the resources to sustain the organizations and the status to realize these ideas in practical form during their many years at the bar. To paraphrase the Jesuit boast, "Give me the law student until his graduation and I will give you the lawyer for life".

While I was one of the founding members of the Harvard Law School Chapter, I did not attend the first convention, but was fortunate enough to attend the second convention, held at the University of Chicago Law School. There the topic was judicial activism.[4] I can say that this convention was one of the formative experiences of my intellectual life. Before the convention I had become a pretty listless and alienated law student. Although I was on the *Harvard Law Review*, the principal legal journal of the Harvard Law School, the presidency of which launched the career of Barak Obama, I did not participate much in its intellectual life. Most of my fellow editors thought my ideas crazy and gave me little work. At the *Review*, I was relegated to sitting next to its one true eccentric and talking about his single jurisprudential passion – the law of the medieval papacy. Outside of the *Review*, I saw fifty movies in my third year of law school. I probably saw more movies than I read cases.

The Chicago convention lifted me out of my slough of despond. Here were students who did not automatically dismiss my ideas, and here were faculty members who expressed my intuitions far more articulately than I could. I was at once comforted by company and challenged to reach the level of the panelists. It was a marvelous combination of fellowship and rigour that I am sure has spurred on thousands of other students to live more seriously and largely in the ideas of the law.

For a student, the conference's other remarkable feature was the large measure of sharp disagreement among the distinguished panelists. First, many liberals in good standing were invited to participate. The openness to opposing ideas has been a mark of all the Society's subsequent conventions. In my view, it has been a key to the Society's success, earning the respect of Professors in the more liberal mainstream of the academy and greater influence for its ideas in the long run.

But disagreement raged not only between those sympathetic and those antipathetic to the ideals of the Federalist Society, but among committed Federalists themselves. There was no party line: famous Professors like Richard Epstein and Frank Easterbrook disagreed fundamentally about such matters as the nature of legal interpretation.[5] If one were inclined to intellectual puns, the essence of the Federalist Society has been right clashing with right.[6]

The result has not been tragic, but it has made for great theatre, and I do believe the theatrical aspect of internal disagreement among Federalist Society stalwarts has been an important source of the Society's continuing appeal. The audience looks forward to the sharp repartee between the troupe of academics and practitioners they have come to know.

The internal disagreement also performs two other important functions. First, it keeps scholars and other participants alive to the possibility of nuance and subtle mistakes. Ideologically external critiques of work are, of course, helpful: they elicit better rhetoric, but only rarely substantive rethinking of fundamental building blocks of political philosophy. Internal critiques, however, are likely to be taken sympathetically and really

change steps in arguments on the ground. As a result of this internal questioning, important changes have come to conservative jurisprudential ideals.

For instance, originalism began as the doctrine of original intent: under this view constitutional interpretation is to be guided by the intent of those who framed the document. But many participants in the Federalist Society critiqued this doctrine, because it was difficult to discern the intent of the multi-member bodies that drafted and ratified the Constitution, and because a focus on intent slighted the importance of the understanding of the audience. The Constitution was government of, by, and for the people, and it was thus their understanding that was paramount.

A new view of originalism was thus born – one that focused on the original public meaning of the words rather than the "original intent" of the enactors of the document. But even as original meaning became the dominant view, the debate on the exact content of originalism has not ended. Even the content of original public meaning is now a source of dispute among the Society's members. Some believe that the public meaning is fixed by the legal interpretative rules at the time the Constitution was framed.[7] Others disagree. Such developments mark substantial refinements and improvement in conservative jurisprudence, and provide intellectual capital from which to draw in the future.

Second, for any modern conservative movement to be successful it must be a fusion between traditional conservatives and classical liberals, often now called libertarians in the United States. There is simply never enough of either segment of the right to be a powerful, let alone majoritarian social movement. Their union is ultimately predicated on strong agreement on a matter of political philosophy that transcends policy differences – the pre-eminence and salience of accountability for the individual. That is why conservatives and libertarians are united against the Left's schemes of social engineering.

Yet traditional conservatives and libertarians disagree on more than a few policy matters. Indeed, on a whole variety of specific issues, from pornography to the war on drugs, they are divided, sometimes bitterly so, with libertarians opposed to restrictions on freedom and conservatives sympathetic to government efforts to preserve traditional values. These divisions also carry over to disagreements about government structure, with libertarians generally being more enthusiastic about vigorous judicial enforcement of enumerated and even unenumerated constitutional rights, including a *Bill of Rights*, whereas conservatives tend to argue for deference to legislation and more broadly to the traditions of society.

It is important to encourage these internal debates. First, for the sake of internal cohesion, these disputes must be aired. Disparate elements of a coalition are more likely to stay together if they have felt they got a fair hearing. Second, the disputes help forge the most attractive "fusionist" position, which is often a compromise or combination of the purest positions of the libertarian and traditional conservative viewpoints.

I have continued to be involved in the Federalist Society since that convention in Chicago, but I want to switch to a more impersonal discussion of three institutional transformations that have been crucial to making the Society the most important new civic organization of the last quarter of the 20th Century in America. These important organizational changes are: 1) establishing student chapters in almost every law school across the United States; 2) establishing chapters of practitioners in a majority of major cities; and 3) creating legal practice groups that focus on particular subject matter areas.

First, the Federalist Society created chapters in almost every law school in America. The national student conventions, like the one I attended, continued. But national conventions cannot reach everyone, nor can they counteract the continual left wing influence exerted by law Professors on students at their home institutions. Thus, local student chapters play an essential role in both recruiting new members and in creating a counterpoint to the overwhelmingly dominant left-liberal ideology of the American law school.

To that end, the main office of the Federalist Society now pays for conservative and libertarian Professors to travel across the country. These visits become catalysts for the miniconventions with debates with local liberal faculty members. When students are able to do comparison shopping between conservative and liberal ideas, even those who were previously liberal often become converts.

Students, of course, graduate to become full fledged attorneys, and the second important move of the Federalist Society was to create local lawyers' chapters across the nation. These chapters have become focal points in every major city for continuing agitation on behalf of conservative and libertarian legal ideas. They hold regular meetings and debates. Unlike topics at the national convention, the topics at local chapters are often more narrowly focused and of more direct relevance to practice. The New York chapter, for instance, has held important meetings in the areas of corporate governance and tort reform.

The recruiting of practitioners among chapters across the nation has been so successful that the Federalist Society may be second only to the American Bar Association as a national organization in the number of practicing lawyers it has as members. The Federalist Society then took advantage of these numbers to become a kind of shadow ABA. For instance, it publishes a newsletter that comments on and implicitly critiques the organized Bar, on such matters as the ABA's opposition to tort reform and support for constitutional abortion rights.

Third, as the numbers of practising lawyers in the Federalist Society grew, the national organization created practice groups, in which lawyers from across the nation could meet their counterparts in a wide range of practice areas such as employment law, corporate law, and communications law. In this way the Society broadened its focus from constitutional law and interpretation to the entire range of controversial legal issues. The Society thus increased both its appeal and impact among practising lawyers.

I should mention that one of the most active practice groups (of which I incidentally am a member) is that in international law. This practice group has sought to hold debates on the status of international law in American law, because in a wide variety of ways, academics and others have suggested that international law should become a source of American jurisprudence and binding norms even if it has not been ratified by the political branches. This question of how international law should relate to domestic law is emphatically not a parochial American one. In the democratic West as a whole, the question of how the nation state should relate to international law will become an increasingly central question in an era of globalization. The central danger is that international law will transfer power away from democratically elected governments, and lodge authority in unaccountable international agencies and tribunals. It is one concrete area where I believe the Federalist Society and The Samuel Griffith Society could have many useful exchanges.

Moreover, as a result of these changes in organizing lawyers, the Society now hosts a yearly convention for lawyers as well as one for students. These lawyers' conventions are held in Washington, and now regularly attract Supreme Court Justices, Cabinet members and even, on occasion, the President of the United States. They show the power of the Federalist Society and reinforce the solidarity of its members.

As the Federalist Society has grown in size and power, there have come the temptations of size and power – to throw the weight of the Society around and become another Washington lobby. This development would have been a great mistake. A pressure group necessarily becomes organized around the positions for which it lobbies. As a result it ceases to be open to new ideas and change. Such openness is essential to allow the Society to adapt, and in adapting the law to new circumstances. While principles of conservatism and libertarianism in law are unchanging, their particular application often cannot remain the same. Indeed, law must often change so that things can remain the same.

Under the leadership of its President, Gene Meyer, the national office of the Federalist Society has wisely taken a consistent stance against lobbying or taking positions on legislation and judicial decisions. In that sense, the spirit of debate engendered by the founders of a fledgling, academic and politically powerless society remains the animating spirit of the 10,000 strong, now Washington-based organization. Just as a religion remains truer to its purposes, if it can retain the spirit it enjoyed when its members were few, scattered in catacombs and liable to persecution, so too will a civic association remain vibrant and fertile of ideas, if it hews to the intellectual objectives that first brought it into being.

The refusal to take political positions has had the advantage of repelling the now constant attacks made on the Society as its members become more numerous and its ideas have gained influence and even ascendancy in the legal outlook of the current Administration. One of my own home State's Democratic Senators has made a practice of asking nominees to federal office in their confirmation hearings, whether they had been members of the Federalist Society. These questions, although unconsciously echoing the 1950s refrain, "Have you ever been a member of the Communist Party?", are certainly an indication that the Society has captured the imagination of its opponents. But by remaining a debating Society at its core, the Society is able to deflect much of the incoming political flak.

An excellent recent book, *The Rise of the Conservative Legal Movement* by Steven Teles, has commented shrewdly on the Society's refusal to take positions. Professor Teles has suggested that this refusal maintains the Society as a civic association rather than an interest group.[8] A civic association serves vital functions for an ideological movement as a whole. According to Teles, "it provides a common venue, resolves disputes, and establishes rules for interaction".[9] In short, it serves as an encompassing interest for generating conservative and libertarian ideas and sustaining networks of conservatives and libertarians. The Federalist Society would serve

these functions much less well, and be liable to splinters and division, if it became committed to particular positions and became embroiled in the day-to-day politics of Washington.

To stay apart from particular positions, the Society cannot be financially dependent on interest groups that want particular results. A civic association devoted to advancing an encompassing ideological interest must have a financial base that reflects these commitments. As a result, the Society has raised most of its funds from foundations and individuals rather than companies and trade associations. Despite this, the Society has been very successful, raising this year about ten million dollars, while employing only the equivalent of four full-time members in fund-raising. The profile of Federalist Society donors is much younger than that at most organizations.[10] I think this is again a happy consequence of its student orientation. Many members can be expected to give for a lifetime to an organization that was more intellectually nurturing than the college or law school they attended.

Nevertheless, while the Society itself has remained resolutely apart from both policy positions and partisan politics, it offers networking opportunities for those who want to translate ideas into policy formation and political activism. As a result, it has created the most powerful political cultural force for conservative ideas about law that I believe the United States has ever known. From its inception, influential members of the Society have ascended to the bench. Frank Easterbrook of the 7th Circuit, J Harvie Wilkinson of the 4th Circuit, Dennis Jacobs of the Second Circuit and, most recently, Michael McConnell of the 10th Circuit are but a few of the intellectual heavyweights who now shape the interpretation of federal law. (The Circuit Courts are Federal intermediate appellate courts – the equivalents of the NSW Court of Appeal.) In the executive branch of the current Administration, it may well be that members of the Society occupy the majority of consequential legal positions. The result is an Administration more focused on conservative ideals and less on partisanship than it otherwise would be.

But the scope of the Federalist Society's power, and the extent to which it has changed legal culture, was most reflected in the reaction to the nomination of Harriet Miers to the United States Supreme Court. For those of you in Australia who understandably do not follow the intricacies of the American Supreme Court nomination process, Harriet Miers was nominated to fill the vacancy created by Justice Sandra Day O'Connor's resignation in the fall of 2005. She was the President's personal counsel at the White House, but she had no experience in the kind of constitutional issues that come before the Court.

There was a chorus of conservative opposition to this choice, both because the nomination was seen as an insult to the many qualified nominees, like those named above, who had seriously grappled with the hard issues of constitutional law, and because such nominees, unlike Miers, would make an enduring difference in our constitutional law and culture. Such potential nominees had been largely nurtured by the Federalist Society, and thus it was the Society that was largely responsible for the pool of strong alternatives that made Ms Miers seem so weak in comparison. And it was members of the Society, as influential opinionmakers, who subjected her nomination to such ferocious criticism that the President was forced to withdraw it and nominate Samuel Alito of the Third Circuit Court of Appeals.

Before Judge Alito ascended the Bench, he had himself been a member of the Federalist Society and had worked at the Office of Legal Counsel. That office acts as the chief solicitor to the executive branch as a whole, and proved an engine room of the Reagan legal revolution in its effort to restore such fundamental ideas, as originalism and federalism, to American jurisprudence. A nominee who combined experience both as a jurist and a government lawyer for the most transformative conservative administration in a generation, was obviously a Justice who could move the law in a direction consistent with the Federalist Society's *credo*.

It is a mark of the distance that the Federalist Society has traveled, from a Society focused on the legal academy to one devoted to the larger world, that the culture that it created had the power to constrain a sitting conservative President and make his choices sounder than they would have otherwise been. As a result, whatever the apostasy of Senator John McCain on other aspects of the conservative agenda, a President McCain is also likely to nominate judges who are as jurisprudentially sound as is consistent with being confirmed by a Senate that will be collectively well to his left.

The Society, however, has not been resting on its laurels. There can be no assurance that conservatives will continue to have the kind of electoral success that has made possible the appointments of Justices like John Roberts and Samuel Alito. Moreover, in the long run the battle over law is a battle of ideas. Thus, the Society has recently turned its energies to trying to change the composition of law faculties at our universities. This task is a daunting one, because at élite law schools politically active faculty members on the left outnumber those on the right by close to six to one.[11]

The Federalist Society has created four programs to accomplish this goal. First, it has established a faculty division. This faculty division accomplishes for faculty members what the practice groups accomplish for practicing lawyers. It provides a forum for improving ideas as well as a network of contacts and a sense of camaraderie. Second, the Society gives out fellowships to promising conservative lawyers who are considering going into teaching. These fellowships are absolutely vital, because the market for law Professors in America grows more competitive by the year. Candidates need to have written substantial articles before going on the market – a task almost impossible while remaining in private practice. These fellowships, which secure a position at a major law school for a year, give promising candidates for academia the leisure to write. They have paid off, with over a dozen recipients now secure in academia.

Third, and more recently, the Society has started a forum to advance candidates for the job market. Just this month I participated in the first three-day session designed to prepare conservative candidates. We vetted their talks and gave mock interviews. It was good fun to play a liberal academic for a few days and so better prepare the candidates for the hostile gauntlet they will face. In my view, conservatives still face substantial discrimination in the academy, particularly in public law. They need to be more widely and better published than their liberal peers in order to be hired laterally and move up the academic pecking order to major universities and more substantial influence in society at large. These fellowships and preparatory sessions will give them an added boost.

Fourth, the Federalist Society has also established a new set of fellowships for young untenured academics. It will allow them to take a leave of absence for a semester to write a major article. These fellowships will also be very useful in permitting young conservative academics to get additional time to produce additional articles, to allow them to be hired laterally at better schools, and move up the ladder of prestige that characterizes the legal academy.

In closing, let me discuss the reasons that I believe that a society like the Federalist Society or The Samuel Griffith Society is needed in any advanced industrial society, not only in the United States or Australia. Lawyers, as Alexis De Tocqueville noted, have played an aristocratic function in the United States,[12] and this is true by extension in any modern democratic society, because they are the experts in democracy's legal mode of governance. In a classical liberal society, one largely regulated by private law, lawyers tend to be a force for classical liberalism, because it is that legal framework which gives them their livelihood. This is one of the reasons why Alexander Hamilton, the great defender of the commercial republic, was so enthusiastic about judicial review. Lawyers could be counted upon to uphold the essential framework of property and contract rights that advanced commerce.

But since the birth of the modern regulatory state and social democracy, the interests of lawyers have changed. They are the technocrats and enablers of regulation and redistribution. The more a nation intervenes in economic affairs to regulate and redistribute, the greater slice of compliance costs and transfer payments lawyers can expect to receive. As a result, they are no longer supporters of property rights or even a stable rule of law. Their interest lies frequently in dynamic forms of legal transformation and the uncertainty they bring.

Given that the financial interests of contemporary lawyers are so much in tension with the classical liberalism and even some of its rule of law values, only a strong ideological interest will provide a sufficiently counteracting force. And given the importance of classical liberal values to the prosperity and security of citizens, such a counterbalancing is essential to a modern democracy, with its permanent impulse to regulation and redistribution. Thus, a society of right minded lawyers, as well as citizens interested in the sound development of law, may be the most important civic association of any kind for the health of our modern Western societies. In that sense, the Federalist Society and The Samuel Griffith Society are not only important to their own societies but are models for modern market democracies everywhere.

Endnotes:

1. See 6 *Harvard Journal of Law & Public Policy* 1 (1983) (symposium on federalism).
2. http://www.fed-soc.org/aboutus/id.28/default.asp.
3. John Maynard Keynes, *The General Theory of Employment, Interest and Money* 383 (1936).

4. See *HJLPP* 1 (1984).
5. Compare Frank Easterbrook, *Legal Interpretation and the Power of Interpretation*, 7 *HJLPP* 87 (1984) with Richard A Epstein, *The Pitfalls of Interpretation*, 7 *HJLPP* 101 (1984).
6. G W F Hegel, *Lectures on the History of Philosophy* 446 (1995) (defining tragedy as "right clashing with right").
7. See, e.g., John O McGinnis & Michael B Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const Comm, 371 (2007).
8. Steven Teles, *The Rise of the Conservative Legal Movement* 153 (2008).
9. *Ibid.*.
10. Conversation with Gene Meyer, President of the Federalist Society (July 30, 2008).
11. See John O McGinnis *et al., The Patterns and Implications of Political Contributions By Elite Law School Faculty*, 93 Geo L J 1167 (2005).
12. Alexis de Tocqueville, *Democracy in America*, 282 (Henry Reeve trans. 1841).

Chapter Ten

Commonwealth Coercion and Cooperation

Dr Anne Twomey

In recent years, and particularly since the election of the Rudd Government in November 2007, the architecture of Australia's federal system has undertaken a significant transformation. This paper discusses some of these key changes, being the establishment of the Council for the Australian Federation, the COAG Reform Council, the Rudd Government COAG reforms and the reform of fiscal federalism in Australia. It concludes by considering the extent to which these changes have resulted in effective cooperative reform or retain the taint of Commonwealth coercion.

The Council for the Australian Federation

The Council for the Australian Federation, known as "CAF", was formed in October 2006. It comprises the Premiers and Chief Ministers of the States and Territories. Previously, meetings of this group had been held on an *ad hoc* basis, usually prior to the meetings of the Council of Australian Governments (COAG), under the title of the "Leaders' Forum". The meetings, however, were often rushed; their timing was dictated by the Commonwealth, which controlled the convening of COAG, upon which the Leaders' Forum piggy-backed; and the Commonwealth ensured that crucial information was only provided to the States at the last minute, to ensure that they did not have sufficient time to caucus and develop an agreed position. CAF, in contrast, is a formal body with its own secretariat and agenda which meets on a more regular basis, as determined by the States. It fulfils a number of purposes, such as allowing the States to reach agreed positions prior to negotiations with the Commonwealth, as well as providing a forum for States to contract their own inter-governmental business, in which the Commonwealth has no interest or involvement.

There were three strong influences on the establishment of CAF. The first was the Canadian Council of the Federation. This body was established in 2003 to promote inter-governmental cooperation, and to allow the Provinces to exercise leadership on national issues. In 2005, after meeting with the Governor of Manitoba at a Convention in the United States, the South Australian Premier, Mike Rann, proposed that a similar body be established in Australia.[1] Some of the States were sceptical about its value, fearing it would be seen as a politically partisan body. On 12 April, 2006 a number of State Premiers or their representatives, including Steve Bracks, Mike Rann and Anna Bligh held a joint meeting with the Canadian Council of the Federation in Montreal. The Canadians explained how their new Council operated, and how it had greatly improved the effectiveness of inter-governmental relations in Canada. Not long after their return, all the States accepted the value of such a body, and the proposal to establish CAF was announced on 21 July, 2006. The relationship with the Canadian Council of the Federation continues, with a Canadian delegation joining a CAF meeting in Adelaide in February 2008, and a further joint meeting proposed for 2010.

The second influence on the establishment of CAF was the increasingly dysfunctional relationship between the Commonwealth and the States. By 2005 the States were concerned that the impetus behind the national competition policy reforms of the 1990s was running out, and that a new wave of major economic reforms was needed to increase Australia's competitiveness in the global market. Victoria prepared the economic and policy basis for a national reform agenda which would not only take up reforms in the areas of competition and regulation which had dropped off the agenda, but which would place a new emphasis on better utilising Australia's human capital, by increasing workforce participation through improved education, training and health (for example, by tackling and preventing chronic disease and moving people from disability pensions into work).[2]

COAG agreed to the National Reform Agenda (NRA) at its meeting on 10 February, 2006. Despite the fact that COAG twice reaffirmed its commitment to the National Reform Agenda,[3] the Commonwealth

did not appear to be truly committed to it. In the first instance, it was a State initiative. Secondly, while the States insisted that the dividends of these reforms should be shared amongst the Commonwealth and the States, rather than simply accrue to the Commonwealth through increased tax revenue, the Commonwealth was reluctant to transfer any benefits to the States. It had already unilaterally suspended payments to the States under the National Competition Policy.[4] With respect to the National Reform Agenda, it merely committed to providing funding to the States and Territories on a case-by-case basis, if needed.[5] Thirdly, as the Commonwealth election approached, the electoral strategy adopted by the Commonwealth government was to demonise the States and intervene in State matters whenever there was a political point to be scored, rather than on any constructive or principled basis. This strategy was encapsulated in Prime Minister Howard's Address to the Millennium Forum on 20 August 2007, where he outlined his policy of "aspirational nationalism", which involved the Commonwealth interfering in any aspects of policy and administration at any level of government, if it considered it in the "public interest" to do so.[6] In doing so, the federal system was disregarded.

This approach had not reached its zenith in October 2006 when CAF was formed, but it was still a driving factor behind its establishment. The first CAF Communiqué notes that CAF "expressed concern at the Commonwealth's approach of unilateral announcements of specific initiatives in important areas of NRA reform, without consultation with States and Territories about these policies and how they would be implemented."[7] CAF pointed to the Commonwealth's unilateral announcement of a "Skills Package", which it argued did not address Australia's most pressing skills issues. It contended that the Commonwealth needed to work with the States "to ensure that Australia's training system is properly resourced to meet the skills shortage crisis". It was also critical of the National Water Initiative and the National Water Commission, which it noted were originally intended to be cooperative exercises, but where there had been "difficulties in the implementation of this cooperative spirit under the current regime". Finally, it expressed concern that the Commonwealth was continuing "to play politics with education", and that it was considering imposing a "centrally mandated school curriculum upon States and Territories" rather than pursuing the existing cooperative approach under the *Adelaide Declaration on National Goals for Schooling in the Twenty-First Century.*[8]

The third important influence on the establishment of CAF was a concern that there were matters of national importance that the Commonwealth was ignoring or not adequately dealing with, and that the States needed to take the lead to get them on the national agenda. Primary amongst these areas was climate change and the need for an emissions trading scheme. Prior to the establishment of CAF, the States had already established a "National Emissions Trading Taskforce" in 2004. It undertook much of the policy spadework in Australia in the absence of Commonwealth involvement. At its meeting in February 2007, CAF reiterated its request that the Prime Minister place the development of a national emissions trading scheme on the COAG agenda. It also stated that "if the Commonwealth refuses to commit [to an emissions trading scheme] at this time, the States and Territories will introduce an emissions trading scheme by the end of 2010".[9] The fact that the States were prepared and capable of implementing their own scheme, even if the Commonwealth declined to participate, forced the issue onto the national agenda.

What CAF does

CAF fulfils a number of different functions. First, it commissions expert reports as a means of supporting its agenda. So far it has commissioned a paper on the future of federalism,[10] a review of education,[11] and the Garnaut report on climate change and the policies needed to improve the prospects of sustainable prosperity.[12] CAF is not simply a body that responds to events of the day. It has its own work-plan and is capable of undertaking significant policy development.

Secondly, it addresses the need to harmonise laws on particular subjects or to establish agreed standards or administrative mechanisms. For example, at its first meeting, in October 2006, Premiers and Chief Ministers signed an agreement on the "Harmonisation of Workers' Compensation and Occupational Health and Safety Arrangements", and agreed to the development of proposals to further harmonise teacher registration and the administration of payroll tax. At its second meeting, in February 2007, it agreed to extend mutual recognition laws to deal with occupational licences in 22 occupations. At its third meeting, in April 2007, it agreed to undertake work on the feasibility of the mutual recognition of drivers' licences and vehicle registration, as well

as cutting red tape on product safety regulation across jurisdictions. At its fourth meeting, in February 2008, CAF committed itself to the improvement of vehicle safety standards and to harmonise travel concessions for Senior Card holders. It also achieved agreement on the same start and end dates for daylight saving in Victoria, New South Wales, South Australia, Tasmania and the Australian Capital Territory.

A third function of CAF is reaching an agreed State and Territory position on matters prior to their consideration by COAG. For example, at its meeting on 12 April 2007, CAF agreed on policy positions to take to COAG on the National Reform Agenda, climate change and the health workforce. This limits the Commonwealth's ability to "divide and rule" as it has done so successfully in the past.

The migration of matters from CAF to COAG

CAF has been particularly successful at placing matters of importance on the national agenda by giving them prominence and commencing action in relation to them. While climate change and emissions trading is an obvious example, many other parts of CAF's agenda have migrated from CAF to COAG.

For example, in 2006 CAF focused upon the harmonisation of occupational health and safety standards and regulation. On 13 April 2007, COAG agreed upon a "timetable for achieving national occupational health and safety standards and harmonising elements in principal [occupational health and safety] Acts", and on 3 July 2008 an agreement was signed to implement uniform legislation on occupational health and safety "complemented by consistent compliance and enforcement".

CAF's efforts to extend mutual recognition to 22 further trades and occupations in 2007 has now migrated into a commitment by COAG to develop a national trade licensing system.[13] CAF's commitment in 2006 to "begin work on national planning for infrastructure" became a commitment by COAG in 2008 to a "more nationally-coordinated approach to further infrastructure reform".[14] CAF's agreement to harmonise payroll tax administration in 2006 was reported by COAG in 2008 as having been implemented.[15] CAF's proposal to cut red tape on product safety regulation in 2007 was transformed into COAG's agreement in 2008 for the Commonwealth to take responsibility for permanent product bans and standards.[16]

It is not always clear how much this migration is a mark of the success of the States in pushing matters onto the national agenda, or is a result of the Commonwealth muscling in on State matters or claiming the credit for State successes. It is clear, however, that many matters that have been initiated by CAF have now been taken up by the Commonwealth through the COAG process.

The future of CAF

The fact that at the time CAF was created all State Premiers and Territory Chief Ministers came from the same political party has been both a benefit and a curse for CAF. It has meant that its birth was relatively easy but its life remains precarious if it is perceived as a party-political forum rather than a forum for State cooperation.[17] The States have similar interests in their dealings with the Commonwealth, regardless of the political flavour of their governments. A lone Coalition State Government is likely to need the support of State solidarity in dealing with a national Labor Government. It would be more likely to be effective in influencing the States, through CAF, than simply being a lone voice in COAG.

The economic benefits of cooperative federalism and the harmonisation of State laws are such that there would be huge pressure on any Coalition State or Territory government from the business community to join in the cooperative endeavours that will relieve burdens on business and advance national productivity. The few political points gained from acting as a spoiler and destroying CAF would be completely overwhelmed by the loss of the economic benefits derived from cooperative reform.

Finally, it should be remembered that the Canadian Council of the Federation and its United States counterpart, the National Governors' Association, both operate very effectively despite the fact that their participants come from different parties. Indeed, COAG has previously been very successful when comprised of governments from different political parties, such as when it agreed to the national competition policy despite the political pressures to take the easier route and object.

The COAG Reform Council

In February 2006, COAG agreed to the creation of a COAG Reform Council at the same time that it agreed to implement the National Reform Agenda. The COAG Reform Council was intended to be an independent body that would replace the National Competition Council. Its functions were to report to COAG on progress in achieving milestones in the implementation of the National Reform Agenda by the States and Territories as well as the Commonwealth, and also to take up the functions of the National Competition Council under Part IIIA of the *Trade Practices Act* 1974 with respect to third-party access to infrastructure.[18] COAG later decided, in April 2007, that this third party access function should remain with the National Competition Council, which continues to exist.

In July 2006, the structure of the COAG Reform Council was agreed upon. It was to comprise up to six members, including a Chairman appointed by the Commonwealth, a Deputy Chairman appointed by the States and Territories, and four members agreed upon by COAG. At the same meeting the COAG Reform Council was given the additional function by COAG of completing an independent assessment of each specific reform proposal endorsed by COAG under the National Reform Agenda, which would assess the relative costs and benefits of the reform proposals, taking into account the "economic, demographic, geographic and other differences between jurisdictions".[19] It was to be on the basis of such reports that the Commonwealth would consider any "fair-sharing" payments to the States, given the relative costs and benefits of these reforms.[20]

Despite all the talk about the COAG Reform Council and its functions, there was a significant delay in establishing the body. In October 2006, the States and Territories, through CAF, expressed their frustration and called for the establishment of the Council "as quickly as possible".

More matters were referred by COAG to the COAG Reform Council for "monitoring of progress and subsequently for assessment" in April 2007. They included infrastructure regulation, transport pricing reform, a new National Energy Market Operator and a national system of trade measurement. Despite collecting such a swag of functions, the COAG Reform Council did not start meeting until August 2007, when it considered its role and functions. In March 2008 it presented its first report to COAG, which provided a "snapshot" of the progress of reform in the seven areas referred to it in April 2007.[21]

At the same COAG meeting in March 2008 the COAG Reform Council was given significant new roles. The first was to publish "performance information for all jurisdictions" that is measured against the outcomes and progress measures set for specific purpose payments. These reports are to be made to the Prime Minister as Chair of COAG and are to be made public.[22] The COAG Reform Council was also asked to produce an analytical overview of this performance information for each specific purpose payment.

The second role given to the COAG Reform Council in March 2008 was to assess whether "predetermined milestones and performance benchmarks" have been achieved in order for jurisdictions to receive national performance payments, which are a form of reward for achieving reforms, similar to the national competition payments of the past. These reports are to be provided to COAG[23] and will not necessarily be made public.

In making its assessments in relation to both national performance payments and specific purpose payments, the COAG Reform Council is obliged to consult with relevant jurisdictions for one month before releasing its reports, and may consider whether to include in its reports any feedback from a jurisdiction.[24]

The COAG Reform Council was also asked in March 2008 to highlight examples of good practice and performance, but it was made clear that this would not extend to a policy-advising role. It cannot create references for itself. It can only deal with matters referred to it by COAG. Its role in monitoring the progression of the National Reform Agenda, remains. In this context it monitors the performance of the Commonwealth as well as the States and Territories.

In March 2008, COAG also removed from the COAG Reform Council the role it had previously given it in April 2007 of "*ex post* assessment of the costs and benefits of reforms". This function was instead passed to the Productivity Commission. The Productivity Commission also provides the secretariat for the "Steering Committee for the Review of Government Service Provision". This body, which was first established in 1994, develops "national performance indicators" for government services, and collects and publishes data from the Commonwealth, States and Territories to "enable ongoing comparisons of the efficiency and effectiveness of Commonwealth and State government services, including intra-government services".[25] It publishes this data in the annual *Report on Government Services.* The Steering Committee is required to provide agreed performance information to the COAG Reform Council to allow it to undertake its own "assessment, analytical and

reporting responsibilities". The COAG Reform Council is empowered to request improvements in specific areas of data provided by the Steering Committee.[26]

The new regime

Since the November 2007 election of the Rudd Government there have been substantive changes in both the form and practice of intergovernmental relations.

First, the agenda is far more ambitious. A great number of areas are now the subject of extensive reform negotiations and agreements. Some of these have migrated from CAF's agenda to COAG. Others formed part of the Rudd Government's election commitments. Others still are new additions to national reform, or have been resurrected after being lost in the interstices of Ministerial Councils.

Secondly, the pace at which reform is being driven has increased dramatically. COAG is meeting more frequently, having agreed to meet four times in 2008. At each of its meetings it lays down timetables that frequently require reports back to COAG at the next meeting in three months time. Gone are the days of the Howard Government, when Ministerial Councils were graveyards for proposals, and negotiations proceeded at a leisurely pace over years, if not decades. The reforms currently being pushed by COAG and its working groups have placed significant strains upon the policy areas of the States, especially the smaller States, which have been struggling to keep up with the demands for information, analysis, policy reform and legislation. The COAG Reform Council noted in its first report that:

> "[T]he limited resources available to all jurisdictions is one of the most significant factors in the failure to meet a high proportion of timetables laid down by COAG, and all Governments will need to substantially increase both policy and legislative drafting capabilities if the new and more ambitious reform agenda being considered by COAG has any chance of timely and successful implementation".[27]

Thirdly, the participation in COAG has expanded, with Commonwealth, State and Territory Treasurers attending the COAG meetings in December 2007, March 2008 and July 2008.[28] This has reflected the fact that reforms in fiscal federalism are being used to drive policy reforms. This closer relationship between the money and the desired policy outcomes is reflected by Treasury involvement in COAG, ensuring that a whole of government approach is achieved at Commonwealth, State and Territory levels.

Fourthly, COAG has established a new intergovernmental structure. In December 2007, at its first meeting after the change in Commonwealth government, COAG agreed to create seven Working Groups, covering the areas of health and ageing; productivity (including education, skills, training and early childhood); climate change and water; infrastructure; business regulation and competition; housing; and Indigenous reform.[29] Each Working Group is chaired by a Commonwealth Minister, with a deputy chair who is a senior State official. The rest of the group is comprised of Commonwealth and State officials. This creates an interesting and very different power dynamic. On the one hand, it allows Commonwealth Ministers to hear about problems directly from State officials, without the usual filter of Commonwealth bureaucrats. This might create a better understanding of the issues. On the other hand, the power and accountability of the different participants of the Working Groups is mixed. Commonwealth officials who participate in the Working Groups are subject to the authority of the Commonwealth Minister, while State officials must account back to and seek authority from their own State Ministers. State officials may find it more difficult to dispute matters with a Commonwealth Minister rather than a Commonwealth official. The effectiveness of these groups rather depends upon the personality of the Commonwealth Minister, and whether he or she tries to dominate or seeks to act in a consensual manner.

At its meeting in December 2007, COAG set out objectives and indicative forward working plans for each of the Working Groups, and described the nature of the implementation plans that the Working Groups were required to prepare and present to COAG in March 2008. In some cases the Working Groups were to be involved in the establishment of separate ongoing bodies established to fulfil particular policy roles, such as the National Health and Hospitals Reform Commission, the National Curriculum Board, the Infrastructure Australia Council and the National Housing Supply Research Council. The seven Working Groups produced 26 implementation plans to COAG for its approval in March 2008.

The COAG Working Groups have temporarily trumped Ministerial Councils in their exercise of power, but more significantly they have provided competition to Ministerial Councils that now feel the need to produce outcomes rather than more reports. The Standing Committee of Attorneys-General (SCAG) is one Ministerial Council that has recognised the need to lift its game. It has renegotiated and reprioritised its agenda, and started funding a permanent secretariat which can pursue its work between meetings and give extra policy support to those smaller jurisdictions that have been struggling to keep up with the policy reform demands.[30] It now has its own web-site, and since July 2007 it has been publicly reporting the outcome of its meetings.

The COAG Working Groups were originally established as a temporary measure to negotiate the new specific purpose payments and start the reform process moving. It will be interesting to see whether they disappear once the new system of fiscal federalism is finalised at the end of 2008, or whether they continue to exist in competition with Ministerial Councils.

The final difference under the new regime is not structural, but it is none the less significant. It is the different experience of those participating in the COAG process and intergovernmental relations at a senior level. First, it is very important that the Prime Minister has had significant COAG experience from a State perspective. For five years he represented Queensland on the national secretariat of the Special Premiers' Conferences (which later became COAG).[31] The Prime Minister is more likely than any of his predecessors to understand State concerns and the frustrations and possibilities of the process. This is not necessarily an advantage for the States, as the Prime Minister will be well aware of their weaknesses and how to exploit them. However, greater understanding is always helpful in achieving an outcome acceptable to all parties.

Secondly, there has been a significant migration of personnel from the State public sector to senior levels in the Commonwealth bureaucracy. Terry Moran, the Secretary of the Department of Prime Minister and Cabinet, came directly from the position of Secretary of the Victorian Department of Premier and Cabinet. There, he was instrumental in the operation of CAF and closely involved in COAG negotiations and the development of the NRA. Roger Wilkins, who has recently been appointed as Secretary of the Commonwealth Attorney-General's Department, is the former Director-General of the Cabinet Office of New South Wales. Rod Glover, who is Prime Minister Rudd's adviser on intergovernmental relations, and Wayne Swan's Chief of Staff, Chris Barrett, both came from the Victorian Department of Premier and Cabinet.[32] There are many others who have also made the journey from the States to the Commonwealth. The Berlin Wall between the Commonwealth and the States has, at least temporarily, been breached. The consequence is a better informed Commonwealth government and far more nuanced and sophisticated intergovernmental negotiations.

The new architecture of fiscal federalism

Prior to the 2007 election, the use of specific purpose payments ("SPPs") in Australia's Commonwealth-State fiscal arrangements was the subject of major criticism from a number of sources. For example, Access Economics, in a report to the Business Council of Australia in 2006, argued that where there is joint Commonwealth-State responsibility for a subject, "funding should go to pools that extend to all related programs, rather than being earmarked to specific programs" in order to allow "some discretion as to the allocation within funding pools". It also pointed out that SPPs have previously imposed "excessively detailed and distorting conditions on how the States exercise" their functions, "resulting in overlap, duplication and other inefficiencies".[33] It recommended that the Commonwealth focus on specifying policy objectives rather than inputs and give the States "greater freedom in designing program delivery". It deplored existing SPPs which imposed disincentives to efficiency and inhibited innovation.[34]

A report on SPPs prepared by the Allen Consulting Group in June 2006 also complained that SPPs:

- tend to focus on inputs and processes rather than outcomes;
- inhibit efficient achievement of desired outcomes;
- give rise to inadequate coordination across related programs;
- involve micro-management and impose excessive administrative burdens at both State and Commonwealth levels;
- compartmentalise Commonwealth funding into narrow uses, preventing the States from adopting the best mix of services to meet the needs of their communities;

- lack incentives for pursuing improvements;
- deny flexibility and inhibit diversity of responses; and
- expose States to disproportionate financial risk and uncertainties about the continuity of funding.[35]

Even the Commonwealth's own National Commission of Audit, set up by the Howard Government after its 1996 election, recommended that where grants deal with areas of State responsibility they should be general purpose grants, and where they deal with areas of joint Commonwealth/State responsibility, they should be allocated to pools that cover related programs, to allow the States some allocative discretion within funding pools. It also recommended that specific purpose payments should focus on policy objectives and improved accountability frameworks that give the States greater freedom in designing program delivery.[36]

A report prepared for the Council for the Australian Federation in April 2007 noted that options to improve the operation of SPPs include reforming their operation so that they:

- support the achievement of outcomes agreed by the States and the Commonwealth;
- permit flexibility by focusing on those outcomes rather than on inputs and processes, and by not compartmentalising funding into narrow subjects;
- include incentives to find more efficient ways to achieve the desired outcomes;
- complement and coordinate with other existing State policies to avoid overlap and confusion amongst those who seek to use government services;
- avoid micro-management and the imposition of costly reporting and administration requirements; and
- balance obligations, contributions and risk-sharing.[37]

Reform of SPPs

Most of these criticisms and reform suggestions have been addressed by the Rudd Government's reforms to fiscal federalism. Its first major reform of SPPs will be to reduce the existing number of 92 SPPs, directed at narrowly defined subjects, to five SPPs that cover the broad areas of health, early childhood education and schools, vocational education, disabilities and housing.[38] This will give the States far more flexibility to spend the allocated funds where they are most needed within these broad areas, and averts the inefficiencies of the previous system that compartmentalised funds. It will permit the States to coordinate services better and will reduce the problem of cost-shifting. Some existing SPPs will be turned into general revenue assistance grants "where there are no compelling national objectives associated with the payment".[39]

Secondly, instead of focusing on inputs and processes, the SPPs will be directed at outcomes agreed with the States and Territories. This is likely to have the effect of supporting innovation and greater efficiency at the State level, as States will have both the flexibility and the incentive to find better ways of achieving the specified outcome. Previously, SPPs were often tied to State inputs, such as a requirement that States make matching grants. The effect of these conditions was to tie up approximately 33 per cent of State budget outlays.[40] The removal of "matching grant" conditions will give the States greater control over their budgets and the capacity to prioritise their spending commitments in a more rational fashion. The removal of input requirements will also remove much of the administrative burden at the Commonwealth and State level in accounting for inputs and reporting on detail.

The third change is that once the new SPPs are negotiated and adopted, which is anticipated to take place in December 2008, they will have a continuing status. This is in contrast to the previous system under which SPPs expired after five years and States were faced with "take it or leave it" offers for new SPPs. Under the new system States will have greater financial certainty. They will also have better centralised control over grants, with payments being made from the Commonwealth Treasury to State Treasuries in a lump sum each month, rather than the existing system where payments are made under each of 92 SPPs to the different State departments involved.[41] The risk, however, is that the SPPs might not be adequately adjusted to meet changing needs. The Commonwealth has stated that SPPs will be subject to periodic reviews by the Commonwealth and the States to ensure that funding levels remain adequate.[42] The level of control States have over this review system remains to be seen.

The fourth change is that rather than being forced to comply with Commonwealth conditions at the input stage, States will be accountable to the public for achieving agreed outcomes by way of greater transparency

and the public reporting of State performance. The COAG Reform Council will play a crucial role here in independently assessing the States against agreed performance indicators and reporting the results not only to COAG but also to the public. The States will continue to receive specific purpose payments, even if they don't achieve the specified outcomes. The pressure on the States to perform in the case of SPPs will come from public comparisons and performance assessments which will place electoral pressure on badly performing governments.

Finally, it has been claimed that one of the other aims of the new SPPs is agreement upon "clearly defined roles and responsibilities" to avoid existing problems concerning duplication and the blurring of responsibilities.[43] It is not yet clear, however, how this is to come about. As with most of these announced reforms, it remains to be seen whether the new SPPs, once made public, live up to their advance publicity.

COAG's Working Groups are currently negotiating the form of these five new SPPs and a new "Intergovernmental Agreement on Commonwealth-State Financial Arrangements", which will formalise the announced framework and set out the outcomes, performance indicators and funding arrangements.[44] The draft agreement and draft SPPs will be considered by COAG in October 2008, with finalised arrangements to be adopted in December 2008 and commence on 1 January 2009.[45]

National partnership payments

In addition to the SPPs, which tend to be focused on areas of core State responsibility, the Commonwealth announced a new system of national partnerships in areas which COAG described in March 2008 as "joint responsibility, such as transport, regulation, environment, water and early childhood". This will involve the making of national partnership payments (NPPs). In contrast to the SPPs, the NPPs will be focused more narrowly on particular reforms that the Commonwealth wishes to achieve, including its election promises where they cross into State fields of responsibility, such as the promise of computers in secondary schools.

There are three types of national partnership payments. The first type is the project payment, which will be used to assist the States in delivering specific projects, such as the construction of a highway through AusLink or some other form of infrastructure. This will involve the making of capital payments, in contrast to the SPPs which are largely focused on recurrent costs. Three funds have been established for capital investment, being the Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund. These funds are to be financed from budget surpluses for capital investment. The States will be able to tap into these funds through national partnership payments.[46]

The second type of payment is the "facilitation payment" which is intended to assist a State to lift its standards of service delivery.[47] This may involve the payment of capital, where infrastructure is needed to support service delivery, or it may involve payments to support reforms in the way services are delivered.

The main type of NPP, however, will be the "reward payment" which is intended to support the States in achieving reform targets by rewarding States that meet agreed "milestones and performance benchmarks".[48] For example, there will be a national partnership to fulfil the needs of "low socio-economic status school communities",[49] and a national partnership to address the needs of indigenous children in their early years.[50] Success will be measured by the COAG Reform Council against agreed criteria, and the rewards will be paid from a newly established COAG Reform Fund.[51] If a State fails to meet a milestone, its payment may be withheld or commensurately reduced to the level of achievement. The States therefore will have economic incentives to meet the policy outcomes that are being driven by the Commonwealth.

Commonwealth coercion and cooperation

The new intergovernmental regime is certainly more cooperative than the previous regime in some ways. The promised form of SPPs, if given effect, will be less coercive in their nature. They will allow the States greater flexibility to achieve better outcomes for their citizens. The "stick" will be the bad publicity given to poorly performing governments and the electoral consequences that attach, rather than the loss of Commonwealth funding. However, the Commonwealth has maintained its capacity to use its greater financial resources to coerce the States through national partnerships, where "incentive payments" will only be paid if certain "milestones" and "performance benchmarks" are met by the States. If the Commonwealth had truly wanted to relinquish coercion, however, it would have given the States as general payments a sufficient share of

Commonwealth tax revenue to fund their responsibilities adequately. It has chosen not to do so.

The structure of COAG Working Groups also suggests that the Commonwealth seeks to maintain the whip hand in inter-governmental relations. However, it is at least trying to achieve reform through intergovernmental cooperation, rather than making unilateral forays into areas of State responsibility by taking over a hospital here or setting up its own technical colleges there. The focus on structured cooperative reform, while it might still be driven by coercive Commonwealth policy, is still an improvement on the *ad hoc* unilateral exercises of brute Commonwealth legislative and financial power which was the hallmark of the dying days of the Howard Government.

Finally, the total payments made by the Commonwealth to the States, as a percentage of GDP, are projected by the Commonwealth Treasury to be 6.4 per cent in 2008-9,[52] below the average of 6.8 per cent during the Howard Government, which itself had been criticised as being extremely low. Indeed, once one takes into account the State taxes foregone by the States as part of the GST agreement, the States will be receiving significantly less financial support from the Commonwealth, measured as a percentage of GDP, than they did prior to the GST. Although the States will potentially have greater access to capital funds through the COAG Reform Fund, overall the Commonwealth will retain control of the public purse while the States remain the beggars of the Federation. This result is not beneficial for Australia as a whole. While the Commonwealth has made significant advances, through co-operative means, to alleviate some of the problems that beset the Federation, it still needs to do much more to rebalance the Federation and restore the role of the States to make them true partners in a balanced, effective and productive Federation.

Endnotes:

1. Anne Tiernan, *The Council for the Australian Federation: A New Structure of Australian Federalism* (2008) 67(2) *Australian Journal of Public Administration* 122, 125.
2. Victoria, Department of Premier and Cabinet, *A Third Wave of National Reform – A New National Reform Initiative for COAG,* August 2005.
3. COAG Communiqués, 14 July 2006 and 13 April 2007.
4. This suspension was lifted on 13 September 2007: Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 67.
5. COAG Communiqués, 10 February 2006 and 14 July 2006.
6. John Howard, *Making Australia Stronger*, Address to the Millennium Forum, 20 August 2007, http://www.liberal. org.au/info/features/economicmanagement.php [viewed 8 August 2008].
7. Council for the Australian Federation Communiqué, 13 October 2006.
8. *Ibid*..
9. Council for the Australian Federation Communiqué, 9 February 2007.
10. A Twomey and G Withers, *Australia's Federal Future,* Federalist Paper No 1, April 2007.
11. P Dawkins, *The Future of Schooling in Australia,* Federalist Paper No 2, September 2007.
12. A draft report by Ross Garnaut was issued in June 2008, with the final report to be issued in September 2008.
13. COAG Communiqué, 3 July 2008.
14. Council for the Australian Federation Communiqué, 13 October 2006; and COAG Communiqué, 3 July 2008.
15. *Ibid*..
16. Council for the Australian Federation Communiqué, 9 February 2007; and COAG Communiqué, 3 July 2008.
17. The change of government in Western Australia in September 2008 will prove a test for CAF. The new Western Australian Coalition Government could choose to spurn it, but it would appear to be contrary to its interests to do so.
18. COAG Communiqué, 10 February 2006.
19. COAG Communiqué, 14 July 2006.
20. COAG Communiqué, 13 April 2007.

21. COAG Reform Council, *Report to the Council of Australian Governments*, March 2008.
22. COAG Communiqué, 3 July 2008, Attachment A.
23. *Ibid*..
24. *Ibid*..
25. Steering Committee for the Review of Government Service Provision, Terms of Reference, http://www.pc.gov.au/gsp/tor.
26. COAG Communiqué, 3 July 2008, Attachment A.
27. Council of Australian Governments Reform Council, *Report to the Council of Australian Governments*, March 2008, p. 2.
28. This is apparently the first time in more than a decade that Treasurers have attended COAG: Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 11.
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30. Standing Committee of Attorneys-General, Communiqué, 25 July 2008.
31. Geoff Gallop, *The Federation*, in Robert Manne (ed) *Dear Mr Rudd – Ideas for a Better Australia* (Black Inc Agenda, Melbourne, 2008), 42 at 46.
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33. Business Council of Australia, *Reshaping Australia's Federation – A New Contract for Federal-State Relations* (2006), Appendix 2, pp 16 and 18.
34. *Ibid.*, pp 17 and 33.
35. The Allen Consulting Group, *Governments Working Together? Assessing Specific Purpose Payment Arrangements* (Department of Premier and Cabinet, Victoria, June 2006). The points listed above are drawn from statements throughout this report. See also similar points made in: Ross Garnaut and Vince FitzGerald, *Review of Commonwealth-State Funding – Final Report,* (August 2002), pp 70-5.
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37. Anne Twomey and Glenn Withers, *op. cit.*, pp 48-9.
38. COAG Communiqué, 26 March 2008. See also Wayne Swan, *Modern Federalism and Our National Future*, Address to the 2008 Social Outlook Conference, Melbourne, 27 March 2008.
39. Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 6.
40. Neil Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements* (Final Report, May 2006), p. xxxix.
41. Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 16.
42. Wayne Swan, *Modern Federalism for Australia's Economic Future*, Press Release No 17, 26 March 2008.
43. Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, pp 4-5.
44. COAG Communiqué, 26 March 2008.
45. Note, however, that the new healthcare payments are to be implemented by 1 July 2009: Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 6.
46. NPPs will be funneled from these three capital funds through the COAG Reform Fund to the States: Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 18.
47. *Ibid.*, p. 17.
48. COAG Communiqué, 26 March 2008.
49. *Ibid*..
50. COAG Communiqué, 3 July 2008.
51. Commonwealth, *Australia's Federal Relations,* Budget Paper No 3, 2008-9, p. 17.
52. *Ibid.*, p. 9.

Chapter Eleven

Chariot Wheels Federalism

Professor Kenneth Wiltshire, AO

> *"As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free but financially bound to the chariot wheels of the Central Government. Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortune will follow; and finally even the greatest and most prosperous will, however reluctantly, be brought to heel. Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the States and the Commonwealth. The Commonwealth will have acquired a general control over the States, while every extension of political power will be made by its means and go to increase its relative superiority".*[1]

Chariot wheels and lions may seem to belong more to the ancient world of the Colosseum than the late 19th Century milieu of the Australian continent. However, federal financial relationships (particularly Deakin's prophecy), and the so-called "Lion in the Path" of federation, i.e., the elimination of intercolonial tariffs, would become the two issues which would dominate the evolution of Australian federalism. Indeed, the achievement of appropriate tax sharing and the creation of a true common market remain the most glaring examples of unfinished business in the Australian federation.

The two issues were related of course. The main sources of revenue for the colonies had been customs and excise duties and, to a lesser extent, land taxes. Once the colonies would hand over their customs and excise powers to the new national government, as had to be done because a "nation" must constitute an internal common market, then the Commonwealth government would have more revenue than it needed for its prescribed functions, and the States would have less than they needed for theirs. Thus began VFI, Vertical Finance Imbalance, which has plagued the Australian federation ever since. Since the founders also recognized that certain States might need special assistance from time to time, they also created Section 96 of the Constitution, which is the foundation of the means for addressing HFI, Horizontal Fiscal Imbalance. This became ever more important as the philosophy took root that all Australians were entitled to the same standard of government services no matter where they lived, a noble though expensive sentiment for a new nation that pursued unity in diversity.

The foundation principles

It is too often the case that discussion of federalism begins from pragmatics and expediencies rather than principles, especially when proposals for reform are being considered. Therefore it is worth reflecting on the original basis of federation as enunciated by Henry Parkes.

Parkes, at Tenterfield, had already appealed to Australia's new sense of national identity with the memorable phrase, "the crimson thread of kinship runs through us all". His genius at the National Australasian Convention in 1891 was to seek agreement first on a set of principles before any detailed consideration of the Constitution could begin. The principles that Parkes proposed (which were readily accepted) were:

- Powers of colonies to remain intact, subject to whatever surrender of power is necessary and incidental to the power of the federal government.
- Trade between the colonies to be absolutely free.

- The federal body to have exclusive power to levy customs duties, subject to agreement on their disposal.
- Defence to be entrusted to the federal force under one command.
- A system of responsible government comprising the Senate (a States' House with no power to originate or amend money bills), the House of Representatives, State Supreme Courts, and the Executive (led by the Governor-General with advisers drawn from Parliament).[2]

At Federation in 1901 there were no income taxes; the main colonial revenue measures had been customs and excise duties, and to a lesser extent land taxes. As mentioned, since customs and excise would have to be national taxes, the Founders realised that this would leave the States with a revenue deficit. Arrangements were therefore made in the constitutional design for transfers of this revenue (originally three-quarters of it) to occur from the national government to the State governments – the beginning of Vertical Fiscal Imbalance in the federation. This was done through the so-called Braddon Clause, the first and only sunset clause in the Constitution, which was set to expire after ten years unless renewed; in the event it was replaced by a system of per capita grants from the Commonwealth to the States which was simply VFI in a different package. Section 96, the solution devised by the founders to address HFI, contained the ominous words that the Commonwealth could make grants to the States "on such terms and conditions as the Parliament thinks fit". This of course involved conditional funding, but the Founders considered that it would only be used for emergency or isolated circumstances. Clearly they did not all possess Deakin's foresight.

Other clauses in the Constitution were included as part of the attempt to create a common market, particularly s. 92, guaranteeing freedom of interstate trade, and the creation of an Interstate Commission to police this (based on American experience).[3] Section 92 has prevented many a Commonwealth and State Labor government from nationalizing industry, and so it has oft been said that in the Australian Constitution s. 92 is to private enterprise what s. 96 is to public enterprise.There were also various clauses preventing the Commonwealth from discriminating against particular States in the exercise of its powers, e.g., in taxation, customs, bounties, and trade and commerce. They also served indirectly to protect the smaller States from predatory behaviour by the larger States, something the small States had demanded as the price of joining the federation, along with the creation of the Senate as a States' House with all States having equal representation.

The arrival of Federation in 1901 fell in the middle of Australia's original era of major economic infrastructure construction, including railways, tramways, electricity generation, postal and telecommunications services, roads and bridges, harbours, and dams. The provision of this infrastructure fell almost entirely to the public sector, unlike the situation in other federations, because Australia's small population, scattered across such a vast continent, made it unprofitable for private enterprise to undertake these tasks. The States had primary responsibility for infrastructure and its financing, which, given their narrow revenue base, meant recourse to significant borrowing on international as well as domestic loan markets. Construction of far flung rail lines was particularly expensive, and dominated many State budgets for a long while. Thus the whole federal design set up the States for the fiscal stress that would dominate their lives in the 20th Century.

Testing the federalism concept

It was not long after Federation that the different priorities of the States began to show. This was particularly so after 1915, when income taxes were introduced and quickly grew to become a major revenue source for both State and Commonwealth governments. The bases and progressive rates of State income taxes began to vary considerably, reflecting the ideology and needs of each jurisdiction. This was only natural, given the States' differing geography and topography, population dispersal, industrial structure, and socio-cultural diversity.

The founders had anticipated this. Indeed it is the key reason why they had chosen to form a federal rather than a unitary system of government. For the theory of federalism posits that one of its great advantages is the provision it makes for differences in public policy arrangements to suit particular regions, while at the same time encouraging local innovation and experimentation, as well as community participation. In so doing it also encourages competitive federalism among the States, with the potential for lower taxation, greater efficiency and effectiveness in service delivery, and client responsiveness owing to the closer proximity of decision-makers to key areas.

The fundamental defining feature of federalism, which distinguishes it from other forms of government, is that States are *sovereign entities* each with its own Constitution. This is reflected in Wheare's classic definition of "layer cake" federalism, which has been the foundation of many of the world's modern federal systems and which the Australian Founders took to heart:

> "By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent".[4]

Looking across all of the key theories of federalism and the practice of the concept in ancient and modern civilizations, the key agreed characteristics of federalism would appear to be :

- Some degree of ***heterogeneity*** of the population, whether characterized by cultural differences or large distances separating communities within the nation, i.e., spatial differences.
- ***Divided Sovereignty***, leading to the
- ***Delineation of areas of jurisdiction*** for national and sub-national governments, requiring the existence of
- An ***umpire*** to resolve questions of sovereignty and jurisdiction, supplemented by
- Mechanisms for the ***political allocation of powers*** and resources, which play a crucial role in the
- Maintenance of a ***sustainable balance of power*** between the units of the federation.[5]

This was the sort of federation which the Australian founders thought they had created; one where the States would be equal partners with the new national government. Indeed, according to the federation debates they expected the States to be the more powerful, and in the eventual Constitution, the national government held only a narrow list of exclusive powers (defined mainly in ss 51 and 52). Moreover, it was envisaged that the Commonwealth would be kept in check by the States through the Senate, which was granted very strong powers by the standards of comparative federal systems.[6] Technically, the Constitution also created a wide scope for concurrent powers; nevertheless, the Founders clung to the belief that it would be the States that would drive the nation, as appeared to them to be the case in other modern federations such as the United States, Switzerland and Germany.

By and large, in 1901 Australia was seen as six separate economies and polities. It was envisaged that any interconnections between them could be handled by the few national economic powers the Commonwealth had been given (for example, powers over trade, immigration and banking), through joint exercises of power in areas of constitutional concurrency, through State referrals of power pursuant to s. 51(xxxvii), or through bail-outs of troubled States through the Commonwealth's use of the s. 96 grants power. Possibly the best example of the perception of a fragmented economy and society is to be found in the industrial relations power in the Constitution (s. 51(xxxv)), which grants to the Commonwealth power in respect of *inter*state industrial disputes, something which was considered to be an unlikely occurrence. Menzies was later to comment that the Founders must have seen industrial action as something akin to a bushfire which would only occasionally cross State borders.

The centralisation bushfire begins

The history of Australian federalism throughout the 20th Century is one of a gradual centralisation of power in favour of the Commonwealth, through the following means.

Referendums

The emergence of "people power" in the 1890s ensured a popular vote to create the Australian federation, and the inclusion of the Swiss style referendum approach to constitutional amendment, as finally contained in s. 128 of the Constitution. There have been only eight successful referendums since Federation, and three of them have resulted in profound changes to the Commonwealth-State balance in favour of the Commonwealth Government: (a) the establishment in 1927 of coordinated government borrowing and the creation of the Australian Loan Council; (b) the introduction of significant social welfare powers for the national government in 1946; and (c) the formal power given to the national government with respect to Indigenous affairs in 1967

(the largest "Yes" vote ever recorded, at almost 91 per cent).

Judicial review

The oscillation of the High Court in different periods of its history between favouring State and national governments has also been well documented.[7] However, following the seminal decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, and particularly in the period since the Commonwealth takeover of the States' income tax powers through the introduction of the Uniform Tax scheme in World War II, the trend has been unmistakably towards the national government. This trend has had a particular impact regarding taxation and regulation, and especially as successive Court decisions squeezed the States out of wholesale taxes (for example, over petrol and tobacco), forcing them to resort to retail or "nuisance" taxes, or seek Commonwealth compensation or a referral of taxation power, as in the case of payroll tax, now the States' largest "own source" of direct revenue.

While it used to be fashionable to blame the ideological disposition of High Court Justices and the governments that appointed them for this centralising trend, it is now evident that many High Court decisions involved the bench basically recognising Australia's increasingly national economy and its operation in a globalised, treaty-saturated, environment. However, the willingness of the Court to rule that some sections of the Constitution, for instance the external affairs and corporation powers, could be used by the Commonwealth to intervene in areas previously thought to be the domain of the States, is less easy to explain. This pattern is rare in other federations.

Fiscal federalism

Australia has progressively become the most fiscally centralised federation in the democratic world. This is mainly due to the dominance of the Commonwealth government in the field of income tax, surrendered by the States during World War II and, despite all of their bleating about it, their failure to resume these taxation powers. ***The States could at any time re-enter the field of income tax***, although they would have to do so unanimously.

The situation is also exacerbated by the fact that the main indirect taxes are also national ones, thanks to High Court interpretations; for example, the former sales tax, excise duties, and the Goods and Services Tax (GST) (which is a Commonwealth tax despite being hypothecated to the States).The States are left with payroll tax as their main current "own" source of revenue, although this is also courtesy of the Commonwealth, and it is a regressive and punitive tax.

For most of the past 50 years, measures of VFI have generally seen the national government collecting over three-quarters of all public revenue but responsible for only about half of all public expenditure. The States have, on average, received about half of all their income from transfers from the national government, and half of that again has had conditions attached. The smaller the State or Territory the greater the dependence on national transfers.

The situation is far worse for local governments, which have become increasingly dependent on transfers, particularly from State governments. This creates significant issues for local governments, because State governments routinely attach their own conditions to the bulk of their transfers whilst hypocritically complaining that the Commonwealth is doing the same thing to them. Local government has been very poorly treated by State governments, particularly through the continual abolition, creation and amalgamation of local councils, and the devolution of State powers to them without accompanying fiscal compensation. Local government has also been the victim of cost-shifting by the States and, as a consequence, has become ever more reliant on property taxes. VFI is chronic in the State-local interface. Whereas in most nations local government has been the cradle of democracy, in Australia it has usually been the graveyard.

Australia's VFI has seriously distorted accountability in the federation, with each level of government often blaming the others for poor service delivery or fiscal mismanagement. When the government that spends is not the same as the government that taxes, a significant break occurs in sound public policy-making and accountability. A further consequence has been the proliferation of taxes: a 2007 study identified 56 taxes across the three levels of government, a figure which is now a target of lobbying by peak business groups.[8]

Executive federalism

Since the first conference in 1920 of interstate police ministers to plan a Royal Visit, and the first specific purpose grant for roads from the Commonwealth government to the States in 1923, the intermingling of the levels of government has proliferated. It received a significant boost during and after the Great Depression, when the so-called era of "Co-operative Federalism" saw the establishment of many Ministerial Councils ("Minco(s)") based on the Australian Agricultural Council prototype. Each Minco comprised Ministers with the same portfolios from the Commonwealth and all State and Territory governments, and occasionally New Zealand for good measure.

By the 1980s there were 43 such Mincos, presiding over approximately 350 intergovernmental agreements, and comprising about one-third of all Australian public expenditure. Many of these agreements had conditional grants attached, of which there came to be some 110 in total, though by 2008 this was reduced somewhat to 98. At the pinnacle of this pyramid stood the annual Premiers' Conference (not mentioned in the Australian Constitution), which later morphed into the Council of Australian Governments (COAG).

The pattern was much the same in all these bodies – an annual charade was played out with the Commonwealth pretending to engage in consultation, but at the end of the conference laying down its law because it controlled the purse strings. The Commonwealth could enforce its will because of the High Court's liberal interpretation of s. 96 of the Constitution, no matter that this was never the use of the clause envisioned by the Founders. The most significant example is the Court's upholding of uniform taxation arrangements after World War II on the grounds that the Commonwealth could continue to give Taxation Reimbursement Grants (later termed Financial Assistance Grants) to the States on condition that they refrained from levying income taxes.

This was centralisation by stealth, as the deliberations of all Mincos were usually secret. Indeed, for a very long period there was no central repository of all the Australian intergovernmental agreements kept by any government – national, State or Territory. Once again accountability was severely distorted; indeed, it is still unclear whether the Commonwealth Auditor-General and Ombudsman can investigate the policy-making decisions and behaviour of State government public servants, who are also not obliged to appear before committees of the Commonwealth Parliament.

Executive federalism and its proliferation of bureaucracy has produced a mess of unaccountability, known in the literature as "marble cake federalism", where nobody can tell who had baked the cake or where the recipe was kept.[9]

Interestingly, some studies of executive federalism (sometimes called "administrative federalism" given its 40 year evolution) have revealed the main purposes of these intergovernmental agreements, including:

- the achievement of national approaches to attain national priorities;
- the desire for uniformity;
- avoidance of overlapping and duplication in service provision;
- catering for mobility and portability;
- ensuring access to and equitable treatment by government programs;
- standardisation and complementarity;
- dissemination of information;
- promotion of research;
- pooling of resources, especially to cope with national emergencies and disasters; and
- addressing the implications of globalisation.[10]

The irony was that these agreements took the nation in the direction of uniformity and homogeneity when, as we have seen, the main advantage of having a federal system of government is its purported diversity.

New Federalism chariots

From World War II until the early 1970s, the period dominated by the Menzies governments, there were only mild incursions into State functions powers (e.g., in education), but there was aggrandizement of the Commonwealth's financial clout through its control of the major taxes. The concept of "New Federalisms" begins with Gorton's mild centralizing tendencies[11] and has been applied to every regime since then.

Whitlam's Centralist Federalism

The Whitlam Government's (1972-75) centralist incursions included forays into arenas formerly considered the preserve of the States, including urban and regional policies, housing, transport and communications, sewage, environment, Indigenous affairs, education and health, and resources. Significant national funding in this period involved a sizeable infrastructure component from a Labor government ideologically somewhat hostile to the private sector. Being very sympathetic to international treaties, the Whitlam Government posed a threat to the States on this score as well. Many of the Whitlam Government's national policy objectives were achieved through an escalation in the use of conditional funding to the States, the total of which quickly came to represent half of all transfers, compared with approximately one-third in earlier periods. The chariot wheels had spawned blades. Whitlam also engaged in direct funding to local government by circumventing the Constitution (hitherto unknown), mainly by having local governments register as entities under the relevant legislation for the program. He also often imposed a requirement that the allocation of certain funding provided to State governments had to be decided upon with the involvement of regional bodies and local governments.

Of course, none of this was done in a clandestine manner. Whitlam had always been quite open about his disdain for the States and their so-called "States' House", that is, the Senate. Indeed, it had been Labor Party policy for many decades to abolish the States and the Senate, and create a regional form of government (and a republic to boot). Ironically, in 1975, the year of Australia's greatest constitutional crisis, it was the Senate, effectively acting as a States' House, that triggered the actions which saw the dismissal of the Whitlam Government.[12]

Needless to say there was no interest by the Whitlam government in rectifying VFI.

Fraser's New Federalism

Malcolm Fraser's New Federalism (1975-83) rolled back many of the aforementioned Whitlam Government initiatives, introduced a mild form of tax-sharing between the three levels of government, consulted the States on High Court appointments, involved local government more in intergovernmental forums, and, through its Advisory Council on Intergovernment Relations, produced certain useful criteria for the roles and responsibilities of the three levels of government. Fraser was also hostile to multilateral international treaties, meaning that State powers were not threatened from this direction.

Because he also introduced a mild form of tax sharing with the State and local governments, Malcolm Fraser is therefore the only Prime Minister to have addressed the matter of VFI. State and local governments would now receive a fixed percentage share of the Commonwealth's income tax take in lieu of their former Financial Assistance Grants, and the total would be distributed among all the States (rather than just claimant states as hitherto), on the recommendation of the Commonwealth Grants Commission, thereby also addressing HFI.

However, in a very telling development, when Fraser also offered to allow each State to levy an income tax surcharge or grant a rebate to the taxpayers of that State, no State government accepted, and some used it as a political pawn, claiming it erroneously to be "double taxation". Thus the States lost an opportunity to reclaim some direct access to the growth-based income tax.

Hawke's consensus federalism

Undoubtedly, the most comprehensive reform of federalism, which has had the greatest impact on federal arrangements, was that of the Hawke Government. Elected in 1983 on a platform of consensus building, Bob Hawke is arguably the only Australian Prime Minister who has been equally comfortable in the boardrooms of big business as he was in those of the trade unions from whence he came. The beginning of the decline of purely ideological approaches to federalism in Australia can probably be attributed to this time.

During the early period of the Hawke Government, the emphasis was on macroeconomic reform and achieving international competitiveness for the Australian economy, with accompanying reform of the Commonwealth. However, before long the reform drive led to microeconomic reform. This in turn logically led to federal-State relations, because it was the States that controlled a significant proportion of infrastructure provision, and because their service delivery in many of the sectors impacting on business was uneven and incompatible across the nation. Australian businesses could not become more export-oriented and internationally competitive while their input cost structures were inflated by the operation of inefficient

State government activities, for example, in the areas of energy, transport, education and training.

With no national or State elections in sight for an 18 month period, and all governments bar that of NSW being Labor (and NSW Premier Nick Greiner being very sympathetic to rationalist reforms), a window of opportunity was presented to achieve radical change. A series of Special Premiers' Conferences (present-day COAG) took place. Hailed by all governments as cooperative federalism, the rubric was now that when a policy was deemed to be "national" this no longer simply meant "Commonwealth government"; rather, it meant "partnership with the States". COAG worked to reform federal arrangements based on four principles:

- The Australian Nation principle: All governments in Australia recognize the social, political, and economic imperatives of nationhood and will work cooperatively to ensure that national issues are resolved in the interests of Australia as a whole.
- The Subsidiarity principle: Responsibilities for regulation and for allocation of public goods and services should be devolved to the maximum extent possible consistent with the national interest, so that government is accessible and accountable to those affected by its decisions.
- The Structural Efficiency principle: Increased competitiveness and flexibility of the Australian economy require structural reform in the public sector to complement private sector reform; inefficient Commonwealth-State divisions of functions can no longer be tolerated.
- The Accountability principle: The structure of intergovernmental arrangements should promote democratic accountability and the transparency of government to the electorate.[13]

The single most important conceptual contribution of the new approach was to refocus the debate concerning allocation of powers in the federation ***from functions to roles***. This was identified as a key element for reform in a paper prepared by the Economic Planning Advisory Council, itself a creation of this era.[14] Drawing on successful experiences in modern federations like that of Germany, it was argued that the old style coordinate or layer cake federalism could no longer apply, because in so many functions of government there were now not one, but two, and often three, levels of government involved. Therefore, the challenge was to accept this milieu and, rather than trying to unravel the *discrete* functions, it was necessary to identify more clearly the roles and responsibilities which each level would play in the *shared* functions. From this time on there was a discernible increase in the use of the term "roles and responsibilities" in debate about federalism reform.

The era is probably best remembered for the *National Competition Policy* report ("Hilmer Report"),[15] which demonstrated that significant financial benefits lay in the introduction of open competition into the Australian economy. This led directly to the subsequent National Competition Policy (NCP), which transformed the economic landscape across the nation. It created an almost level playing field between public and private sectors and saw State government business undertakings, usually conducted through government-owned corporations, subject to private sector style efficiency performance benchmarks. It also shifted the focus of regulation and deregulation markedly from State to national level. Some subsequent commentary on NCP has portrayed it as a policy initiative foisted on the State and local governments, whereupon they were forced to meet benchmarks set by the national government or lose their share of the productivity dividend being attained. However, it is important to remember that the Hilmer Report had been commissioned by COAG, and NCP had also had the full endorsement of COAG, which comprised all States and Territories, and representatives from local government.

Other outcomes from Hawke's New Federalism include the achievement of mutual recognition of professional and trade qualifications (based on the European Union model); the establishment of the eastern seaboard electricity grid; national standards in food labeling; a national rail freight corporation; uniform road regulations and user pays principles for charging; national performance monitoring of government trading enterprises, accompanied by national accounting standards, including standards for asset valuation, as well as other issues such as borrowing arrangements, taxation and competition policy; a uniform State-based system of prudential supervision for non-bank financial institutions; an intergovernmental agreement setting out roles and responsibilities of all governments across a range of environmental management issues; and ongoing review of duplication of services in many government functions, with an emphasis on health, welfare and vocational education and training. Subsequently, the Australian National Training Authority (ANTA) was established as a cooperative federalism body through complementary Commonwealth and State legislation (it was subsequently abolished by the Howard Government).

Following these successful reforms in areas of expenditure, which had seen the States return to a greater role as policy partners, Hawke was willing to consider some form of tax-sharing arrangement with the States. However, this became part of the cause of his downfall at the hands of centralist Paul Keating, who was never enthusiastic about most of the New Federalism agenda and no lover of the States. Hence, the opportunity to continue the federalism reform process so as to embrace intergovernmental revenue sharing, which would have addressed VFI and restored a degree of sovereignty to the States, was lost.

Howard's federalism enigma

The Howard Government (1996-2007) will probably be best remembered for its tax reforms, including the introduction of a 10 per cent GST. After considerable difficulty getting the reforms through the Senate, the final package of reforms ushering in the GST also included a reduction in personal income tax, a reduction in company tax (largely in line with the recommendations of the 1999 *Review of Business Taxation* ("Ralph Report"), and abolition of the sales tax.

In a complete surprise, the Government decided to give the proceeds of the GST to the States and Territories in lieu of their former Financial Assistance Grants, though this was subject to the condition that the States abolish, over a five year period, nine of their minor "nuisance" taxes, primarily those concerning property transactions and licenses. The revenue from the GST would be distributed amongst the States and Territories according to the recommendations of the Commonwealth Grants Commission (CGC), but a guarantee was given that no State would receive less than would have been the case under the old system. Most interestingly, the rate and base of the GST could not be changed without the unanimous agreement of the Commonwealth and all States and Territories (a measure designed to assuage concerns over the potential for the tax rate to increase, as had occurred in value added taxes in other nations). But it is important to remember that the GST is a Commonwealth tax, not a State one, and it does nothing to reduce VFI. The chariot now simply carries 8 GST purses to the State and Territory capitals.

The Howard Government's approach to federalism surprised many observers because of its profoundly centralist nature, given that the Coalition, especially the Liberal Party, had been born and bred on a diet of State's rights. It is tempting to explain this by the fact that all of the States and Territories were governed by Labor for almost all of the period from 1996-2007, but this is only part of the explanation. Howard and his long serving Treasurer Peter Costello pursued a different kind of economic reform agenda, one in which it was held to be essential for the Commonwealth government to be dominant, with the States predominantly as service deliverers rather than full policy partners. Consequently, COAG lost its punch and much of its relevance in this period.

Under Prime Minister Howard the Coalition pursued a centralising approach through a number of avenues, including:

- use of the s. 51(xx) corporations power to override State powers, most famously in the area of industrial relations;
- (increasingly) conditional funding to the States;
- simple overriding of States and Territories in a number of policy initiatives, the clearest example being the 2007 intervention into Indigenous affairs in the Northern Territory;
- by-passing States and Territories, for example, through the establishment of Australian Technical Colleges as Commonwealth government entities receiving direct Commonwealth funding;
- contracting out of Commonwealth services on a competitive basis, whereby State and Territory governments would not have preferential bidding rights; and
- direct appeals to citizens and parents to embrace national performance standards and reporting/accountability measures, which would then be forced upon the States and Territories, for example, in school education.

The public and media generally applauded the Howard Government's moves because they promised uniformity, portability, accessibility, rising standards of government services, more choice, and better reporting leading to greater accountability. School education was the prime example. Howard often stated words to the

effect that the person on the Bondi bus did not care which level of government was theoretically responsible for a service, as long as it was effectively and appropriately delivered.

By and large, business and industry also welcomed the Howard Government's measures in the field of intergovernmental relations, partly because of the national approach to issues of ongoing concern to the business community, but also because of the general feeling that the States and Territories had been incompetent with respect to the delivery of basic infrastructure and the provision of utilities. The business community had long expressed concern over clogged ports, dysfunctional infrastructure, lax regulation of non-bank financial institutions, regressive and burdensome State taxation regimes (despite the bonanza for the States from the GST), long hospital waiting lists, sub-standard literacy and numeracy in schools, and politically correct school-based curricula. Consequently, when Treasurer Costello flagged that the Commonwealth was considering taking over ports and other major aspects of infrastructure delivery from the States, together with the dimensions of financial regulation residing with the States, he received warm support from the business sector.

This period also saw the State governments come under severe pressure from the electorate, for their poor planning and management of infrastructure and basic services. Somewhat desperately, those State governments which had formerly been hostile to the market-based concepts involved in engagement with the private sector, took them on board, if only to relieve pressure on their budgets which were often under strain during this period. This budget strain was often of their own making as they eschewed borrowing, fearing that this would jeopardise their credit ratings, objects of almost religious worship since the 1980s – it was, one might say, "Government by Moody's".

Thus Australia began a fundamental shift away from its heavy reliance on the public sector for the provision of capital and recurrent services. This occurred even in remote areas, where the use of the Community Service Obligation could now see the private sector handling much of this activity, even though this would give rise to much debate and controversy as to standards of service. In Australia's remote areas, such as much of the Northern Territory, the delivery of vital functions depends more on the visible hand of the public service than the invisible hand of the market. Such delivery was supposedly watched over more vigilantly by regulators. Indeed, this was also the era in which regulators, both national and State, supplemented their increased prominence under NCP, albeit with mixed results and performances across the nation. It was the States who were largely being blamed during the 20th Century for clogged and inefficient infrastructure, for example in relation to ports, roads, energy, and water, because of a lack of foresight and under-funding, and often because of the inadequacy and economic insensitivity of their regulatory regimes. Business and citizens looked to the Commonwealth to step in and address these crises, whether by carrot or stick.

In stepping into these arenas the Commonwealth has been politically aided by the poor performance of State governments, as identified by the three sentinels of federal performance measurement – the Australian Bureau of Statistics, the Commonwealth Grants Commission, and particularly the Productivity Commission. Each, within its own mandate and using its own methodology, provides progressive comparative snapshots of State government performance, and the result is usually not a pretty sight.

Productivity Commission Chairman, Gary Banks, has criticised the national wastefulness of competitive federalism, especially attempts by States to poach industries. In response State governments, with the exception of Queensland, signed non-poaching of industry agreements. The Commission has also castigated the regulatory overlap in the federation, the proliferation of taxes across the three levels, and the barriers to establishment of a true common market because of differing State regimes in many policy areas.

At the Productivity Commission symposium on Productive Reform in a Federal System, the Secretary to the Commonwealth Treasury, Ken Henry, went so far as to suggest that Australian federalism had been characterised by both cooperative federalism and competitive federalism, but that it was the latter that had been dominant, to the detriment of the national economy.[16]

Another concern of most participants at the symposium was the lack of a true common market in Australia which, it was said, poses a serious economic hindrance because of the need for industry to meet differing standards of regulation and conform to differing legislative frameworks throughout various State jurisdictions. Again, it was Henry who put this most forcefully, stating that Australia did not have a national common labour market, nor national markets in electricity, water, and land transport, thus creating significant obstacles to the achievement of greater productivity and hindering the economy in an era of globalisation. He observed that the sections in the Constitution (in particular s. 92 and the powers concerning uniformity of policy in s.

51) which the Founders included in an attempt to ensure a common uniform market, had not been sufficient. Moreover, the courts and legislatures had not taken positive action to interpret these sections proactively or realise that, in themselves, they were not adequate, and had indeed been interpreted differently in different jurisdictions:

- These various constitutional prohibitions fall well short of ensuring nationally uniform laws affecting economic activity – except in narrowly defined areas.
- More generally, none of the Constitution's so-called "common market" provisions compels the States to do anything at all to facilitate the development of national markets in anything – no good, no service, whether a business input or a household purchase.[17]

The basic causes of this malaise, Henry believed, could be found in geography, competitive federalism, and the way politicians at all levels refused to truly engage markets:

> "The two biggest threats to economic reform in Australia are an aversion to the logic of markets and stubborn parochialism. Neither of these threats is new".

The Productivity Commission with its focus on outputs, and the Commonwealth Grants Commission focusing on capacity and inputs, both produce stark revelations about the poor comparative performance of many State governments. However, the venues where one would most expect these findings to be closely examined and taken up, viz. State Parliaments, are simply hopeless on this score. Provided with a wealth of condemnatory comparative data on their State or Territory's performance, the Parliaments (and particularly Opposition parties) too often do nothing with this vital information. This is a major defect in the functioning of the Australian democratic process and it weakens the very sinews of Australian federalism. It also augments the arguments of the lobby who argue for the abolition of the States.

Enter Rudd's process ridden federalism

Labor's platform for the 2007 national election was largely a mix of promises that copied those of the Coalition, along with a series of dot points in other fields which could not really be called policies. The latter was certainly true of the platform on federalism, despite the appointment before the campaign began of a panel of experts for advice, reporting to the Shadow Minister for Federal-State Relations, Bob McMullan.

Once in government no federalism principles were espoused, not even the Hawke Government's four pillars policy, which Rudd had helped to draft in an earlier bureaucratic life. The States were described as "service providers" by Rudd and his Minister of Finance who, in his maiden speech to Parliament, had called for the abolition of the States. The key rhetoric of the campaign was to end the so-called "blame game" between the levels of government; this was based on the dubious assumption that it could easily be achieved because all of Australia's governments would be Labor. (Australian history certainly proves that having the same party in power at different levels can never guarantee cooperation and harmony in intergovernmental relations). Moreover, Rudd's stance was contradictory, on the one hand promising to reduce the number of conditions on Commonwealth funding, but in the same breath threatening to take over functions from the States and Territories if they did not perform, particularly in relation to hospitals.

It was not long after the election that COAG was summoned, and a plethora of working parties, comprising national and State ministers and officials, were established to review federal arrangements, ostensibly with a view to reducing overlap and duplication and achieving nationally cohesive approaches. Astoundingly, two more Mincos were created (in the areas of Ageing and Trade). Significant confusion reigned when it was stated by COAG that the achievement of such national approaches might occur in different ways in different areas, including template legislation, cooperative pledges of some kind, complementary legislation with some opting out allowed, and occasionally transfers of power to the national government. This applied in such fields as industrial relations, occupational health and safety, workers' compensation, uranium mining, and the diffuse and confusing methods which were outlined for achieving a national school curriculum.

The matter of conditional funding was reasonably quickly addressed by an agreement to broadband the more than 90 SPPs into a smaller bundle and reduce the onerous burdens contained therein, but no further detail has emerged.

The comprehensive Human Capital Reform agenda, previously proposed to the Howard Government by the States and Territories at the behest of Victoria, and seen as a natural flow-on from the capital expenditure emphasis of NCP, was revived. It covered such fields as health, education, skills, and workplace safety. However, its modalities were flawed from a federalism perspective, because they would sacrifice the sovereignty of the States and Territories and subject them to performance benchmarks which would be set and policed by the Commonwealth; this would also involve an ambiguous role for a new Federalism Reform Council. The approach would also discriminate against the smaller States and Territories, who do not have the capacity to launch the same bids as larger and richer States. This was yet another example of the way in which NSW and Victoria have persistently refused to accept that HFE is part of the price of nationhood. Nor have they recognised that the smaller States often prop up Sydney and Melbourne through export earnings, tariff policy, and the fact that many company headquarters are taxed in Sydney and Melbourne in spite of the fact that the income involved is earned in other jurisdictions. It is also the case that monetary policy (applied uniformly across Australia) is primarily based on economic conditions in Sydney and Melbourne which do not always apply elsewhere.

Whether Rudd's process-ridden federalism was an antbed or a beehive of activity depended on the perception of the commentator; however, it appears that little has changed in terms of who is calling the shots. Prime Minister Rudd made it plain that the main role he saw for the States is to implement his election platform. Over subsequent COAG meetings in 2008 the "blame game" was only resolved by very significant grants of money to those States and Territories who complained or threatened to scupper any national approach; examples include water funding for the Murray-Darling, hospitals funding, and funding for computers in schools.

A number of side-deals were also done with particular States on specific programs. Some States, whilst agreeing to participate in particular areas, reserved the right to opt-out of aspects of the arrangements, as with occupational health and safety and industrial relations. Ironically, COAG did deliver on former Treasurer Costello's dream of a national takeover of the remaining financial services regulation. When Rudd announced a review of Australia's tax system, to be chaired by the Commonwealth Secretary to the Treasury, Ken Henry, but then excluded the GST from the review, most commentators saw this as opportunism and irrational policy-making designed to mollify the States and bolster the rhetoric of cooperative federalism.

Rudd's so called new federalism saw divided opinion amongst the media. Some were skeptical, others hopeful. To the skeptics, the continuous COAG meetings seemed like a series of opportunities for "spinfests", even by mid-2008 when the States finally agreed to abolish the remaining State and Territory nuisance taxes, to cede powers over financial regulation to the Commonwealth, and to make uniform a raft of other business regulations. By mid-2008 the Government had begun to set up its new body, Infrastructure Australia, with a sizeable cache of funding, although it was not clear whether it would take a truly national approach to project funding as business had called for, or whether the old parochialism would prevail. When various States started immediately putting in bids the signs were not hopeful; it seemed like the Loan Council revisited because, according to any mandated State bidding process, funding would be allocated on a regional or spatial basis rather than according to national economic priorities. The operative word here is "bidding" – the States could well be relegated to begging for money which constitutionally belongs to them. Beggars have little dignity, let alone sovereignty.

The largest challenge facing the Commonwealth government in 2008 has been climate change and its associated policy ramifications. Following the release of the Garnaut Climate Change Review *Draft Report* in mid-2008, which outlined a draft model for a national emissions trading scheme, many States and Territories, particularly NSW (which launched a scathing attack on the *Draft Report*), joined a lineup of business groups arguing for exemptions, special consideration, or compensation for particular industries, regions, consumers, or sectors.

In 2008 the Rudd Government also convened the Australia 2020 Summit, with some 1,000 handpicked persons in attendance. There was significant criticism of the logistics of the Summit from both observers and also attendees; these criticisms related to perceived bias in the selection of delegates and alleged engineering of the Summit's findings, which did not always match the actual discussions. Some of the topics covered related directly to federalism reform, and a response is awaited.

Despite all of the rhetoric of the Rudd Government, its actions to date have been profoundly centralist, and the engagement of the States has been almost entirely as service deliverers. Amazingly, State Ministers and bureaucrats have been conned into a myriad of processes where they now advise the Commonwealth

how they can be further subjugated to Commonwealth – determined performance benchmarks and become bidders rather than sovereign entities. There has been no talk of tax sharing, which would be the fastest and most effective way to end the "blame game". All Rudd's Chariots lead to Canberra, and the wheels do a lot of spinning.

The wake of the chariots

The 107 years since Federation have certainly brought significant changes that have impacted on the functioning of Australian federalism. Australia now has a truly national economy with significant mobility of capital, labour, and goods and services. It also has a sophisticated pattern of communications by land, sea, air, post and particularly telecommunications – a far cry from the 1890s when the Premiers would communicate in Morse Code. Remoteness has to a large extent been overcome by the revolution in communications, although this is not always a complete or adequate substitute for face-to-face service delivery by governments. The media remains largely regional and parochial, with just two truly national newspapers, and Australia, unlike most federations, has no major truly national television networked news.

The Australian economy is substantially locked in to globalisation with all of its challenges and opportunities regarding capital, migration, treaties, and international agreements. This process has also meant that the economy has been impacted on by forces and trends once considered external to the pure realm of economics, such as social capital, environmental linkages, and sustainable development. Business has begun to embrace triple bottom line reporting and aspects of Corporate Social Responsibility. Partnerships of various kinds have sprung up between government and business, and governments themselves have begun to create joined up government. Thus the community, business, and not-for-profit sectors now have a greater stake in federalism than ever before, especially as non-government entities now deliver any services that were formerly considered public goods or responsibilities.

However the stark reality is that ***Australia is no longer a true federation*** because the States have lost their *de facto* sovereignty. This is primarily because, as Deakin prophesied, the Commonwealth chariot has accrued so much fiscal power that it can ride roughshod over the States in every race. Instead, we now have a national polity with a virtually unitary system of governance. Politics has been transformed and power has clearly shifted to the national arena. All of the major political parties are now centralists.

This brings us to arguably the most significant change in the political landscape affecting federal-State relations in Australia, viz. the transformation of the Liberal Party. There are two dimensions to this. One is the change of the party from the States' rights party of its foundation by Menzies, and which used to be based on a philosophical commitment to deconcentration of power and devolution of responsibility. For the Liberal Party to become a centralist party is truly a remarkable phenomenon, and it has changed the whole dynamic of federalism.

The second dimension is the discipline which the party now seeks to impose on its parliamentarians, whereas once it was considered the essence of liberalism that a Member of Parliament would have a free vote. Apart from producing the demise of much of the most creative and innovative elements of the Liberal Party, this has also been a major factor in destroying the role of the Senate as a States' House as was envisaged by the Founders. Whilst the Labor Party has always been centralist, and advocated the abolition of the Senate and the States for most of its history, the Liberals were once the beacon of State sovereignty, free enterprise, competition, and liberty; but this is no more the case, and it has profound consequences for the ever faster rumbling of the Commonwealth's chariot wheels. It is also a potent symbol of the decline of ideology in Australian politics, as both major parties move closer to the centre for electoral gain.

The economic and social trends have also created centripetal forces propelling power towards the centre. Australia's constitutional design has not been able to accommodate this phenomenon, and so extra-constitutional structures and processes have evolved, spurred on by curious interpretations from the High Court that have given the Commonwealth substantially increased control over the nation by virtue of its taxation, corporations, and external affairs powers. Thus political structures have been introduced to adapt these forces of centralisation, in an attempt to make Australia's federal system work. For example, executive federalism, in the form of the Premiers' Conference and its morphed cousin COAG, might be seen as a substitute for the decline of the Senate as a States' House, but the State Premiers sitting at COAG are servants, not sovereign partners, of the Commonwealth.

In essence, the institutions of federalism are not working as designed and intended by the Founders, and governments at all levels are no longer properly accountable to voters, particularly in the realm of intergovernmental relations. The Constitution has proved itself to be a distinctly rigid document, largely because many citizens have become so alienated from politics and politicians that they distrust any proposals from them to change its provisions.

Chariots cause damage

So what does it matter that the Australian federation is so financially centralized? The answers lie in the realms of democracy, accountability, efficiency, effectiveness, and self reliance.

Australian democracy, with its proud history in so many domains, can not remain robust whilst its governments are no longer fully and directly accountable to citizens. Fiscal centralization has been the main force which has produced all the distortion and blurring in roles and responsibilities between levels of government, to such an extent that citizens no longer know who to blame, or give credit to, for the outcomes of public policy in the vast terrain of activity encompassed by executive federalism. The breaking of the nexus between spending and taxing renders any government irresponsible for its actions. In Wood's words, "The need for the States to have revenues that match their expenditures is central to a functioning federation".[18] As the Business Council of Australia has observed, the high level of VFI is causing waste and overspending because of the lack of accountability it produces. Indeed, in one of the most comprehensive series of reviews ever undertaken of Australian federalism, the Business Council of Australia has identified three major defects in the system and called for action to:

"1. Clarify roles and responsibilities.
2. Institutionalise cooperation.
3. Fix federal arrangements." [19]

Moreover, in this process of horse trading many interest groups and communities are frozen out of, or simply not consulted by, the peak government policy-making bodies of federalism policy, viz. the Ministers and bureaucrats who do the wheeling and dealing. This can be especially true for smaller private sector or civil society groups. It seems to be true at the moment, for example, for the private education and private health sectors, who are not fully consulted re COAG deliberations on their sectors.

He who pays the piper calls the tune, and the pipers in Canberra are more devastating than the legendary one of Hamlyn. Fiscal centralization means that the Commonwealth view prevails in so many parts of the public sector. Yet Australia cannot be governed, let alone administered, from Canberra, and certainly not by bureaucrats with a centric view of the world, never having worked at the coal face in service delivery areas in which they are attempting to impose uniform solutions on sub-national levels of government. (And they get no inspiration from their own back yard. The ACT Territory governments have mostly comprised political regimes that resemble a social experiment or work in progress, rather than a sound system of governance).

Such heavy reliance by the States on national funding, and with so much of it with conditions attached, sends the wrong signals, or no signals, to State governments. Their own priorities are constrained, they are led into policy solutions which may not be appropriate for their jurisdiction, and worst of all they see their main stakeholder as the Commonwealth government rather than the citizens and clients they are meant to serve. They manage upward to Canberra rather than outward and downward to their real constituents and stakeholders.

Fiscal centralization has produced overlapping, duplication, and second guessing between State and Commonwealth governments, the result of which is more bureaucracy, red tape, delays, and confusion for clients.

Tax distortion is also an inevitable consequence of the extremely high level of VFI. States have embarked on many journeys into bizarre, damaging, and inequitable tax avenues and possibilities in an endeavour to obtain greater own source revenue. The fact that there are some 56 taxes across the three levels of government is testimony to this pattern.

It all adds up to poor State performance since they have no incentive to manage more effectively or efficiently, either because they can blame the national government, or they do not have sufficient of their own

resources to address particular problems, having to wait for the wheels of the whole COAG machine to turn before special challenges can be addressed, and even then risk omission because of the drive for uniformity which such processes engender. A State government which had to directly tax its citizens to meet pressing community needs would be more inclined to lift its own game than one which ran to Canberra with every problem that arises.

A little competition between States does not go astray either, provided it is competition for improved governance and service delivery, and not just for interstate poaching of capital, labour or physical resources at taxpayers' expense across the nation. Whilst it is not true that if States simply pursue their own interests, an invisible hand will combine them to produce the national interest, it is the case that accepting continuing handouts from Canberra will not provide any incentive for improved governance. Hopefully, as the Australian population and capital are becoming considerably more mobile, they will be comparing State government performances as occur in North America and within the European Union. As Alan Wood remarked to this Society ten years ago:

> "I believe that in a healthy federation, competitive federalism and the variety it brings is a crucial feature. It provides scope to respond to different community choices, provides competing models of service provision and funding, a greater capacity to respond to change, and to recognize the differing needs of different States more efficiently than a centralized system".[20]

Indeed it might be asked, if National Competition Policy is so good for Australia, why do we not also deregulate the States from the shackles of the Commonwealth and have them engage in some healthy competition? Governments are like people in many ways. It would be surprising if this were not the case. Anybody constantly on a drip of funding will lose their self reliance, their dignity, and their resourcefulness. The Australian States currently resemble this pattern. Every challenge that comes along is earmarked for Commonwealth assistance, and if this is not forthcoming then the strategy seems to be just to hope the problem will go away, or make some token gesture and start spinning.

Finally, it is the case that Australia is simply not homogenous. Proof comes from successive Commonwealth Grants Commission findings re disabilities of particular States re cultural diversity, scale, indigeneity, dispersion, industry and economic structure. It is also the case that the small jurisdictions, especially the Northern Territory and Tasmania, are at a disadvantage in any fiscal heavyweight bouts with the Commonwealth, and are easily discriminated against at a COAG or Minco table. As Deakin prophesied, "The less populous will first succumb".

It is almost one of the laws of nature that centralization produces uniformity. The horrifying current spectacle of the European Union is a clear example, as the bureaucrats of Brussels are homogenising Europe and stamping out its greatest virtue – its cultural diversity. Any acceleration of fiscal centralization in Australia will result in harmful attempts to rid this nation of the diversity of its people and terrain, which is one of its great strengths. Indeed, our sophisticated if complex system of horizontal fiscal equalization, with its policy neutral methodology, is one guarantee that diversity can be protected despite all the centripetal forces in our federation. As such it truly is part of the glue that holds the nation together, far more effective than the Clag that COAG seeks to use to cement agreements between governments. Cultural diversity, like biodiversity, should be a key objective in the challenge of sustainable development on this planet.

Chariot paths for the future

Australia is trying to operate a 21st Century economy and society with a 19th Century Constitution and system of government. This, at least, is generally agreed.

However, the current crop of politicians, like most of those of the past two decades, want to reform the federation in an incremental fashion and from purely pragmatic perspectives. Any true and lasting reform has to begin from principles. This is the legacy of Henry Parkes, Alfred Deakin, Samuel Griffith and all of the founders. Agreement on principles was also the underpinning of the most effective reforms to Australian federalism to date, in the 1980s. It is also the case that federalism reform cannot just address the expenditure side of the ledger, it has to address simultaneously the revenue side; otherwise the result is just tinkering with the nuts and bolts, rather than a complete overhaul, of the chariot.

Moreover, no reform of federalism can begin until one basic question is resolved. ***Are the States going to be sovereign and genuine policy partners, or mere service deliverers***? On the answer to this question hangs the whole direction of reform.

Taking all of these factor into consideration there would appear to be *three fundamental options for the reform of Australian federalism:*

1. Continue the process of centralisation, abolish the States, and create a two-tier system with one national government and numerous regional governments. The number of regions suggested has varied, generally between 32 and 56. The amount of discretion for the new regions is also an uncertainty but they are usually cast predominantly as service deliverers for the national government. Of course, this would spell the end of federalism, but it is an option which opinion polls tell us enjoys significant support among citizens, and is a favourite of much of the business community.

   However, there is another alternative. Over the next century, as Australia's population and economy grows, there is a real possibility that New States will be created. The obvious candidates are Northern Territory, the ACT, North West Australia, North Queensland, and the old favourite – the New England region of New South Wales. Thus regionalism may come about with the federal constitutional design intact. Constitutionally it is far easier to create a new State than abolish an old State.

2. Restore State sovereignty and return to a truly federal system of government. Since federalism is essentially a contractual partnership, and the only true partnership is one in which the partners are equal, this must involve the States taking back their income tax powers so that they are no longer dependent on largesse from Canberra and can bargain from a strong independent financial position. Business has been very cool on this option, since it fears a two-tier tax system and a proliferation of taxes. However, there need only be one tax office, the ATO, which can do all the collecting on behalf of all levels, as is the case in Canada. It also raises the prospect of tax sharing, as occurs in many modern federations, Germany being the obvious example – which would be the most appropriate model for Australia, but only if the sharing formula and the means of its continuous modification were enshrined in the Constitution. Otherwise the Commonwealth will dominate this process as well, and Deakin's prophecy will still reign supreme.

   There are other options. Alan Wood canvassed the comparative merits of tax base sharing and revenue sharing in his seminal contribution to this subject, so those arguments still stand.[21] He also addressed the old shibboleth that the Commonwealth cannot surrender any tax room because it needs to manage the economy. On this point it is noteworthy that all the other federations with which we usually compare Australia, i.e., USA, Canada, Germany, have systems where the national and sub-national governments share the tax room, by tax sharing (Germany), separate tax bases (USA), or shared tax bases and joint collection (Canada). As Wood concluded, this argument "is the last resort of the centralist".

   If the restoration of State sovereignty option is to be pursued, the States are going to have to develop more backbone and stop their past propensity, as identified by Alan Stockdale, as being to pass over revenue-raising responsibilities in return for greater grants from Canberra. The States will have to become Chariots of Fire themselves.

3. Continue muddling through with incremental changes at the margins, leaving the centralisation of power intact, but shunting around the roles and responsibilities of the three levels of government. This can be approached by tinkering at the margins (as has been going on for the last 20 years) or by a more fundamental attempt to change the constitutional alignment of powers.
   If we were seriously going to consider constitutional amendments the following might be put on the list :

   - four year terms of Parliament (preferably fixed terms);
   - rectification of VFI by mandated tax sharing between levels of government;
   - inserting new functions relating to the environment and sustainable development into the Constitution *(currently not even mentioned)*;

- Institutionalising and formalizing COAG;
- clarification and possibly qualification of external affairs, corporations and trade powers;
- eliminating anachronistic passages, such as s. 51(xxxv) dealing with industrial relations;
- more clearly defining powers concerning national markets;
- the removal of past ambiguities in constitutional wording, particularly in respect of the "free trade" provisions, thereby casting aside restrictive High Court interpretations; and
- fostering a new alignment of functions between levels of government as well as defining their respective roles, responsibilities and shared functions, as occurs in the Joint Tasks provisions in the *Basic Law for the Federal Republic of Germany*.[22]

A more inspiring and relevant Preamble would also not go astray. We should also take the opportunity to get our main constitutional monkey off our back by adopting Sir Charles Court's suggestion of an amendment to stipulate that if the Australian Senate forces the House of Representatives to an election, the Senate itself should also face a full election.

Achieving all this requires a Constitutional Convention, bi-partisan agreement, a constructive debate in both national Houses of Parliament, and a clearly defined set of referendum proposals to be put to the Australian people accompanied by a positive education and information campaign.

However, this option can only have meaning if the preliminary step, clarifying just what sovereignty the States possess and whether they are genuine policy partners or mere service deliverers, is taken. There also needs to be the establishment of foundational principles. The principles put forth by Parkes in 1891 and Hawke in the New Federalism era could each contribute, since they remain relevant today, and Deakin's warning needs to be inscribed on the table mats and coasters at every COAG table.

Endnotes:

1. Anonymous column [written by Alfred Deakin] in the London *Morning Post*, 1902.
2. See the full account in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Constitution of Australia*, 1901 edition, Sydney, Legal Books, 1976.
3. The Interstate Commission, though disbanded on legal grounds, had run foul of political pressure from the States as it prevented them from using tapered rail freights to lure produce to their ports and retail outlets.
4. K C Wheare, *Federal Government*, OUP, 1947, p.10.
5. Kenneth Wiltshire, *Planning and Federalism*, St Lucia, UQP, 1987, Ch 2.
6. The small colonies were more fearful of the large ones than they were of the new national government, and so pressed for their protection, especially in the make up and powers of the Senate and in the amending formula. Since the Australian Senate can force the lower house to an election without itself having to face one, it is one of the world's most powerful upper houses.
7. See Brian Galligan, *The Politics of the High Court*, St Lucia, UQP, 1987; and Geoffrey Sawer, *Australian Federalism in the Courts*, MUP, 1967.
8. Business Council of Australia, *Tax nation: Business taxes and the Federal-State Divide*, Melbourne, 2007.
9. See Morton Grodzins in *The American System: A New View of Government in the United States*, ed. Daniel Elazar, Chicago, Rand-McNally, 1966; and Geoffrey Sawer, *Modern Federalism*, Pitman, 1957.
10. See Kenneth Wiltshire, *Administrative Federalism*, St Lucia, UQP, 1977.
11. Gorton's centralism was manifest in policies such as higher education and control over offshore resources.
12. The Queensland Governor, acting on the advice of the Premier, issued writs for the Senate election in that State, as provided for in the Constitution, in a manner which created sufficient vacancies to prevent the Whitlam Government from gaining a Senate majority at the ensuing election. This gave the Opposition control of the Senate, which led to the dismissal of the Whitlam Government by the Governor-General: Australia's greatest constitutional crisis.
13. For an account of Hawkes's New Federalism see Kenneth Wiltshire, *Australia's New Federalism: Recipes for Marble Cakes*, *Publius*, 1992 Summer, 165-180.
14. Economic Planning Advisory Council, *Towards A More Cooperative Federalism*, Discussion Paper No.

90/04, 1990, AGPS, Canberra.

15. *National Competition Policy, Report by Independent Commission of Inquiry,* (Chair Fred Hilmer) 1997, Canberra, AGPS.
16. Productivity Commission, *Productive Reform in a Federal System*, Canberra, 2005.
17. *Ibid.*, p. 340-341.
18. Alan Wood, *Beneath Deakin's Chariot Wheels*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), p. 5.
19. See three reports from the BCA: *Modernising the Australian Federation, 2006; Reshaping Australia's Federalism: A New Contract for Federal-State Relations*, 2007; *Charter for New Federalism*, 2007, Melbourne.
20. Alan Wood, *op cit.*, p.6.
21. *Ibid.*.
22. In the German Constitution the concept of Joint Tasks between the levels of government is entrenched. It was inserted because the architects of this modern federation after World War II could see that the layer cake model of federalism did not operate in most federations, because so many functions of government now involved two or more levels of government. The emphasis was rather on the appropriate roles of the levels in the shared functions.

Concluding Remarks

Sir David Smith, KCVO, AO

This has been yet another great conference and I thank all of our speakers for their contributions.

Our conference was opened by the Hon Ian Callinan, who delivered the second **Sir Harry Gibbs Memorial Oration** on the topic *Superior Courts in the Republic of Australia.*

Ian invited us to consider how a new or an amended Constitution might deal with Australia's judicial system. He pointed out the problems caused by the creation of the Federal Court and the removal of vested jurisdiction from State courts and giving it exclusively to the Federal Court. He outlined the advantages of a single judicial hierarchy, headed by the High Court as the constitutional court and the final court of appeal; and he concluded with an examination of alternative processes of appointment to judicial office.

Our first session on Saturday morning had as its theme **Undermining Australia's Federalism: The High Court at Work.** Professor Nicholas Aroney, in his paper *The Idea of a Federal Commonwealth*, reminded us that the creation of our federation was premised on the consent of the constituent States, who brought with them their self-governing and independent status, and continued to exercise their original powers. The framers of the Constitution intended that the High Court would interpret the limited and specific legislative powers of the Commonwealth Parliament so as to protect the rights of the constituent States.

On the other hand, Professor James Allan, in his paper *Implied Rights and Federalism: Inventing Intentions while Ignoring Them,* showed us how the High Court's discovery of implied rights has allowed unelected judges to ignore the expressed intentions of the framers, while presuming the existence of other, implied, intentions that the framers had failed to express. This heresy is compounded by the High Court's presumption that, in their past rejection of referendum proposals, the people got it wrong, and that it is the role of the High Court to remedy this so-called defect in our democracy.

The theme for the second session was **Bills of Rights**. We heard papers by Paul Sheehan, *The Rule of Lawyers, not Law*, and Peter Faris, QC, *Human Rights Legislation and Australian Sovereignty.* We were presented with a series of disturbing examples of how the human rights industry is subverting the role of Parliament to protect the people, and placing it in the hands of lawyers and judges and unelected tribunals. This has resulted in the supremacy of international law over Australian domestic law, and a diminution of Australian sovereignty.

National Sovereignty and International Commitments was the theme for the third session. Senator George Brandis, SC, in his paper *A Collision Waiting to Happen? The UN Declaration on the Rights of Indigenous Peoples and Australian Domestic Policy,* raised concerns about the UN Declaration. He cited a number of defects in the text of the Declaration, and pointed out that the four dissenting states – Australia, the United States of America, Canada and New Zealand – not only refused to create different classes of citizens, as required by the Declaration, but also had in force laws and policies which protected the rights of indigenous people far better than was the case with many of the signatories to the Declaration.

Alan Oxley's paper, *Global Warming and its Discontents: The Threat to National Sovereignty of Climate Change Populism*, asked the questions why, after a quarter of a century of economic reform that has given Australia such a strong economy, are we now contemplating government interference in market forces; and why are the industrialised economies to have economic restraints imposed on them which will not apply to developing economies? He concluded that currently-proposed carbon emission policies won't work, and will cause harm by restructuring the Australian economy to produce poverty.

In our final session on Saturday, **Europe's Constitutional Muddle**, Dr Matt Harvey spoke to us on *The Treaty of Lisbon: A Federal Constitution that Dares not Speak its Name?* He traced the chequered history of the various constitutional structures operating within the European Union. He pointed to the loss of national sovereignty for the original western members of the Union through the supremacy of EU law over their national law, while the later-joining members of the EU from eastern Europe continue to assert their state rights and their independence.

Professor David Flint's after-dinner address on Saturday night was entitled *Supreme Summit Smashes Creaky Constitution* (Pravda). I won't even attempt to summarise it, other than to say that it was a highly amusing and

extremely perceptive *exposé* of current politics in Australia. If David should decide to give up his day job, a fortune awaits him as a comedy writer. If only he could find a Sullivan to put his Gilbertian prose to music.

This morning's two sessions, **The (US) Federalist Society** and **Australian Federalism Today**, brought us back to the theme with which we had opened this conference.

In the first session, Professor John McGinnis, in his paper *An Opinionated History of the Federalist Society*, presented us with an interesting and fascinating perspective on our kindred spirits in the United States of America. Our Society can but envy the US Federalist Society its penetration into, and its influence on, the study and practice of the law in the United States. We should be so fortunate.

In our final session we heard two papers: Dr Anne Twomey's *Commonwealth Coercion and Cooperation*, and Professor Kenneth Wiltshire's *Chariot Wheels Federation.*

Anne gave us a most informative and insightful overview of a range of formal organisational structures that have been established to strengthen the position of the States *viz-a-viz* the Commonwealth, and she described the Commonwealth's attempts to bring about a greater degree of Commonwealth/State cooperation. These relatively new arrangements are not without their power-structure problems, but overall there are achievements and benefits for the Australian community.

In his paper Ken began by reminding us how prescient Deakin had been more than a century ago in predicting the Commonwealth's dominance over the States. As a consequence, Australia has the greatest degree of vertical fiscal imbalance of any federation in the modern democratic world. True federalism depends on the sovereignty of the constituent States but, as Ken and several of our other speakers this weekend have reminded us, this concept has been largely eroded in Australia in a variety of ways. Ken gave us the whole melancholy list, and concluded that Australia is no longer a federation.

As with every one of the Society's previous conferences, we are again greatly indebted to John and Nancy Stone for a splendid conference. Sadly, this will be the last conference for which these two very special people will be responsible, for they have asked to be allowed to lay down the burden which they have carried so willingly and so competently on our behalf for more than sixteen years.

The Society is fortunate indeed that John has agreed to continue to serve as a member of the Board, and to edit and publish the Proceedings of this conference, and that Bob Day has agreed to take up the duties of Secretary.

The inspiration that led to the establishment of this Society came from its Founder, John Stone. With former Chief Justice of the High Court of Australia, Sir Harry Gibbs, as our first President, Dr Nancy Stone as our first Secretary, and John as a member of the Board and Conference Convenor, this trio created The Samuel Griffith Society with its aim to uphold the Australian Constitution.

In his launching address to our first conference on 24 July 1992, Sir Harry reminded us of the essential characteristics of our Constitution: an indissoluble federal union under the Crown; a bicameral Parliament democratically elected; a system of responsible government with Ministers members of, and responsible to, the legislature; and an independent judiciary. He also exhorted us, as members of this Society, to participate in the process of public education and debate on the Constitution, in the hope that no change would be made to it unless it were clearly seen to be for the good of the Australian people.

In administering the Society's affairs from their home, first in Melbourne and later in Sydney, in organising our conferences and in publishing the Proceedings, John and Nancy have ensured that the Society has lived up to the charge that Sir Harry placed upon us. Together they have given us a Society of which we can be very proud; a series of conferences that have enlightened and inspired; and a set of volumes of our conference Proceedings that will continue the education process for generations to come.

To John and Nancy Stone I extend the Society's grateful thanks for a job well done.

In closing this twentieth Conference I wish you all safe journeys home.

Appendix I

Australia Day Messages, 2006-2008

Editor's Note

An Appendix to Volume 16 (2004) of these Proceedings recorded the Australia Day Messages that had been sent to members by our inaugural President, the Rt Hon Sir Harry Gibbs, GCMG, AC, KBE. As explained in the Foreword to that volume, those communications had been greatly appreciated by our members and, although they did not form part of any Conference Proceedings, they had certainly come to form part of the proceedings of the Society more generally.

For reasons of space only, Sir Harry's messages for the years 1993 through 2000 were recorded in Volume 16. The remainder of his messages, for the years 2001 through 2005, were subsequently published in an Appendix to Volume 17 (2005). Sadly, by that time we had suffered the tragic blow of Sir Harry's death on 25 June, 2005. His message for 2005 was, therefore the last to be received from him.

In the aftermath of Sir Harry's death, our then Vice-President, Sir Bruce Watson, AC agreed to serve as Acting President of the Society pending the appointment of a successor. Although, by Australia Day, 2006 a new President (Sir David Smith, KCVO, AO) had been nominated by the Board, his appointment did not take effect until approved at the then impending Annual General Meeting. The Australia Day Message for 2006 was, therefore, composed by Sir Bruce. Subsequent messages, for 2007 and 2008, have of course been delivered by Sir David.

In recording, in what follows, those three messages, I should not fail to note also the death, on 1 November last, of Sir Bruce. While this is not the place for an obituary, suffice to say that he died as he had lived – a good man, a fine Queenslander, and a steadfast supporter, since its 1992 inception, of this Society.

Australia Day Message, 26 January, 2006

Sir Bruce Watson, AC

Dear Fellow Members of the Society,

During the year we were all saddened by the death of our President, the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE, who had served as President of our Society since its inception. Your attention is drawn to the tribute to him in Volume 17 of the Proceedings of the Society, written by John Stone.

Sir Harry Gibbs provided Australia and this Society with outstanding leadership. He was a man of great intellectual integrity. We shall all miss him enormously.

As members will know, each year since 1993 it had been Sir Harry's practice to send to members an Australia Day message on behalf of the Society. The texts of those messages are to be found in Appendices to Volumes 16 and 17 of our Proceedings.

At the request of the Board of Management I have, since Sir Harry's death, served as Acting President of the Society pending the appointment of his successor. Although a new President (Sir David Smith) has now been nominated by the Board, he will not take office until his election at next month's Annual General Meeting. It therefore falls to me to mark this Australia Day, not in Sir Harry's place (because that is impossible), but temporarily in his stead.

On Australia Day, all Australians should reflect on the individual freedom we enjoy and our individual rights to choose how we live our lives. These rights are directly related to our form of government.

This Society makes no apology for supporting debate on the Constitution from a federalist perspective. When the Commonweatlh was formed the national government was given limited specific power. Unfortunately, year by year we see increasing centralisation of government functions. To achieve this the Commonweatlh, supported by decisions of the High Court, has used its external affairs power; its power to impose conditions, without limit, on grants of financial assistance to the States; and its corporations power.

There is a well established management principle that the best decisions are made as close to where action is being taken as possible, where all undertand fully the ramifications of these decisions. Authority levels should be established to enable the reasonable making of these decisions. Surely this principle applies to government, which is, after all, a very big business. Yet we continue to see increasing centralisation.

The recent problems within the health system of my own State, Queensland, are an example of centralisation within a State. Not many years ago Queensland hospitals were administered under a system of local boards. These boards were abolished, removing local independent representation, and management was centralised. Most of the problems that have now occurred would simply not have been possible under the old decentralised system.

Sir Harry Gibbs, in his Australia Day Message of 1994, wrote: "It cannot be too often repeated that the division of power effected by a federal system is a valuable check on excesses of government power".

Our Society will continue to maintain its advocacy of the federal system.

While reflecting on individual choice, it is interesting to note the progress in the debate during the year on how most effectively to assist Aboriginal people. There has been increased advocacy and action by indigenous leaders seeking to build the future of these people on self-reliance, dignity and education. The move is to have the relevant decisions taken at the local level. Mr Noel Pearson, in an address during the year, said: "The end goal for the Cape York reform agenda is to ensure that the Cape York people have the capabilities to choose a life they value. It is not about making choices for people, but is rather about expanding the range of choices people have available to them".

Many will agree with those sentiments, and it is hoped that this debate will lead to improved living standards and opportunity for Aboriginal people throughout Australia.

On behalf of the Society, I extend all best wishes on Australia Day, 2006.

Australia Day Message, 26 January, 2007

Sir David Smith, KCVO, AO

Before penning my first Australia Day message to members of the Society, following the tradition established by Sir Harry Gibbs, I sought inspiration by reading all thirteen of Sir Harry's messages, a task made easier by John Stone's happy decision to publish them as Appendices to Volumes 16 and 17 of the Society's conference Proceedings, *Upholding the Australian Constitution.* As John wrote in his Editor's Note in Volume 16, "Over the years, those brief messages have conveyed, in Sir Harry's characteristically limpid prose, a wealth of wisdom distilled from the mind of one of Australia's finest and most honourable public servants (employing that phrase in its time-honoured, and best, sense)". Attempting to follow in Sir Harry's footsteps is a daunting prospect indeed.

Following my retirement on 31 August, 1990 from the Commonwealth Public Service and from my appointment as Official Secretary to the Governor-General, the very first speech that I was invited to give was to propose the toast "To Australia" at an Australia Day function in Melbourne on 25 January, 1991. The occasion was the annual luncheon of the Australia Day Council of Victoria. I had accompanied two Governors-General to these luncheons when they had been invited to be guest speakers, little dreaming that I would one day receive my own invitation. My speech had two main themes – our Australian system of government and our Australian way of life (thus pre-empting Prime Minister Paul Keating, who put our Australian system of government on the public agenda in 1995, and Prime Minister John Howard, who put our Australian way of life on the public agenda last year.)

Speaking to my second theme, I was critical of the word "multiculturalism" and of the way it was being

misused, even then. Whatever that distinguished scholar, Professor George Zubrzycki, may have had in mind when he first gave us the word, it had been quickly commandeered, distorted and misused, until it became a sad travesty of what was intended. As I recall, my criticism of the word and of its misuse earned me a serve on SBS television news that evening, so my remarks must have been close to the bone. I was therefore greatly interested in press reports last year that the Howard Government is looking to scrap the word, and that Mr Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, has described it as unhelpful.

In my 1991 address I asserted that there is an Australian culture, contrary to what some would have us believe, and, like our Australian system of government, it must be nurtured and defended. I noted that it was British in origin; that it has been added to, and enriched, by successive generations of immigrants; that we must continue to welcome and encourage such enrichment; but that we must not forget or apologise for our basic culture. I specifically rejected the inference that ours was a BYO culture – bring and retain your own, for we don't have one to offer you.

In 1991 I noted that I am a first generation Australian, born in Melbourne. My parents were non–English speaking migrants from Poland. My father arrived as a young man in 1932, alone, leaving his parents and siblings behind. My mother had arrived in 1929, in her late teens, with her mother and her younger siblings. They, in turn, had been preceded in 1928 by their husband and father – my maternal grandfather – who, by the late 1920s, had seen the rise of Nazism in Germany and feared it would soon spread across Europe. So he chose Australia as a safe haven for his family, came out first to make sure he was right, then sent for them. None of my family had any difficulty in becoming loyal and patriotic Australians

My purpose in recounting this brief family history was to establish the fact that I know, from personal experience, that the immigrants who came to this country prior to World War II, and in the post-war years, had no difficulty in accepting the way of life – the culture – which they found here. They brought with them their own languages and customs and traditions, and some they chose to hold on to. But they became loyal Australians and adopted Australian customs, at the same time making their own contributions to what they found here. They quickly learned our language and our ways. They eagerly sought Australian citizenship: in the jargon of those days, they became naturalised. They had to wait five years for this privilege, and it involved renouncing their previous allegiance, which they did gladly.

But over the years our citizenship standards were progressively lowered. The residence requirement was reduced from five years to three years to two years (although an increase to four years has been foreshadowed). The English language requirement was reduced from "adequate" to "basic" (although again a raising of that standard is foreshadowed). The requirement to renounce other allegiances was removed, and dual citizenship became permissible for foreign-born citizens. Australian-born ones automatically forfeited their Australian citizenship the moment they acquired that of another country. This discrimination against them was removed in 2002, and they, too, may now enjoy (if that is the right word) dual citizenship. It might have been better if the removal of the discrimination had gone the other way – if dual citizenship had been denied to all Australian citizens.

Today we find some older foreign-born dual citizens returning to live permanently in the land of their birth, having resided in Australia only long enough to qualify for Australian old-age and other social service pensions. Some younger Australians, whether foreign-born or the Australian-born offspring of former immigrants, travel abroad to join in foreign wars or other terrorist activities, including activities contrary to Australia's national interests or even against members of Australia's defence force. This seems not to stop any of them from seeking assistance from Australian diplomats and consular officials when in trouble.

Dual citizenship enables Australian citizenship to be treated as a cloak of convenience, to be sheltered under or cast aside at will. It should be worn with pride by all Australians.

Your Board has decided to hold the Society's conferences in or around the month of August each year. This will enable the conference and the annual general meeting to be held at the same time, instead of separately, as has occurred in recent years, and will enable more members to attend and participate in the Society's annual general meetings.

This year's conference will be held in Melbourne from Friday 17 August to Sunday 19 August, 2007, and I hope that as many members as possible will be there.

Australia Day Message, 26 January, 2008

Sir David Smith, KCVO, AO

One of my interests in retirement is to use the internet to keep up with political events around the world. I do this by logging on to the BBC and CNN news services and by browsing among the news pages of British, United States and Canadian newspapers. As 2007 was an election year in Australia, I was particularly interested in elections in other countries. It was often a melancholy experience.

I'll refrain from naming the countries, but Society members will no doubt recognise many of them. All too often, news services reported on election campaigns in which the mud-slinging turned to violence, with the undignified spectacle of a full-blown punch up on the floor of the Parliament; or the imposition of a state of emergency, followed by calls for the release of political prisoners and the immediate reinstatement of the Constitution; or violence leading to the quelling of the rights of citizens to assemble peacefully; or calls on the government to guarantee the independence of the judiciary; or yet another declaration of a state of emergency and the indefinite postponement of the polls; or calls for an end to violence and atrocities against innocent civilians; or an end to chaos, fraud and violence at polling places; or the exile or imprisonment of the Leader of the Opposition. And these are only some examples.

In reflecting on these depressing stories, my thoughts turned to our own federal election held last November, when we changed our national government. We did this by writing numbers in pencil on pieces of paper. In so many countries around the world, some of whose election processes I have described above, their citizens risk being thrown into prison or shot on the streets in attempting to do what we did that Saturday in November with those pencils and pieces of paper.

Within hours of the polls closing we knew that we had rejected the old government and had elected a new one. That same evening the defeated Prime Minister appeared on national television and made a gracious concession speech in which he congratulated the incoming government. The Leader of the Opposition followed soon after and made a gracious acceptance speech in which he promised to govern for all Australians. The speeches of both John Howard and Kevin Rudd included generous references to their political opponent.

That night some Australians went to bed pleased and happy, others disappointed and sad, but next morning life went on as usual for the vast majority of us. The Australian Electoral Commission resumed its counting of the votes, the Australian Public Service prepared to receive its new masters, and the Governor-General prepared to take the steps which the Constitution required of him in order to install the new government.

On Monday 26 November, two days after polling day, Prime Minister John Howard, in accordance with constitutional convention, resigned his commission as Prime Minster and advised the Governor-General to invite the Leader of the Opposition, Kevin Rudd, to form a government. The Governor-General asked Mr Howard and his Ministers to continue in office in a caretaker capacity until a new government had been sworn in. The Governor-General then invited Mr Rudd to form a government.

On Thursday 29 November, five days after polling day, Mr Rudd advised the Governor-General of his proposed government and received His Excellency's approval to announce it. Mr Rudd and his wife Ms Therese Rein then called at the Prime Minister's Lodge in Canberra where they were warmly welcomed by Mr and Mrs Howard.

On Monday 3 December, nine days after polling day, the Governor-General accepted Mr Howard's resignation; approved a new Administrative Arrangements Order which changed the structure of Commonwealth government departments, allocated functions and legislation to them, and assigned responsibility for those functions and legislation to the respective Ministers and Parliamentary Secretaries; and swore in the new Rudd Government.

At the conclusion of the swearing-in the Governor-General congratulated all Ministers and Parliamentary Secretaries, and particularly Mr Rudd on his appointment as Australia's 26th Prime Minister and Ms Gillard on her appointment as Australia's first female Deputy Prime Minster. His Excellency commented on the conduct of the 2007 federal election campaign, the good will evident after the election, and the courtesies observed in the smooth transition of executive power. The Governor-General described these events as a wonderful example of Australia's democratic process at its best, and a tribute to our proud record as one of the world's oldest democracies. He wished the new government every success in the supreme task of governing our country wisely and well.

The processes and procedures that I have described were all carried out peacefully, orderly, and in accordance with our Constitution, its inherent checks and balances, and its conventions. The task that was begun by those pencils and pieces of paper in polling booths around the country was put into effect by the Governor-General in a dignified ceremony at a happy family occasion in the Drawing Room at Government House, Canberra.

I am proud to be a member of a Society whose aim is to protect the Constitution that governs our election processes. We really are a fortunate country.

I wish you all a happy Australia Day.

Appendix II

Contributors

1. Addresses

The Hon Ian CALLINAN, AC, was educated at Brisbane Grammar School and the University of Queensland (LLB, 1960). He was admitted to the Queensland Bar in 1965 and practised as a barrister-at-law, becoming Queen's Counsel in 1978, and serving as President of the Queensland Bar Association (1984-87) and of the Australian Bar Association (1984-85), before being appointed to the High Court bench in 1998, from which he retired in 2007. Prior to that time he held several company directorships (QCT Resources Ltd, Santos Ltd, Queensland Coal Resources Ltd), while also acting as Trustee of the Queensland Art Gallery (Chairman, 1997-98), the Brisbane Community Arts Centre and the Brisbane Civic Art Gallery Trust. Since retirement he has chaired the Commission of Inquiry into the equine influenza outbreak. He has also rejoined, and become Vice-President of, The Samuel Griffith Society. He remains, since 2000, Chairman of the Australian Defence Force Academy. He is also the author of a number of plays, novels and short stories.

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (BScEcon, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociales, Paris (DSU, 1979). After admission as a Solicitor of the NSW Supreme Court in 1962, he practised as a solicitor (1962-72) before moving into University teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. In 1987 he was appointed Chairman of the Australian Press Council, and in 1992 Chairman of the Executive Council of the World Association of Press Councils. In October, 1997 he became Chairman of the Australian Broadcasting Authority, resigning that post in 2004. He is the author of numerous publications and in 1991 was honoured by the World Jurists Association. During the 1999 Republic Referendum campaign he played a prominent part in the "No" Case Committee, and remains today National Convenor of Australians for Constitutional Monarchy. He has been for many years a member of the Board of Management of The Samuel Griffith Society.

2. Conference Contributors

Professor James ALLAN, a Canadian by birth, was educated at WA Porter Collegiate, Scarborough, Toronto and at Queen's University, Ontario (BA, 1982; LLB, 1985), the London School of Economics (LLM, 1986) and the University of Hong Kong (PhD, 1994). After working at the Bar in Toronto and in London, he has since taught law in New Zealand, Hong Kong, Canada and the United States before appointment as Garrick Professor of Law at the University of Queensland in 2004. The author of numerous articles in professional legal journals – and more recently, of numerous articles in assorted Australian newspapers and other journals of opinion – he says that, since moving to Queensland, he "has been revelling in a country not burdened with a Bill of Rights".

Dr Nicholas ARONEY was educated at Wahroonga Christian Academy, at the Universities of New South Wales (BA, Political Science, 1988) and Queensland (LLB Hons, 1992; LLM, 1994) and at Monash University (PhD, 2001). He is Reader in Law and a Fellow of the Centre for Public, International and Comparative Law at the TC Beirne School of Law, University of Queensland, and has published widely in Australian and comparative constitutional law and theory. Apart from publications in professional law journals, his books include *Freedom of Speech in the Constitution* (1988), *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2008) and a co-edited volume, *Restraining Elective Dictatorship: The Upper House Solution* (2008).

Senator George BRANDIS, SC was educated at Christian Brothers College, Lewisham (NSW) and Villanova College, Brisbane, and then at the Universities of Queensland (BA Hons, 1978; LLB Hons, 1980) and Oxford (BCL, 1983). After a brief period as a solicitor in Brisbane, he went to the Queensland Bar in 1985, also lecturing in Jurisprudence at the University of Queensland (1984-91). After becoming a Liberal Party Senator for Queensland in 2000, he became a member of several Senate Committees before taking silk (SC) in 2006. In 2007 he was appointed Minister for the Arts and Sport in the Howard Government. He has published many articles and contributed many chapters to books on both legal and political topics, and is currently shadow Attorney-General in the federal Opposition.

Peter FARIS, QC was educated at Hampton High School (Melbourne), Melbourne High School and the University of Melbourne (LLB, 1962). After a period (1962-70) working as a solicitor, he was admitted to the Victorian Bar in 1970, becoming Queen's Counsel in 1986. A former chairman of the National Crime Authority, he also found time to become a founder both of the Fitzroy Legal Service and the Alice Springs Aboriginal Legal Aid Service. Today he has a busy practice in the criminal law jurisdiction, while at the same time featuring widely in both the print and electronic media. He is the co-author of *Human Rights Charters in Australia*.

Dr Matt HARVEY was educated at Melbourne Grammar School, the University of Melbourne (LLB, 1987; BA Hons, 1988) and Monash University (PhD, 2004). After lecturing in the law faculty at Monash (2002-2007), where he was also Associate Director of the Monash European and European Union Centre, he now lectures in constitutional law and European Union law at Victoria University. He is a co-author of *European Union Law: An Australian View* (2008).

Professor John O McGINNISS was educated at Phillips Exeter Academy and at Harvard College (BA, 1978), Balliol College, Oxford (BA, 1980) and Harvard Law School (JD, 1983), where he was editor of the *Harvard Law Review*. After clerking in the District of Columbia Circuit Court of Appeals, and serving as a Deputy Assistant Attorney-General in the Office of Legal Counsel (1987-1991), he is now the Stanford Clinton, Sr Professor of Law at the Northwestern University Law School, where he teaches courses in constitutional law, international trade, antitrust and law and economics. He is the author of numerous scholarly articles in a wide range of professional law journals, and is a past recipient (1997) of the Paul Bator award, given by the Federalist Society to an outstanding young (under 40) law professor.

Alan OXLEY was educated at Wesley College, Melbourne and Monash University (BA Hons, 1969). Originally a career diplomat, serving in Singapore and at the United Nations in both New York and Geneva, he transferred to the Department of Trade (subsequently the Department of Foreign Affairs and Trade) in 1985. As Australia's Ambassador to the GATT (1985-1989), he was the first Australian to serve as Chairman of the GATT, and played a key role in creating the international coalition of agriculture product exporters (the Cairns group). Since leaving the Commonwealth public service he has worked in many capacities as an international trade consultant. In that capacity he was for three years Director of AUSTA, the Australian business group promoting a Free Trade Agreement with the USA. Today, as a Managing Director of ITS Global, he is Chairman of the Australian APEC Study Centre at Monash University; a member of the Commonwealth government's Foreign Affairs Council; and a member of the China Business Forum, a business group established to examine issues relevant to a Free Trade Agreement with China.

Paul SHEEHAN was educated at St Edmunds College, Canberra and at the Australian National University (BA, 1974) and Columbia University, New York (MS, 1980). Over the course of a life-long career in journalism with *The Sydney Morning Herald*, he has at one time or another served as that newspaper's New York correspondent, Washington correspondent, and Chief of Staff. In 1985-86 he was awarded a Nieman Fellowship at Harvard University. Today he is a senior writer and regular columnist. He is the author of three notable (and best-selling) books, namely *Among the Barbarians* (1998), *The Electronic Whorehouse* (2003) and *Girls Like You* (2006).

Sir David SMITH, KCVO, AO was educated at Scotch College, Melbourne and at Melbourne and the Australian National Universities (BA, 1967). After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. In 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Republic referendum. While a visiting Scholar in the Faculty of Law of the Australian National University, his research has done much to clarify the role of the Governor-General in Australia's constitutional arrangements, culminating in his book *Head of State* (2005). In 2006 he became, and remains, President of The Samuel Griffith Society.

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, DC (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. In 1996-97 he served as a member of the Defence Efficiency Review, and in 1999 he was a member of the Victorian Committee for the No Republic Campaign. A principal founder of The Samuel Griffith Society, he has served on its Board of Management since its inception in 1992 and is Editor and Publisher of its Proceedings. Today he writes regularly for *Quadrant* and for *National Observer*. In 2008 he became a member of the Mont Pelerin Society.

Dr Anne TWOMEY was educated at Sacred Heart College, Shepparton and at the University of Melbourne (BA/LLB (Hons), 1989); the Australian National University (LLM, 1996); and the University of New South Wales (PhD, 2006). As a constitutional lawyer, she has worked for the High Court of Australia, the Commonwealth Parliament and the NSW Cabinet Office. She is currently an Associate Professor at the Law School of the University of Sydney. As well as numerous articles in professional journals, she is the author of *The Constitution of New South Wales* (2004) and *The Chameleon Crown – The Queen and Her Australian Governors* (2006). Now completing a book on the *Australia Acts* 1986, she intends to write her next book on procedural and jurisprudential issues concerning constitutional amendment.

Professor Kenneth WILTSHIRE, AO was educated at Kedron High School, Brisbane, the University of Queensland (B Ec Hons, 1968), the London School of Economics (MSc, 1972) and the University of Queensland (PhD, 1983). After a period as an economist with the Queensland government (1963-70), he entered academia as a lecturer, later Reader, in Public Administration at the University of Queensland (1971-88), where in 1988 he became, and remains, the JD Story Professor of Public Administration at the University of Queensland Business School. The holder at one time or another of many public offices, he was a consultant to the "new federalism" reforms of both the Fraser and Hawke Governments, and subsequently served both as a member of the Commonwealth Grants Commission (1995-2004) and as the Australian representative on the Executive Board of UNESCO (1999-2005). He has written many books and articles on comparative federalism, including *Tenterfield Revisited* (1991).